



Legal migration policy and law

Annex I to the
European added
value assessment

STUDY

EPRS | European Parliamentary Research Service

European added value of EU legal migration policy and law

Research paper

This research paper supports the European Added Value Assessment (EAVA) on a legislative initiative of the European Parliament on the topic of 'Legal migration policy and law'. Legal and economic analysis was carried out to review the state of play and the existing gaps and barriers in EU action. Based on the findings, the research paper defines 14 policy options that are distributed across three policy clusters:

- Harmonise rules for the recognition of qualifications
- Introduce new legal channels for labour migration to the EU
- Improve TCN workers' rights and employment conditions, including policies on the demand side of the labour market

The legal and economic aspects of each policy option are assessed in qualitative and quantitative terms drawing on a range of sources. The study assesses the impacts on fundamental rights protection, internal and external coherence, and on labour market outcomes.

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It is an annex to the [European added value assessment on Legal migration policy and law](#).

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Executive summary

This is a study on the assessment of the 'European added value of EU legal migration policy and law', for the European Parliamentary Research Service (EPRS).

Why this assessment?

In the past years, the publications of the EPRS¹, European Parliament, Commission and others identified several important structural weaknesses in the EU migration policy and potential policy solutions to address them.

The European Commission has taken several initiatives. In its Communication on the New Pact on Migration and Asylum published in September 2020, the Commission recognises the limits of the current EU legal migration system. For example, the system is too fragmented, and EU Member States tend to prefer applying their own national schemes to regulate labour migration.

However, a specific legislative proposal on labour migration was not included in the New Pact. Therefore, in accordance with Article 225 TFEU, the European Parliament Committee on Civil Liberties, Justice and Home Affairs (LIBE) aims to adopt a Legislative Own-Initiative Report (INL) to request the European Commission to take legislative action.

To support the INL, the European Added Value Unit within the EPRS will prepare a European Added Value Assessment (EAVA). This study supports the EAVA by identifying existing gaps/barriers, reviewing the state of play and defining potential EU-level policy options in the area of legal migration, and assessing their potential economic and legal aspects of them.

The analysis conducted for this study is based on a comprehensive literature review, legal and economic analysis and validated in two expert workshops. The legal analysis consists of an analysis of national, EU and international legal texts; European and national case-law. The economic analysis consists of descriptive and regression analysis, mostly using microdata at EU-level such as the EU labour force survey and the European Commission Business Survey.

Scope of the assessment

Within the current framework several gaps and barriers can be identified, concerning equal treatment, entry and re-entry conditions, work authorisation, residence status and mobility within the EU and within Member States, social security coordination, family reunification, recognition of qualifications, protection of fundamental rights, national administrative organisations, and the lack of legal channels. The COVID-19 crisis has also contributed to revealing several flaws in the legal structure of the EU labour migration policy.

To address these identified gaps and barriers as well as drawing on the evidence base and stakeholder views, this study defines 14 different policy options distributed across three clusters:

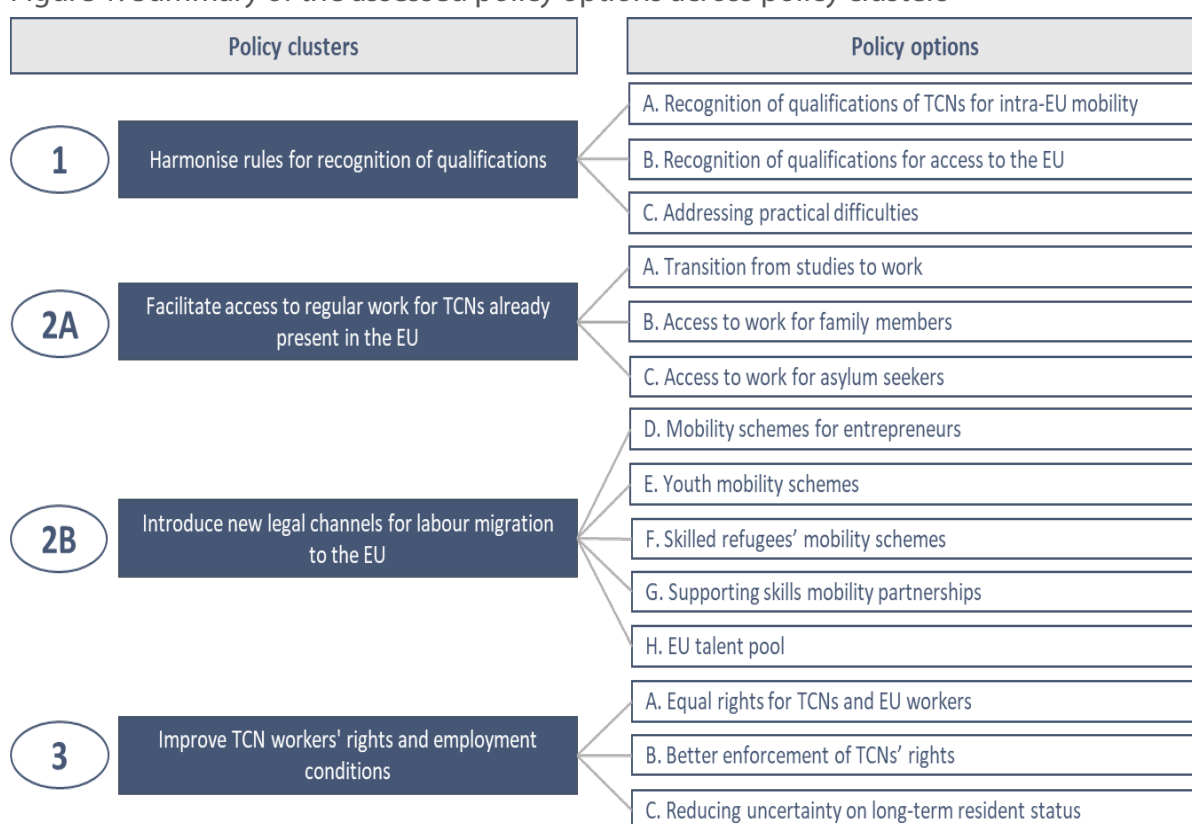
- The first policy cluster addresses the issue of recognition of skills and qualifications among third-country nationals (TCNs). The lack of recognition is responsible for barriers to integration and migration such as down-skilling and de-skilling, poor integration, long waiting periods and limited intra-EU mobility. Therefore, the proposed policy options within this first cluster aim to facilitate recognition of qualifications, skills and previous learning.

¹ 'The Cost of Non-Europe in the Area of Legal Migration' (Van Ballegooij & Thirion, 2019)

- The second policy cluster concerns the creation of new legal channels at EU-level for TCNs. On the one hand it addresses challenges faced by TCNs, and on the other hand it responds to EU labour market needs. This is also reflected in the two sub-clusters, which address 'keeping' or 'retaining' skilled migrants living in the EU and creating new legal avenues for different groups of TCNs respectively.
- The third policy cluster targets the improvement of migrant workers' rights protection. This policy cluster covers the gaps and barriers related to equal treatment, social rights and channels of legal migration. The proposed policy options range from amending EU legislation to increasing equality and the protection of rights, as well as enhanced enforcement.

The policy options within each of the policy clusters are listed below.

Figure 1: Summary of the assessed policy options across policy clusters



Source: authors' analysis.

European added value

From the assessment of the impacts, it emerges that the adoption of specific policy options, or a mix of them, could address the gaps and barriers substantially. For example, the adoption of harmonised rules on qualifications could enhance the protection of rights for TCNs, while reducing overqualification and increasing employment rates and wages. The creation of legal pathways for migrants could have a positive impact on wages, skill shortages and human capital investments, as well as the attractiveness and credibility of the EU in its external action. Finally, better protection of the fundamental rights of TCNs would improve the EU's reputation abroad and reduce the wage gap, while granting better working conditions.

The main impacts of each policy cluster are presented in the table below:

Table 1: Summary of impacts for each policy cluster

Policy cluster	European added value		
	Contribution to EU policies	Contribution to EU external action	Labour market impact
1. Harmonise rules for recognition of qualifications	<ul style="list-style-type: none"> • Intra-EU mobility and internal market • Harmonisation and completion of migration directives • Implementation of fundamental rights (Articles 15,16, 20 and 21 CFR) • Development of skills mobility partnerships • Consistency with Lisbon Convention and ILO principles and objectives • Action in favour of education 	<ul style="list-style-type: none"> • Attractiveness for migrants, esp. skilled workers • International action for skilled migrants • Common ground in negotiation of trade agreements 	<ul style="list-style-type: none"> • Individual wage gain improvements • Employment rate increases • Reduction in overqualification • Increased tax revenue • Positive effects on productivity and potentially innovation
2. New legal channels for migration	<ul style="list-style-type: none"> • Attracting talent and increasing inclusion of TCNs • Alignment with EU Action Plan on Integration and Inclusion • Protection of fundamental rights and social rights • Social policy in favour of work-life balance • Tackle irregular work • Fill the gap in EU migration law concerning self-employed migrants • Complementarity with the digital decade strategy • Deepening and upgrading of the single market • Curb irregular migration 	<ul style="list-style-type: none"> • Reaching objectives of UN action and to international protection of labour rights • Improvement of EU attractiveness and credibility • Becoming a global actor in the competition for talent and investment • Increased role in refugee protection 	<ul style="list-style-type: none"> • Reduce the gap in job quality and earnings due to longer job search and broader geography • Retain qualified young TCNs in the EU and encourage country-specific human capital investment • Attract a larger pool of prospective TCNs willing to study and later to work in the EU • Reduced economic loss due to employment bans • Tax income gained instead of benefits paid • Increase skilled migration to the EU to reduce skill shortages • Increase firm productivity and innovation • Reduce costly irregular migration, detention and return efforts • Avoid brain drain in origin country

Policy cluster	European added value		
	Contribution to EU policies	Contribution to EU external action	Labour market impact
3. Improve TCN workers' rights and employment conditions, including policies on the demand side of the labour market	<ul style="list-style-type: none"> Acting on equality and non-discrimination Protection of fundamental rights Consistent with ECHR Integration of TCNs International action in favour of migrant workers (consistent with ILO law) Inclusion of TCNs (cf. Action Plan on Integration and Inclusion 2021-2027) 	<ul style="list-style-type: none"> Attractiveness of the EU Increased reputation as an entity where rights and values are respected 	<ul style="list-style-type: none"> Reduction in wage gap Potentially increased employment rate of TCNs Better working conditions Potential to attract highly skilled migrants

Source: authors' analysis.

In consideration of the complementary impacts offered by different policy options, this Research Paper defines several policy packages:

- The first package, 'migrants' intra-EU mobility', combines the policy options (1A, 1C, 2A, 2B, 2C, 3A and 3B) that contribute to recognising intra-EU mobility as a basic element of the EU migration policy.
- The second package, 'enhancing rights and access to rights of TCNs', combines the policy options (2F, 2G, 2H, 3A and 3B) protecting the rights of TCNs under the Charter of Fundamental Rights of the European Union (CFR) and enhancing the level playing field for EU enterprises, contributing to fair competition.
- The third policy package, 'de-fragmentation of EU labour migration policy', combines the policy options (1A, 1B, 2B, 2D, 2E, 2F, 3A and 3B) overcoming the lack of internal coherence and completeness in the EU migration policy framework.

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List of abbreviations

BARDA	European Biomedical Research and Development Agency
BCD	Blue Card Directive (COM(2016)385 final)
Cedefop	European Centre for the Development of Vocational Training
CFR	Charter of Fundamental Rights of the European Union (2012/C 326/02)
CJEU	Court of Justice of the European Union
CoE	Council of Europe
CoNE	Cost of Non-Europe
EAVA	European Added Value Assessment
EC	European Commission
ECJ	European Court of Justice
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EEA	European Economic Area
EFTA	European Free Trade Association
ELA	European Labour Authority
EMN	European Migration Network
ENIC	European Network of Information Centres
Eoi	Expression of Interest
EPRS	European Parliament Research Service
Equinet	European network of equality bodies
ETF	European Training Foundation
EU	European Union
EU LFS	European Union Labour Force Survey
EU-MIDIS II	Second European Union Minorities and Discrimination Survey
EU-SILC	European Union Statistics on Income and Living Conditions
EUROMED	Euro-Mediterranean Partnership
Eurostat	Statistical Office of the European Union
FRA	Fundamental Rights Agency
FRD	Family Reunification Directive (2003/86/EC)
GAMM	Global Approach to Migration and Mobility
GIV	Global Impact Visa (New Zealand)
HERA	European Health Emergency Preparedness and Response Authority
ICT	Information and Communication Technology

ICTD	Intra-Corporate Transferees Directive (2014/66/EU)
IEC	Canadian International Experience
ILO	International Labour Organization
INL	Legislative Own-Initiative Report
IOM	International Organization for Migration
ISCO	International Standard Classification of Occupations
LIBE	European Parliament's Committee on Civil Liberties, Justice and Home Affairs
LTRD	Long-Term Residents Directive (2003/109/EC)
NGO	Non-Governmental Organisation
NMS	New Member State
OECD	Organisation for Economic Co-operation and Development
PICUM	Platform for International Cooperation on Undocumented Migrants
SMEs	Small and Medium-Sized Enterprises
SMP	Skills Mobility Partnership
SPD	Single Permit Directive (2011/98/EU)
SRD	Students and Researchers Directive (2016/801)
STEM	Science, Technology, Engineering and Mathematics
SWD	Seasonal Workers Directive (2014/36/EU)
TBB	Talent Beyond Boundaries
TCN	Third-Country National
TEC	Treaty establishing the European Community (2002/C 325/01)
TEU	Treaty on European Union (2012/C 326/13)
TFEU	Treaty on the Functioning of the European Union (2012/ C 326/47)
UN	United Nations
UN Global Compact	UN Global Compact for Safe, Orderly and Regular Migration
UN Pact	UN Pact on Civil and Political Rights
UNDP	United Nations Development Programme
UNESCO	United Nations Educational, Scientific and Cultural Organisation
UNHCR	United Nations High Commissioner for Refugees
WHM	Working Holiday Maker

1 Introduction

1.1 Background

Since the adoption of the Treaty of Amsterdam in 1997, the European Union has had a concurrent power in the area of migration and asylum. Legally, the competence is enshrined in Article 79 of the Treaty of the Functioning of the European Union (TFEU), which reads at paragraph 1:

The Union shall develop a common immigration policy aimed at ensuring, at all stages, the efficient management of migration flows, fair treatment of third-country nationals residing legally in Member States, and the prevention of, and enhanced measures to combat, illegal immigration and trafficking in human beings.

Despite the conclusions adopted during the Tampere Council in 1999, where the establishment of a comprehensive immigration policy framework was agreed, the European Commission's proposal for legal migration in 2001 was not adopted.

After that, the European institutions adopted sectoral pieces of legislation. A total of seven directives were adopted between 2003 and 2016². The adoption of these directives brought some harmonisation of the national systems for legal migration and for the protection of the fundamental rights of third-country nationals (TCNs) (European Commission, 2019) in line with the conclusions of the Tampere Council. The increase in migration experienced by the EU in 2015-2016 changed the context in which it acts with regard to legal migration, while giving a prominent role to it in public discourse.

The 'Fitness Check'³ carried out by the Commission in 2019 aimed at assessing the EU legal migration policy framework and its relevance to the needs in this context. The Fitness Check identified numerous limits arising from this sectoral approach. One critical issue that was highlighted was the fragmentation of the legal framework, causing gaps and barriers for several categories of TCNs (e.g., entrepreneurs, self-employed, non-seasonal low-skilled and mid-skilled workers). Furthermore, the Fitness Check found that comprehensive action at EU level could have several advantages, among which:

- simplification of administrative procedures;
- greater legal certainty and predictability for stakeholders;
- harmonisation of conditions, procedures and rights;
- improvement of recognition of rights and improved intra-EU mobility of TCNs.

In the same year, a study requested by the Committee on Civil Liberties, Justice and Home Affairs (LIBE) was published with the title 'The Cost of Non-Europe in the Area of Legal Migration' (Van Ballegooij & Thirion, 2019). Like the Fitness Check, the Cost of Non-Europe (CoNE) study identified several important structural weaknesses in the EU migration policy. It highlighted gaps and barriers arising from the current legal framework, and identified potential policy solutions to address them.

² These are the Family Reunification Directive (FRD), the Long-Term Residents Directive (LTRD), the EU Blue Card Directive (BCD), the Single Permit Directive (SPD), the Seasonal Workers Directive (SWD), the Intra-Corporate Transferees Directive (ICTD) and the Students and Researchers Directive (SRD).

³ *ibid.*

More recently, in September 2020, the Commission presented its New Pact on Migration and Asylum, composed of five legislative proposals and several non-legislative measures. The legislative proposals were:

- an asylum and migration management regulation;
- a screening regulation;
- a crisis and force majeure regulation;
- an amendment to the Eurodac Regulation⁴;
- an amendment to the asylum procedure.

Among the objectives of the newly proposed Pact, the Commission identifies the establishment of 'comprehensive governance at EU level for better management and implementation of asylum and migration policies', the development of 'sustainable legal pathways for those in need of protection and to attract talent to the EU' and the implementation of 'effective integration policies'⁵. Moreover, the Communication on the New Pact⁶ notes that:

There are a number of inherent shortcomings in the EU legal migration system (such as fragmentation, limited coverage of EU rules, inconsistencies between different Directives, and complex procedures) that could be addressed through measures ranging from better enforcement to new legislation. The Commission will first ensure that the current framework is implemented fully and effectively, by intensifying cooperation and dialogue with Member States.

The COVID-19 outbreak further changed the context for legal migration. On the one hand, the movement restrictions imposed by national governments to contain the virus largely influenced the number of TCNs who reached Europe in 2020; on the other, the increased demand for some specific occupations further exposed the structural demand for TCNs in the European labour market.

Finally, as a consequence of all of the above, the Commission indicated in its 2021 Work Programme that it would produce a proposal for a number of measures concerning legal migration⁷. Such proposed measures would 'include a "talent and skills" package and, as part of it, a revision of the Long-Term Residents Directive and a review of the Single Permit Directive'.

1.2 Objective of the study

This study will support a European Added Value Assessment (EAVA) to accompany a Legislative Own-Initiative Report (INL) from the European Parliament's LIBE Committee in the area of legal migration policy and law. The EAVA aims to identify and assess the potential individual and societal impacts of possible EU actions that can be taken in this area.

Against this background, the objectives of the study can be summarised as follows:

- **Objective 1:** assess the current state of play / baseline situation in the area of legal migration policy and law in the EU;
- **Objective 2:** define possible legislative options for the EU in the area of legal migration policy;
- **Objective 3:** assess the legal and economic aspects of the identified policy options.

⁴ Regulation 603/2013 of 26 June 2013.

⁵ European Commission, 2020, Communication on a New Pact on Migration and Asylum, COM (2020) 609 final.

⁶ Ibid.

⁷ 2021 Commission work programme – key documents.

1.3 Reading guide

The remainder of this study provides a brief overview in **Chapter 2** of the methodologies used to gather and analyse the data necessary to define the possible policy options and to conduct their impact assessment. In particular, the study relied on a literature review, on data collected from EU and national databases, on legal and economic analysis, and on two validation workshops.

This is followed in **Chapter 3** by a presentation of the current state of play in the field of legal migration. This chapter builds on the previous findings of the CoNE study, updating them on the basis of the transformation and changes that have taken place in recent years, including the COVID-19 pandemic, the proposed New Pact on Migration and Asylum, the European Pillar of Social Rights and the new pieces of legislation in the field of sustainable development. In addition, the existing gaps and barriers in the area of legal labour migration are identified.

In **Chapter 4**, the policy options are defined to address the identified gaps and barriers. These policy options are divided across three policy clusters.

The subsequent three chapters assess each policy cluster: **Chapter 5** focuses on the first policy cluster on harmonising rules for recognition of qualifications; **Chapter 6** focuses on the first part of the second cluster on introducing new legal channels for labour migration for TCNs in the EU; **Chapter 7** looks at the second part of the second cluster on introducing new legal channels for labour migration to the EU; and **Chapter 8** examines the third policy cluster on improving TCN workers' rights and employment conditions. The assessment is based on both legal and economic analysis.

Finally, **Chapter 9** draws conclusions regarding the potential policy options, and provides an overview of the assessment of the legal and economic aspects.

2 Methodology

The study is based on a combination of data collection and analysis tools e.g., desk research supplemented by legal analysis and econometric analysis with validation by workshops.

2.1 Literature review

For this study a targeted literature review was conducted. It covers the CoNE study supplemented by legal, economic and policy literature relevant to the field of legal migration. This also includes national and European case-law, economic studies conducted by international organisations working on the topics studied (e.g., OECD, IOM and UNHCR) and relevant academic works.

2.2 Data collection

The data collection focused primarily on the existing harmonised data for EU Member States (e.g., micro-level EU Labour Force Survey [EU LFS] and industry-level EU business survey). This is complemented by various case studies on specific countries or sectors.

2.3 Legal analysis

The legal analysis consists of an assessment of the existing gaps in legislation, as well as an assessment of each of the identified options vis-à-vis the EU Treaties (including the Charter of Fundamental Rights of the European Union - CFR), the EU legal migration legal *acquis* and other EU relevant legal norms.

The legal assessment was conducted through a combination of (the most recent) literature review and legal analysis (analysis of national, EU and international legal texts; European and national case-law). The legal arguments both in favour of and against the policy options were identified. The assessment was conducted around three aspects:

- the legal basis to be used to implement the policy option, and respect of the principles of subsidiarity and proportionality;
- the added value in terms of more effective, efficient and coherent compliance with: other EU actions in the field of migration; other EU policies; the CFR and EU values and rights more generally; and international law, in particular the protection of human rights;
- the impact of the policy option on the attractiveness and credibility of the EU.

2.4 Economic analysis

The economic analysis comprises two parts: an analysis of the state of play and an impact assessment of the proposed policy options. The analysis focuses on labour market outcomes of TCNs. Whenever necessary and possible, it also covers additional social outcomes.

The economic analysis was conducted based on the information obtained in the literature review, as well as the authors' own descriptive and regression analysis. The main data sources include the Eurostat Asylum and Managed Migration Database, EU LFS microdata, EU-MIDIS II 2016, the United Nations High Commissioner for Refugees (UNHCR) 2021 and the European Commission Business Survey. The advantage of these data sources is that they provide harmonised data at EU level.

Section 3.1 characterises the current state of regular and irregular migration in the EU. It provides descriptive statistics on the number of TCNs residing and working in the EU, as well as on the skill composition of TCNs. The regression analysis helps to characterise the existing gap in outcomes (such as employment, overqualification, job quality and perceived discrimination) between TCNs, mobile EU nationals and citizens. The regression analysis allows controlling for a number of observable factors such as gender, marital status, education, field of study, industry and occupation of work to disentangle (to the extent possible) the role of legal gaps and barriers faced by TCNs from the role of their underlying characteristics. The Data Annex includes the underlying data for the descriptive statistics, complementing it with additional data by Member State. 'Quantitative Annex A: State of Play Tables' includes tables from the regression analysis and outlines the econometric specifications.

The corresponding subsections in Chapters 5 to 8 discuss possible economic outcomes of the proposed policy options. The impact assessment comprises several parts. First, the target group is identified: TCNs who could be potentially affected by a policy option. Second, the scope for the policy option is quantified: what part of the existing gap in outcomes between TCNs, mobile EU nationals and citizens could be reduced by the policy option. Third, the economic impacts of the policy option are assessed based on the existing economic literature. If plausible quantitative estimates are not available, the impacts are discussed qualitatively. Fourth, possible limitations and implementation issues are highlighted. 'Quantitative Annex B: Impact Tables' includes descriptive statistics on the target groups and tables from the regression analysis that identify the scope of the policy options.

2.5 Workshops

Two online workshops (legal and economic) of two hours each were organised in July 2021 to collect additional input for the assessment of the impacts and validation of the state of play, policy options and impacts.

The workshop on legal aspects had six legal experts as participants. The experts represented academia, international organisations active in the field and organisations working with TCNs.

The workshop was divided into two sessions. The first session included a presentation and discussion on the state of play and on the policy options. The second session included a presentation and discussion on the expected impact of the policy options, focused on the issues concerning the legal basis and the impact on the EU external action.

The workshop covering economic aspects had seven economic experts as participants. The experts represented academia, international organisations active in the field and organisations working with TCNs.

The workshop consisted of a single session, including a presentation and discussion on the state of play, policy options and impacts. The latter covered impact on the labour markets as well as limitations and enhancers of the impacts.

The feedback received on the state of play, policy options and assessment of the economic and legal aspects during the workshops is addressed in the respective sections of the report.

3 Current state of play

This chapter presents the current context in terms of labour migration, providing a baseline for the definition and assessment of policy options.

3.1 Regular and irregular migration

This section provides a descriptive data analysis to update the information currently contained in the research report on the 'Cost of Non-Europe in the Area of Legal Migration' (Carrera, et al., 2019)⁸, including an assessment of the scale of regular and irregular migration and demographic composition of migrants, as well as statistics on differences in economic and social outcomes between migrants and the native population.

In addition, the section discusses the existing literature and available recent data on the impact of COVID-19. Here, the discussion focuses on the effects of border closures on legal migration.

3.1.1 Scale of regular and irregular migration

3.1.1.1 TCNs residing in the EU

As at December 2019, 20.3 million TCNs were residing in the EU Member States⁹. The largest group are TCNs holding residence permits for family reasons, accounting for 38 % of the total. TCNs holding permits for work reasons and studies represent 17 % and 4 % respectively. Refugees and individuals with subsidiary protection hold 9 % of all valid permits. The remaining 32 % of permits are not classified. About 75 % of TCNs in the EU are of working age, between 20 and 64 years old¹⁰.

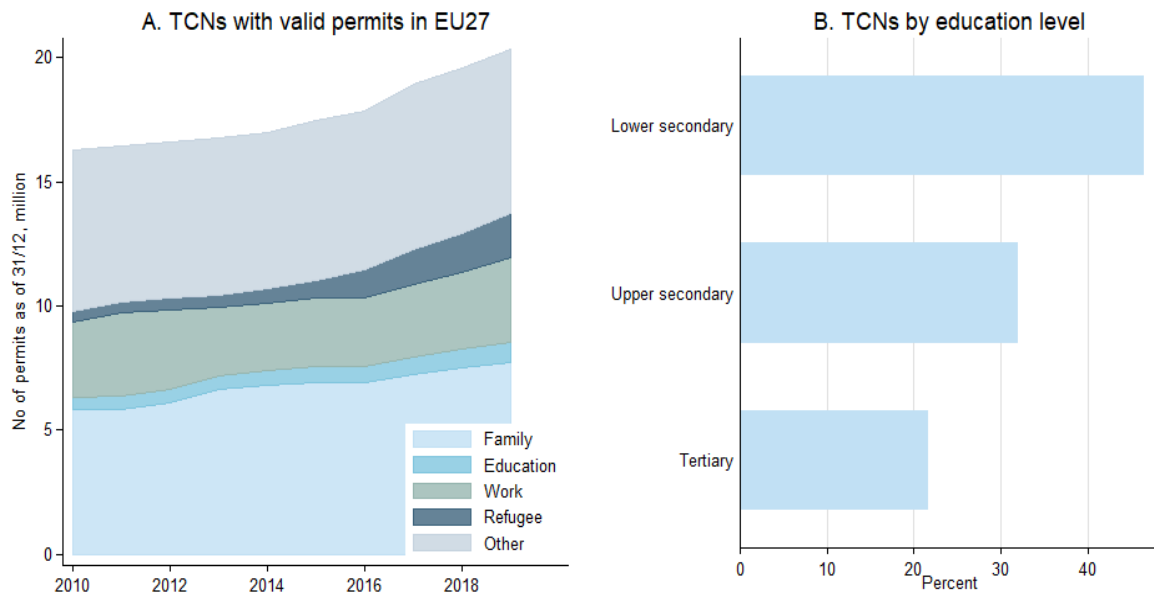
According to the EU LFS 2019, most TCNs of working age (46.4 %) have at most a lower secondary education, 32 % have an upper secondary degree, and 21.6 % hold a university degree. Later in the text, we will also refer to individuals having at most a lower secondary education as low-skilled, those with upper secondary education as middle-skilled, and those with tertiary education as highly skilled.

⁸ i.e., Chapters 4 and 5 on gaps and barriers and their impacts at individual and societal level.

⁹ This figure is based on the number of individuals with a valid residence permit (Eurostat, migr_resvalid).

¹⁰ This information comes from Eurostat, migr_resvas (age is available in five-year bands). As not every EU Member State reports the data by age, we use a more complete table migr_resvalid to characterise the number of TCNs currently residing in the EU.

Figure 2: TCNs residing in EU27, by reason of migration and education level



Note: the sample in the EU LFS is limited to TCNs (excluding EFTA nationals) between 20 and 64 years old.

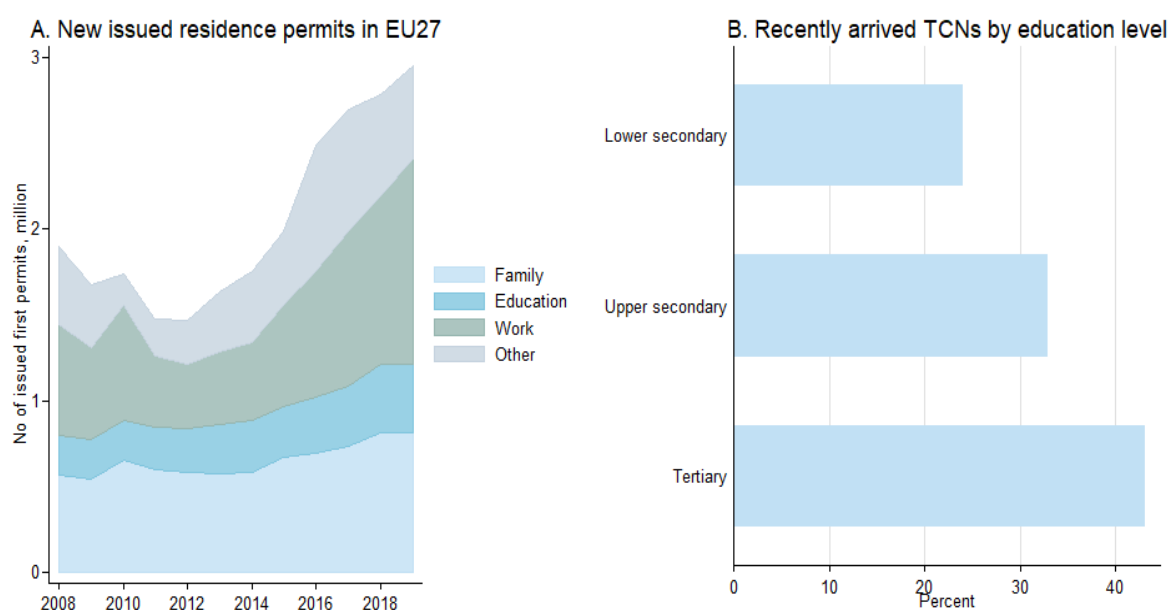
Source: authors' calculations based on Eurostat, migr_resvalid for panel A and EU LFS 2019 for panel B.

3.1.1.2 Arrivals to the EU for reasons of migration and education

In 2019, the EU27 Member States issued about three million first residence permits to TCNs (see Figure 3). The largest group of residence permits (41 % of the total, or about 1.2 million) were issued for work reasons. Family-related and education reasons accounted for 27 % (810 000) and 14 % (400 000) respectively. The category 'Other', which accounted for 19 % of total permits in 2019, comprises residence permits issued to refugees and those under subsidiary protection, permits issued to unaccompanied minors and victims of trafficking, permits for humanitarian reasons, and permits for other unspecified reasons.

There is a positive trend in the education level of recently arrived TCNs to the EU: compared to all TCNs residing in the EU (Figure 2, panel B), TCNs who arrived at their destination between 2017 and 2019 are on average better educated (Figure 3, panel B). TCNs with a tertiary degree constitute the largest group (43 % of all recent migrants), while only 24 % of recently arrived TCNs have at most a lower secondary education.

Figure 3: First residence permits issued to TCNs in EU27 by reason for migration



Note: a first residence permit is a residence permit issued to a person for the first time. A residence permit is considered as a first permit also if the time gap between the expiry of the old permit and the start of validity of the new permit issued for the same reason is at least six months, irrespective of the year of issuance of the permit (Eurostat). The sample in the EU LFS is limited to TCNs (excluding EFTA nationals) between 20 and 64 years old, who have resided for less than three years in their destination as at 2019.

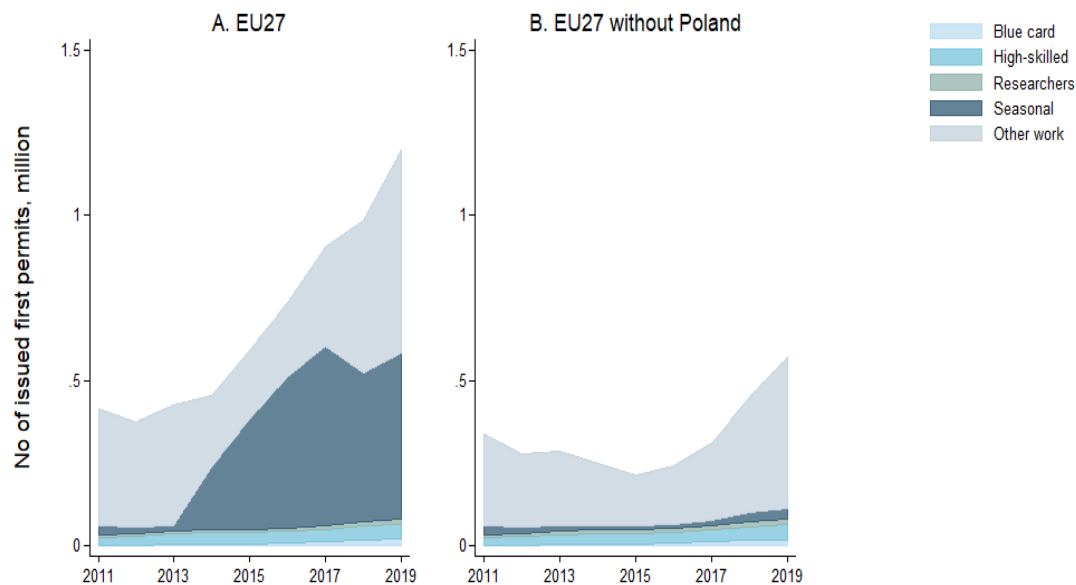
Source: authors' calculations based on Eurostat, migr_resfirst for panel A and EU LFS 2019 for panel B.

3.1.1.3 Legal labour migration pathways to the EU

The composition of residence permits issued for work reasons provides insights into the implementation of labour migration policies by the Member States. The share of highly skilled workers entering the EU under dedicated schemes (Blue Card, 1.6 % of all work-related permits; Researchers Directive, 1.3 %; national schemes for highly skilled, 3.8 %) is low compared to the overall number of issued work permits. This contrasts with the actual skill composition of recently arrived TCNs, which can be observed in the EU LFS. According to Figure 3 above and Figure 37 in the Annex, in 2019 about 43 % of all TCNs who had resided in an EU country for no more than two years had tertiary education. About 25 % were employed in typical highly skilled occupations, such as managers and professionals. Even if we assume that every highly skilled work migrant is accompanied by a highly skilled spouse entering through the family channel, the number of residence permits issued under the EU schemes for highly skilled TCNs is low relative to the number of highly skilled TCNs who actually arrive in the EU.

Seasonal work appears to be an important pathway into the EU, accounting for 42 % in 2019. However, 93 % of all work permits in this category were issued by Poland, mainly to Ukrainian seasonal workers, while the application of this scheme by other Member States has remained very limited since its introduction in 2013. Overall, Figure 4 suggests that most EU Member States prefer to apply their national schemes to regulate labour migration of both highly and lower-skilled TCNs.

Figure 4: First residence permits issued to TCNs in EU27 for work reasons

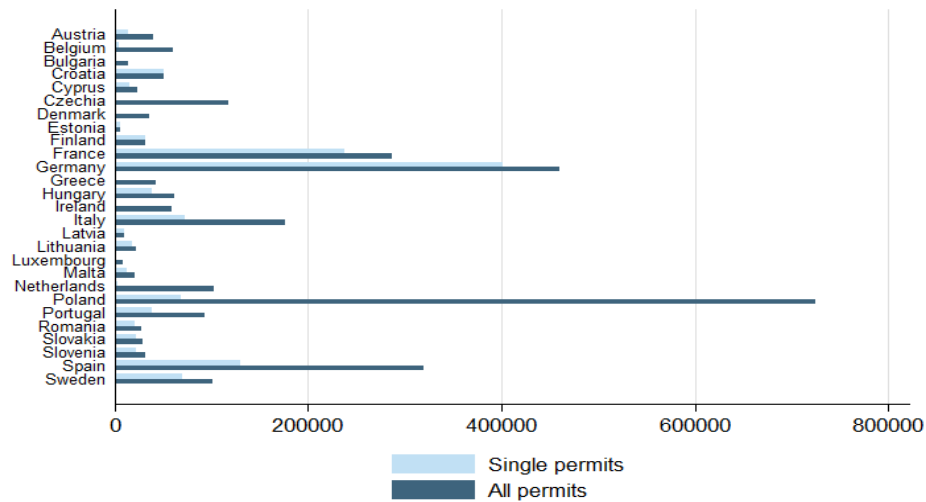


Source: authors' calculations based on Eurostat (migr_resocc).

Member States also differ in terms of applying two other relevant directives. The EU Single Permit Directive (2011/98/EU) (SPD) establishes common EU rules for a simplified procedure to obtain a combined residence and employment permit. A single permit can be issued not only to TCNs whose primary reason is work related, but also to family migrants, students and other categories. Importantly, this directive also contains equal treatment provisions for all TCNs who have this type of permit. In 2019, about 40 % of all issued permits by EU27 Member States were classified as single permits (in 2013 – the first year when for which data on single permits is available – this number constituted only 20 %). While implementation of this directive has increased substantially over recent years in many Member States, as Figure 5 shows, there are still several countries (Poland, Bulgaria, Belgium and the Netherlands) where the share of single permits among all issued permits is below 10 %.

In a similar way, there are differences in the implementation of the EU Long-Term Residents Directive (2003/109/EC) (LTRD). As Figure 6 illustrates, most Member States rely on their national schemes for long-term residents. In 2019, the share of EU long-term permits was equal to or higher than the share of national long-term permits in Austria, Estonia, Italy, Lithuania, Romania and Slovenia only.

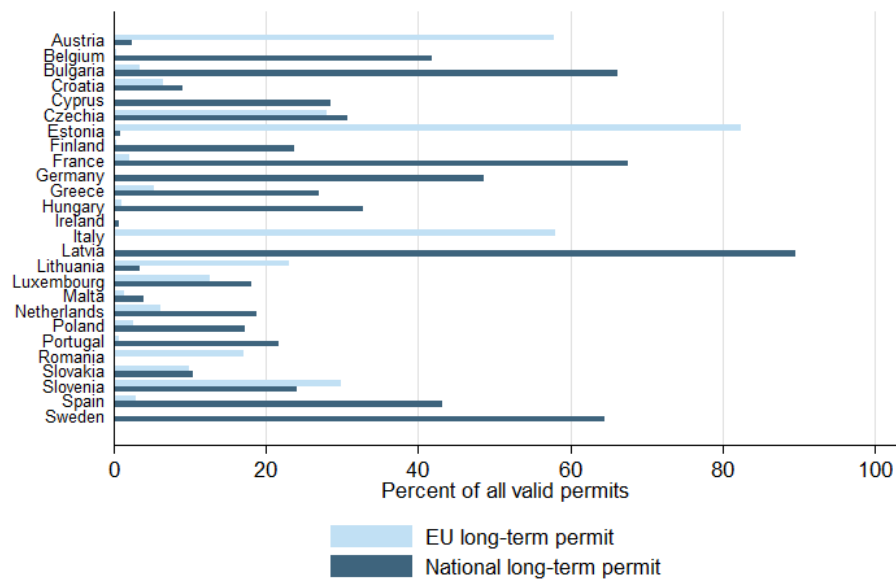
Figure 5: Single permits and total number of residence permits issued to TCNs in EU27 in 2019



Note: single permits are issued according to the SPD.

Source: authors' calculations based on Eurostat (migr_refirst and migr_ressing).

Figure 6: Long-term residents among all TCN holders of valid EU permits, 31 December 2019



Note: the figure above distinguishes between EU long-term resident status (Directive 2003/109/EC) and national long-term resident status. The large shares for Estonia and Latvia are due to ethnic Russians.

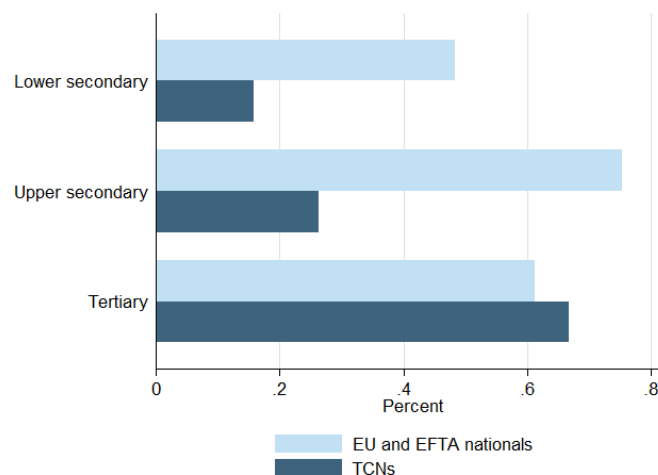
Source: authors' calculations based on Eurostat (migr_resshare).

3.1.1.4 Intra-EU mobility of third-country nationals

Frictionless intra-EU mobility could allow TCNs to benefit from opportunities in the large EU labour market, to improve the fit between their skills and jobs, and to adjust more flexibly to economic shocks. Access to the single EU labour market is often mentioned as the major added value of the EU migration policies. Therefore, reducing barriers to the intra-EU mobility of TCNs constitutes an important policy concern. While there is considerable anecdotal evidence of current barriers to the

intra-EU mobility of TCNs, harmonised statistics for the EU27 are missing¹¹. Following Poeschel (2016) and CoNE (2019), EU LFS 2019 data can be used to compare intra-EU mobility between EU/EFTA nationals and TCNs¹². An individual is considered mobile if at least one of the two conditions are met: 1) an individual has moved to another EU Member State in the last year¹³; 2) an individual resides and works in two different EU Member States. As Table 1 in Quantitative Annex A shows, TCNs are less likely to be mobile compared to EU/EFTA nationals of the same gender, age, education and previous and current countries of residence. While the estimated mobility rate for EU/EFTA men and women in 2019 was 0.9 and 0.4 % respectively, TCN men were 50 % and TCN women 34 % less likely to be mobile. While TCNs account for about 5.4 % of the working-age population in the EU, they represent only 2.5 % of mobile individuals. Figure 7 further disaggregates mobility rates by education¹⁴. It highlights that the difference in mobility is driven by low- and middle-educated individuals. These results are consistent with previous studies that used earlier waves of the EU LFS. While the presented estimates point to the presence of additional barriers for TCNs, the approach has several shortcomings. First, some Member States (Finland, France, Ireland, Luxembourg in 2019) do not report the previous country of residence and, thus, do not constitute a part of the sample to measure intra-EU mobility. Second, due to the small sample size of TCNs in the EU LFS, the results should be treated with caution. Third, such an approach is likely to miss short-term intra-EU mobility, as temporary migrants are less likely to participate in the survey.

Figure 7: Intra-EU mobility rates of EU/EFTA nationals and TCNs in 2019, by education



Note: the sample comprises individuals between 20 and 64 years old who already resided in the EU in the year before the survey. The mobility rate is calculated as follows: number of individuals who moved to another Member State between 2018 and 2019 or who worked and resided in two different Member States in 2019, as % of individuals who resided in the EU as of 2018.

Source: authors' calculations based on the EU LFS 2019.

¹¹ An informative dataset would contain annual information on the number of immigrants by EU destination, previous country of residence and citizenship.

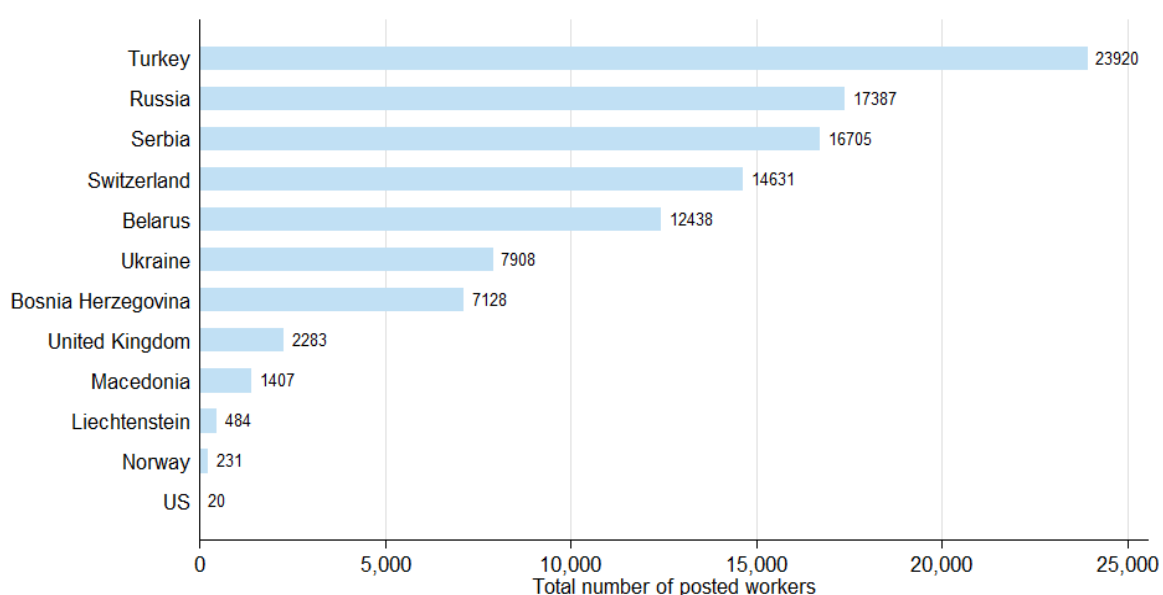
¹² Here and later in the text, we merge EU and EFTA nationals into one group, as the latter enjoy similar rights. The results are robust to excluding EFTA nationals from the analysis; they account for about 1.2 % of all EU/EFTA mobile nationals.

¹³ Country of residence in the previous year is different to country of residence in the survey year (conditional upon an individual already residing in the EU in the previous year).

¹⁴ Due to the small sample size, the figure plots unconditional mobility rates by education.

A rapidly growing mobility pattern constitutes TCNs who are mobile within Europe as posted workers¹⁵. This type of temporary migration is based on case law of the European Court of Justice (ECJ) that allows TCNs with a valid work and residence permit in one Member State to be posted freely across the EU (Lens et al., 2019). Data on TCN posting is incomplete and not centrally available at EU level, but evidence from selected Member States (De Wispelaere & Parcolet, 2018) shows that the percentage of non-EU nationals among posted workers amounts to an average of 10 %. From the countries that reported data, the percentage was lowest in Malta (~ 2 %) and highest in Romania (~17 %). When looking at the precise countries of origin, the data available shows that main routes for TCN posting are via EU countries that border or are close to the countries of origin, or have historical migration pathways or bilateral agreements for facilitated migration procedures. It is therefore relatively common to find TCN posted workers from the Western Balkans being posted from Slovenia; Ukrainian workers being posted from Poland; or non-EU Eastern European, Western Balkan and Northern African workers being posted from Italy (Krilić et al., 2020). For Germany, we have access to detailed 2020 data from the Directorate General of Customs. TCNs constitute 6.3 % of all posted workers in Germany. Figure 8 shows that the five main countries of origin are Turkey, Russia, Serbia, Switzerland and Belarus.

Figure 8: Posted TCNs in Germany in 2020



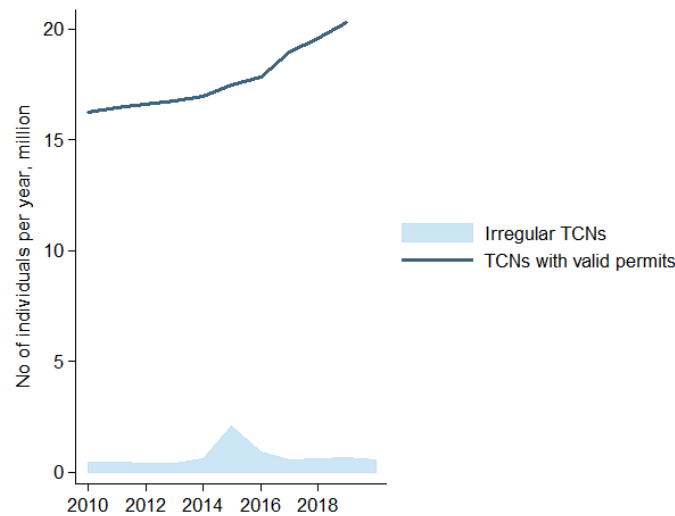
Source: authors' calculations based on German Directorate General of Customs (2020).

3.1.1.5 Irregular migration to the EU

To put irregular migration to the EU into perspective, we compare the number of irregularly present TCNs in the EU27 with the number of TCNs residing with a valid residence permit. As a proxy of irregular migration, we are using the Eurostat indicator that measures the number of foreign nationals found to be illegally present.

¹⁵ A 'posted worker' is an employee who is sent by his/her employer to carry out a service in another EU Member State on a temporary basis, in the context of a contract of services, an intra-group posting or a hiring out through a temporary agency (European Commission).

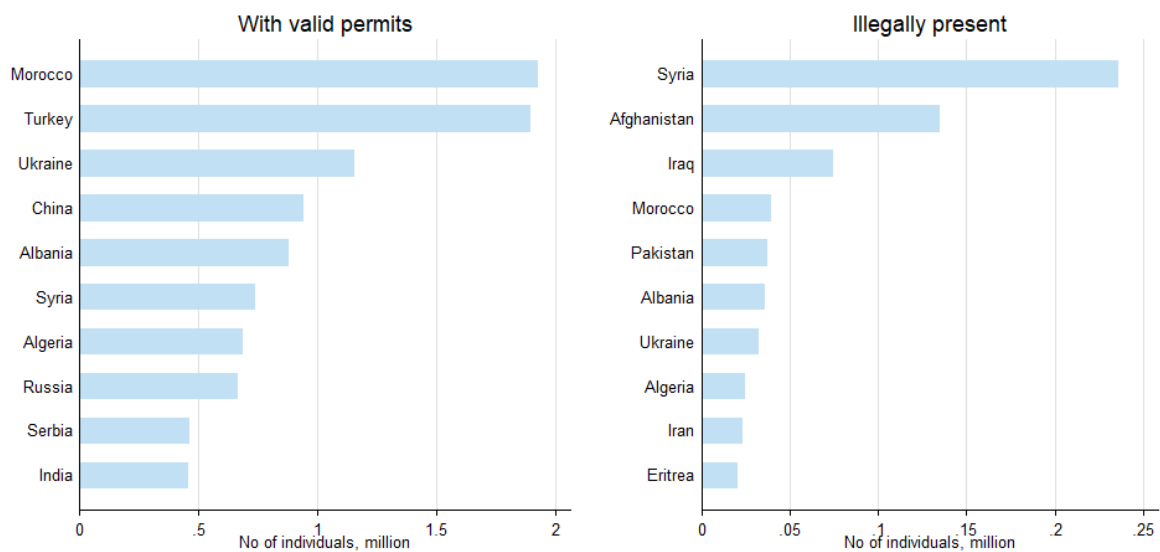
Figure 9: Comparison of regular and irregular migration scale



Note: Eurostat's definition of TCNs found to be illegally present: TCNs who are detected by Member States' authorities and have been determined to be illegally present under national laws relating to immigration.
Source: authors' calculations based on Eurostat (migr_resvalid and migr_eipre).

Many irregularly present TCNs come from typical refugee origin countries: Syria, Afghanistan and Iraq. These origin countries account for about 47 % of detected irregular migrants between 2015 and 2019. It is likely that they were found to be illegally present before they managed to apply for asylum or due to the Dublin Regulation. However, there are several origin countries, such as Morocco, Algeria, Ukraine, Albania and Serbia, where individuals are less likely to obtain recognised refugee status and might have chosen to move to the EU irregularly due to a lack of regular options.

Figure 10: Top origin countries of regular and irregular migrants in the EU (average over 2015-2019)



Source: authors' calculations based on Eurostat (migr_resvalid and migr_eipre).

To describe irregular migrants' characteristics in more detail, we can rely on surveys conducted by the International Organization for Migration (IOM). These monitoring surveys have been conducted since 2015 in many European first arrival countries. In 2015 and 2016 a particularly large sample (over 19 000 irregular migrants) were surveyed in several South and Southeast European countries, and the characteristics analysed in Aksoy and Poutvaara (2021). They show that the average age of the irregular migrants who arrived was 26 years. 82 % were male, 18 % had tertiary education and 50 % secondary education. The five most common countries of origin were Syria (29 %), Afghanistan (21 %), Iraq (11 %), Nigeria (6 %) and Pakistan (5 %). When asked about their reason for migration, 77 % indicated conflict or persecution as their main reason. The second most frequent reason was economic (17 %), followed by limited access to amenities (3 %). This highlights that while most irregular migrants come to the EU out of conflict-related reasons and are thus potentially eligible for asylum, a non-negligible share are also arriving for economic reasons and are unlikely to obtain asylum.

More recent (but less representative) data from the IOM can be found in surveys of 299 irregular migrants who arrived in Italy, and 302 irregular migrants who arrived in Spain in 2020. These surveys provide suggestive evidence that the countries of origin and the reason for migration have shifted in the last years. Following the Turkey migration deal¹⁶ and the difficulties in entering Greece and Bulgaria, irregular migrants have been more likely to cross the Central Mediterranean or Western Mediterranean or enter the EU via the Canary Islands. Migrants arriving in Italy were most likely to come from Sudan (16 %), Bangladesh (15 %) and Pakistan (9 %), whereas migrants arriving in Spain were mostly arriving from Algeria (25 %), Mali (24 %) and Morocco (22 %). Compared to earlier arrivals, 2020 arrivals were more likely to indicate economic reasons as their main reason for migration (29 % in Italy and 49 % in Spain). This emphasises the demand for legal migration pathways for economic reasons. An interesting finding from the United Nations Development Programme (UNDP) report 'Scaling fences' (UNDP, 2019) is that many irregular migrants in the EU are working. Those who have stayed in the EU for a long time have secured the right to work (36 % in total, 72 % of whom arrived before 2005) and 38 % of all survey participants¹⁷ are currently earning money in the EU. This highlights that there seems to be a labour market demand for those individuals, especially once they have work permits.

3.1.2 Immigrants in the EU labour market

3.1.2.1 Motivation: labour market needs in the EU

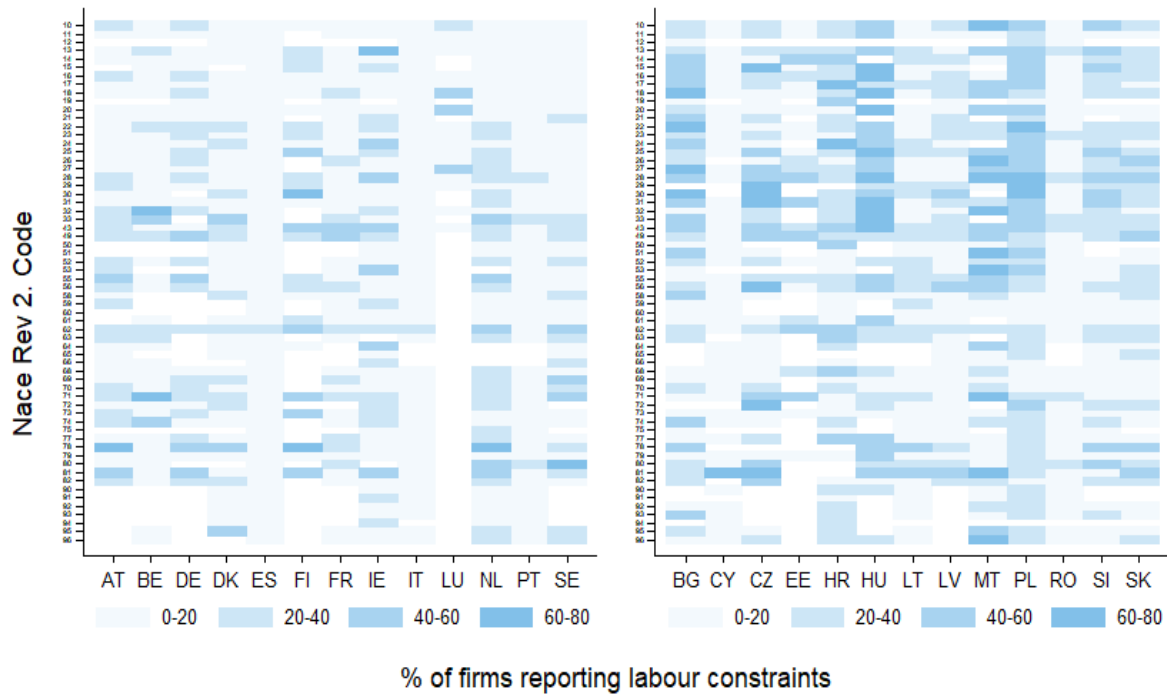
To identify sectors with large labour market demand, we use information on reported labour shortages by firms in the EU Member States. The data stem from the European Commission Business Survey¹⁸, which, among other questions, asks firms whether their business is constrained by lack of labour. The data is aggregated at Member State and industry level, showing the share of firms experiencing labour shortages. Figure 11 shows the percentage of firms in a given country (x-axis) and a given industry (y-axis) that report to be constrained in production by labour shortages. The darker the cell, the more firms in a given sector are constrained by labour shortages.

¹⁶ https://ec.europa.eu/commission/presscorner/detail/en/MEMO_15_5860.

¹⁷ The survey consisted of 1 970 irregular migrants from 39 African countries who had not travelled for asylum or protection-related reasons.

¹⁸ https://ec.europa.eu/info/business-economy-euro/indicators-statistics/economic-databases/business-and-consumer-surveys/download-business-and-consumer-survey-data/subsector-data_en

Figure 11: Reported labour shortages in the EU Member States (2019)



Note: the left panel contains Member States that joined the EU before 2004, the right panel contains Member States that joined the EU in 2004 or later.

Source: authors' calculations based on European Commission Business Survey.

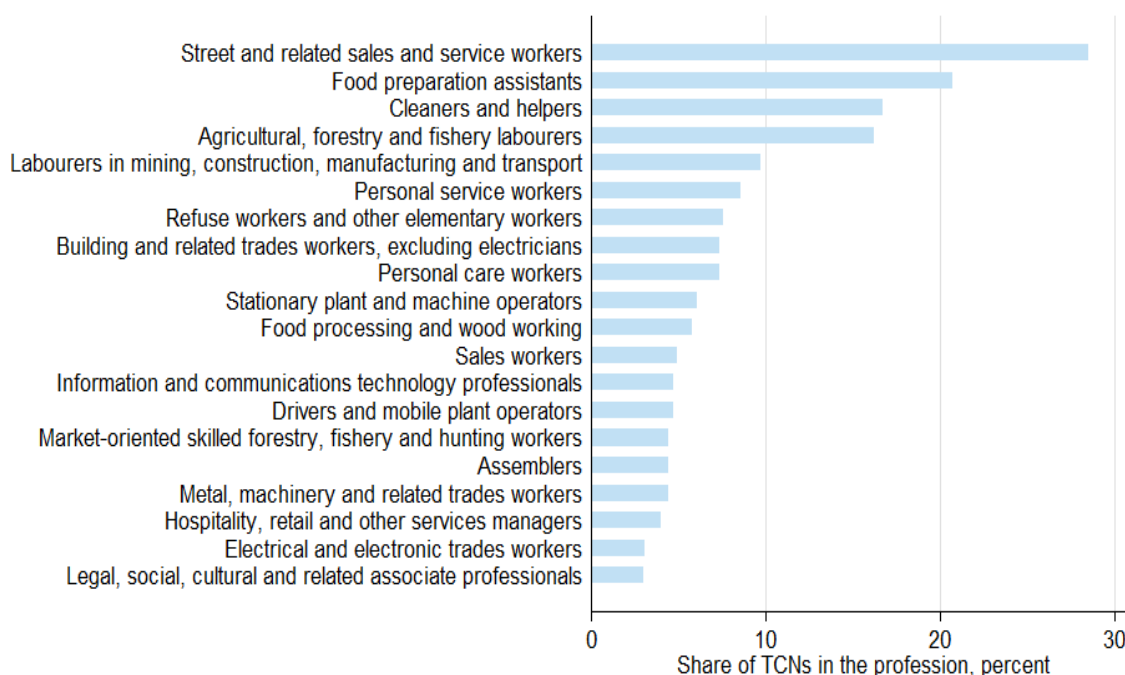
EU firms report shortages in sectors requiring both highly skilled and lower-skilled employees. There are several sectors where the labour shortage situation is similar across different Member States. These are: computer programming (62 % of firms), construction (43 %), land transport (49 %), repair and installation services (33 %), services to buildings (81 %), employment services (78 %) and security services (80 %). In general, however, skill shortages vary across Member States. Skill shortages are the highest in the new EU Member States (as the result of high emigration rates after the EU enlargement, as shown by Giesing and Laurentyeva (2017).

Figure 36 in the Annex plots the concentration of TCNs in four top sectors where the largest number of EU firms report labour shortages. As the Figure shows, there is no apparent association between reported labour shortages and the current concentration of immigrants. The variation in the presence of TCNs in a sector is driven mainly by the general openness of a country to migration and the traditional presence of immigrants in certain sectors.

3.1.2.2 Sectors and professions with the highest concentration of immigrants

To characterise the existing labour market situation of TCNs in the EU in more detail, the EU LFS can be analysed. Figure 12 shows that the four occupations (2-digit ISCO) with the largest percentage of TCNs (more than 15 %) are street and related sales and service workers; food preparation assistants; cleaners and helpers; and agricultural, forestry and fishery labourers.

Figure 12: Occupations with the highest share of TCNs among all employed, EU27 (2019)



Note: the sample includes employed individuals between 20 and 64 years old. The figure shows the aggregate for the EU27 in 2019.

Source: authors' calculations based on the EU LFS 2019.

As Figure 13 illustrates, TCNs cluster in occupations that, on average, employ larger shares of low-skilled workers. The largest occupations in terms of employed TCNs are cleaners and helpers, personal services, and personal care workers. Information and communication technology (ICT), science and highly skilled health professions, on the contrary, depend to a lesser extent on the foreign workforce. On the one hand, the distribution of TCNs across occupations reflects their skill composition (see Figure 35 in the Annex): in 2019, 46.4 % of all TCNs were low skilled, 32 % middle skilled and 21.6 % highly skilled (among the working age population between 20 and 64 years old). To compare, among the citizens of the same age group: the share of low-skilled workers constituted 19.4 %, middle-skilled 49.8 % and highly skilled 30.8 %. On the other hand, as discussed below, TCNs face professional overqualification in their destinations.

Figure 13: Share of TCNs v share of highly skilled in the occupation in the EU27 (2019)



Note: the sample includes employed individuals between 20 and 64 years old. The figure shows the aggregate for the EU27 in 2019; circles are proportional to the number of TCNs working in a given occupation.

Source: authors' calculations based on the EU LFS 2019.

3.1.2.3 Recognition of immigrants' qualifications

One approach to measuring the degree of overqualification is to calculate the share of highly skilled individuals (with an education level corresponding to ISCED 5-8, tertiary education) working in lower-level occupations (ISCO 400-900 – sectors with a high share of lower- and medium-educated workers) to the total number of highly skilled¹⁹. As Table 2 in Quantitative Annex A illustrates, highly educated TCNs (of similar age, gender, marital status and field of study) are more likely to be classified as overqualified, relative to both natives and mobile EU/EFTA nationals. In 2019, about 48 % of highly skilled TCNs worked in low- or medium-skilled jobs; for citizens this share constituted about 20 %. Figure 14 provides another illustration: it is striking that among highly skilled TCNs, the most common occupations in terms of absolute numbers are cleaners and helpers.

An alternative measure of overqualification is self-reported overqualification as measured in the EU LFS 2014 ad hoc module. It cannot be directly compared with the above measure, because it concerns workers of any education, not only highly educated. The results, however, point in the same direction: TCNs are more likely to report being overqualified compared with citizens and mobile EU nationals with the same observable characteristics. Moreover, as Table 3 demonstrates (for men and women), this difference does not fully disappear when comparing individuals with the same level of language skills, years of residence in the destination and migration reason.

¹⁹ https://ec.europa.eu/eurostat/documents/1978984/6037334/Evaluation_report_AHM_2014.pdf.

Figure 14: Top occupations employing TCNs with tertiary education in the EU27 (2019)



Note: the sample includes employed TCNs with tertiary education between 20 and 64 years old. The figure shows the aggregate for the EU27 in 2019.

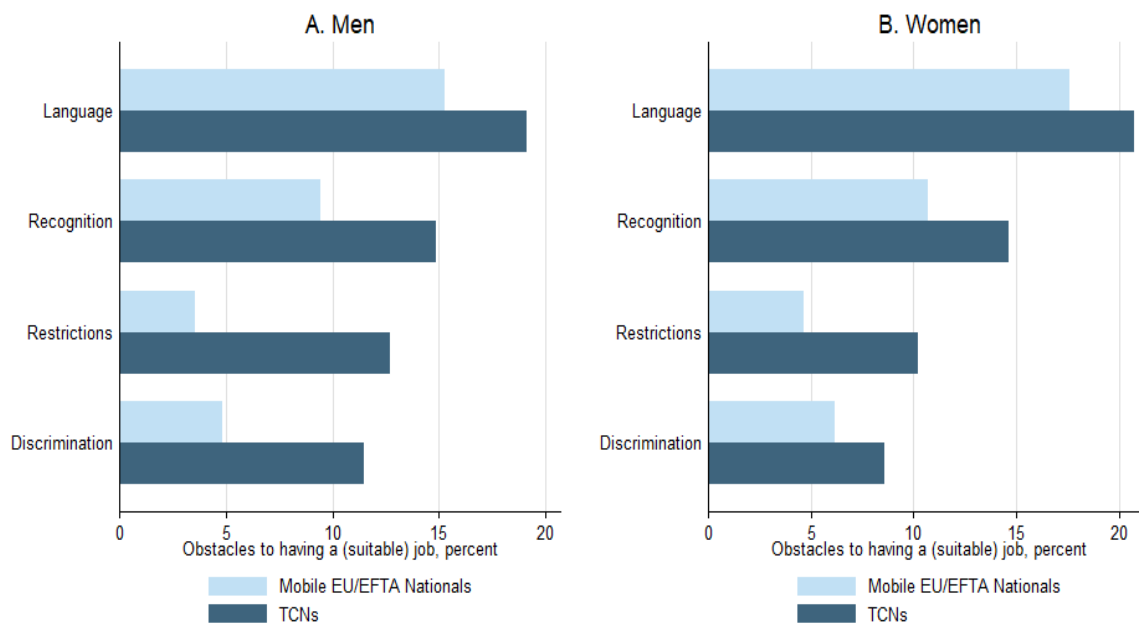
Source: authors' calculations based on the EU LFS 2019.

A large amount of literature documents migrants skill downgrading in the destination country. Overproportional presence of highly educated TCNs in lower-skilled occupations compared with similar natives and mobile EU nationals can result from several factors: unobserved differences in ability and country-specific skills, poorer quality and non-transferability of foreign education, difficulties in the job search process due to a lack of network or support services, demand factors, personal choice of migrants, or discrimination. One reason that is often mentioned is a lack of recognition of migrants' qualifications. Brücker et al. (2021) show that three years after obtaining recognition, immigrants in Germany earn almost 20 % higher wages and are 25 percentage points more likely to be in employment compared with similar immigrants who did not obtain recognition.

In the EU LFS data, we find that a lack of recognition of qualifications is, after missing language skills, the second biggest obstacle to finding a job among unemployed, inactive or overqualified TCNs (EU LFS ad hoc module, 2014). Overall, TCNs are more likely to report obstacles in their job search. In every category of potential obstacle, they report a higher prevalence compared to EU/EFTA mobile nationals²⁰.

²⁰ The precise wording of the question is: 'What do you consider to be the main obstacle preventing you to have a job corresponding with your skills?' if they state that they are overqualified, and 'What do you consider to be the main obstacle preventing you to have a job?' if they state that they do not have a job. The possible answers are: 1) Lack of language skills in host country language(s); 2) Lack of recognition of qualifications obtained abroad; 3) Restricted rights to work because of citizenship or residence permission; 4) Origin, religion or social background; 5) Another obstacle; 6) No particular obstacle; 9) Not applicable; 10) Unknown.

Figure 15: Major obstacles to finding a suitable job, or a job at all (2014)

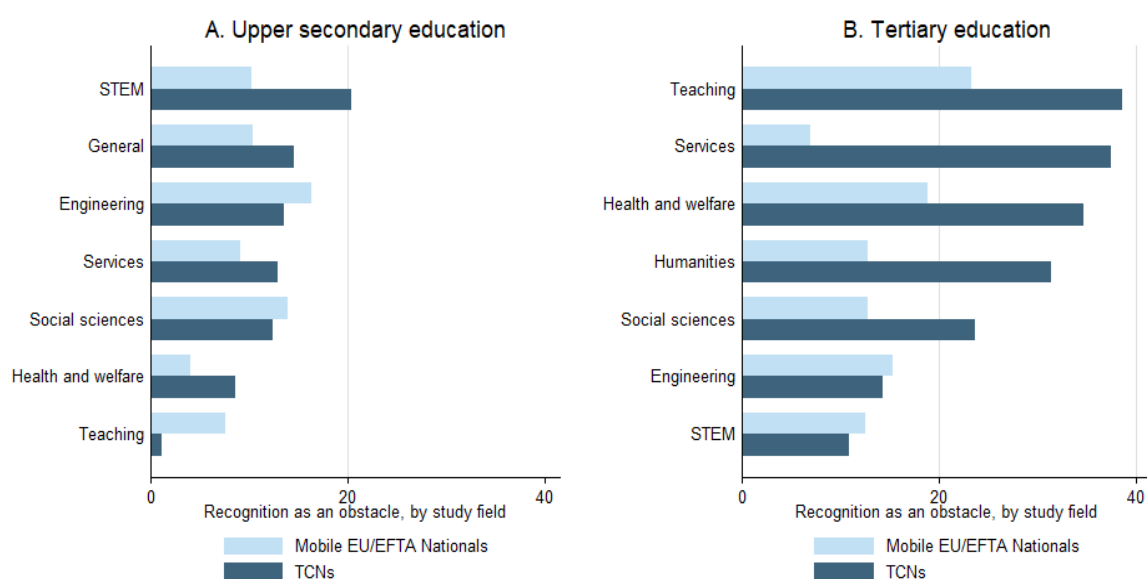


Note: the sample includes unemployed and inactive individuals and those reporting overqualification, between 20 and 64 years old. The figure shows the aggregate for the EU27 in 2014, ad hoc module.

Source: authors' calculations based on the EU LFS.

To gain further insights, we can also disaggregate lack of recognition as a job search obstacle by field of study. With the exception of a few fields of study, TCNs report that recognition of their professional qualification(s) is a larger obstacle compared with mobile EU nationals. TCNs with a tertiary degree are affected more than middle-skilled TCNs. The fields of study that suffer most from lack of recognition are teaching, services, health and welfare, and humanities and social sciences in general. Highly skilled engineering and STEM graduates seem to be less affected by lack of recognition. This could have several different reasons, including strong demand, good transferability of skills and good quality of education abroad, which allow graduates in these subjects to be employed even without recognition.

Figure 16: Lack of recognition as an obstacle to finding a suitable job, or a job at all, by field of study



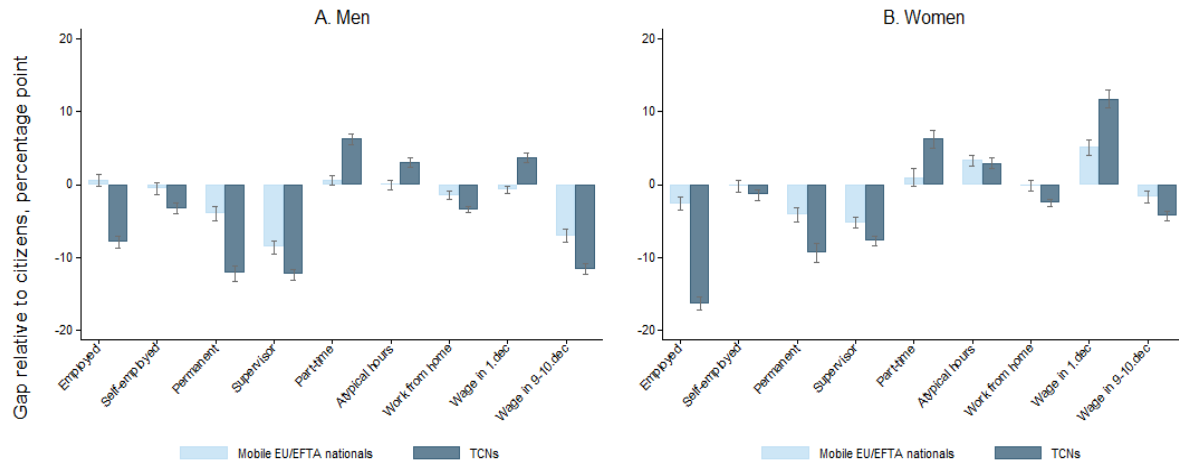
Note: the sample includes unemployed, inactive or overqualified respondents with middle and higher education levels, between 20 and 64 years old. The figure shows the aggregate for the EU27 in 2014, ad hoc module.

Source: authors' calculations based on the EU LFS, ad hoc module 2014.

3.1.2.4 Differences in labour market outcomes between citizens, TCNs and mobile EU/EFTA nationals

The challenges that immigrants face in the EU labour market result in their labour market outcomes being worse compared to those of citizens. Figure 38 in the Annex illustrates that, on average, TCNs are less likely to be employed (by more than 10 percentage points) and consequently their unemployment and inactivity rates are higher than those of citizens and EU/EFTA nationals. Figure 17 compares different labour market indicators for mobile EU/EFTA nationals and TCNs in relation to citizens. The results stem from regression analysis that control for age, marital status, education (lower secondary, upper secondary or tertiary) and field of study. For all indicators, TCNs have worse outcomes than citizens. Mobile EU/EFTA nationals are positioned between citizens and TCNs. The employment gap is negligible for mobile EU/EFTA nationals but strongly pronounced for TCNs and even more strongly for TCN women, who have an approximate 15 percentage point lower employment rate. TCNs are also less likely to be self-employed, have a permanent contract or be in a position with supervisory tasks, compared to both natives and mobile EU/EFTA workers with similar characteristics. TCNs are more likely to work part-time or atypical hours, and are less likely to work from home. Further, TCNs are more likely to earn wages in the lowest decile (national wage distribution) and are less likely to be among the top earners. Taken together, these indicators show that both mobile EU/EFTA workers and TCNs have worse labour market outcomes than natives, with TCNs being in a more disadvantaged position.

Figure 17: Labour market differences between citizens, mobile EU/EFTA nationals and TCNs, 2019



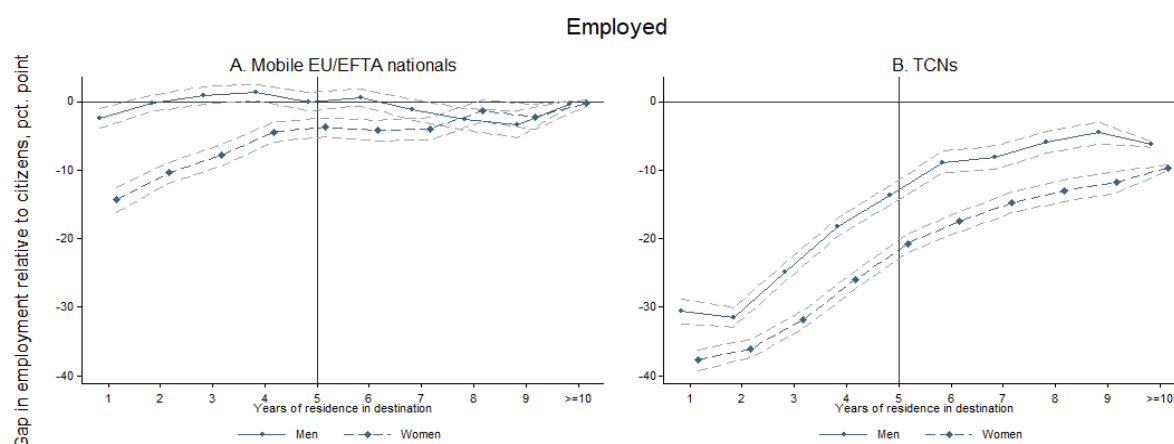
Note: sample includes individuals residing in the EU27, between 20 and 64 years old. Mobile EU/EFTA nationals are migrants who are citizens of other EU Member States or EFTA countries. The gap is conditional on age, marital status, education, field of study and country of residence.

Source: authors' calculations based on EU LFS 2019.

These results could be due to the selection of immigrants in certain industries and occupations with worse labour market outcomes, or to worse labour market outcomes even when they work in the same industries and occupations. Most results remain the same when we only compare natives and immigrants in the same industry and occupation. There could be several different reasons why this is the case, including the characteristics of the TCNs (e.g., language skills and professional skills) and the characteristics of the labour market (e.g., discrimination). The result that TCNs work more atypical hours disappears when controlling for industry and occupation, indicating that the difference in the prevalence of atypical work is due to the selection of TCNs in sectors and occupations with a high prevalence of atypical hours, such as personal service and personal care workers, agricultural workers, drivers and mobile plant operators. The result that immigrant women work more part time reverses once we control for industry and occupation, indicating that immigrant female workers are more represented in industries and occupations where part-time work is more prevalent, such as personal service and personal care workers, food preparation assistants, cleaners and helpers. Once we compare women in the same industry and occupation, immigrant workers have a lower tendency to work part time.

The analysis so far has looked at a particular point in time. It is also interesting to investigate how the employment gap between mobile EU/EFTA workers, TCNs and natives develops during the time spend in the destination. Figure 18 illustrates the employment gap for mobile EU/EFTA workers and TCNs according to years of residence (Figure 41 in the Annex repeats the same analysis for the probability of receiving a wage in the lowest decile). While the employment gap for mobile EU/EFTA workers is only significant for women and almost closes over the first five years, the initial gap is much larger for TCNs. Although there is a positive trend, the gap does not fully close, even for those who have resided for more than 10 years in the destination. It should also be noted that the reduction in the gap over time is the product of several effects. First, immigrants indeed perform better over time, as they learn the language, acquire the necessary skills and become less restricted in terms of their labour market mobility (e.g., after obtaining long-term status). Second, the reduction in the gap can be a reflection of the decision of immigrants to stay in the destination, as those who do not find a job are more likely to leave.

Figure 18: Differences in employment rate between EU/EFTA migrants, TCNs and citizens, by years of residence



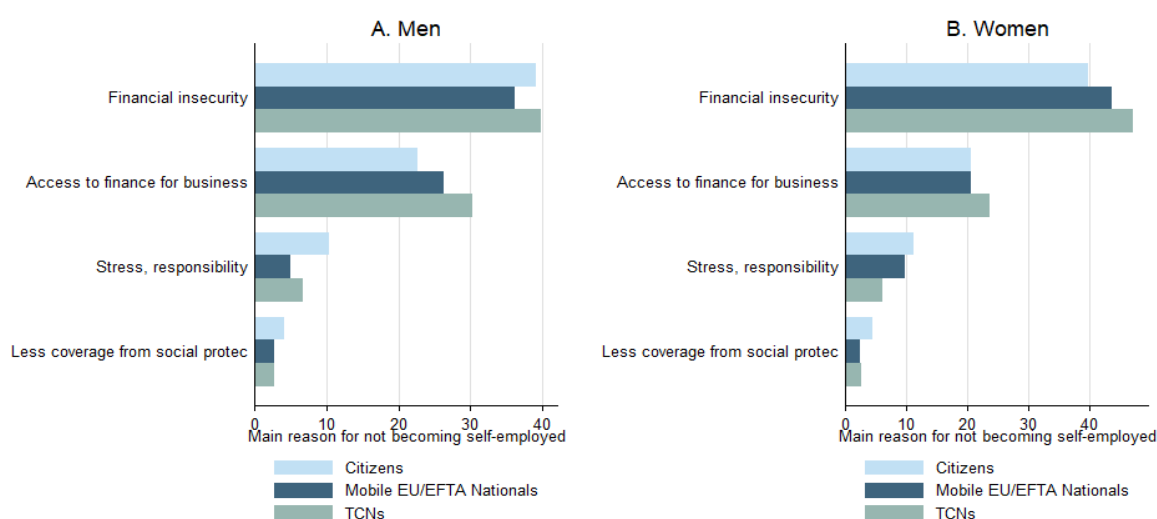
Note: the sample includes individuals residing in the EU27 between 20 and 64 years old. Mobile EU/EFTA nationals are migrants who are citizens of other EU Member States or EFTA. Baseline level – citizens. The gap is conditional on age, marital status, education, field of study, year and country of residence fixed effects. Source: authors' calculations based on EU LFS (2010-2019 waves).

3.1.2.5 Differences in self-employment

Figure 19 shows that male TCNs in particular have lower self-employment rates in the EU. For men, the difference does not disappear even when controlling for occupation and industry of work. Thus, the question arises whether this is due to specific obstacles that TCNs face when starting a business. The ad hoc module of the 2017 EU LFS can shed some light on this question.

Figure 19 helps investigate the reasons for not becoming self-employed. TCNs mention access to finance more often than both natives and mobile EU/EFTA nationals. The difference is particularly large (10 percentage points) for TCN men. This could, for instance, be due to additional administrative barriers, lower access to collateral or less local financial knowledge.

Figure 19: Main reasons for not becoming self-employed

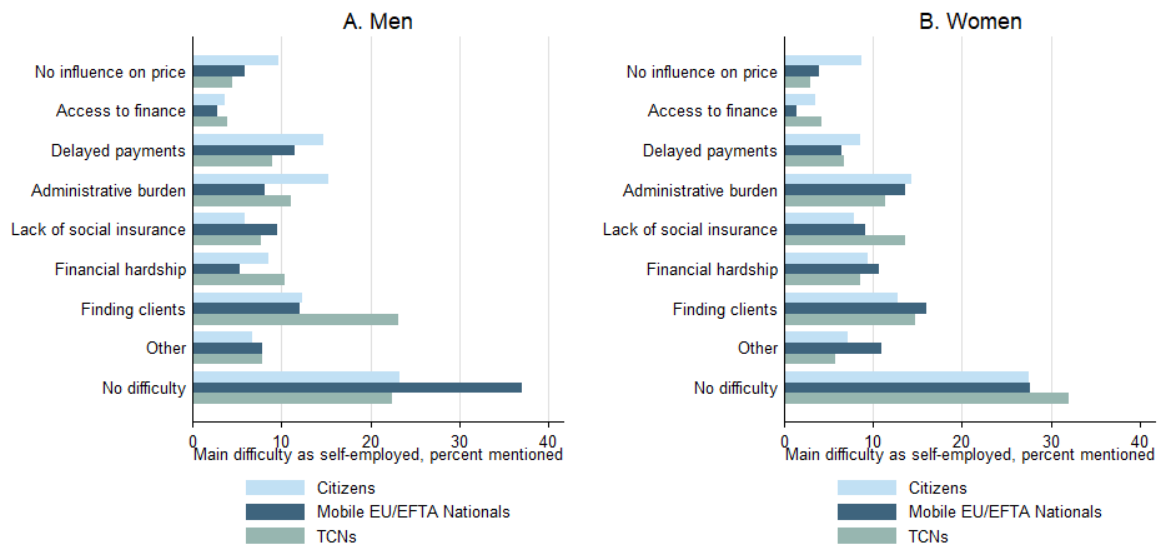


Note: the sample includes employees and unemployed individuals in the EU27 between 20 and 64 years old.

Source: authors' calculations based on the EU LFS (2017).

Once self-employed, there are no apparent differences in reported difficulties between self-employed citizens and immigrants, for either mobile EU/EFTA nationals or TCNs. The only notable difference is access to clients for self-employed TCN men.

Figure 20: Main difficulty as self-employed (2017)

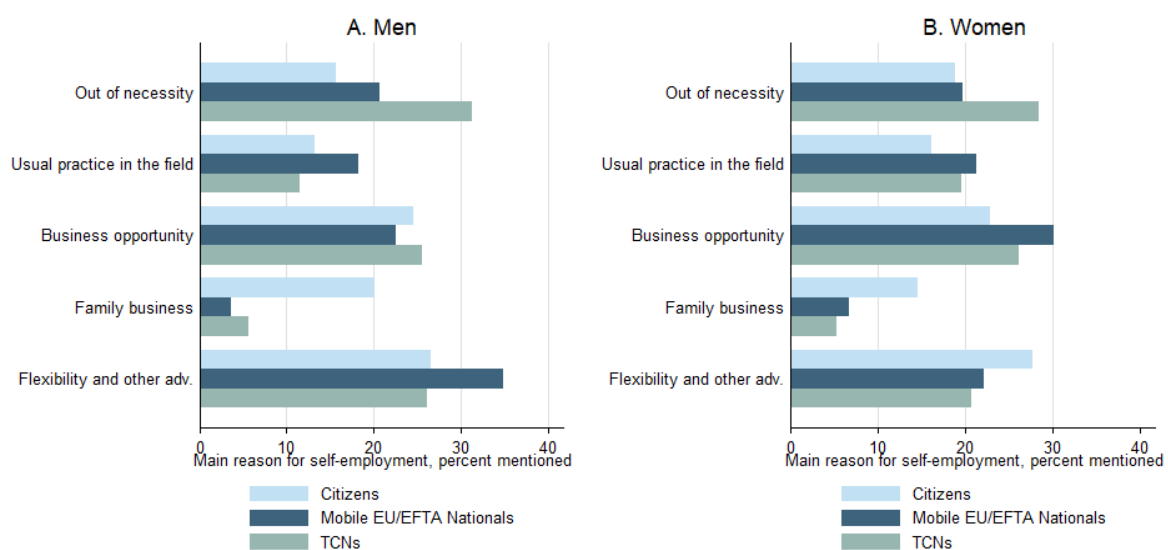


Note: the sample includes self-employed individuals in the EU27 between 20 and 64 years old.

Source: EU LFS (2017).

About 30 % of TCNs decide to become self-employed out of necessity (i.e., lack of other employment opportunities). This could also signal higher barriers for this group in the EU labour market.

Figure 21: Reasons for becoming self-employed (2017)



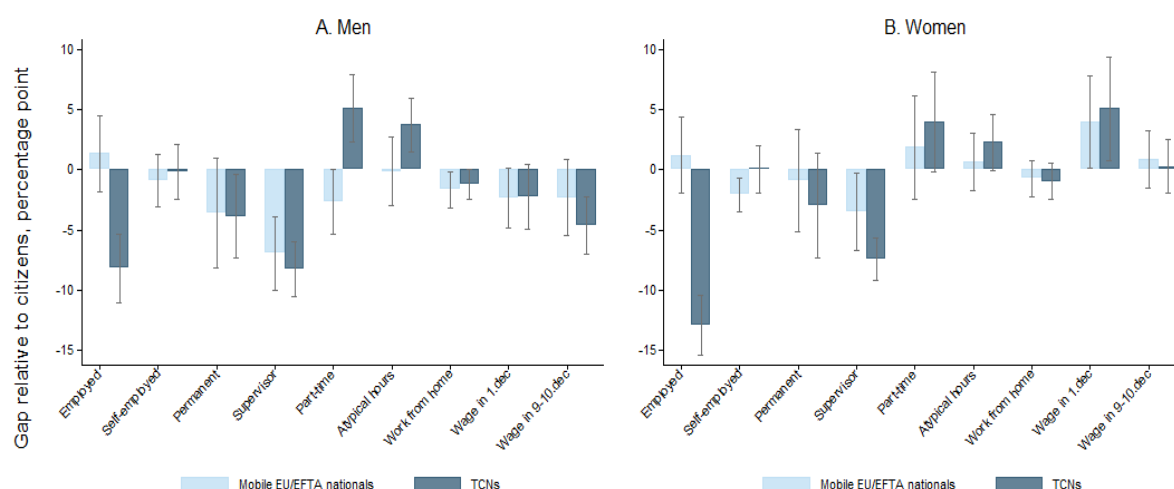
Note: the sample includes self-employed individuals in the EU27 between 20 and 64 years old.

Source: EU LFS (2017).

3.1.2.6 Young TCNs in the EU27 labour markets

Young people often face particular difficulties when entering the labour market. We therefore investigate the differences in employment characteristics for young people between natives and immigrants. The analysis is based on the LFS ad hoc module 2016. The module targeted young individuals (15-34 years old) residing in EU Member States, and focused on the study-to-work transition. Figure 22 illustrates that young TCNs are less likely to be employed and to have a permanent position or a supervising role than comparable natives. They are also more likely to work part time, and men are more likely to work atypical hours. Effects for young mobile EU/EFTA nationals are weaker.

Figure 22: Differences in employment characteristics, young people in the EU27

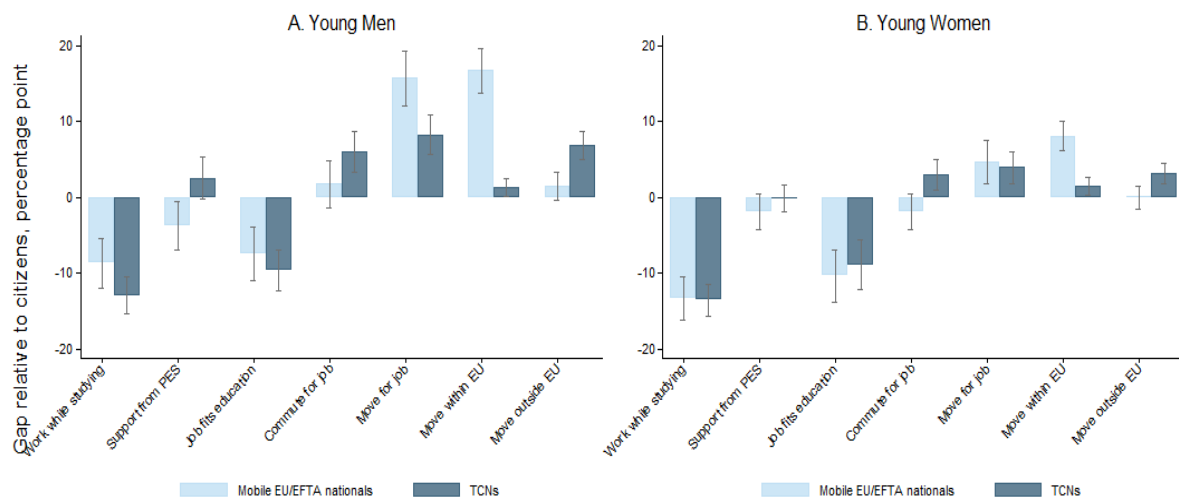


Note: plotted coefficients are from regressions, which in addition control for marital status, age, education, field of study and country of residence. Baseline group: citizens. The sample includes individuals between 15 and 34 years old.

Source: EU LFS, (2016).

Figure 23 shows differences in labour market behaviour that could explain these differences in labour market outcomes. One striking difference is that both mobile EU workers and TCNs are less likely to work while studying. For TCNs this could be related to visas that restrict working opportunities. This lack of work experience during tertiary education might explain why job entry is harder for migrants. Employed young TCNs, similarly to older migrants, are less likely to have a job that fits their education. In addition, maybe unsurprisingly, young TCNs are more willing to be mobile to find a job: they are more willing to commute for more than an hour to work, and are more willing to move outside the EU for a job. This could either be because they already have migration experience and are therefore more likely to repeat it, or because they have more difficulties in finding a job in their current place of residence and are thus forced to be more mobile during the job search. Another potential reason is the housing situation, which might be different for TCNs.

Figure 23: Differences in labour market behaviour, young people in the EU27



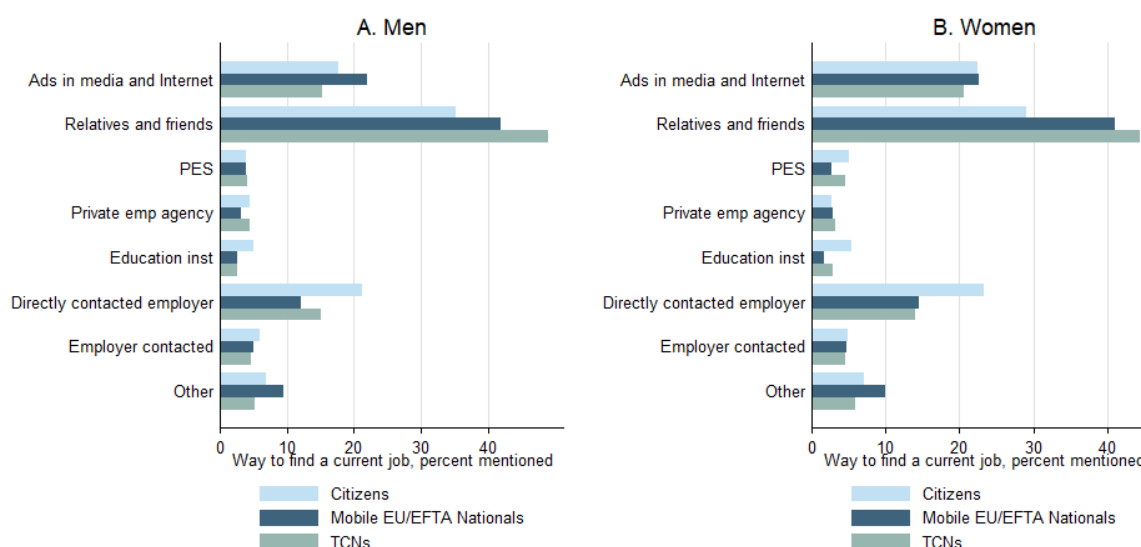
Note: plotted coefficients are from regressions, which in addition control for marital status, age, education, field of study and country of residence. Baseline group: citizens. Work while studying = obtained work experience while studying. Support from PES = obtained support from public employment services for job search. Commute for job = commutes or is willing to commute for more than one hour for a job. Move for job (within EU, outside EU) = moved or is willing to move for a job. The sample includes individuals between 15 and 34 years old.

Source: authors' calculations based on the EU LFS (2016).

Another reason why young migrants are disadvantaged in the labour market could be because they are searching less effectively. Informal channels through the migrants' network often act as a substitute for missing formal channels (Comola and Mendola, 2015). Battisti et al. (2019) show that refugees search less effectively by mostly relying on relatives and friends, and can benefit from additional job search support. This picture is confirmed when we look at the EU LFS (Figure 24). The largest difference in ways of finding a job among young individuals is that migrants search more via their network of relatives and friends²¹. This might not always be the best way to search for work if the people in that network are employed in lower quality jobs and cannot provide recommendations for suitable positions. Barsbai et al. (2020) show that migrants who receive pre-departure migration and integration training rely more on formal information and less on networks.

²¹ Blumenstock et al. (2019) also show that these networks not only provide support at the destination but are also a crucial factor in determining the migration decision.

Figure 24: How young individuals in the EU27 found their current job



Note: sample includes individuals between 15 and 34 years old.

Source: authors' calculations based on the EU LFS (2016).

3.1.2.7 Labour market integration and residence status

Besides age, another major determinant for labour market success is the reason for migration and the residence status. Evidence from the EU LFS (2014) ad hoc module (Table 2) shows that unemployment is highest among migrants who indicate asylum as their main reason for migration (35.8 %), and second highest among family migrants (31.4 %). The unemployment rate is significantly lower for migrants who came for a study purpose (22.9 %) or work (20.9 %).

Table 2: Employment status of TCNs by reason for migration

	Employed	Unemployed	Inactive
Asylum	38.9 %	35.8 %	39.4 %
Family	40.4 %	31.4 %	41.2 %
Study	55.4 %	22.9 %	28.2 %
Work	70.3 %	20.9 %	11.1 %

Note: the sample includes TCNs between 20 and 64 years old. Employment and inactivity rates are calculated as a % of the working-age population. Unemployment is calculated as a % of the active working-age population (employed and unemployed).

Source: authors' calculations based on the EU LFS (2014).

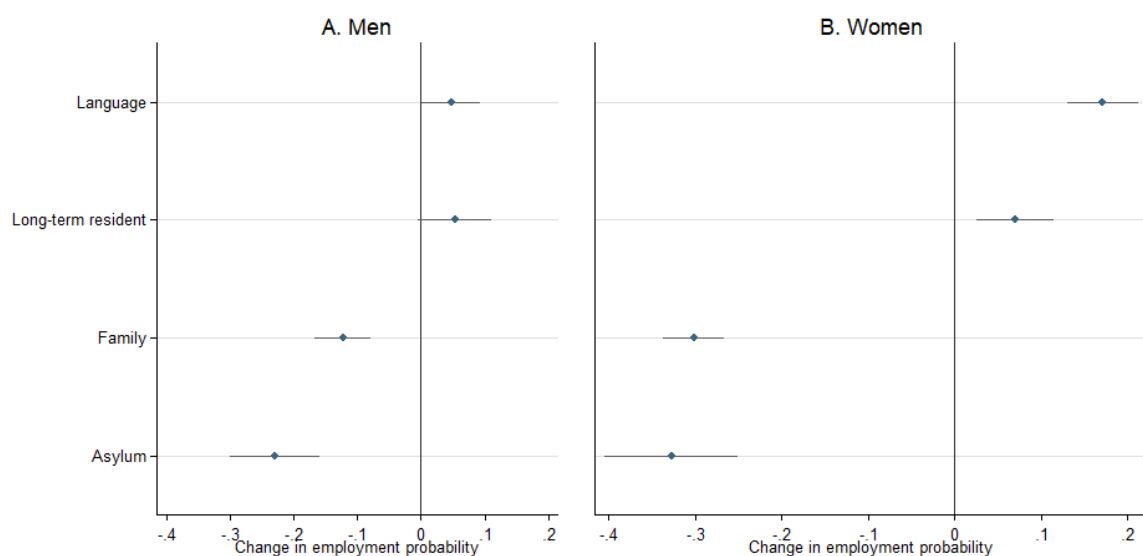
A similar picture emerges when we analyse the determinants of employment among TCNs (Figure 25). Having arrived as an asylum seeker or family migrant reduces the employment probability significantly. On the other hand, good language skills and a long-term residence permit increase the employment probability.

Figure 26 provides some hints about potential reasons. Asylum seekers and refugees in particular face bigger challenges in the labour market. Given that their migration was not planned in advance,

asylum seekers often arrive without destination-specific skills and without valid documents and certificates. As a result, they face more difficulties compared to other migrants due to insufficient language skills and difficulties with recognition of professional qualifications. They also face more legal restrictions upon arrival, such as initial bans on employment for asylum seekers or restricted geographic mobility for already recognised refugees. Both asylum seekers and refugees also face higher uncertainty in the labour market due to the duration of asylum procedures and temporary residence permits.

Barriers in the labour market for family migrants appear to be of a different nature. Reasons for their higher unemployment rates and overqualification can be linked to the fact that family migrants do not select their destination based on economic conditions (for instance, family migrants can also arrive during a period of an economic downturn; see for example Barsbai et al., 2021) or the best economic match to their skills. These reasons apply not only to TCN family migrants, but also to those moving within the EU and within Member States. Yet, challenges related to language, recognition of degrees, or legal restrictions are still more pronounced for TCN family migrants compared to family migrants from other EU Member States. This could partly translate to the existing gap in labour market outcomes and job quality between TCN family migrants and those coming from another EU/EFTA Member State (see Table 15 in Quantitative Annex A). The gap in employment for female family migrants persists and amounts to 5.6 percentage points, even when we restrict the sample to two very similar groups of EU mobile nationals from Central and Eastern Europe (New Member States - NMS) and TCNs from non-EU European countries.

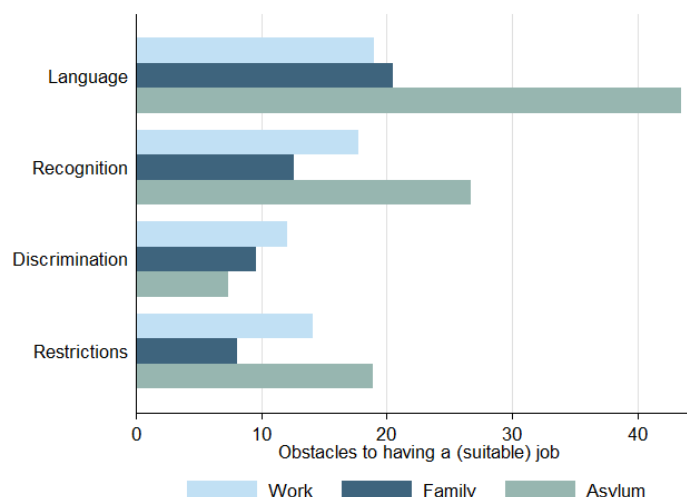
Figure 25: Determinants of employment among TCNs



Note: plotted coefficients (selected) are from regressions, which in addition control for marital status, age, education, field of study, country of residence, years of stay and other reasons for migration. Language: knowledge of German at least level B2. Long-term resident: a dummy equal to one if years of stay in a destination ≥ 5 (used as a proxy for a long-term residence permit). The sample includes TCNs between 20 and 64 years old.

Source: authors' calculations based on the EU LFS (2014).

Figure 26: Obstacles to finding a suitable job, or a job at all, for TCNs, by reason for migration



Note: the sample includes unemployed, inactive or overqualified TCNs between 20 and 64 years old.
Source: EU LFS (2014).

3.1.3 Discrimination of immigrants and judicial protection

To dig deeper into different types of discrimination and factors that influence the prevalence of discrimination, we analyse data from the Second European Union Minorities and Discrimination Survey (EU-MIDIS II 2016). This survey is based on face-to-face interviews with 25 515 respondents with different ethnic minority and immigrant backgrounds in the EU²².

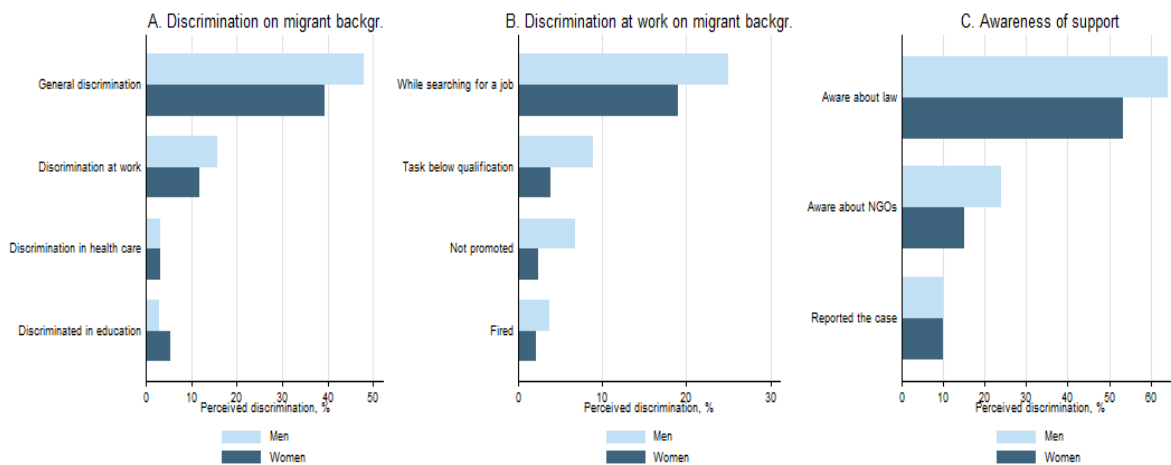
As the survey explicitly targeted minorities and disadvantaged migrants, the sample size for citizens and mobile EU nationals is too small to do comparisons as we did with the EU LFS data in the previous section. The descriptive analysis therefore focuses only on TCNs between 16 and 59 years old²³.

Figure 27 shows the prevalence of perceived discrimination for men and women in different aspects of life. One can see that most discrimination is general or takes place at work. Almost 50 % of men and 40 % of women have experienced general discrimination. At work, the greatest prevalence is seen during the job search. More than 20 % of men and almost 20 % of women feel that they have been discriminated against in the job search. Interestingly, there is a large discrepancy between awareness of non-discrimination laws (more than 50 %) and actual reporting (10 %). One reason could be that there is less awareness about non-governmental organisations (NGOs) that support immigrants in claiming their rights.

²² More information about the survey can be found here: https://knowledge4policy.ec.europa.eu/dataset/ds00141_en.

²³ We had to adjust the age brackets compared to EU LFS because of different aggregations in the different datasets.

Figure 27: Perceived discrimination based on ethnic or immigrant background, by gender

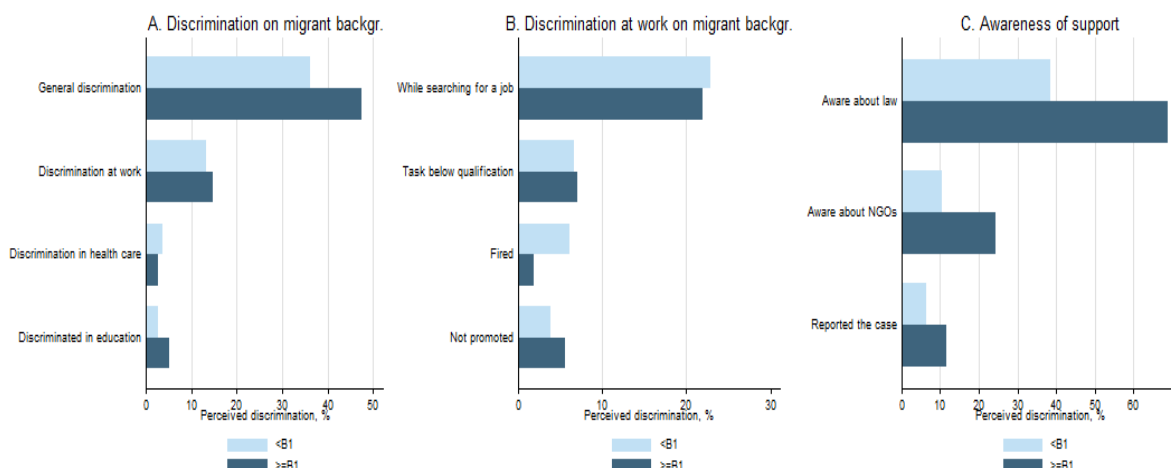


Note: the sample includes TCNs between 16 and 59 years old.

Source: EU-MIDIS II (2016).

Figure 28 shows discrimination differences according to language skill differences. The light blue bars show the results for immigrants with low native language skills (below level B1) and the dark blue lines show discrimination perceptions for people with good native language skills. Both perceived general discrimination and awareness of support are larger for people with good language skills. They are also more likely to report a case. This provides some evidence that one reason for low reporting numbers is missing language skills.

Figure 28: Perceived discrimination based on ethnic or immigrant background, by language skills

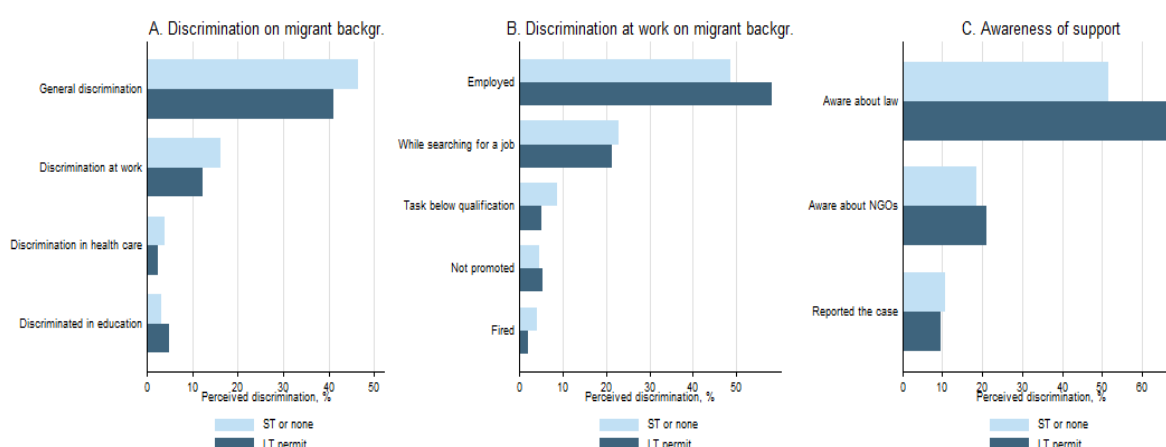


Note: the sample includes TCNs between 16 and 59 years old.

Source: EU-MIDIS II (2016).

Figure 29 provides differences in discrimination perception by residence status. The light blue bars report results for people with short-term or no residence permits, and the blue bars report results for people with long-term residence permits. Discrimination rates seem similar overall and depend on the precise category. While awareness about support is greater among long-term residents, their actual reporting is not higher.

Figure 29: Perceived discrimination based on ethnic or immigrant background, by residence status



Note: the sample includes TCNs between 16 and 59 years old.

Source: EU-MIDIS II (2016).

Besides discrimination in the labour market, there is also evidence that migrants have worse outcomes in the area of access to health care. According to the Fundamental Rights Agency (FRA) analysis of the European Union statistics on income and living conditions (EU-SILC) 2009 dataset, the proportion of individuals reporting 'unmet needs for medical examination or treatment' is higher among immigrants than among natives. It varies by destination, though. Among the five countries of the study, Czechia (2.9 % of unmet needs for natives v 6.6 % for immigrants) and Sweden (12.0 % for natives v 15.7 % for immigrants) registered the largest disparities in access to health care. Some of the reasons for worse access to health services are 'communication and language barriers, lack of information on health care entitlements and services, organisational barriers and accessibility, working and living conditions, (and) cultural and psychological barriers' (FRA, 2013)²⁴. It remains unclear what part of the discrepancy is due to discrimination and what part is due to other factors.

Research on discrimination in local public services has shown that ethical discrimination is widespread. Giuliotti et al. (2019) show that simple queries to local public service providers in the United States are almost 4 percentage points less likely to receive an answer if the email is sent by a black sounding name. 'Moreover, responses to queries coming from black names are less likely to have a cordial tone' (Giuliotti et al., 2019). Gsottbauer and Müller (2021) conducted a similar experiment in Austria and studied ethnic discrimination by private firms and public institutions. They found that discrimination is prevalent and exists in practically all sectors and public institutions. Interestingly, discrimination is considerably lower in the public than in the private sector (10 v 17 percentage point difference in response rates). While this research is not directly linked to immigration but more to ethnicity, the results are very applicable to the potential discrimination of TCNs in access to public services.

3.1.4 Impact of the COVID-19 pandemic

Harmonised EU-level information on legal migration since the pandemic has not yet been released. Figures from the Organisation for Economic Co-operation and Development (OECD) suggest that recorded migration fell by 46 % in the first half of 2020, compared with the same period in 2019. And

²⁴ The full report is available at: https://fra.europa.eu/sites/default/files/inequalities-discrimination-healthcare_en.pdf

figures for the second quarter of 2020 suggest that the fall was even sharper at 72 % (OECD et al., 2020). Given that 105 000 movement restrictions²⁵ were implemented around the world between March 2020 and February 2021 (IOM, 2021), this is hardly surprising.

3.1.4.1 Effects of border closure on asylum applications and irregular immigration (UNHCR)

From January to October 2020, the EU experienced a 33 % decline in asylum applications compared with the same period in 2019 (European Commission, 2021). This can partly be explained by a lower number of arrivals of irregular migrants. According to the Operational Data Portal of the UNHCR²⁶, 95 031 irregular migrants arrived by sea via a Mediterranean route or by land (via Spain or Greece). In 2019, this number was 123 663 and even higher in previous years. Looking at detailed monthly data, this decline is driven by a reduction in land arrivals, and effects are greatest for April and May 2020. While sea arrivals were reduced in April 2020, the numbers recovered quickly and were high again in summer 2020.

3.1.4.2 Migrants in essential sectors

A recent study by Fasani and Mazza (2020) analysed the prevalence of migrant workers in so-called 'key professions' in the EU. According to their study, on average, 13 % of all key workers in the EU are immigrants. Among these, the share of TCNs is larger than mobile EU workers in most destination countries (notable exceptions are Luxembourg, Ireland and Hungary). This percentage varies among Member States and is highest in Luxembourg (53 %), Cyprus (29 %) and Ireland (26 %) while in many eastern Member States almost all key workers are natives. Migrant workers (and especially TCNs) are overrepresented in low-skilled key professions (e.g., personal care workers in health services, drivers, transport and storage labourers, food processing workers). In certain occupations, for instance cleaners and helpers, and labourers in mining and construction, the percentage of EU migrants and TCNs is significantly higher and reaches up to one third of all workers. The pandemic has therefore highlighted the importance of low-skilled EU migrants and TCNs in ensuring the functioning of our key professions. This is crucial because the migration policy debate in the EU has often focused on attracting highly skilled migrants.

3.1.4.3 Increased risks for migrants on the labour market

Harmonised EU labour market microdata for 2020 were not yet available at the time of writing. Therefore, instead of analysing actual unemployment, a study by Fasani and Mazza (2021) analyses differential unemployment risks for natives and immigrants during the pandemic in the EU14²⁷+UK. They estimate the unemployment risk based on a worker's occupation, contractual protection, the possibility to work from home and the industry's resilience. They conclude that immigrants in general, and especially TCNs, are exposed to a higher risk of unemployment than natives, even within industries and occupations. In addition, they find that young, low-skilled and female migrants are particularly vulnerable. According to their estimates, more than 9.3 million immigrants in the EU14+UK are exposed to a high risk of unemployment during the pandemic, with 1.3 million facing a very high risk. Macro data that are already available show that the indicator developed by Fasani and Mazza captures aggregate employment losses very accurately. Also, descriptive evidence from

²⁵ Movement restrictions include entry restrictions and conditions for authorised entry. Entry restrictions 'include a complete border closure, nationality ban, suspension of visa issuances, and suspension of flights'. Conditions for authorised entry 'include medical measures, new requirements on visa/travel documents or other specific requirements for entry'.

²⁶ <https://data2.unhcr.org/en/situations>.

²⁷ AT, BE, DE, DK, EL, ES, FI, FR, IE, IT, LU, NL, PT, SE.

Germany (Giesing and Hofbauer, 2020) confirms that migrants, and especially refugees, have experienced larger increases in unemployment rates compared to natives during the pandemic.

3.1.4.4 Migrants' increased vulnerability to COVID-19

As outlined above, immigrants have more limited access to health services in the EU. At the same time, they often live and work in more vulnerable conditions and are thus more at risk of infection. This is particularly true for asylum seekers living in community accommodation. Actual incidence numbers by migration status for all EU Member States are not available and not systematically collected in all countries (Laczko, 2021). Some evidence, however, is available for a few EU countries. In Norway, Sweden and Denmark, for instance, migrants seem to have higher infection rates of COVID-19 (OECD, 2020). In Italy, on the other hand, infection rates among foreign born are lower than among natives.

3.2 Existing gaps and barriers

In this section, a number of gaps and barriers in the area of legal labour migration are assessed. These gaps and barriers have multiple sources: the structure of the EU legal framework; the EU's difficulty in adapting to the different crises it has faced in the last six years; and the need for a clear and long-term vision for the future EU labour migration policy, which should be developed autonomously but also coherently with other EU policies.

This section starts by complementing the findings of the CoNE study. It identifies an important number of gaps and barriers in EU law, namely the high degree of fragmentation of the legal migration *acquis*, the existence of unlawful discrimination considering the standards of regional and international law, and the interplay of the transposition of EU law and national procedures and instruments. The section also highlights significant gaps and barriers deriving from the distribution of competences between the EU and the Member States, and the insufficient protection of fundamental rights in EU labour migration law.

The identification of gaps and barriers also requires consideration of recent developments. The COVID-19 crisis has revealed a number of flaws in the legal structure of the EU labour migration policy, which need to be addressed. In addition, the adoption of the New Pact on Migration and Asylum by the Commission, in September 2020, transforms the overall design of the EU migration policy. While the reflection on the future of the EU labour migration policy must consider the articulation between labour migration and asylum migration in EU law, this coherence requirement does not appear to be a dominant feature of the pact.

Finally, there are questions on the appropriate method for implementing future EU labour migration policy. An examination of other fields of EU law, especially social policy, can help the purpose of designing adequate instruments for labour migration.

The main gaps and barriers identified in the CoNE study, in the European Parliament's recent Non-Legislative Initiative²⁸ and in the context of this study are summarised in the table below.

²⁸ Report on new avenues for legal labour migration, 26 April 2021, 2020/2010(INI).

Table 3: Overview of gaps and barriers

Benchmark area	Gaps	Barriers
Equal treatment	<p>Gaps in equal treatment (G1)</p> <ul style="list-style-type: none"> • Equal treatment of nationals with regard to remuneration and working conditions • Restrictions and derogations with regard to education and vocational training • Social security restrictions • Unjustified differences between TCNs 	<p>Barriers to equal treatment (B1)</p> <ul style="list-style-type: none"> • Lack of implementation and enforcement at national level • Unfair remuneration and working conditions • Difficult access to long-term resident status
Entry and re-entry conditions (circular migration)	<p>Gaps in entry conditions (G2): by design, inherent to the sectoral directives – certain categories are omitted</p> <p>Gaps with regard to different re-entry options (G3): circular migration restrictions</p>	<p>Barriers to entry (B2):</p> <ul style="list-style-type: none"> • Requirement for migrants to apply from outside the EU • Labour market tests • Requirement to provide address <p>Barriers to different re-entry and circular migration options under the directives (B3):</p> <ul style="list-style-type: none"> • Applying 'cooling off' periods • Penalising longer absences
Work authorisation	<p>Gaps concerning change of employer (G4):</p> <ul style="list-style-type: none"> • Changes of employer are limited or subject to prior authorisation • ICTD permit holders are bound to their employer <p>Gaps in the consequences of unemployment (G5):</p> <ul style="list-style-type: none"> • Unemployment leads to permit withdrawal, unless Blue Card holder • Lack of possibility to seek alternative work, unless Blue Card holder 	<p>Barriers concerning change of employer (B4):</p> <ul style="list-style-type: none"> • Fear of loss of employment and dependency on employer • Different labour inspectorate enforcement capacities at national level <p>Barriers concerning the consequences of unemployment (B5):</p> <p>Different rights provisions at national level due to the lack of explicit provisions in this regard</p>
Residence status and mobility within the EU/Member State	<p>Gaps in mobility and choice of residence (G6):</p> <ul style="list-style-type: none"> • SWD does not provide sufficient guarantees to address employer-organised accommodation <p>Gaps in residence status (G7):</p> <ul style="list-style-type: none"> • ICTD and SWD permit holders, as well as other TCNs residing on temporary and formally limited permits, are excluded from access to long-term residence <p>Gaps in intra-EU mobility (G8):</p> <ul style="list-style-type: none"> • ICTD and SRD allow temporary mobility, whereas LTRD, ICTD, BCD and SRD allow long-term mobility 	<p><i>Legal gaps in many cases lead to practical obstacles. Therefore the barriers in this area are not discussed further.</i></p>
Social security coordination	<p>Gaps in social security coordination (G9):</p> <ul style="list-style-type: none"> • Provisions on export of benefits differ between directives and there are no provisions in this regard in the LTRD and FRD • The directives do not cover other social security coordination principles, such as aggregation of periods of insurance, employment and residence 	<p>Barriers to social security coordination (B6):</p> <ul style="list-style-type: none"> • Coordination of social security at national level is subject to the conclusion of bilateral agreements between Member States and third countries, which provide for the actual entitlements. Their number varies between Member States.

Benchmark area	Gaps	Barriers
Family reunification	<p>Gaps in family reunification provisions (G10):</p> <ul style="list-style-type: none"> • No rights for seasonal workers, students or temporary workers with permits for less than one year • Rules for family reunification: for workers with a residence permit valid for one year or more and for long-term residence in the first Member State • Privileged rules: Blue Card Holders, researchers and ICTD • Free admission: family members of a long-term resident TCN admitted in the first Member State are free to move with the long-term resident TCN to the second Member State 	<p>Barriers to family reunification (B7):</p> <ul style="list-style-type: none"> • Narrow definition of 'family members' and Member States allowed wide discretion • Long waiting periods • Prior integration requirements • Restrictions on family members working
Recognition of qualifications	<p>Gaps in recognition of qualifications (G11):</p> <ul style="list-style-type: none"> • Limited intra-EU recognition of qualifications for TCNs • Equal treatment only once authorisation has been obtained, but not before • Limited recognition of qualifications v skills • Limited recognition of qualifications for lower-skilled workers (e.g., 'essential workers') 	<p>Barriers to recognition of qualifications (B8):</p> <ul style="list-style-type: none"> • Long waiting periods for regulated professions • Resistance from national professional orders
Fundamental rights	<p>Gaps in fundamental rights protection (G12):</p> <ul style="list-style-type: none"> • Non-discrimination policies are not fully applied to TCNs • Intersectional discrimination is not recognised by the EU anti-discrimination policy 	<p>Barriers to fundamental rights protection (B9):</p> <ul style="list-style-type: none"> • Lack of implementation and enforcement at national level • Potential for exploitation of workers due to impossibility to control numbers and dilution of liability • Potential for exploitation of workers tied to employer • Awareness that discrimination could happen through neutral rules • Limitations to joining unions and professional orders
National administrative organisation	<p>Gaps linked to national administrative organisation (G13):</p> <ul style="list-style-type: none"> • Difference of practices and positions among Member States • Difference of practices and positions among different administrative bodies and/or Ministries 	<p>Barriers linked to national administrative organisation (B10):</p> <ul style="list-style-type: none"> • Over-bureaucratic procedures • Hostility towards migrants • Lengthy application processes
Legal channels	<p>Gaps linked to legal channels (G14):</p> <ul style="list-style-type: none"> • Lack of mobility schemes for low and medium-skilled labour migrants • Lack of rules to attract entrepreneurs • Absence of instruments to match migrants' skills to labour market needs 	<p>Barriers linked to legal channels (B11):</p> <ul style="list-style-type: none"> • Limited possibility to shift from one migrant legal status to another

Source: authors' analysis based on Carrera et al. (2019), 'Research paper on the cost of non-Europe in the area of legal migration', Chapter 3.

3.2.1 Gaps and barriers identified by the CoNE study

From its analysis of the directives on legal migration, the CoNE study identifies several gaps and barriers concerning equal treatment, entry and re-entry conditions, work authorisation, residence status and mobility within the EU and within Member States, social security coordination, family reunification and recognition of qualifications. These gaps and barriers derive from the lack of incorporation and implementation of international human and labour rights, but also from the sectoral approach to legal migration adopted by the EU, and from different practices at national level.

Concerning **equal treatment**, legal migration directives impose equal treatment of TCNs on Member States regarding remuneration and working conditions. Nevertheless, restrictions and derogations are still in place in areas such as education, vocational training and social security. Moreover, lack of enforcement and implementation at national level reduces equal treatment in practice.

Entry and re-entry conditions vary across different sectoral directives. However, some differences seem unjustified. Barriers to entry include, in particular, the requirement for TCNs to apply from outside the EU, the need to undergo labour market tests and the demand to provide proof of an address in the territory of the Member State concerned. Moreover, additional restrictions apply in case of re-entry options, including the application of a cooling-off period and penalties for longer absences.

Work authorisations create gaps related to a change of employer and consequences of unemployment. The change of employer is restricted or subject to prior authorisation, or not possible in the case of ICTD permit holders. Unless TCNs have a Blue Card, unemployment leads to withdrawal of the work authorisation with no possibility to look for alternative work.

Residence and mobility rights within the EU are arranged under all directives addressing the first admission. However, the Seasonal Workers Directive (SWD) does not sufficiently guarantee the accommodation arranged by the employer. Further, prolonged permanent residence is only possible under the BCD and SRD. Mobility under the ICTD and SRD is in some instances limited to short-term mobility, while the other directives envisage exclusively long-term mobility (LTRD and BCD).

The EU directives on legal migration do not ensure **social security coordination**. They only guarantee equal treatment. There are no provisions on the export of benefits in the LTRD and FRD. Other principles of social security coordination, such as aggregation of periods of insurance, employment or residence, are not covered by any of the directives. Coordination is eventually left to bilateral agreements between Member States and third countries, which differ in nature and number from one state to another.

Under the current policy framework there are four different regimes for **family reunification**: no rights, rules for family reunification, privileged rules and free admission. In general, the higher the skill level of the migrant, the more rights for family reunification. The current framework does not grant any rights in several situations (e.g., seasonal workers, temporary workers with a permit for less than one year, students). Where family reunification rights are foreseen, numerous barriers exist. They include a narrow and discretionary definition of 'family members', long waiting periods, prior integration requirements and restrictions on family members working in the EU.

In terms of **recognition of qualifications**, equal treatment is postponed to the moment when authorisation has been obtained. Moreover, the recognition procedure is in the hands of Member States, creating discrepancies and administrative barriers for regulated professions.

3.2.2 In addition to the CoNE study's findings

Different gaps and barriers can be identified, ranging from limited legal avenues to the EU, to discrimination and lack of protection against exploitation, difficulty in accessing employment due to the resistance of professional orders and unions, and administrative organisation.

3.2.2.1 Lack of legal avenues to the EU for labour migration

Besides the limitations mentioned above, despite its commitment to reduce irregular migration, undermine the business model of smugglers and enhance equal opportunities for all workers irrespective of their nationality, the EU has done very little to promote safe and legal pathways to the EU for labour migration.

Migrant workers must face many obstacles to both entering and re-entering the EU. These obstacles are due to the need to obtain a visa, but also to obtain a work contract before accessing EU territory. Given the limited knowledge of EU labour market demands that TCNs are able to access from their country of origin, one may assume that this leaves many labour market shortages unfilled. But in contrast with EU citizens who are allowed to exercise mobility to search employment, TCNs are not allowed to enter and reside for the sole purpose of searching for a job in the EU. True, the EU has created legal pathways for some categories of migrant workers. The main one that exists is for skilled workers the EU aims to attract. The recast Blue Card Directive (BCD) is about to be adopted, and the Students and Researchers Directive (SRD) was revised in 2016. But these reforms are not sufficient to reach the goals pursued by the EU. Many skilled migrants who are legally residing in the EU meet obstacles when trying to access employment or change employers. Despite the changes announced with the BCD reform, further evolutions are needed if the EU wants to guarantee unconditional intra-EU mobility rights for Blue Card holders. Students continue to face substantial difficulties if they want to remain in the EU for work purposes after graduation. Asylum seekers' access to employment is delayed, and TCN workers' families face many obstacles to entering the labour market. These obstacles are mainly the consequence of the EU labour migration legal *acquis*, which contains restrictive provisions. Consequently, many skilled workers who legally reside in the EU are stuck with a legal status tailored to other purposes than work: asylum seeker, student or family member. There is a clear need for bridges to be built between their initial legal status and the status of worker.

Likewise, re-entry possibilities into the EU are very limited, except for seasonal workers. Consequently, circular migration remains very limited, which is highly problematic for many TCNs. One may, for example, consider the situation of domestic workers, often women who have left family in their country of origin and would need to move back and forth between the EU and their country of nationality. The current EU legal *acquis* is blind to these situations. Another limit of the current approach is that, except for seasonal and posted workers, a system to admit low and medium-skilled workers is lacking in the current EU framework. This is at odds with the fact that, as shown by Triandafyllidou, in different sectors ethnicization (i.e., 'migrants' jobs') has resisted and perpetuated the crisis effects (Triandafyllidou & Marchetti, 2014).

In its 2021 Non-Legislative Initiative, the European Parliament stresses the need to consider the EU's ageing population and shrinking workforce²⁹. It calls for mobility schemes that 'have the potential to galvanise EU labour markets and contribute to economic growth'. This description underlines the difficulty faced by the EU in conceiving of a form of cooperation with third countries, not aimed at limiting and controlling migration. So far, the EU has done very little to match migrants' skills to EU labour market demands. Many obstacles remain for migrants and employers. Migrants, who reside

²⁹ European Parliament (LIBE Committee), Report on new avenues for labour migration (2020/2010/INI), 26 April 2021, point 23.

outside the EU, have limited knowledge of available jobs, and employers experience difficulty in identifying skilled migrants and having a full understanding of their qualifications.

In addition, the EU policy in the domain of labour migration must consider the transformation of work relations and work arrangements, triggered by the digitalisation of the economy, among other factors. Solutions to an increase in precarious work have been identified at EU level, which apply to TCNs (see namely the recent Directive on Transparent and Predictable Working Conditions³⁰). Increased self-employment, especially among ‘platform workers’ (another outcome of digitalisation), requires an evolution of EU migration policy to open legal immigration paths to the EU for self-employed TCNs. Until now, EU legislation has focused on legal paths designed for employees under standard or fixed-term labour contracts. New developments should open new paths for self-employed in the digital economy. This evolution is also needed if the EU wants to attract ‘talent’. Attractiveness of countries to entrepreneurs wanting to start or move their business abroad is an important dimension of current national immigration policies, which the EU cannot ignore in the exploration of new paths to Europe for TCNs (see De Lange, 2018). ‘Start-up visas’ for entrepreneurs active in emerging sectors, or who are exploring business innovations, should be supported by EU action.

3.2.2.2 Fundamental rights of TCNs, beyond equal treatment

The CoNE study focuses on equal treatment of TCNs with nationals of Member States, and on access to justice to enforce the equal treatment rule. The importance of these fundamental rights is undeniable: equal treatment with regard to nationality is the key instrument to ensure justice and protection of migrants on the territory of the Union. It is the core element of international and European law instruments concerned with the protection of migrant workers. But the EU non-discrimination framework does not prohibit discrimination on the grounds of nationality for TCNs, as a general principle.

It thus comes as no surprise that the CoNE study insists on both the need to expand and harmonise equal treatment applying to TCNs, to abide by international and European law, and to better enforce existing non-discrimination rules. This is required not only by EU values and the rule of law, but also because the lack of equal treatment leads to workers’ exploitation, and affects the EU’s internal and external credibility³¹. A report on the legal situation of third-country workers in the EU (Wollenschläger, van der Mei, Robin-Olivier & Verschueren, 2018) concluded that even the most privileged category of TCNs (long-term residents) do not benefit from the same, particularly extensive equal treatment rule as EU workers. Judgments on the equal treatment of TCNs are rare, and do not indicate a general line (extensive or restrictive). It is therefore hard to predict whether the Court of Justice of the European Union (CJEU) will interpret the equal treatment rule for TCNs in a way that approximates them more closely to EU workers. As for now, several differences remain, especially concerning social advantages. In particular, grants and loans for education can be refused, specific procedures can apply to housing and a condition of residence to benefit from social advantages is not always prohibited.

The CoNE study also rightly insists on problems of implementation and enforcement of equal treatment requirements at national level in fields where equal treatment applies, especially in the domain of employment and working conditions. The report takes stock that access to justice is often problematic for TCNs, not only when they are undocumented workers, but also more generally, as claims in courts or other institutions threaten the relationship with their employer, on whom residence and work permits depend. The study suggests that existing EU instruments could serve as

³⁰ Directive 2019/1152 of 20 June 2019, OJ L 186, 11 July 2019, p. 105.

³¹ CoNE, p. 44.

a basis for better enforcement, if used in the field of legal migration³². It mentions, in particular, the Victims of Crime Directive³³, which constitutes an example on how to address ‘the justice gap’. The Directive contains minimum standards on the rights, support and protection of victims of crime, including hate crime. The report also takes the example of the EU Returns Directive³⁴, which obliges Member States to provide legal aid free of charge. A recent report by the FRA insists on the issues concerning the enforcement of migrants’ rights under the Employers Sanction Directive³⁵. Although the Directive concerns irregular workers, the FRA report gives an idea of what needs to change to ensure workers’ rights are respected: improving complaints systems, providing more information and ensuring that irregular workers are compensated for their work, are among possible actions. The FRA suggests starting with small steps, for example by requiring labour inspections to focus on labour conditions and not on reporting workers’ status to immigration authorities.

It must be added that the right to effective judicial protection has also been expanded and clarified by the recent case-law of the CJEU³⁶. This case-law must be considered (or even codified) in future legislation with the aim of better enforcing migrants’ rights.

In addition to equal treatment and access to justice, both mentioned in the CoNE study, other fundamental rights of TCNs should also be considered.

First, discrimination on other grounds than nationality must be mentioned. Indeed, EU law protects all persons against discrimination on a series of grounds mentioned in Article 19 TFEU (sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation), and the CFR extends the list of prohibited grounds³⁷. TCNs are not, in principle, outside the field of application of EU non-discrimination law. One major problem is, again, enforcement.

What is missing is not only efficient enforcement, but also awareness that discrimination can occur through neutral rules, which must be considered in the design of EU migration policies. This seems particularly true for women, disabled persons³⁸ and older or younger workers. In addressing barriers to entry, residence and work in the EU, the situation of the members of these protected categories should be kept in mind.

In addition, it has been observed that migrants are particularly vulnerable to discrimination. For them, nationality combines with other discriminatory grounds to increase the risk of exclusion or less favourable treatment, including a wage gap (see Amo-Agyei, 2020). Until now, EU law has not endorsed intersectionality³⁹, which can be considered as a caveat in EU non-discrimination framework particularly problematic for migrants. Discrimination based on gender is particularly

³² Ibid.

³³ Directive 2012/29/EU.

³⁴ Directive 2008/115/EC.

³⁵ FRA, Protecting migrants in an irregular situation from labour exploitation – Role of the Employers Sanctions Directive, 24 June 2021, <https://fra.europa.eu/en/publication/2021/employers-sanctions-against-exploitation>.

³⁶ See: ECJ, Országos, C-924/19 PPU and C-925/19 PPU (Grand Chamber), 2020 (on Directive 2008/115/EC on common standards and procedures for returning illegally staying third-country nationals: right to judicial review and not only an appeal before an administrative authority); ECJ, Torubarov, C-556/17, 2019 (on Directive 2013/32 on common procedures for granting and withdrawing international protection: the judgment of a court cannot remain ineffective because that court does not have any means of securing observance of that judgment).

³⁷ Article 21 mentions sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation.

³⁸ Considering the situation of persons with disabilities is required by the UN Convention on the Rights of Persons with Disabilities (2006), which the EU ratified in 2010.

³⁹ On intersectionality, see: Xenidis (2018).

concerned: the need to consider the precarious situation of migrant women on the labour market has been documented in recent studies⁴⁰.

Social fundamental rights, including freedom of association and affiliation to organisations representing workers or any other organisation whose members are engaged in a specific occupation, is also of crucial importance for migrants. Such rights are already granted to TCNs by EU directives on legal migration. But since the condition to join a professional order or union can depend on being a member of that profession, or on working in a specific sector, the exercise of this right is conditional upon recognition of qualifications and access to certain jobs. The absence of recognition, or the existence of barriers to accessing to certain jobs, can limit the participation of TCNs in associations, trade unions or professional orders.

3.2.2.3 Insufficient action against exploitation

The current Union framework regulating legal migration was developed, in part, to prevent labour exploitation and to protect the rights of TCN workers. However, the existing directives have had only a limited impact on preventing and sanctioning labour exploitation⁴¹. A 2019 report by the FRA⁴² highlights the continuous exploitation of migrant workers. This includes being paid as little as EUR 5 per day, being forced to pay debts to traffickers before earning a cent and sleeping in shipping containers with no water or electricity. The report sheds light on precarious employment in various sectors, including agriculture, construction, domestic work, hospitality, manufacturing and transport.

The Employers Sanctions Directive (2009)⁴³ includes provisions aimed at combating the exploitation of migrants. But it only applies to migrants who are in an irregular situation. In addition, a recent FRA report shows that, in some Member States, migrants are not using the existing complaints systems that the Directive requires, for several reasons⁴⁴.

Exploitation can result from many factors and concern all categories of TCN work. Risks of exploitation are particularly high in situations where employees are tied to their employer. This is the case when, because of the EU legal *acquis*, loss of employment entails loss of residence permit or, in situations like seasonal workers, the employer offers housing. In the same vein, situations that exist at national level based on 'trusted sponsorship'⁴⁵ can be problematic given that the migrant's legal situation is dependent on the employer's actions and goodwill⁴⁶. Severe cases of exploitation have been evidenced for both posted and seasonal workers. Migration and mobility of TCNs to the EU indeed often take place through the posting of workers by companies established in the EU, making use of their right to free provision of services. As a right derived from the free provision of services, and when Directive 96/71/EC is respected, the posting of labour from third countries within the EU is not, as such, illegal or particularly problematic. But it has resulted in Member States losing control of immigration from third countries: the host Member State is deprived of the possibility to

⁴⁰ See: Buckingham et al. (2020).

⁴¹ European Parliament (LIBE Committee), Report on new avenues for labour migration (2020/2010/INI), 26 April 2021.

⁴² <https://fra.europa.eu/en/news/2019/severe-labour-exploitation-migrant-workers-fra-report-calls-zero-tolerance-severe-labour>.

⁴³ Directive 2009/52/EC of the European Parliament and of the Council of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals, OJ L 168, 30 June 2009, p. 24.

⁴⁴ FRA, Protecting migrants in an irregular situation from labour exploitation – Role of the Employers Sanctions Directive, 24 June 2021, <https://fra.europa.eu/en/publication/2021/employers-sanctions-against-exploitation>.

⁴⁵ Trusted sponsorship is a tool to avoid a labour market test and facilitate fast-track procedures. Trustworthy businesses receive the status of 'recognised or trusted sponsor' and benefit from less paperwork and fast-track procedures.

⁴⁶ On this issue in the context of the BCD and improvements in the recast Directive, see: De Lange, T. (2021).

determine how many – or which – TCNs work in its territory. Member States have also lost the possibility to assess employment and working conditions before work permits are granted: indeed, when TCNs have obtained a work permit in a Member State prior to their posting to another Member State, the host Member State cannot require another work permit.

Moreover, what has led to serious tensions and criticism with regard to the posting of workers, is that it has sometimes resulted in the circumvention of national labour and social security laws. This has resulted in the severe exploitation of workers⁴⁷, as well as fraud affecting fair competition and national social security systems. In several problematic situations, service providers were temporary work agencies specialising in the posting of TCNs within the EU. This was illustrated in an important case (*Bouygues Travaux Publics*), which led to decisions of the CJEU and of the French Superior Court for civil matters⁴⁸. Another important case (*Terra Fecundis*) concerning the posting of workers from South America in the field of agriculture is currently pending before the French criminal courts⁴⁹.

As these cases illustrate, the system of posting when involving TCNs has contributed to worsening the exploitation of workers. TCN workers posted across the EU are particularly vulnerable, not only because of their legal status and unstable place of work, but also because their actual employer is not the user company but another company (i.e., a temporary work agency or another firm contracting with the user company for the provision of a service).

Abuses related to posting are often linked with subcontracting and chains of contracts, resulting in dilution of liability. Complicated and opaque structures of subcontracting or outsourcing can lead to more serious forms of exploitation⁵⁰. In settings involving a series of sub-employers and fragmented and unclear rules, responsibilities and liabilities, identification of the persons responsible for the exploitative work situation is difficult, if not impossible⁵¹. Complicated webs of intermediaries facilitate exploitation of the workforce, including TCNs.

For seasonal workers, exploitation, which was always a serious issue, has worsened during the COVID-19 crisis⁵². In addition to low wages and working conditions incompatible with the notion of decent work, seasonal workers employed in agriculture were locked in, to limit propagation of the virus. They experienced quarantines at work, a situation bringing some of them close to forced labour.

These concerns contribute to explaining the creation of the European Labour Authority (ELA). By coordinating national authorities and providing support to tackling cases of fraud and abuse, namely those in relation to posting of workers, ELA should contribute to limiting the exploitation of workers, including TCNs. Indeed, combating bogus subcontracting and self-employment, as well as undeclared work lies within the mission of ELA. Its role in coordinating the actions of Member States and providing support to concerted and joint inspections on posting and undeclared work is not limited to EU citizens: TCN workers are also covered.

⁴⁷ See: Report of the LIBE Non-Legislative Initiative on new avenues for legal labour migration 2020/2010 (INI), 26 April 2021, Suggestions of the Committee on Employment of Social Affairs, point 31.

⁴⁸ ECJ, 14 May 2020, *Bouygues Travaux Publics*, C-17/19; (French) Cour de cassation, Chambre sociale, 4 November 2020, n° 18-24.451 (*Bouygues Travaux Publics*).

⁴⁹ The case concerns the company *Terra Fecundis*. The temporary agency is being tried by the criminal court of Marseille for undeclared work. Many workers posted were migrants from South America.

⁵⁰ FRA, Protecting migrant workers from exploitation in the EU: workers' perspectives, 2019, p. 37.

⁵¹ Ibid.

⁵² See: Augère-Granier (2021) and Raznaca (2020).

3.2.2.4 Resistance from national professional orders

The CoNE study identifies a number of gaps and barriers preventing migrant workers from participating in trade unions⁵³. Further study would be required to examine the part of migrant workers in professional orders. But resistance from professional orders to the integration of TCNs in national labour markets has been evidenced by studies and by ECJ case-law.

Although professional orders are organised very differently across the EU (in terms of structure and organisation, powers and capacity of influence), studies (Cerna, 2014) show that professionals are not necessarily open to newcomers, especially when the market is not booming. The profession of notary is a good example of professional orders resisting opening the profession to non-nationals. Given the strong resistance to deleting the nationality condition, the European Commission has been obliged to use the infringement procedure against a number of Member States⁵⁴.

More recently, cases have also been brought to the national courts and the ECJ⁵⁵ concerning the enforcement of Directive 2005/36/EC⁵⁶ on the recognition of professional qualifications. The recent *Chirurgiens-dentistes de France* case illustrates well that mutual recognition is facing substantial resistance. These cases shed light on the resistance to EU rules, which are perceived as opening unfair competition for jobs to persons with qualifications from other countries. This resistance evidences the need for a sector-specific approach to integration of non-nationals in labour markets through recognition of their qualifications and skills.

3.2.2.5 Impact of national administrative organisation

The type of authority in charge of applying the law is another important variable in the level of protection of labour migrants' rights. Literature has evidenced the way in which bureaucracy – and the administrative organisation in general – plays a crucial role in the legal situation of migrants (Maybritt & Spire, 2014). Excessively bureaucratic procedures and lengthy processing of applications, not to mention hostility to migrants, affect the way in which EU and national legal instruments – and the rights granted by those provisions – are applied. As regards labour migration, the interviews conducted for the CoNE study⁵⁷ also emphasise the importance of the administration in charge of adopting or implementing these rules, and its impact on migrants' rights. Interviewees have underlined the various approaches to legal migration by home affairs institutions (where migration tends to be treated as an issue of 'security') and by ministries of labour and social affairs (which tend to have an approach more focused on fair and non-discriminatory working conditions). However, other interviews have highlighted that sometimes ministries of interior have been more open to EU proposals than ministries of social affairs and labour, which see themselves as 'protecting labour markets from social dumping'. Given the different conclusions presented, further research is needed. But it has been made clear that the impact of the administrative organisation on the protection rights is insufficiently addressed. More generally, the need to treat labour migration as an issue of employment rather than one of home affairs is a crucial political and legal question, which must be given more attention when the EU designs its future labour migration policy.

⁵³ CoNE, pp. 92 and 118.

⁵⁴ Judgments in Cases C-47/08, C-50/08, C-51/08, C-53/08, C-54/08, C-61/08 and C-52/08, *Commission v Belgium, France, Luxembourg, Austria, Germany, Greece, and Portugal*.

⁵⁵ See: ECJ, 25 February 2021, *Les Chirurgiens-Dentistes de France and Others*, C-940/19; ECJ, 26 June 2019, *European Commission v Hellenic Republic*, C-729/17.

⁵⁶ Directive 2005/36/EC of 7 September 2005 on the recognition of professional qualifications, OJ L 255 30.9.2005, p. 22.

⁵⁷ See p. 42

3.2.3 Taking recent developments into account

3.2.3.1 Lessons to be learned from the COVID-19 crisis

An important consequence of the COVID-19 crisis was the emergence of a new category of mobile workers: ‘essential’ or ‘critical’ workers, whose mobility was somehow preserved because it was considered necessary to keep economies and societies alive⁵⁸. Early on in the crisis, the Commission worked out a list of ‘essential workers in critical occupations’⁵⁹, which included health professionals, personal care workers in health services, scientists in health care related industries, workers involved in the supply of goods, and transport workers. It has been made clear that these essential workers were, for a significant proportion, migrants from third countries⁶⁰.

As mentioned before, the situation of seasonal workers was already a source of particular concern, especially in agriculture and the food industry. The Commission guidelines on seasonal workers in the EU in the context of the COVID-19 outbreak⁶¹ recalled the rules, which had to be applied: the right to benefit from the core terms and conditions of employment of the host Member State for posted workers; the right to suitable living and working conditions, including physical distancing and appropriate hygiene measures; the right to occupational safety and health protection; and the right to social security for all seasonal workers, including TCNs.

The particular needs of health professionals also resulted in specific recommendations⁶². A Commission Communication on free movement of health professionals and minimum harmonisation of training, in relation to COVID-19 emergency measures, aimed at facilitating recognition of qualifications for cross-border movement, and to ensure the free movement of health professionals to the largest extent possible. It suggested different measures, including adaptation of recognition for temporary mobility. For temporary and occasional service provision, where health professionals move temporarily to another Member State to strengthen the workforce for a limited period, the Communication suggested that only a simple prior declaration may be required, without the need to wait for a decision from the host Member State authorities. It also stressed that declaration obligations could be waived unilaterally by the host Member State, either in general or for particular periods, activities or sectors. Another suggestion concerned employment of health professionals with diplomas from third countries, giving them access to work under a different status than that of a full member of one of the professions, for which minimum training requirements are harmonised in the EU.

During the crisis, several EU countries have indeed taken action to mobilise the migrant health workforce. For example, they have facilitated the temporary licensing of doctors with foreign medical degrees (Italy) and recruitment in the national health service (Spain); expedited current applications for the recognition of foreign qualifications of health professionals (Belgium, Germany, Ireland, Luxembourg and Spain); and allowed foreign-trained health workers in non-medical occupations in the health sector (France)⁶³.

⁵⁸ On this new category, see also Robin-Olivier (2020).

⁵⁹ Guidelines concerning the exercise of the free movement of workers during the COVID-19 outbreak, C/2020/2051, OJ C 102I, 30.3.2020, p. 12.

⁶⁰ On the role of migrant workers among ‘essential workers’, see: Fasani & Mazza (2020).

⁶¹ C (2020) 4813 final, 16.7.2020.

⁶² Communication from the Commission, Guidance on free movement of health professionals and minimum harmonisation of training in relation to COVID-19 emergency measures – recommendations regarding Directive 2005/36/EC, 2020/C 156/01, 08.05.2020.

⁶³ See: OECD (2020).

In drawing attention to ‘essential workers’ in critical sectors, the COVID-19 crisis has underlined that the distinction between EU workers and migrant workers is not appropriate as far as access to work and working conditions are concerned. Such a distinction could, to a certain extent, be removed. To face urgent social and economic needs, workers from third countries were necessary, and their protection had to be ensured, which led to regularisation in some Member States⁶⁴.

The COVID-19 crisis has also raised awareness of the need to anticipate situations of emergency, which can lead to a greater need to bring in ‘essential workers’. The idea of an infrastructure to fill the gap in EU crisis preparedness is on its way for biomedical production with the European Health Emergency Preparedness and Response Authority⁶⁵. Similarly, the crisis has highlighted the necessary improvement of facilities (accommodation, catering, health care, etc.) for migrants who must continue to cross borders, even throughout a crisis⁶⁶. In the New Pact on Migration and Asylum, the Commission argues that the EU needs to put in place a ‘robust crisis preparedness and response system’⁶⁷. The objective is to be ready to address situations of crisis and force majeure with resilience and flexibility. To achieve this objective⁶⁸, the Commission has proposed a new legislative instrument, which would provide for temporary and extraordinary measures needed in the face of crisis⁶⁹. The text provides flexibility to Member States to react to crisis and force majeure situations, and to grant immediate protection to persons in need. It also ensures that the system of solidarity established in the new Asylum and Migration Management Regulation is well adapted to situations of crisis. In such situations, where national asylum systems risk being overwhelmed, some margin to (temporarily) derogate from the normal procedures and timelines would be recognised. However, the focus of the mechanism is not on migrant workers. In its current shape, the pact creates a two-tier system, in which the EU and its Member States have organised their response to asylum crises, while the impact of crises on labour migration is overlooked.

3.2.3.2 To be learned from the New Pact on Migration and Asylum

In September 2020, the Commission issued its New Pact on Migration and Asylum⁷⁰ and announced a fresh start in the EU asylum and migration policy. Interestingly, the pact starts from the principle that migration is normal, and that people are constantly on the move. As regards labour migration, the Commission acknowledges that the EU’s migration policy needs to reflect the integration of the EU economy and the interdependence of Member States’ labour markets: ‘EU policies need to foster a level playing field between national labour markets as migration destinations. They should also help Member States use their membership of the EU as an asset in attracting talent’.

⁶⁴ On regularisations prompted by the pandemic, see: PICUM (2020).

⁶⁵ Legislative proposal to establish a European Biomedical Research and Development Agency (BARDA) / European Health Emergency Preparedness and Response Authority (HERA).

⁶⁶ On this topic, see: Rasnaca (2020).

⁶⁷ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee of the Regions, on a New Pact on Migration and Asylum, COM/2020/609 final, §3.

⁶⁸ This is apparent from the Commission Recommendation (EU) 2020/1366 of 23 September 2020 on an EU mechanism for preparedness and management of crises related to migration, C/2020/6469, OJ L 317, 1.10.2020, pp. 26-38.

⁶⁹ Proposal for a regulation of the European Parliament and of the Council addressing situations of crisis and force majeure in the field of migration and asylum, COM/2020/613 final.

⁷⁰ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, on a New Pact on Migration and Asylum, COM/2020/609 final.

However, labour migration is secondary in the pact, which mainly presents an extensive policy agenda on asylum⁷¹. Labour migration is only cursorily mentioned, at the very end of the main communication, in relation to the project to develop 'legal pathways to Europe', or as part of the ambition to increase cooperation with third countries.

In the same vein, despite the Commission's intention to 'patch up its patchwork legal migration *acquis*' (De Lange & Groenendijk, 2021), the pact does not propose substantial transformation of the legal *acquis* on labour migration. Rather, it relies on the rapid adoption of recast directives and proposes minor amendments. The Commission first hopes that the revised BCD will be adopted quickly⁷². The recast project, which has been at a standstill for several years, expands the scope of the Directive to the lower salary level and aims to facilitate intra-EU mobility. But the revised text builds on the Member States' unwillingness to give up their national schemes. Given that the revisions offer 'great flexibility' as they are tailored to national labour markets⁷³, the Commission has accepted that the disparities between Member States will remain important. This limited transformation offers little guarantee that the new BCD will transform the EU into an attractive continent for highly skilled workers.

The Commission also includes in the New Pact the project to revise the LTRD, which, in comparison with national schemes, is under-used and does not provide an effective right to intra-EU mobility. The Commission's objective is to strengthen the right of long-term residents to move and work in other Member States⁷⁴. In addition, the Commission calls on Member States to fully apply and comply with existing legal instruments: the SPD⁷⁵ and the recently revised SRD, which is essential to facilitate access to the EU, make the EU more attractive and promote the circulation of knowledge through movement between Member States.

Given the limited ambition expressed in the pact, there is good reason to believe that the many gaps and barriers, which come from the fragmented legal *acquis* on labour migration, will not be tackled. The approach remains one of limited harmonisation of national laws, and of minor amendments. In its Fitness Check⁷⁶, the Commission acknowledges that 'the current legal migration framework has limited impact vis-à-vis the overall migration challenges that Europe is facing'. The pact does not provide hope for significant change.

The main impression is that the provisions of the pact on labour migration are modelled on the objectives pursued by the EU in other policies: asylum management and the fight against irregular migration. The main rationale of the pact is indeed to control migrants' access to the EU territory, and to prepare for future migration crises. This approach affects the way in which labour migration

⁷¹ In its Report on New Avenues for legal Migration, LIBE Committee, 26 April 2021, the European Parliament notes that 'the New Pact on Migration and Asylum does not include any specific proposals on legal labour migration, despite legal labour migration being indispensable for a comprehensive migration and asylum policy'.

⁷² On 17 May 2020, the European Parliament and the Council reached a provisional agreement on the main elements of the recast BCD.

⁷³ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee of the Regions, on a New Pact on Migration and Asylum, COM/2020/609 final, p. 25.

⁷⁴ The objective is to increase TCNs' rights to reside and work in a second EU country, and to improve their access to work in a second country. Persons holding asylum status could also be granted long-term residence after three years of residence in the first Member State.

⁷⁵ This directive has not achieved its objective to simplify the admission procedures for all third-country workers. The goal is now to simplify and clarify the scope of the legislation, including admission and residence conditions for low- and medium-skilled workers.

⁷⁶ Commission Staff Working Document, Fitness Check on EU legislation on Legal Migration, SWD (2019)1056 final, p. 105.

is addressed in the pact. The development of legal pathways to Europe (including for labour migrants) is thus aimed at 'alleviating the pressure' on migration routes.

The call for new partnerships is a paradigmatic example of this approach. In the pact, the Commission calls for improved cooperation with third countries and the development of partnerships. The external dimension of the pact is central: it occupies a whole section devoted to 'working with our international partners'. The Commission announces a 'change of paradigm in cooperation with non-EU countries' that will be centred on comprehensive, balanced and tailor-made migration partnerships destined to be 'mutually beneficial for the different parties involved'. In practice, the objective is to adjust the admission of labour migrants in relation to demographic and labour market needs, and to win the 'race for talent'. To reach these objectives, the Commission will launch its 'talent partnerships', which will provide a comprehensive EU policy framework and funding support. The goal is to set up a mechanism, as foreseen in the 2018 UN Global Compact for Safe, Orderly and Regular Migration⁷⁷ (UN Global Compact), to better matching the EU's labour needs and skills, as well as supporting mobility schemes for work, and training capacity building. The rationale is that the country of destination provides capacity building and finances potential migrants in origin countries with the skills needed in the country of destination. Despite the Commission's silence on the content and scope of these partnerships, the pilot projects on labour migration will serve as a model, which includes bilateral agreements and private sector participation.

However, this approach is hardly a novelty (Farci & Sarolea, 2020). It appears to replicate the flaws of the Global Approach to Migration and Mobility (GAMM), which has more undermined the credibility of the EU than allowed it to better manage labour migration (Guild, 2020). The main rationale of the partnerships concluded until now remains linking legal migration opportunities with control-oriented commitments (Garcia, 2020). Readmission is a central aspect of these partnerships, as illustrated by the 2019 reform of the visa code⁷⁸.

3.2.4 Lack of coordination with other EU policies and goals

The EU's labour migration policy has been constructed in isolation, with very little consideration to other policies directly connected to it. Yet, new methods of EU social law offer possible paths to be followed. The impact of the Green Deal and the overall EU efforts to support more sustainable development are also likely to have an impact on the future labour migration policy.

3.2.4.1 Alignment of current proposals at EU level with new methods in EU social law

An interesting and original instrument of EU social policy adopted in 2017 is the European Pillar of Social Rights. Although the legal nature of the pillar is uncertain, it has simplified the objectives of EU social policy and made them more visible (three chapters, 20 'principles and rights'). The revitalisation of EU social policy is largely attributed to the European Pillar of Social Rights. Most recent instruments in this domain refer to the pillar⁷⁹, and 'delivering on the pillar' justifies all new Commission initiatives in social matters⁸⁰. It is thus obvious that the new type of instrument that the pillar constitutes is serving the development of EU social policy. The European Pillar of Social Rights

⁷⁷ www.iom.int/global-compact-migration.

⁷⁸ Regulation (EU) 2019/1155 of the European Parliament and of the Council of 20 June 2019 amending Regulation (EC) No 810/2009 establishing a Community Code on Visas (Visa Code), OJ L 188, 12.7.2019, pp. 25-54.

⁷⁹ Cf. Directive 2019/1152 of 20 June 2019 on transparent predictable working conditions, OJ L 186, 11 July 2019, p. 105; Directive 2019/1158 of 20 June 2019 on work-life balance, OJ L 188, 12 July 2019, p. 79; Regulation (EU) 2019/1149 creating ELA, OJ L 186, 11 July 2019, p. 21.

⁸⁰ See: European Commission (2021) on the European Social Pillar Action Plan.

has associated an idea of ‘rights’ recognised at EU level with tools to monitor progress in terms of performance by Member States. Inspired by instruments of the Economic and Monetary Union, and integrated into the European Semester to ‘socialise’ the coordination of national economic policies, the pillar is an instrument of mainstreaming. This specific tool, combining legal and economic approaches, can serve as a model for other domains, such as migration.

Another emerging methodological evolution, in the field of European social policy, consists of framing and supporting sectoral collective bargaining at national level, as illustrated by the proposal for a directive on adequate minimum wages in the EU⁸¹. This approach is justified by the constraints on EU action in the domain of remuneration, where EU competences are limited (harmonisation is excluded). It is also due to stark opposition to EU intervention in some Member States. But targeting sectoral negotiations in Member States can be considered an efficient way, more generally, to circumvent limits concerning EU competences and the opposition of some Member States, while allowing sectoral adjustments to take place. In the field of migration, the EU could play a role in fostering sectoral negotiations between social partners at national level on topics such as working conditions of TCNs, access to training, and recognition of qualifications and skills, etc.

3.2.4.2 EU labour migration policy and sustainable growth

In the Commission’s Green Deal Communication of September 2019⁸², there is only one direct reference to the nexus between climate change and migration⁸³. Moreover, the current Green Deal proposals refer mainly to EU citizens as the constituents, or as the beneficiaries, of the new approach. This is problematic given that the whole population of Europe could be involved in the transition process, to honour the pledge to ‘leave no one behind’ frequently repeated by the President of the Commission.

More generally, one may note the sharp contrast between Article 11 TFEU, a horizontal clause that states that the promotion of sustainable development ‘must be integrated into the definition and implementation of the Union’s policies and activities’ (Nowag, 2015) and the complete absence of reference to sustainable development in the EU’s legal *acquis* on labour migration. In the same vein, there is a contrast between the growing literature on climate-induced migration and the absence of sustainable development and environmental challenges in the EU migration policy discourses. One may thus argue that ‘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*’ in the domain of legal migration⁸⁴.

This change of approach is highly recommended because, as the IOM notes⁸⁵, many migrants in Europe are at a greater risk of being socio-economically disadvantaged and exposed to environmental stressors. For the IOM, recognising the key role that migrants play in the sectors that will be impacted most by the transition – namely agriculture and fisheries, energy, manufacturing,

⁸¹ COM (2020) 682 final, 28 October 2020.

⁸² Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions, The European Green Deal, COM/2019/640 final, p. 21.

⁸³ ‘The EU will work with all partners to increase climate and environmental resilience to prevent these challenges from becoming sources of conflict, food insecurity, population displacement and forced migration, and support a just transition globally.’

⁸⁴ Commission Staff Working Document, Fitness Check on EU Legislation on Legal Migration, 29 March 2019, {SWD (2019) 1056 final}, p. 100.

⁸⁵ <https://environmentalmigration.iom.int/blogs/migration-and-european-green-deal>.

and construction – could greatly support the advancement of the Green Deal. The Green Deal aims to shape efforts to progress towards the energy transition, more sustainable food value chains, and more resilient health care systems. In this context one may expect that the structural needs of EU economy will not be only those expressed by the employers today. If labour needs are likely to evolve in response to the Green Deal policies, this is likely to have an impact on the definition of labour migration policies. When it defines its approach to labour migration, the EU cannot ignore this medium-term perspective anymore.

True, the need to reflect on the normative foundations of the EU legal *acquis*, and to transform the narrative for European labour migration policy has not been, so far, a central question in the literature. Yet authors like De Lange (2021) show that the emergence of such a narrative, which connects labour migration and sustainable development, would allow a more comprehensive assessment and more adequate reforms of the legal migration *acquis*. De Lange takes the example of the BCD and shows how the introduction of the sustainable development narrative highlights gaps in the current legal framework. The social and sustainable inclusion of labour migrants is a secondary element in the current recast directive; in the text under discussion, inclusion is indeed assumed to be achieved through intra-EU mobility. What is missing is an attempt to support a broad notion of inclusion, in line with the Commission's approach in its 2020 Action Plan⁸⁶. In this text, priority is given to different forms of socialisation in the host societies, the possibility of social advancement through skills acquisition, together with increased protection of fundamental rights. This would be beneficial for the integration of the labour market. A promising approach to the future legal framework on labour migration would thus be to draw from intersecting policy fields relating to environment protection, integration and human well-being.

In short, introducing sustainable development in the narrative of EU labour migration policy would require considering that the perspective of 'the unfulfilled needs of business for economic growth' must coexist with other perspectives. Instead of starting from the EU employers' demand for migrant workers, EU law would promote a more balanced approach, including the perspective of migrants and their country of origin. Because, in its current form, the recast BCD mainly considers EU employers' needs, 'economic needs' remain central to the design of highly skilled workers' migration. In contrast, a change of paradigm would lead to emphasising the risks of privatising the economic needs test and more generally the interference of employers in immigration strategies. What is needed, if the EU aims to depart from a short-term perspective, is a 'new narrative for EU migration policy, based on sustainability instead of the current narrative of labour migration for economic growth'⁸⁷.

⁸⁶ Action Plan on Integration and Inclusion, 2021-2027, 24 November 2020, COM (2020) 758 final.

⁸⁷ De Lange, loc. cit.

4 Policy options

This chapter presents the policy options to address the gaps and barriers concerning EU legal migration. The policy options can be broadly categorised in three policy clusters, which in turn consist of 14 policy options and 14 sub-options that solely or in combination could potentially address the gaps and barriers identified.

The three clusters have been selected to offer a response to the gaps in the EU legal *acquis* on labour migration, for which EU action is particularly needed. As the last part of this study will highlight, the three questions addressed in the clusters – recognition of qualifications, skills and previous learning; creation of new legal pathways to the EU for labour migrants; and improvement of migrant workers' rights protection – cannot be addressed separately. Possible 'packages' of policy options are suggested.

Recognition of skills and qualifications tends to be at the periphery of EU migration studies, which is surprising given its impact on access to employment. In the absence of a proper qualification recognition mechanism for TCNs, the phenomena of downskilling and de-skilling can be observed, which are detrimental to both TCNs and the EU. Intra-EU mobility of TCNs is also impaired by the absence of such a mechanism. The CoNE study highlights gaps in recognition of qualifications, including intra-EU recognition, delayed equal treatment, limited recognition of skills and limited recognition of qualifications for lower-skilled (e.g., 'essential') workers. The study also points at barriers to recognition of qualifications consisting namely of long waiting periods for regulated professions and resistance from national professional orders. The proposed policy options, which aim to facilitate recognition of qualifications, skills and previous learning, are structured as a response to problems identified in two different situations: qualifications acquired by TCNs in the EU, and qualifications acquired outside the EU. Considering the lessons learned from the COVID-19 crisis, the proposed actions are not limited to higher-skilled workers, but also cover low- and medium-skilled migrants.

Creating legal pathways to the EU for labour migrants is the second cluster chosen for this study. Indeed, imagining legal avenues is an attempt to tackle two different problems. It allows a number of gaps and barriers faced by labour migrants to be addressed. These gaps and barriers, highlighted by the CoNE study, range from obstacles to mobility to the risk of resorting to irregular migration, which leads to precarious situations for migrants once they are on the labour market. In suggesting the creation of new mobility schemes, the policy options also seek to respond to the needs of EU employers. These proposals are thus based on the assumption that it is possible to reconcile the objectives of managing labour migration and attracting talent. For the sake of clarity, this cluster is divided into two sub-clusters, each corresponding to a certain type of action that the EU could take: first, 'keeping' or 'retaining' skilled migrants living in its territory; and second, creating new legal avenues for different groups of labour migrants, inspired by schemes set up in countries with experience of different programmes to manage migration.

The third cluster, devoted to actions to be taken to improve labour migrants' rights, was both necessary per se, and to complement the other policy options. Indeed, facilitating access to the EU, and to its labour market, must be coupled with actions to ensure respect of equality and the protection of the fundamental rights and social rights of persons living in the EU territory. Despite the EU's involvement in human rights protection, important gaps remain in the protection of labour migrants at work, as both the CoNE study and the current study make clear. The proposed policy options thus range from amending the EU legislation to increase equality and rights protection, to measures aimed at better enforcing migrant workers' rights, involving different stakeholders (EU

agencies, national equality bodies, trade unions and organisations active in the domain of human rights and/or migrants' rights).

The table below summarises the policy clusters, policy options and sub-policy options.

Table 4: Overview of policy options

Policy clusters	Policy options		Gaps and barriers
Harmonise rules for recognition of qualifications	1A	Recognition of qualifications of TCNs for intra-EU mobility	<ul style="list-style-type: none"> • Equal treatment • Recognition of qualifications
	1B	Recognition of qualifications for access to the EU	<ul style="list-style-type: none"> • Recognition of qualifications
	1C	Addressing practical difficulties	<ul style="list-style-type: none"> • Recognition of qualifications
Introduce new legal channels for labour migration to the EU	Policy cluster 2A: introduce new legal channels for labour migration for TCNs in the EU		
	2A	Transition from studies to work	<ul style="list-style-type: none"> • Equal treatment • Intra-EU mobility • Legal channels
	2B	Ease access to work for family members	<ul style="list-style-type: none"> • Family reunification • Equal treatment • Fundamental rights protection • Legal channels
	2C	Ease access to work for asylum seekers	<ul style="list-style-type: none"> • Equal treatment • Intra-EU mobility • Fundamental rights protection • National administrative organisation • Legal channels
	Policy cluster 2B: introduce new legal channels for labour migration to the EU		
	2D	Mobility schemes for entrepreneurs	<ul style="list-style-type: none"> • Entry conditions • National administrative organisation • Legal channels
	2E	Youth mobility schemes	<ul style="list-style-type: none"> • Entry conditions • Intra-EU mobility • Legal channels • National administrative organisation
	2F	Skilled refugee mobility schemes	<ul style="list-style-type: none"> • Entry conditions • Equal treatment • National administrative organisation • Legal channels
	2G	Supporting skills mobility partnerships	<ul style="list-style-type: none"> • Entry conditions • Equal treatment • Legal channels
	2H	EU talent pool	<ul style="list-style-type: none"> • Legal channels
	3A	Equal rights of TCNs and EU citizens	<ul style="list-style-type: none"> • Equal treatment

Policy clusters	Policy options		Gaps and barriers
Improve TCN workers' rights and employment conditions			<ul style="list-style-type: none"> • Social security coordination • Recognition of qualifications
	3B	Better enforcement of TCNs' rights	<ul style="list-style-type: none"> • Equal treatment • Fundamental rights protection
	3C	Reducing uncertainty with respect to obtaining long-term resident status	<ul style="list-style-type: none"> • Equal treatment • Work authorisation • Family reunification • Legal channels • Residence status • Intra-EU mobility • Social security coordination

Source: authors' analysis.

The different policy clusters, options and sub-options are discussed in more detail in the remainder of this chapter.

The three different policy clusters distinguished in this study for the sake of clarity should not be conceived as separate actions to be taken. On the contrary, the report frequently underlines the need to couple different policy options. This is the case, for instance, with the 'EU talent pool' (policy option 2H), which can only be efficiently developed if coupled with EU action to harmonise recognition of qualifications, skills and previous learning (policy options 1A and 1B). Likewise, the objective to facilitate TCNs' intra-EU mobility (underlined in many policy options of cluster 2) can only be achieved if coupled with recognition of qualifications, skills and previous learning (policy options 1A and AB).

Chapter 9 proposes a global reflection on possible complementarity between the different policy options. The chapter also suggests priorities for EU action on labour migration. Finally, because the proposed policy options can form part of a global strategy, the codification approach mentioned in the CoNE study is discussed. Two possible paths for a future EU labour migration code are evoked.

4.1 Policy cluster 1: harmonise rules for recognition of qualifications

Recognition of migrants' qualifications has been identified as necessary to ensure that labour migration benefits both migrants and the host society. Today, a large proportion (much larger than for natives) of highly educated TCNs work in low- or medium-skilled jobs (see section 3.1.2.4 above). For migrants, this skill downgrading after migration is often considered to be the result of a lack of recognition of their qualifications. Recognition of qualifications, skills or previous learning obtained or achieved by migrants is also a condition for facilitating access to jobs in the EU, without going through multiple costly and time-consuming procedures to obtain recognition in each Member State.

Thus, EU intervention to harmonise rules for recognition of qualifications must reach two objectives: easing TCNs' access to jobs corresponding to their qualifications when they access the EU labour market, and facilitating intra-EU mobility of TCNs. To reach these objectives, the EU should take measures to reduce practical difficulties faced by migrants trying to obtain recognition of their qualifications, skills or previous learning.

Policy option 1A: recognition of qualifications of TCNs for intra-EU mobility

Practical implementation
<ul style="list-style-type: none"> • Recognition of qualifications, skills and previous learning obtained within the EU in all Member States (Directive 2005/36/EC would apply to TCNs). <p>or</p> <ul style="list-style-type: none"> • Sectoral recognition, for example for ‘essential workers’ like health workers.

EU action should aim to guarantee that migrants’ previous learning, skills and **qualifications are recognised by all Member States when they have been acquired in one of them**. To this end, two different paths can be taken. The first one relies on an EU system of general recognition of professional qualifications, which could also concern skills and previous learning. The second – more limited – path corresponds to a sectoral approach, reserving recognition for certain professions for which the need for recognition is most felt within the EU.

1) A system of general recognition

Neither Directive 2005/36/EC on the recognition of professional qualifications⁸⁸ nor the case-law of the CJEU on the recognition of professional qualifications apply directly to TCNs. Directive 2005/36/EC, which ensures recognition of professional qualifications obtained in a Member State (or in a third country, under conditions⁸⁹) for the purpose of working in another Member State, only applies to Member State nationals⁹⁰. Under the Directive, recognition only concerns regulated professions, but for situations not covered by Directive 2005/36/EC, recognition is also required for EU nationals by the case-law of the CJEU⁹¹. As a result, where EU citizens are concerned, the host Member State must take into consideration all diplomas, certificates and other evidence of qualifications and relevant experience by comparing the specialised knowledge and abilities so certified, as well as experience acquired in another Member State, with the knowledge and qualifications required by national legislation.

Comparatively, TCNs only benefit from recognition of qualifications acquired in the EU based on the migration directives. These directives guarantee, for the TCNs they cover, equal treatment with nationals of the host state as regards ‘recognition of professional diplomas, certificates and other qualifications, in accordance with the relevant national procedures’⁹². The TCNs concerned are: long-

⁸⁸ Directive 2005/36/EC of 7 September 2005 on the recognition of professional qualifications, OJ L 255, 30 September 2005, p. 22.

⁸⁹ According to Article 2 (2), ‘each Member State may permit Member State nationals in possession of evidence of professional qualifications not obtained in a Member State to pursue a regulated profession within the meaning of Article 3(1)(a) on its territory in accordance with its rules. In the case of professions covered by Title III, Chapter III, this initial recognition shall respect the minimum training conditions laid down in that Chapter’. According to Article 3 (3) Directive 2005/36/EC, ‘evidence of formal qualifications issued by a third country shall be regarded as evidence of formal qualifications if the holder has three years’ professional experience in the profession concerned on the territory of the Member State which recognised that evidence of formal qualifications in accordance with Article 2(2), certified by that Member State’.

⁹⁰ Article 2 (1).

⁹¹ ECJ, 6 October 2015, Brouillard, C-298/14.

⁹² Article 11(1)(c) Directive 2003/109/EC (LTRD), Article 14(1)(d) Directive 2009/50/EC (BCD), Article 12(1)(d) Directive 2011/98/EU (SPD), Article 23(1)(h) Directive 2014/36/EU (SWD), Article 18(2)(b) Directive 2014/66/EU (ICTD), and Article 22(1)(3) and (4) Directive 2016/801/EU (SRD). Only Directive 2003/86/EC (FRD) contains no provisions regarding the recognition of professional qualifications.

term residents⁹³; EU Blue Card holders⁹⁴; single permit holders⁹⁵; seasonal workers⁹⁶; intra-corporate transferees⁹⁷; and researchers and students⁹⁸. As for Directive 2003/86/EC on Family Reunification (FRD), the Directive contains no provisions regarding the recognition of professional qualifications. All in all, only migrants covered by the migration directives can benefit from recognition for intra-EU mobility. It must be noted that these directives leave out of their material scope previous learning and skills obtained by TCNs, and only concern 'professional diplomas, certificates and other qualifications'.

To facilitate intra-EU mobility for TCNs legally residing in the EU, it would be necessary to ensure equal treatment with EU nationals across the board. One way to achieve this, although it would be limited to regulated professions, would be to lift the applicability of Directive 2005/36/EC to nationals of the Member States. Indeed, the Directive establishes rules according to which a Member State that makes access to – or pursuit of – a regulated profession in its territory contingent upon possession of specific professional qualifications, must recognise a professional qualification obtained in one or more of the other Member States, which allows the holder of this qualification to pursue the same profession there, for access to – and pursuit of – that profession on its territory.

This extension of the scope of application of the text could use the same legal basis as the one used for Directive 2005/36/EC: free movement of workers, free establishment, and free provision of services (Articles 46, 53 and 62 TFEU). It could also be based on Article 79 TFEU, according to which 'the Union shall develop a common immigration policy aimed at ensuring, at all stages (...) fair treatment of third-country nationals residing legally in Member States'. According to Article 79 (2) b), the European Parliament and the Council can adopt measures concerning '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'.

This evolution is in line with the current proposal for reforming the Directive concerning asylum seekers' reception conditions, as modified by the Council. The preamble of the proposal indicates that 'once applicants are granted access to the labour market, a Member State should recognise professional qualifications acquired by an applicant in another Member State in the same way as those of citizens of the Union and should take into account qualifications acquired in a third country in accordance with Directive 2005/36/EC of the European Parliament and of the Council'⁹⁹. Article 15(3) of the proposal states that equal treatment is granted to applicants having access to the labour market as regards 'recognition of diplomas, certificates and other evidence of formal qualifications in the context of existing procedures for recognition of foreign qualifications'.

However, extending the scope of application of Directive 2005/36/EC to TCNs would not ensure recognition of qualifications for access to non-regulated professions (which are not within the scope of Directive 2005/36/EC), nor concerning skills and previous learning. Another limit is that qualifications obtained outside the EU would only be restrictively recognised, for the purpose of intra-EU mobility (under the system deriving from Directive 2005/36/EC, in its current state).

⁹³ Article 11(1)(c) Directive 2003/109/EC.

⁹⁴ Article 14(1)(d) Directive 2009/50/EC.

⁹⁵ Article 12(1)(d) Directive 2011/98/EU.

⁹⁶ Article 23(1)(h) Directive 2014/36/EU.

⁹⁷ Article 18(2)(b) Directive 2014/66/EU.

⁹⁸ Article 22(1)(3) and (4) Directive 2016/801/EU.

⁹⁹ Recital 37.

Achieving the much more ambitious outcome of recognition of all qualifications, skills and previous learning, obtained inside or outside the EU, for the purpose of intra-EU mobility, would require more extensive intervention by the EU. It would need to go beyond the alignment of TCNs and European citizens in Directive 2005/36/EC. The case-law ensuring recognition of skills and other competences for EU mobile citizens would have to be codified in legislation for TCNs. In addition, limits currently enshrined in the text (Articles 2(2) and 3(3)) concerning qualifications obtained outside the EU would have to be removed. The EU has competence to do this under free movement provisions and Article 79 TFEU (see above).

2) Recognition limited to specific professions

Another way to move forward with recognition is to proceed sector by sector, progressively. To begin with, a few professions could be selected, for which recognition would be ensured.

The professions concerned could be chosen among those in which ‘essential workers’ were identified in the COVID-19 crisis. For workers belonging to this category, action at EU level could be more easily justified since the crisis highlighted the need to facilitate access to work for the TCNs concerned. This is the case for health professionals. Recognition could also be justified for construction workers, in relation to both the COVID-19 crisis and current issues concerning the posting of workers.

Regarding health professions, several EU countries took action during the COVID-19 crisis to mobilise the migrant health workforce. This was done by facilitating the temporary licensing of doctors with foreign medical degrees (Italy) or recruitment in the national health service (Spain), expediting current applications for the recognition of foreign qualifications of health professionals (Belgium, Germany, Ireland, Luxembourg and Spain) or allowing foreign-trained health workers in non-medical occupations in the health sector (France)¹⁰⁰.

Before adding to this list, further studies should be conducted for other workers considered essential during the crisis but less qualified than health professionals, since there are many different situations. For construction workers, for instance, there are a large variety of activities in the sector, some of which are regulated while others are not. A selection needs to be made among these workers to rank priority.

For a sectoral approach, the EU has competence to act, just as for a general system of recognition, under both Article 79 TFEU and based on free movement of workers, freedom of establishment and freedom to provide services (see above). Sectoral directives could be adopted, which would cover TCNs and be comparable to the sectoral directives adopted in the 1970s to facilitate the free movement of EU professionals (e.g., doctors in medicine, nurses and dental practitioners).

Policy option 1B: recognition of qualifications for access to the EU

Practical implementation

- Sectoral harmonisation of recognition by all Member States of qualifications, skills and previous learning obtained outside the EU, even for low-skilled workers.

This policy option concerns the harmonisation of the conditions of recognition of qualifications, skills and previous learning acquired outside the EU. Until now, recognition of third-country qualifications in Member States has been dependent on national rules, resulting in significant variations from state to state.

¹⁰⁰ See: OECD (2020).

When equal treatment with nationals is granted by migration directives (see above), TCNs should benefit in all Member States from the system of recognition applicable to nationals who have earned qualifications or skills abroad. Some of the migration directives also insist that qualifications acquired in a third country should be considered in accordance with Directive 2005/36/EC¹⁰¹, which limits the discretion of Member States.

But these common requirements are a far cry from comprehensive harmonisation of recognition of qualifications obtained abroad: harmonisation is limited to the requirement of equal treatment to nationals (which does not exclude variations from state to state) and only applies to migrants covered by the migration directives. Where access to regulated professions benefiting from automatic recognition is concerned, harmonisation does not aim to facilitate TCNs' access to these professions, but rather ensure that TCNs have been trained in accordance with EU requirements¹⁰².

In addition, just as for intra-EU mobility, the issue of recognition for accessing the EU labour market goes beyond recognition of the qualifications needed to gain access to regulated professions: access to non-regulated professions, and recognition of prior learning and skills, are also necessary to improve the situation of TCNs on the labour market.

All of these gaps justify the development of common rules for recognition of qualifications, skills and previous learning. These rules could be worked out on a sectoral basis, in line with the solution recently adopted in the revision of the BCD. The revision of the BCD plans to cover recognition of qualifications and skills of highly skilled workers from the ICT sector, with a requirement of three years of professional experience. The exact professions that benefit from mandatory recognition of skills are identified based on their classification in the International Standard Classification of Occupations (ISCO), mentioned in an annex to the Directive. A review clause was agreed on, according to which the Commission will assess every two years whether the list should be revised.

This sectoral approach, designed for the Blue Card status, could be applied to other occupations to include workers who are not highly skilled but are nonetheless 'essential' for the European economy (see Chapter 3).

One direction would be to harmonise recognition in professions requiring lower qualifications, for instance, in the construction sector (for similar reasons to those mentioned with regard to intra-EU mobility). Another direction would be to focus on health professionals, as they belong to the category of 'essential workers'. Under current rules, the recognition of health professionals with diplomas from outside the EU/EFTA is granted according to national procedures in the Member States. But for health professions for which minimum training requirements are harmonised at EU level (e.g., doctors and nurses responsible for general care) the EU minimum training requirements must be respected¹⁰³. If professionals have a non-EU/EFTA qualification in one of those professions that does not meet the harmonised requirements, the Member State intending to recognise such a diploma must apply compensation measures. Alternatively, these professionals may be allowed to work in health care, but without being treated as a member of the profession for which they do not meet the qualification standards laid down in the Directive, which results in overqualification. For

¹⁰¹ Directive 2009/50/EC (BCD) recital 19; Directive 2011/98/EU (SPD) recital 23; Directive 2014/66/EU (ICTD) recital 22. A comparable statement is absent from the recitals of Directive 2003/109/EC (LTRD), Directive 2014/36/EU (SWD) and Directive 2016/801/EU (SRD), even though the relevant provisions in the directives are worded similarly.

¹⁰² In particular, when minimum training requirements apply (for automatic recognition), all Member States must condition recognition of qualifications to these requirements. This is namely the case for health professionals.

¹⁰³ Article 2(2) of the directive. On the legislation applying to health professionals, see: Communication from the Commission, Guidance on free movement of health professionals and minimum harmonisation of training in relation to COVID-19 emergency measures – recommendations regarding Directive 2005/36/EC 2020/C 156/01, C/2020/3072, OJ C 156, 8.5.2020, p. 1.

example, a third-country qualified nurse whose training does not meet the minimum harmonisation requirements may be allowed to work as a health care assistant, carrying out limited tasks as specified for such activities in national law. This results in lower remuneration and lower benefits (as health care assistants are usually paid less and have access to fewer benefits than nurses, for instance).

To facilitate access to work for health professionals from third countries, EU intervention could aim to support Member States in handling compensation measures: intensive training and/or tests to check qualifications could be worked out and/or supported (financially) by the EU, for instance. For health professions for which minimum training requirements are not harmonised at EU level, a common system for recognition to practise in the EU could be designed.

Article 79 and 79(2) b) TFEU would be an appropriate legal basis for the sectoral harmonisation of national systems of recognition.

Policy option 1C: addressing practical difficulties

Practical implementation
<ul style="list-style-type: none"> • Elaborating rules guaranteeing fair and quick procedures of qualification recognition, with the European Training Foundation intervening together with national bodies.

Practical difficulties, including cost, are a central obstacle for TCNs seeking recognition of their qualifications, skills or previous learning. An EU system aiming to reduce this burden should be designed for TCNs entering the EU for the purpose of work.

The need to facilitate the procedure and make it accessible was pinpointed by the current proposal for reforming the Directive concerning asylum seekers¹⁰⁴. The preamble of the proposal indicates that measures aimed at recognition should also try to effectively address ‘the practical difficulties encountered by applicants concerning the authentication of their foreign diploma, certificates or other evidence of formal qualifications, in particular where applicants cannot provide documentary evidence and cannot meet the costs related to the recognition procedures’.

Such a system could draw inspiration from the Lisbon Convention on the Recognition of Qualifications concerning Higher Education in the European Region (1997) (the Lisbon Convention), which was jointly drafted by the Council of Europe (CoE) and the United Nations Educational, Scientific and Cultural Organisation (UNESCO).

The Lisbon Convention was ratified by all Member States but Greece. It aims to facilitate the recognition of qualifications granted by one party in another party. It provides that requests should be assessed in a fair manner and within a reasonable time. Recognition of a qualification can only be refused if the qualification is substantially different from that of the host country, and the onus is on its educational institution to prove that it is. Two bodies, the Committee of the Convention on the Recognition of Qualifications concerning Higher Education in the European Region, and the European Network of National Information Centres on Academic Mobility and Recognition (ENIC) oversee, promote and facilitate the implementation of the Convention. The Committee is responsible for promoting application of the Convention and overseeing its implementation. To this end, it can adopt recommendations, declarations, protocols and models of good practice to guide the competent authorities of the parties. Before making its decisions, the Committee seeks the opinion of ENIC. ENIC upholds and assists with the practical implementation of the Convention by the competent national authorities.

¹⁰⁴ Recital 37.

A similar system could be put in place within the EU, with the aim of facilitating recognition of qualifications from third countries. It could focus on TCNs from countries with special relationships with the EU. An EU system inspired by the Lisbon Convention could rely on the European Training Foundation (ETF), which plays a role in developing recognition of qualifications and validation of skills, competencies and prior learning of migrants in EU partner countries. This would not necessarily require more resources to be granted to the ETF, but prioritising of its missions towards facilitating recognition of qualifications, skills and prior learning of migrants. A study by the OECD published in 2017 can also serve as a guideline for possible EU action (OECD, 2017). The system proposed by this study suggests a series of practical improvements:

- creating fast-track schemes for recognition, possibly before arrival (which exist in some OECD countries, for some professions);
- facilitating information and applications for the assessment and recognition of foreign qualifications (one-stop shop);
- strengthening the systems of recognition of prior learning and effectively opening them up to migrants;
- allowing partial recognition and linking it with bridging courses possibly leading to full recognition;
- ensuring that regulatory bodies treat immigrants fairly;
- engaging employers and other relevant stakeholders;
- fostering cooperation and exchange of good practices for recognition;
- limiting the cost for migrants.

The reform aimed at facilitating recognition adopted in Germany in 2012 can also be a source of inspiration for the EU. Not only do migrants have a right to receive an evaluation within three months and a certificate of equivalency valid throughout Germany; efforts were also made to facilitate recognition (creation of a network and platform with easy access in various languages, and efforts by chambers for industry and trade, in particular)¹⁰⁵.

All of these actions could be coordinated and supported by the EU. To this end, a system of cooperation with an EU network (which could be managed by the ETF) and national bodies would be appropriate. It could be built as a system aiming to combat discrimination, which relies on equality bodies in the Member States and the Equinet network. The EU network would ensure the sharing of good practices, and would provide support and advice to national bodies in charge of assessments and recognition.

Article 79 TFEU offers an appropriate legal basis for these actions (cf. policy options 1A and 1B). It is also possible to refer to provisions of the TFEU on free movement of workers, freedom of establishment and freedom to provide services, since facilitating recognition of TCNs' qualifications, skills and previous learning would also contribute to free movement within the EU.

4.2 Policy cluster 2: introduce new legal channels for labour migration to the EU

The EU needs workers with different skill levels. Finding pathways to attract skills and talent to the EU is essential¹⁰⁶. This is why the EU should create legal pathways to the EU for labour migrants (see section 3.2.2.1). Instruments are needed to guarantee the effectiveness of these new schemes,

¹⁰⁵ On this reform, see: Rietig (2016).

¹⁰⁶ In the New Pact on Migration and Asylum, in which the Commission calls for new legal channels for migration, the accent is put on 'attracting' skills and talent to the EU.

among which databases, which would help identify and select skilled migrants to fill labour market shortages. But the emphasis on new mobility schemes must not lead to overlooking skilled migrants legally residing in the EU: re-evaluating their legal status to lift the legal obstacles they face when trying to access employment in the EU is a first step to take, to widen legal channels towards the employment of TCNs, in the EU.

4.2.1 Introduce new legal channels for labour migration for TCNs in the EU

For the EU to win the race for talent and avoid brain waste, the possibility of creating new mobility schemes will be explored for the different categories of skilled migrants the EU wants to attract. But the policy cluster can be split in two sub-clusters. Policy cluster 2A covers policy options 2A to 2C and envisages the introduction of new channels for regular access to the labour market for TCNs already in the EU.

In the last years, Member States have indeed been experiencing different procedures of regularisation by work, for rejected asylum seekers, TCNs in transition from studies to work and overstaying migrants in general. These national practices, which cannot necessarily be scaled up at EU level, nevertheless cause one to consider that ‘attracting’ skilled workers can, first, mean ‘retaining’ or ‘keeping’ those who have already spent time in the EU, who are needed to fill labour market shortages and are integrated in the host society. This is the reason why this study makes different proposals to ease access to employment for skilled workers already living and settled in the EU.

The second sub-cluster (policy options 2D to 2H) targets different situations, envisaging the introduction of new legal channels for labour migration to the EU, i.e., for people who are outside the EU.

Policy option 2A: transition from studies to work

Practical implementation
<ul style="list-style-type: none"> • Extending residence period by up to 18 months for job search. • Allowing intra-EU mobility. • Elaborating guidelines for the interpretation of general notions of the SRD.

Migrants to the EU are younger and less well educated than those to other OECD destinations¹⁰⁷. In addition, while the number of international students in the EU has been rising steadily over the past years (see section 3.1.1.2), the percentage of graduates choosing to stay in the EU after the end of their studies remains relatively low (European Migration Network, 2017). This is at odd with the EU’s constant efforts to attract talent and foster TCNs’ integration in the host society. The EU should thus act to ‘keep’ students who trained and graduated in the EU, and facilitate their transition from studies to employment. To this aim, the main path to follow is to adopt a directive revising Article 25 SRD¹⁰⁸ in order to lift or reduce obstacles to work. The adoption of a communication guiding national interpretation and application of EU rules is the second action to be taken.

¹⁰⁷ Of the total pool of highly educated third-country migrants residing in EU and OECD countries, the EU hosts less than one-third (31%), while more than half (57%) are in North America. See OECD (2016).

¹⁰⁸ Directive (EU) 2016/801 of the European Parliament and of the Council of 11 May 2016 on the conditions of entry and residence of third-country nationals for the purposes of research, studies, training, voluntary service, pupil exchange schemes or educational projects and au pairing, OJ L 132, 21.5.2016, pp. 21-57.

Indeed, there is a sharp contrast between the claim that the EU 'is currently losing the global race for talent'¹⁰⁹ and Member States' resistance to opening their labour market to students who have studied or worked in the EU. Facilitating their access to the EU job market and residence on a permanent basis would certainly help the EU compete more efficiently in the race for talent. One may also remember that if TCN students have acquired European qualifications, employers can easily assess their exact level of qualification and fill shortages in EU firms. Finally, allowing this population to remain in the EU would be in line with the new EU Action Plan on Integration and Inclusion¹¹⁰. TCNs who have studied for several years in the EU generally master the language of at least one Member State and have created links with the EU society.

EU action in this field would ensure 'the efficient management of migration', 'fair treatment to third-country nationals residing legally in Member States', and 'the prevention of illegal immigration' mentioned in Article 79 TFEU. More specifically, the action would offer young graduate TCNs the right to remain in the EU to find employment. It can thus be grounded on Article 79(2), a), which gives the EU legislator competence to adopt measures that define 'the conditions of entry and residence, and standards on the issue by Member States of long-term visas and residence permits'.

Ensuring and promoting students' access to work only needs the amendment of Article 25 SRD. Article 25 states that after the completion of their studies, students shall have the possibility to stay on the territory of the Member State that issued an authorisation for a period 'of at least nine months' to seek employment or set up a business. Member States may also decide to set a minimum level of degree that students shall have obtained to benefit from the application of that article (which shall not be higher than level 7 of the European Qualifications Framework). Finally, Member States are allowed to require TCNs to prove, after a minimum of three months from the issuance of the residence permit, that they have a genuine chance of being engaged or of launching a business.

Three amendments to Article 25 are required. First, time constraints should be relaxed. An important step in this direction was already taken when, in 2016, the legislator revised the SRD¹¹¹. But finding a first job is much more difficult for students, who have little professional experience, than for experienced professionals (section 3.1.2.7). The path to be followed, as already argued by the European Parliament in 2015¹¹², is therefore to allow students a period of 18 months to find a job in the EU.

Second, the EU should remove the other elements of Article 25 that impede a smooth transition from studies to work. The three-month deadline to prove that a TCN is having 'a genuine chance of being engaged or of launching a business' is an excessive constraint, and should be replaced by a six-month deadline, as was considered acceptable for EU job seekers¹¹³.

In addition to this legislative action, the EU should offer guidance for the interpretation of the notion of a 'genuine chance' of being engaged. A communication could be adopted, which would set EU guidelines inviting Member States to offer students a degree of flexibility, in line with the case-law

¹⁰⁹ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on a New Pact on Migration and Asylum, COM/2020/609 final, para. 7.

¹¹⁰ EU Action Plan on Integration and Inclusion (2021-2027), COM (2020) 758 final.

¹¹¹ Directive (EU) 2016/801 of the European Parliament and of the Council of 11 May 2016 on the conditions of entry and residence of third-country nationals for the purposes of research, studies, training, voluntary service, pupil exchange schemes or educational projects and au pairing, OJ L 132, 21.5.2016, pp. 21-57.

¹¹² On 25 February 2014 the European Parliament adopted a first reading position, which also served as a mandate, for negotiations with the Council, of the proposed directive: www.europarl.europa.eu/legislative-train/theme-towards-a-new-policy-on-migration/file-directive-on-students-and-researchers

¹¹³ ECJ, 26 February 1991, *Antonissen*, C-292/89.

concerning EU job seekers. In the same vein, the EU could incite Member States to use Article 25(7) restrictively: this provision allows Member States to require that the employment sought by the TCN 'corresponds to the level of (...) the studies completed'. Indeed, the notion of 'correspondence' gives important leeway to Member States in restricting TCNs' possibility to remain after graduation.

Third, and more ambitiously, the EU could incorporate a new provision into the SRD that would offer a truly European job perspective to students who have obtained a qualification in the EU. Article 25(1) could be revised to allow students to stay on the territory of 'any Member State', rather than on the current 'territory of the Member State that issued an authorisation under Article 17'. In 2016, the legislator chose to increase students' possibilities to move within the EU during their stay. They only must notify the Member States to which they are moving (for example to participate in a one-semester exchange), instead of having to submit a new visa application and wait for it to be processed. The proposed revision of Article 25(1) would offer recently graduated TCNs, immediately after graduation, the possibility to look for a job on the whole territory of the EU. Insofar as increased possibility for intra-EU mobility is expected to raise the EU's attractiveness, this evolution would be consistent with the reform of the BCD.

Policy option 2B: ease access to work for family members

Practical implementation
<ul style="list-style-type: none"> • Recognising an unconditional right to access employment. • Amending Article 14 FRD and tidying up sectoral directives dealing with family members' access to work.

To ease family members' access to work in the Member States, different provisions of the EU legal *acquis* in the field of economic migration should be amended. In the FRD, which recognises the right to access employment of the sponsor's family, Member States retain the power to condition and limit this access. The main sectoral directives dealing with economic migration do not grant family members the right to access employment, and could be revised accordingly. EU legal action is required to both limit Member States' capacity to hinder family members' access to work, and promote the progressive autonomy of family members in the field of work. It will mainly consist of amending the FRD.

EU intervention in favour of family members' access to employment would mitigate different problems faced by TCNs¹¹⁴. The capacity to move accompanied by their spouse and children, sometimes also with ascendants, is a key element in TCN workers' decision to migrate. Excluding family members from the labour market reduces the wealth of the whole family, which is dependent on one single source of income. Reduced rights for TCNs' family members limit the EU's attractiveness, as highly skilled workers would select another destination that offers more favourable perspectives to the whole family¹¹⁵. Facilitating family members' access to work would encourage skilled TCNs to settle in the EU, which is in line with the EU's efforts to attract certain skilled workers.

Another benefit can be expected from EU action in favour of family members' access to the labour market. Work is the main source of income, and is the condition for a person's self-sufficiency, giving the possibility for self-realisation. Women who (more often than men) follow their partners remain outside the job market, suffer dependence and the risk of progressively losing their skills. Therefore, offering the right and adequate conditions to facilitate access to the labour market would increase women's autonomy and independence.

¹¹⁴ On the importance of family mobility, see Figure 2.

¹¹⁵ This aspect (with others) has justified the EU's decision to reform the BCD.

EU action could be based on Article 79 TFEU. Ensuring family members' access to work can be deemed to ensure 'the efficient management of migration', 'fair treatment to third-country nationals residing legally in Member States' and 'the prevention of illegal immigration' mentioned at Article 79(1). As the action would consist of granting new rights to TCNs legally residing in a Member State, EU action could also be based on Article 79(2): the European Parliament and the Council shall adopt measures which define the 'b) (...) rights of third-country nationals residing legally in a Member State'.

EU legal action in favour of family members' access to work mainly consists of revising the FRD to limit Member States' capacity to hinder such access to employment.

A revision of Article 14 FRD is necessary. As it stands, Article 14(1) entitles the sponsor's family members, just as their sponsor, to access employment and self-employed activity. But Article 14(2) allows Member States to decide 'according to national law the conditions under which family members shall exercise an employed or self-employed activity'. It adds that 'these conditions shall set a time limit which shall in no case exceed 12 months, during which Member States may examine the situation of their labour market before authorising family members to exercise an employed or self-employed activity'.

The option the EU could choose requires 'rather intensive' action. It would consist of prohibiting Member States from limiting family members' access to employment. A revised Article 14 FRD would directly confer upon TCN workers' family members a subjective 'right' to work. This would be a straightforward solution to ease access to work for TCNs' family members insofar as Member States would be constrained to open their labour markets to legally residing TCNs' family members.

To this end, the EU could take inspiration from the law applicable to EU citizens' family members. Already in the 1960s, Article 11 of Regulation 1612/68¹¹⁶ granted the right to work to EEC workers' family members¹¹⁷. This provision, having direct effect, confers a 'right' that can be enjoyed in the Member States. The right to access employment is now granted by Article 23 of the EU Citizens' Rights Directive¹¹⁸ which states that irrespective of nationality, the family members of a Union citizen who have the right of residence or the right of permanent residence in a Member State 'shall be entitled to take up employment or self-employment there'.

The EU could transpose this approach to TCNs and recognise a subjective and unconditional right to access employment for TCN workers' family members. To achieve this aim, legislation should be amended in different ways. The first, second and third paragraphs of Article 14 FRD¹¹⁹ would be deleted. At the same time, a review and tidying-up of the provisions of the sectoral directives, which introduce derogation to current Article 14 FRD, would be needed. This is the case, for instance, for Article 26(6) SRD. If the revised BCD is finally adopted – in its current formulation – Article 16 would also have to be amended.

¹¹⁶ Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community, OJ L 257, 19.10.1968, pp. 2-12.

¹¹⁷ EEC workers' spouse and those of the children who are under the age of 21 years or dependent on him 'shall have the right to take up any activity as an employed person throughout the territory of that same State, even if they are not nationals of any Member State.'

¹¹⁸ Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC, and 93/96/EEC (Text with EEA relevance), OJ L 158, 30.4.2004, pp. 77-123.

¹¹⁹ Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification OJ L 251, 3.10.2003, pp. 12-18

Policy option 2C: ease access to work for asylum seekers

Practical implementation
<ul style="list-style-type: none"> Reducing or deleting the waiting period before accessing work. Helping asylum seekers and refugees to find a job by taking concrete measures such as early skills-screening, funding language training, etc.

Asylum seekers and refugees, who are (often) skilled workers, face important legal and practical obstacles, which prevent them from accessing Member States' labour markets. Given the Member States' reluctance to open their labour markets, the EU has an important role to play. To this end, the EU would have to limit Member States' capacity to hinder or delay asylum seekers' and refugees' access to employment: a revision of the Reception Conditions Directive and adoption of concrete measures to facilitate access to the labour market are required.

The proposed action is needed to address the different gaps and barriers mentioned earlier in the report. First, because asylum seekers and refugees are often skilled migrants, facilitating their access to work will help fill EU labour market shortages. Second, EU action will limit the brain waste effect, which derives from asylum migration. Asylum seekers and refugees face greater difficulties in accessing the labour market because departure from their home country has interrupted their training, and because during their long journey to the EU they have lost contact with their professional networks¹²⁰. Migrant women are at particularly high risk of being overqualified for their job (see section 3.1.2.3), which may lead to depreciation of their skills (JRC, 2020). But the risks are more severe for people asking for international protection, as traumas resulting from persecution and fear, endured in the country of origin or during the journey, impact their capacity to search employment. Improved access to work would strengthen their chances of integration into their new communities. In other words, access to employment, quickly after arrival, would allow asylum seekers to become self-sufficient and to live in dignity; it can also improve mental health.

EU action in this domain can be based upon Article 78(2) TFEU, which provides that 'for the purposes of paragraph 1' (with a view to offering appropriate status to any third-country national requiring international protection), the European Parliament and the Council shall adopt measures for a common European asylum system comprising '(f) standards concerning the conditions for the reception of applicants for asylum or subsidiary protection'. The proposed reform mainly aims to amend provisions of the so-called 'Reception Conditions Directive', which was adopted based on Article 78(2)(f).

The EU's action would be twofold: a revision of Article 15 of the Reception Conditions Directive, which contains limits to asylum seekers' access to employment; and measures to improve the concrete possibilities for both asylum seekers and refugees to access employment.

1) Fostering labour market access for asylum seekers by removing (or substantially relaxing) temporary employment bans

Amendment of Article 15 of the Reception Conditions Directive¹²¹ is a priority. It excludes many asylum seekers from the labour market with little justification because it contains two main limits. First, it allows Member States to delay access to work: 'Member States shall ensure that applicants have access to the labour market no later than nine months from the date when the application for international protection was lodged'. Second, 'for reasons of labour market policies', Member States

¹²⁰ See Desiderio (2016) on interrupted trajectories and difficulties transferring human capital.

¹²¹ Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast), OJ L 180, 29.6.2013, pp. 96-116.

may give priority to Union citizens and to legally resident third-country nationals'. The proposed recast directive¹²² does not fundamentally alter this logic¹²³. Two types of amendments of Article 15 can be envisaged: a limited one or a complete revision.

The limited version of the amendment consists of prohibiting Member States from cumulating the two limits mentioned in Article 15. Member States would be required, instead, to select only one of the two limits mentioned in the Directive: either a waiting period before accessing the labour market or work priority for EU citizens and legally residing TCNs. This limited improvement is the less ambitious approach, but would consider Member States' resistance to change given their reluctance to open their job markets to asylum seekers. Member States indeed continue to express concerns that to do so might act as a 'pull factor' for migration onto their territory.

A more radical change would consist of allowing asylum seekers to apply for a work permit immediately after their asylum claim has been lodged. This would transform the overall logic of the original directive, and this approach is in contrast with the negotiation of the Reception Conditions Directive¹²⁴. In its current form, the text under discussion indeed introduces two new exclusions from the labour market: Member States are not allowed to grant access to the labour market to applicants whose application is being examined in an accelerated asylum procedure; and applicants who are subject to a Dublin transfer decision are excluded from access to the labour market.

However, many reasons justify the introduction of a new approach. It is coherent with the idea constantly being reaffirmed by the EU that access to employment is beneficial for both asylum seekers and the host state¹²⁵. In the *K.S. and others* case¹²⁶, in which the ECJ held that under the current Directive 2013/33 applicants as regards whom a Dublin transfer decision has been taken cannot be excluded from the labour market, the decision was based on the requirement to ensure a dignified standard of living, and on the Directive's objective to 'promote the self-sufficiency of applicants'. In addition, removing the time delay is a viable reform, as shown by foreign examples. In countries like Canada, asylum seekers can usually apply for a work permit immediately after their asylum claim has been lodged. Considering these elements, the current EU rules cannot be found satisfactory. This observation leads to suggesting that time and priority conditions should be deleted from the Reception Conditions Directive, granting asylum seekers immediate access to employment.

2) Allowing a track change for rejected asylum seekers

¹²² Proposal for a directive of the European Parliament and of the Council laying down standards for the reception of applicants for international protection (recast), 3.7.2016, COM (2016) 465 final.

¹²³ The Commission has proposed amending the directive to oblige Member State to provide applicants with access to the labour market six months after the lodging of their application, instead of the current nine months. The text no longer mentions the priority given to EU citizens and legally residing TCNs; rather it allows Member States to 'verify whether a vacancy could be filled by nationals of the Member State concerned or by other Union citizens, and to third-country nationals lawfully residing in that Member State'. But these changes will have little impact on the ground.

¹²⁴ In particular because in its current form, the text under discussion introduces two new exclusions from the labour market: Member States are not allowed to grant access to the labour market to applicants whose application is being examined in an accelerated asylum procedure; and applicants who are subject to a Dublin transfer decision are excluded from access to the labour market. On the current revision of the Reception Conditions Directive, see: Slingenbergh (2021) and O'Sullivan & Ferri (2020).

¹²⁵ In the proposal for a recast directive, the EU acknowledges that work guarantees 'a dignified standard of living to asylum seekers'. The proposal states that to promote the self-sufficiency of applicants and to limit wide discrepancies between Member States, it is essential to avoid 'imposing conditions that effectively hinder an applicant from seeking employment': preamble, para 34.

¹²⁶ ECJ, 14 January 2021, *K. S., M. H. K.*, C-322/19.

To facilitate asylum seekers' and refugees' access to work, another path can be taken, which is based on more practical actions. Statistics have shown that TCNs who arrive in EU countries face a range of problems when accessing the labour market, making them at higher risk of poverty and exclusion in comparison to EU nationals¹²⁷. A package of measures would have to be adopted in response to this.

The first action to be taken concerns language skills, which deserve special attention, as language is an important obstacle if asylum seekers and refugees speak neither the host state's language nor English. Assuming that comprehensive knowledge of the host state's language can be acquired during employment, the language courses that are generally provided for asylum seekers could be more targeted at job research. Through its different funds, including the ETF, the EU could support Member States' actions in favour of language training tailored to work access.

A complementary action to take as soon as possible is to tackle obstacles that hinder practical access to employment. The EU and its Member States would take measures to better anticipate the moment when asylum seekers start searching for a job. In this regard, an evaluation of skills and qualifications is the first step. Member States, with the help of the EU, could evaluate asylum seekers' skills as early as possible, ideally in parallel with the asylum application. An example can be taken from those states that have started to offer early skills assessments to asylum seekers. Skills screening services are either provided by reception authorities in reception facilities (like in Norway and Sweden) and/or offered in public shelters by civil society organisations, alongside language and literacy classes and 'soft skills' training (as in Belgium, Italy, Portugal and Spain) (Desiderio, 2016). The EU skills profile tool could be used insofar as it constitutes a relevant instrument. In Belgium, asylum seekers can register themselves with the Belgian Labour Agency and receive vocational training and a free assistance programme. It is suggested that such an example can be evaluated, and its development supported in other Member States.

The proposed measures will have a positive impact on the situation of asylum seekers and refugees. Rather than waiting and living with the limited resources allocated to them by the host state, they will have the capacity to project a more active and integrated life. Reduced reception costs can also be expected for Member States if asylum migrants no longer need financial support. However, the reform requires certain precautions. Early evaluation of skills is a useful tool to support asylum seekers' access to employment, but it should not have an impact on the assessment of the asylum application. It is crucial that very separate entities oversee the evaluation of the asylum application and the asylum seeker's professional skills.

4.2.2 Introduce new legal channels for labour migration to the EU

The analysis of gaps and barriers, in this report, has highlighted the different negative consequences deriving from the lack of legal avenues to the EU for migrant workers. New mobility schemes are needed to limit irregular migration, to match EU labour market demands with migrants' skills and to avoid situations of exploitation. New mobility schemes can be adapted to different categories of migrants: entrepreneurs, younger workers and refugees. In addition, skills mobility partnerships (SMPs) constitute a new approach to the organisation of mobility schemes.

Policy option 2D: mobility schemes for entrepreneurs

Practical implementation

- Creating a long-term visa for entrepreneurs (start-up visa) and/or supporting national mobility schemes for entrepreneurs.

¹²⁷ See: Akari (2019).

- Allowing intra-EU mobility for entrepreneurs.

Easing the immigration of foreign entrepreneurs and investors has been identified among recent trends in migration policies around the world¹²⁸. Since 2015, several countries have introduced start-up visas to attract entrepreneurs likely to create, grow or scale-up their business abroad.

Inspired by these national experiences and in line with the idea of creating new paths for legal migration, a new EU instrument could be envisaged that would seek to attract entrepreneurs to the EU.

Start-up visas for entrepreneurs correspond to the needs of the digital economy: migrants, as other workers, are encouraged to develop their activities outside their scope of employment. Starting a business or developing a recently created activity in the EU should be a way for entrepreneurs from outside the EU to access the EU territory through a legal path. It would contribute to limiting irregular immigration, and would also serve the objectives of the EU's Digital Decade Strategy. In order to fulfil these objectives, entrepreneurs in digital markets should be welcomed to the EU.

EU action aimed at creating an entrepreneur mobility scheme can be based on Article 79 TFEU. More precisely, given that it would mostly consist of delivering visas and residence permits, the legal basis adopted is Article 79(2), which provides that the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures concerning: '(a) the conditions of entry and residence, and standards on the issue by Member States of long-term visas and residence permits, including those for the purpose of family reunification'.

The EU policy could draw inspiration from national initiatives. Many national schemes exist, both in and outside Europe (Patuzzi, 2019). There are at least two possible options: the creation of an EU visa for entrepreneurs, or the provision of EU support to national schemes. A combination of both is also possible.

As far as an EU visa for entrepreneurs is concerned, it could be based on the Australian model or on the scheme used in New Zealand. The first is linked with investments in the country (although investments are not the sole condition for obtaining a visa, as with the so-called 'golden visa'), and the second is on the condition of accreditation. In January 2019, the accredited sponsor scheme was expanded in Australia to make it easier for large reputable companies who make major investments in the country to use the employer sponsored skilled migration programmes. This path is meant for migrants who plan to carry out entrepreneurial activity in Australia. They can bring eligible members of their family and apply for a permanent visa if certain requirements are met. Migrants must undertake, or propose to undertake, a complying entrepreneur activity in Australia, have a funding agreement of at least AUD 200 000 to carry out entrepreneurial activity in Australia and show a business plan for it, in addition to having a certain command of English. In New Zealand, the new Global Impact Visa (GIV) provides individual entrepreneurs and investors with a three-year visa to create, support and incubate ventures. Application for this scheme is conditional on the candidate being selected by the Edmund Hillary Fellowship. After three years, migrants can apply for permanent residence, if they maintain the support of the Edmund Hillary Fellowship.

Another possible model, which combines investments and accreditation, is the United Kingdom's 'Start-up and Innovator' visa scheme, which replaced Entrepreneur and Graduate Entrepreneur visas in March 2019. Compared to the previous programme, this scheme is less demanding in terms of capital requirement, but makes third-party endorsement compulsory (by a UK higher education

¹²⁸ See: OECD (2020) and Patuzzi (2019).

institution, or a business organisation with a history of supporting UK entrepreneurs). The scheme involves innovation stakeholders more closely in the assessment and selection process (industry experts rather than immigration officials are now in charge of selecting visa applicants), it is open to a wider pool of talent, and it has a longer duration (two years, with the possibility of switching to another visa to remain on the territory). The migrants concerned must be able to show that their business idea is new, innovative and viable.

Another model that does not require capital investment can be seen in the Netherlands, for essential personnel of start-ups. Introduced in July 2019, it offers residence permits allowing start-ups to attract TCNs who are essential to their success with a lowered remuneration criterion (in comparison with regular ‘knowledge migrants’, who are highly skilled migrants already benefiting from specific arrangements facilitating their immigration to the Netherlands), combined with a share in the company (which makes them partners in the company, and possibly managers, whilst having the status of employee). The start-up entrepreneur must collaborate with a reliable and experienced facilitator in the Netherlands to develop an innovative product or service. He or she must provide a plan on how to move from idea to business, and must have sufficient financial means to be able to reside and live in the Netherlands.

There has also been a start-up programme in Lithuania since 2019, but it is more classical in the sense that it concerns employees. The ‘Startup Employee Visa’ is a migration procedure designed to make it easier to attract highly skilled workers from third countries to Lithuanian companies that create high added value and have great technological potential. The purpose of the measure is to attract, retain and integrate foreign talent in Lithuania.

All of these schemes, including the Lithuanian one, differ from more traditional schemes by targeting less experienced entrepreneurs and not necessarily requiring capital investment (let alone employment creation). Except for the Lithuanian scheme, they also differ from skilled workers’ visas, which correspond to employment offers and require higher qualifications (Patuzzi, 2019). They seek to bridge a gap in immigration policies by offering an option for younger, less experienced entrepreneurs with limited resources. There is also innovation in the marketing of this new immigration channel: dedicated websites are renewing the image of procedures towards entry and work on the territory of another country¹²⁹. Overcoming the burden and costs for TCN entrepreneurs trying to develop their business on the national territory also seems to be the aim of some of these schemes¹³⁰. This model should be adopted at EU level through a new EU visa for entrepreneurs, inspired by these national schemes, that all Member States would have to introduce into their legislation. Compared to current investor residence programmes, which are currently in force in many Member States and do not include any human capital requirement, the EU model for entrepreneurs could set standards to ensure that the human capital component (innovative business idea, business plan, etc.) is a requirement to benefit from such a scheme. The EU could also – in addition or as an alternative – support national schemes.

One of the strongest arguments in favour of a single EU model for start-up visas is the observation that national programmes cannot overcome territorial limits: entrepreneurs concerned by national schemes have no access to free movement and cannot reap the full benefits of the single market. This explains why the European Commission considered amendments to the BCD to facilitate immigration of start-up entrepreneurs at EU level; to overcome this fragmentation (European Commission, 2015). But the extension was eventually dropped: the Blue Card framework, designed

¹²⁹ See, for instance, for France since 2017: <https://lafrenchtech.com/en/about/>. For another example, see the Singapore ‘Startup SG’ scheme, launched in 2017: www.startupsg.gov.sg/programmes/4898/startup-sg-talent

¹³⁰ See: <https://lafrenchtech.com/en/how-france-helps-startups/welcome-to-france/>.

for traditional employment, was not considered fit for this group of economic migrants. As a result, the EU initiative has been limited, until now, to providing start-up entrepreneurs who are already in Europe better access to the single market, through a digital one-stop shop that provides information and helps them gain access to investment capital¹³¹.

The idea of a new path for legal migration that is devoted to attracting entrepreneurs to the EU should thus be considered outside the current revision of the BCD. One way to proceed is to create a specific instrument that would address the issues resulting from the diversity of national schemes. Since start-up visas apply to a limited numbers of migrants and need to be combined with other attractive measures in a competitive context, it seems reasonable to conceive this new path to immigration independently of existing ones.

To design an appropriate instrument, which could take the form of a new directive, a number of issues would have to be resolved when considering national examples. These issues concern, namely: admission criteria (conditions concerning candidates and their business, need for a local sponsor or partner, etc.), their assessment (other actors than immigration officers should be involved) and the kind of support or incentives that should be associated with the programme (training, funding, access to facilities, network, etc.).

If the preference goes to support to national schemes, the EU could focus on intra-EU mobility for the entrepreneurs concerned. Instead of a new visa to the EU, it is indeed possible to decide that when TCNs benefit from national schemes fulfilling certain conditions, defined in an EU directive, they have a right to move to another Member State for the purpose of developing their activity. Such an instrument would be based on the idea of mutual recognition of the selection of promising entrepreneurs through these national schemes.

Policy option 2E: youth mobility schemes

Practical implementation
<ul style="list-style-type: none"> • Benchmarking national youth mobility schemes and disseminating best practices. • Adopting a regulation to create an EU youth mobility scheme, including an intra-EU mobility clause.

In OECD countries, the general tendency has been to expand and strengthen the working holiday maker (WHM) and youth mobility schemes. The rationale of these schemes is to encourage young people to work, study and travel. The objective is to offer young workers and students the possibility to gain work experience abroad. Because youth mobility schemes are a matter of interest for the EU, its intervention should mainly consist of supporting their development. The EU action can be multifaceted. It could first adopt a recommendation, which would have the objectives of benchmarking national youth mobility schemes and disseminating best practices. The EU could also contribute to 'Europeanising' youth mobility schemes. A regulation could be adopted which would define the conditions for European youth mobility schemes, including an intra-EU mobility clause for young TCNs. The 'models' for these schemes are the Australian WHM, the New Zealand working holiday visa and the Canadian International Experience (IEC) programme. Despite their differences, these schemes have a lot in common. They are destined for young people (usually aged 18 to 30 years) from certain countries, who are granted visa and residence permits to apply for one of two visas (working holiday or work and holiday) based on reciprocal agreements. In Australia, the visas enable young people to travel for extended periods and to support themselves during their stay with short-term employment in any industry. In practice, WHM visa holders frequently undertake agricultural work and/or work in certain industries (aged care and disability services, fishing and

¹³¹ See: <https://digital-strategy.ec.europa.eu/en/policies/startup-europe>.

pearling, tree farming, construction, mining, tourism and hospitality). The option of a third visa is sometimes available to applicants who undertake six months' specified work in a specified regional area whilst on their second visa.

EU action could be based on Article 79 TFEU, given that its second indent gives the Council and the Parliament the competence to adopt measures related to: '(a) the conditions of entry and residence, and standards on the issue by Member States of long-term visas and residence permits, including those for the purpose of family reunification'.

The action could take two forms. First, the EU could act as a promoter of national youth mobility schemes. Member States have experience in a variety of schemes, and there is room for evaluation and benchmarking. The EU is the best suited entity to provide a comparison and offer information on Member States' best practices. A recommendation is probably the most adapted instrument for this action. It would be particularly interesting to analyse how different Member States have negotiated and implemented their memoranda of understanding with Canada, New Zealand and Australia, which are the most important partners. A comparison of Member States' youth mobility schemes would allow the EU to identify and flag situations in which the conclusion of multilateral – instead of bilateral – agreements would be a more efficient strategy to negotiate with third countries, and to offer more attractive conditions to young professionals. In this case, the EU could encourage its Member States to take a more 'European' action.

The second possible action could be for the EU to intervene to define a common framework for the development of youth mobility schemes. This requires the adoption of a regulation in which the EU would define the conditions for granting a visa and residence and work permit (including the type of employment young TCNs could take). An intra-EU mobility clause would be incorporated into the text, which would contribute to the attractiveness of the EU. Until now, youth mobility schemes have only enabled youth mobility on the territory of the sole Member State that is party to the agreement. Allowing mobility within the whole EU territory would offer young professionals the possibility to work in two (or more) different EU countries, and to learn several languages. This would make the EU a destination as attractive as New Zealand, Canada or Australia. However, it must be noted that the system envisaged would have to consider that Member States have kept exclusive competence on deciding the number of migrants workers they want to accept on their territory (Article 79(5) TFEU). Consequently, the number of young people moving from the EU to third-country territories would be defined by the Member States alone, probably in the international agreement concluded with their partners.

Finally, the EU should intervene to align Member States' youth mobility schemes with the EU's external policy in the field of migration. The EU has developed or supported many partnerships, and youth mobility schemes should be part of this strategy. These schemes, which operate with selected countries, are generally concluded between high-income countries that are perceived as low risk (i.e., of participants overstaying). However, recent examples¹³² show that criteria other than the income can justify the choice of a partner for youth mobility purposes: a long tradition of cooperation between two countries¹³³ or the crucial need to fill labour shortages can both play a role. In this context, the EU could perform the role of facilitator and encourage Member States to conclude agreements with low-income countries that are considered to be important EU partners in the field of migration. If included in a global migration strategy, youth mobility schemes could indeed be concluded with third states that are the countries of origin of a large proportion of migrants coming

¹³² The UK Government has recently concluded a scheme for young professionals with India: www.gov.uk/government/news/uk-india-agree-partnership-to-boost-work-visas-for-indian-nationals.

¹³³ Countries can also agree on a maximum number of young people allowed to move.

to the EU. The Euro-Mediterranean Partnership (EUROMED) could be a proper framework, for instance, as it seeks to bring together the EU Member States and 16 Southern Mediterranean countries in cooperation to promote, namely, economic integration.

Policy option 2F: skilled refugees' mobility schemes

Practical implementation
<ul style="list-style-type: none"> • Benchmarking national refugee mobility schemes and disseminating best practices. • Providing financial support to refugee schemes. • Introducing monitoring schemes.

While Article 26 of the Reception Conditions Directive¹³⁴ grants beneficiaries of international protection who reside in the EU the right to engage in employed or self-employed activities immediately after protection is accorded to them, refugees who are outside the EU territory – in particular the thousands of people who have been recognised as 'refugees' by the UNHCR – have no right to access the Member States' territory. The EU should thus take action to facilitate their access to the EU for work purposes. One way to proceed is to support the development of a specific scheme for skilled refugees' access to work, based on private sponsorship, in which employers would play a substantial part.

The UNHCR estimates that more than 1.2 million refugees need resettlement worldwide. The EU and its Member States participate in the UNHCR resettlement programme, but their contribution remains modest, resettling fewer than 30 000 refugees per year¹³⁵. This is why 'private sponsorship schemes' have gained interest in the EU arena, as these schemes are indeed assumed to represent complementary pathways to the EU.

The 'model' is the Canadian Private Sponsorship of Refugees Programme, the longest running scheme to date,¹³⁶ which is often described as a success given that more than 350 000 refugees have been resettled since the 1970s. Some Member States, too, have experience in a number of private refugee sponsorship schemes, ranging from the Italian and French 'humanitarian corridors' to the German and Irish 'relatives as sponsors' programmes. There is also the 'community sponsorship' programme in the UK¹³⁷. As the variety of programmes indicates, there is no universally agreed definition of a 'private sponsorship programme'. In general, however, it refers to a public-private partnership in which private partners (NGOs, civil societies, faith communities, employers, etc.) provide financial, social and/or emotional support while the government facilitates legal admission (i.e., allows entry and residence).

To facilitate refugees' access to the EU for work purposes, the EU could borrow from this international experience and support the development of new schemes specifically created for skilled refugees.

¹³⁴ Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast), OJ L 337, 20.12.2011, pp. 9-26. For a description of the limits to asylum seekers' and refugees' access to work in different Member States, see Jesuit Refugee Service (2021), 'Bien accueillir les réfugiés et mieux les intégrer', 13 April 2021, www.jrsfrance.org/reussir-laccueil-et-lintegration-des-refugies-en-france/.

¹³⁵ In December 2019, EU countries pledged a total of 30 000 resettlement places for 2020. In the New Pact on Migration and Asylum, the Commission has extended both the EU target quota of 30 000 as well as the ad hoc pledges that Member States made for 2020 into 2021.

¹³⁶ Canada's Private Sponsorship of Refugees Programme. See: Martani (2021).

¹³⁷ See ERN+ Scoping Paper (2017), Private Sponsorship in Europe, Expanding Complementary Pathways for Refugee Resettlement, <file:///Users/utilisateur/Downloads/ERN+PrivateSponsorshipinEurope-Expandingcomplementarypathwaysforrefugeeresettlement.pdf>.

This would be based on private sponsorship, in which employers would play a substantial part. Employers can indeed be direct sponsors by subsidising the resettlement of skilled refugees, and/or support the action of other private sponsors and intervene to help refugees access the labour market. The EU action could range from bringing financial support to the programmes, to benchmarking the different schemes that exist. The EU could also enounce common rules to be respected by the Member States and private sponsors for the sake of refugees' rights protection.

To create such refugee mobility schemes would allow some of the gaps and barriers mentioned in Chapter 3 of this report to be reduced. Because private sponsorship programmes offer a credible legal pathway to the EU, they could help reduce the incentives for refugees to embark on dangerous journeys (section 3.1.1.3). The action would also help depart from the representation of refugees as merely passive recipients of protection. Rather, refugees would be seen as possible participants in the domestic labour market. Thanks to the improved possibility to work, the risk of de-skilling and brain waste would be reduced. Refugee mobility schemes would also allow some labour shortages to be filled. As indicated in section **Error! Reference source not found.**, refugees' skill profiles often correspond to employers' demand, as expressed by the job vacancies registered in the EU¹³⁸. Private sponsorship would also improve refugees' integration in the labour market insofar as private sponsors, who contribute to reception and integration efforts, can facilitate their access to work in many ways¹³⁹. Given the variety of private individuals who are generally involved in community sponsorship programmes, one can also expect the intervention of professionals in very different sectors and with different skills, which is an asset for asylum seekers and refugees.

Finally, given that the number of displaced persons is likely to increase in the future, safe legal pathways to protection are needed more than ever. Despite the EU Member States' commitment to participate in the UNHCR resettlement programme, the safe pathways remain limited in number and concern a tiny percentage of the world refugee population. Private sponsorship schemes for refugees can help Member States increase the number of resettlement places and successfully integrate refugees into welcoming communities.

Considering the objective pursued, EU action in favour of skilled refugee mobility schemes is more likely to be founded on Article 79 TFEU than on Article 78. Indeed, the objective of the scheme is not, as such, to provide protection. Rather, the ambition is to allow 'refugees' to be admitted in a Member State. The EU action is therefore concerned with entry and residence, and for this reason could be based on Article 79(2)c.

In practice, EU support for private sponsorship schemes for refugees could take different forms.

First, the EU could act as a promoter of these private sponsorship schemes. Member States have experience in a variety of private sponsorship schemes for migrants, and third countries have also created specific schemes for refugees. The EU is a well-suited entity to provide a comparison and offer information on the best practices of its Member States. The EU could also provide support for capacity-building of civil society actors (employers) engaged in private sponsorship schemes. It could foster dissemination of information on these programmes to scale up existing schemes. A recommendation providing guidelines would be an adequate legal instrument for this EU action.

Second, the EU could provide financial support. A pilot project funded by the Asylum and Migration Fund could reimburse employers for visa fees and the costs of having to certify educational or

¹³⁸ See Rasche (2021).

¹³⁹ The services they can provide range from legal and administrative advice (suitable for skills recognition procedures in particular) to language training and support to those asylum seekers and refugees who want to work as entrepreneurs and need financial support, not to mention moral support, which is crucial for people who need international protection.

vocational qualifications. The fund could also subsidise the cost of language courses offered to refugees, and possible (re)training. In addition, because the successful functioning of the refugee scheme requires that refugees with the adequate skills can be identified, the ‘refugee track’ of the future EU talent pool (see policy option 2H) could be used.

Finally, EU monitoring of the schemes is needed to avoid different difficulties. Studies have evidenced the risk of refugees being dependent on their employers (Ortensi & Ambrosetti, 2021). If employers play a key role in sponsorship programmes (e.g., by paying entry and residence fees and part of their training or language courses, and convincing the national authorities to provide residence permits), there is a clear risk that employers abuse their position and exploit the refugees. The EU could rely on the actions taken in the frame of policy option 3B, which range from the intervention of equality bodies or the ELA and protection by trade unions or migrants’ associations, to judicial enforcement of rights. The EU action could also consist of inviting and encouraging the employers hiring from refugee schemes to enter into a corporate social responsibility partnership with the EU. Employers would voluntarily commit to offer labour conditions that are fully consistent with EU values and principles.

Policy option 2G: supporting skills mobility partnerships

Practical implementation
<ul style="list-style-type: none">• Benchmarking national SMPs.• Supporting financially and materially the development of new SMPs.• Monitoring implementation of SMPs and their respect of EU values and rights.

In line with the global skill partnerships evoked in the UN Global Compact¹⁴⁰, the EU should increase its involvement in the development of skills mobility partnerships, which are increasingly viewed as agreements to the mutual benefit of origin countries, destination countries and migrants (Clemens, 2009). The EU action would range from adopting a recommendation for its Member States to set up the ‘best possible’ SMPs (including SMPs involving several Member States) with selected partners, to supporting their development through financial and material support (including concrete actions to improve training, candidate selection and action in favour of qualification recognition). The EU could also involve its different structures to help the Member States implement and monitor SMPs and their compatibility with EU rules and values.

SMPs have developed at a rapid pace around the world: there are around 70 skills-related projects in existence (IOM, 2020). These partnerships link training and skilled migration. Countries of migrants’ origin and countries of destination conclude an agreement, in which they decide who will bear the costs of training skilled migrants, and allow a portion of the economic gains from skill mobility to foster skill creation in the countries of origin.

In practice, the implementation of SMPs requires different steps. A pre-migration agreement between countries must be signed first¹⁴¹, in which the governments and private-sector partners generally agree on the main aspects of the partnership. Then two-track training (home-track and away-track training) is organised in the country of origin. The destination country, and possibly employers, work with the origin country training centres to ensure that students receive high quality training, and that training is given in the areas where skills are needed. This is intended to ensure that graduates are placed successfully. Upon completion, migrants’ skills and experience are

¹⁴⁰ https://refugeesmigrants.un.org/sites/default/files/180711_final_draft_0.pdf.

¹⁴¹ If a binding treaty takes too much time to be signed and ratified (and is not required), a bilateral labour agreement can clarify expectations.

recognised by all parties in the partnership. Finally, TCN workers who have followed the home-track training join the local labour market, while those who have followed the away-track training will be placed abroad, in jobs corresponding to their skill level.

As stated above, SMPs are increasingly viewed as mutually beneficial agreements (Clemens, 2009). Because destination countries direct the training to their labour market needs, SMPs can help them fill the skill shortages identified in section **Error! Reference source not found.** In contrast with current EU action in the field of skilled migration, which mostly targets highly skilled migrants, SMPs can be deployed for low and medium-skilled migrants, in relation to actual EU needs. Employers in the destination country can also gain from this approach. Small and medium-sized enterprises (SMEs) often lack experience and capacity in recruiting workers from other countries, and can benefit from targeted resources and support to navigate this process. In addition, as evidenced by experience with recent pilot projects, the schemes can provide an avenue for employers to build their networks in the partner country and to identify avenues for expanding their future business operations (Hooper, 2019). SMPs are also beneficial for TCN workers and their home countries. By participating in training, TCN workers adjust their skills to labour market needs, which can reduce the differences in labour market outcomes between migrants and natives (section 3.1.2.4). One may add that, given that TCNs will possess qualifications recognised in Europe, SMPs are likely to reduce the risk of TCNs de-skilling, being underpaid and working under exploitative conditions (section 3.2.2.3). In addition, assuming that SMPs select men and women equally among the trainees, they are expected to have a positive impact on the situation of women, who would be granted, equally to men, the possibility to graduate and receive support to access the labour market in the destination state. This is likely to reduce the gaps and barriers to access to employment, and the risk of de-skilling mentioned earlier in the report (section 3.2.2.2). Moreover, because SMPs aim to manage mobility, they offer a safe legal pathway to the EU for economic migrants. This is the condition for reduced irregular migration described in this report (section 3.2.2.1).

Finally, in contrast with traditional approaches to skilled migration, which tend to mainly (if not only) benefit the host states' labour markets¹⁴², SMPs can also be beneficial to the countries of origin. The training component plays a crucial role in limiting brain drain. In addition, because mobility is facilitated, there is no risk of interruption of remittance, which contributes to the development of the countries of origin. In short, SMPs can be deemed as a useful alternative to other approaches generally used for skilled migration by states of origin, such as migration limitation, compensation payments after migration or obliged return migration (Clemens, 2015).

The EU could base its action in this domain on different legal bases. Article 79 (1) TFEU allows the EU to take measures in order to develop a common immigration policy aimed at ensuring 'the efficient management of migration', 'fair treatment of third-country nationals residing legally in Member States, and the prevention of, and enhanced measures to combat, illegal immigration'. SMPs precisely aim to ensure the management of work mobility between third countries and the EU, and to create a new legal pathway to the EU. They participate in the EU effort to efficiently manage migration and combat irregular migration. In addition, a tool that increases training and offers TCN workers the possibility to match jobs with their skill level is related to the objective of offering 'fair treatment' to TCNs. Under Article 166 TFEU, the EU is also competent in the field of vocational training, which is probably a legal basis well suited to its action as regards SMPs. Pursuant to Article 166, 'the Union shall implement a vocational training policy, which shall support and supplement the action of the Member States'. The EU's action shall aim, in particular, 'to improve initial and continuing vocational training in order to facilitate vocational integration (...) into the labour

¹⁴² On the limits of the migration pilot projects launched in 2017, see: Hooper (2019) and Stefanescu (2020).

market'. Under Article 166(3), the EU and its Member States are incited to 'foster cooperation with third countries and the competent international organisations in the sphere of vocational training'.

The EU's action in support of the development of SMPs could take four main forms.

First, the EU could act as a promoter and facilitator for the conclusion and implementation of SMPs. It could create networks and/or high-level reflection groups in which states would share information and exchange best practices. Some Member States have strong expertise in the field. The Commission could adopt a recommendation, in which guidelines would be provided to disseminate the information on good practices and orientate the Member States' action towards efficient schemes. Experience has indeed revealed that the number of workers concerned by SMPs can remain limited for several reasons: training and cooperation require time, money and infrastructure; and it supposes to involve employers, who can prefer to recruit through other channels. The EU could thus help evaluate in which sectors SMPs are more likely to function well, targeting certain categories of skills and professions¹⁴³. Moreover, the EU could play a role in promoting the coherent alignment of SMPs with other agreements concluded by the EU and/or its Member States in the field of migration. First, the EU could target a number of third countries which it aims to develop its partnerships. This selection could also be aligned with the EU development policy.

Second, the EU could bring its own expertise and financial support to ensure the smooth functioning of the SMPs. It could contribute to the selection of trainees and help Member States with skills and qualification evaluation and recognition. On the ground, the entities in charge of organising training indeed need to evaluate trainees to adjust the courses to the migrants' actual skills. The EU has already developed several instruments and practices in these matters (see policy option 1B), which would be of help to the Member States and to employers. Finally, the EU could offer its financial support and fund (part of) the cost of training. This includes, of course, financial support for language training. In particular, the EU could mobilise its Asylum and Migration Fund and/or development funds to fund training in the countries of origin. However, if the aid project is directed to benefit the EU country's labour market, one may ask whether it can qualify as official assistance development.

Third, the EU could act as an entity in charge of monitoring the coherent and fair development of the SMPs. To this end, the EU could draw from its experience in the field of mobility partnerships¹⁴⁴: a task force could be created, consisting of representatives of the Commission and participating Member States. The Commission would also play a substantial role by organising meetings and updating the 'scoreboard', a document produced for each SMP showing all the projects being implemented and their state of play. On the ground, EU delegations could collaborate with Member States' embassies and non-EU countries' authorities to monitor implementation.

The EU could also define a framework agreement, which would recommend different pre-requisites, on human rights protection and labour standards (including on minimum wage, equal treatment and working conditions). This latter action requires a recommendation to be adopted.

Finally, the EU could provide support to 'Europeanise' SMPs. In its recommendation mentioned above, the EU could incite (including through financial leverage) its Member States to conclude multilateral – rather than bilateral – agreements, in which a clause could be incorporated allowing trainees to work in any of the contracting parties after graduation.

Policy option 2H: EU talent pool

¹⁴³ Clemens argues that SMPs are best suited to professions like nursing, where there is a very large gap in the price of nursing services between migrant-origin countries and destination countries.

¹⁴⁴ See: Restow (2015).

Practical implementation

- Creating database (a roster composed of migrants who have expressed a willingness to work in the EU).
- Creating a specific refugee track in the pool.

The different mobility schemes presented above are based on the idea that different categories of TCN workers would have ‘privileged’ access to the EU. But one main difficulty is to identify and select the TCNs who match the employers’ needs and should be allowed for admission. The EU therefore needs to develop an instrument to help Member States and employers identify these migrants and obtain information on their skills: an EU talent pool. To achieve this, the EU could adopt a regulation determining the objective, method and organisation of the scheme.

The regulation would lead to the creation of a roster composed of migrants who have expressed a wish to migrate to an EU country for work purposes: this corresponds to an ‘Expression of Interest’ (Eoi) model (already used outside the EU, as developed below). This ‘pool’ of talented migrants makes it possible for EU employers to have facilitated access to workers corresponding to their needs. It helps match employers with prospective employees, and address labour market shortages. It is conceived as a one-stop shop for TCN workers, EU employers and national administrations. In its most extensive conception, it can cover all sectors of employment for low, medium and highly skilled workers, employees and self-employed labour, including in SMEs and start-ups.

There are interesting examples around the globe of what can be done¹⁴⁵. The Eoi model used by New Zealand, Australia and Canada to select talent is one of them. Considered one of the most modern innovations in skilled labour migration management, it is a several-stage system: in a pre-application phase, candidates for migration express an interest in different migration programmes; if they are selected, they are placed in a pool, and ranked; eventually, Eois are drawn from the pool, by rank, and the migrants concerned can apply for a visa for a given migration programme. Although each national system is different, they have the same inspiration and many common aspects. Their central objective is to deal with queues of highly skilled migrants awaiting visas.

This would not be the objective of an EU talent pool, which would not aim to manage queues: no backlog in highly qualified applications exists today. The EU tool would be centred on increasing the attractiveness of the EU for talented migrants, and solving labour shortages.

EU action in this field could be based on Article 79 (1) TFEU, which gives the EU competence to develop a common immigration policy aimed at ensuring the ‘efficient management of migration’ at all stages. This is an adequate legal basis for the development of a talent pool, whose aim is precisely to manage migration. It must be noted that the system envisaged would have to consider the fact that Member States have kept exclusive competence on permit issuance and on deciding on number of migrant workers they want to accept on their territory (Article 79 (5) TFEU).

To conceive an EU talent pool, two central elements must be kept in mind. One of them is that a talent pool requires the EU to be an attractive destination for (talented) migrants. The other, more technical, is the capacity to constitute a pool, which can serve to select the best candidates for immigration.

Insofar as the first element is concerned, attractiveness requires that ‘talented’ migrant workers have EU-wide opportunities, resulting from a right to intra-EU mobility: this is a key factor of attractiveness of the EU territory. To increase intra-EU mobility, recognition of qualifications, skills and experience

¹⁴⁵ See OECD (2019) on these models, and possible adaptations in the EU.

must be ensured. The success of an EU talent pool depends on the development of portability of qualifications across the EU¹⁴⁶. This factor should determine the type of measure adopted at EU level.

Concerning the second element, the capacity to constitute a pool requires a common system of assessment and recognition of qualifications or skills at the external border of the EU, **which connects this policy option to policy option 1B**: harmonisation of recognition must be ensured to enable the creation of the talent pool. Indeed, the pool, from which employers from all Member States should be able to draw, must be constituted based on common criteria to select migrants. This requires a common approach concerning the assessment of qualifications, skills and experience upon entry into the territory of the Union. As a result, it can be considered that assessment and recognition of non-EU qualifications (policy option 1B) and the construction of an EU talent pool (policy option 2H) must be worked out in parallel.

With these elements in mind, a talent pool is essentially a publicly managed platform with a mechanism to pre-screen and pool interested candidates who meet the admission criteria¹⁴⁷. It could be created through a regulation determining the aim of the system and method employed, considering data protection rules. Criteria for selection of candidates would have to vary depending on the target of the pool (highly skilled or lower-skilled workers; a sectoral approach or a cross-industry pool) but, in all cases, qualifications, skills and/or experience would be considered to select candidates, in addition to other grounds, including language.

If the pool was limited to certain sectors (health professionals or IT engineers, for instance), where an EU system of recognition of qualifications existed (formally or industry-based), it would be possible to envisage a truly European pre-screening of candidates, including assessment of their qualifications at EU level, which could be associated with intra-EU mobility. The sectoral EU talent pool could be combined with a skill development component to identify where training is needed to ensure that candidates fill the criteria for the pool.

The talent pool could, at the same time, work as an employment-matching platform (or work alongside such a platform). It could serve to identify an employer, which would give access to the pool. As such, the EU talent pool would be limited: far from being a new migration channel, it would rather be a tool for facilitating access to the EU for migrants who meet EU employers' needs.

Finally, building upon Lucas Rasche's (2021) suggestion, the EU could incorporate in a future EU talent pool a 'designated refugee track'. In the context of the current conceptualisation of the future EU talent pool, there is indeed room for reflection on the opportunity to embrace skills-based pathways for refugees. The specific track for refugees would aim to add a protection dimension to this labour mobility scheme: people recognised as refugees by the UNHCR would have their skills and qualifications registered in a database to match them with employment offers in the EU. This has already been experienced beyond the European context: Talent Beyond Boundaries (TBB)¹⁴⁸ is a private initiative matching refugees' skill with employers in Canada and Australia. The creation of a refugee track does not aim to be a new safe legal pathway: it is only conceived as a specific branch of the general EU talent pool, devoted to refugees. But once candidates 'are in the track', their admission to the EU territory depends on existing pathways (or future pathways, see policy option 2F) to the EU.

¹⁴⁶ As mentioned in OECD (2019), esp. p. 21.

¹⁴⁷ See the different versions of the European talent pool, proposed by the OECD (2019).

¹⁴⁸ www.talentbeyondboundaries.org.

4.3 Policy cluster 3: improve TCN workers' rights and employment conditions, including policies on the demand side of the labour market

Improving TCN workers' rights and employment conditions requires that they are granted equal rights to EU workers. Better enforcement of TCNs' existing rights is also needed. Another way towards increased rights and protection for migrant workers consists of reducing uncertainty with respect to obtaining long-term resident status.

Policy option 3A: equal rights for TCNs and EU workers

Practical implementation	
	<ul style="list-style-type: none"> Expanding and harmonising equal treatment rules of migration directives.
And/or	<ul style="list-style-type: none"> Creating a new legislative instrument concerning equal treatment of TCN workers.
And/or	<ul style="list-style-type: none"> Adopting a directive prohibiting discrimination on nationality.
And/or	<ul style="list-style-type: none"> Inciting Member States to ratifying the ILO Convention on migration for employment.

Improving the situation of TCN workers on the territory of the EU can be best achieved through the alignment of their rights with the rights of EU citizens (nationals of Member States). This requires an evolution of EU law.

Such an objective is far from revolutionary: equal treatment is a general principle of EU law, and so is non-discrimination on nationality¹⁴⁹. Prohibition of discrimination on nationality is also mentioned at Article 21(2) CFR¹⁵⁰.

However, equal treatment of EU workers and workers from third countries has not yet been fully achieved. One explanation for this is that nationality is not a prohibited ground for discrimination in EU law, unless the nationality of a Member State is concerned. Nationality is not among the grounds prohibited by the non-discrimination directives derived from Article 19 TFEU¹⁵¹. Directive 2000/43, which has the largest scope of application (covering employment, education, housing and the provision of goods and services), concerns race and ethnic origin. Discrimination on the basis of religion, sexual orientation, disability and age has been banned by Directive 2000/78, in the more limited domain of work and working conditions. According to the CJEU, Article 18 TFEU (prohibiting discrimination based on nationality) does not 'apply to cases of a possible difference in treatment between nationals of Member States and nationals of non-member countries'¹⁵². Although, in principle, non-discrimination on nationality should apply to TCNs (based on Article 18 TFEU), it is

¹⁴⁹ Case C-179/90 *Merci Convenzionali Porto di Genova* (1991) EU:C:1991:464, para 11.

¹⁵⁰ On the impact of Article 21(2), see Bribosia, Rorive & Hilaire (2020).

¹⁵¹ Directive 2000/43 (EC) implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (2000) OJ L 180/22; and Directive 2000/78 establishing a general framework for equal treatment in employment and occupation (2000) OJ L 303/16.

¹⁵² Vatsouras para 52. On this limitation of the principle of non-discrimination, see: Evelien Brouwer and Karin de Vries, 'Third-Country Nationals and Discrimination on the Ground of Nationality: Article 18 TFEU in the Context of Article 14 ECHR and EU Migration Law: Time for a New Approach' in Marjolein van den Brink et al. (eds), *Equality and Human Rights: Nothing but Trouble? Liber Amicorum Titia Loenen* (SIM, 2015) 123.

limited by the notion that situations are not comparable¹⁵³. All in all, EU law does not contain a general principle of non-discrimination based on nationality that guarantees that TCNs are treated in the same way as EU citizens.

In addition, legislation adopted in the field of free movement of workers¹⁵⁴ and ECJ case-law¹⁵⁵ have, so far, limited the benefit of equal treatment based on nationality to nationals of the Member States.

Some TCNs do benefit from equal treatment: family members of EU mobile workers¹⁵⁶ and TCNs covered by the migration directives, which contain provisions granting TCNs equal treatment in certain domains¹⁵⁷. There are also general equal treatment rules prohibiting discrimination on nationality in some EU association agreements, such as the Agreement on the European Economic Area (EEA), the Free Movement of Persons Treaty with Switzerland and the Association Agreement with Turkey¹⁵⁸.

But to extend these rules and generalise equal treatment for all TCNs, EU law needs to be modified. There are four different paths to achieving equality in the domain of employment and working conditions: 1) expanding and harmonising equal treatment rules in the migration directives; 2) adopting a new legislative instrument concerning equal treatment of third-country workers; 3) adopting a directive prohibiting discrimination based on nationality (including nationality of a third country); and 4) inciting Member States to ratify the International Labour Organization (ILO) Convention on Migration for Employment. The second and third paths suggested above towards equal treatment relate to the 'binding immigration code' proposed in the CoNE study. Indeed, a central idea of the code consists of abandoning the sectoral approach and adopting a directive covering all TCNs, regardless of their skills status, including an equal treatment rule.

1) Expanding and harmonising equal treatment rules in the migration directives

One step forward in terms of equal treatment would be to standardise the equal treatment rule in all directives, and to limit restrictions, in line with the approach used for long-term residents.

In the EU system, long-term residents benefit from the most extensive equal treatment rule, except for social security. One way to improve the equal treatment of TCNs would be to use the concept of equal treatment in the LTRD as a model, to be replicated in all the other directives. In addition, to fill the remaining gaps, inspiration could be drawn from other directives (such as the BCD) and, for social security, from the coordination of the social security systems of Member States. This evolution requires amendments to all existing migration directives. It would not cover TCNs, who are outside of the scope of these directives.

The LTRD was adopted on the basis of the progressive pre-Lisbon provisions of the TFEU, in order to foster the integration of TCNs who have settled in a Member State¹⁵⁹. Article 11 LTRD grants equal treatment for access to employment, education, recognition of diplomas, social security and social

¹⁵³ See again, recently, the Opinion of Advocate General Szpunar in *X v Belgium*, C-930/19.

¹⁵⁴ In the domain of free movement of workers, this restriction of the scope of equality to nationals of Member States was explicitly mentioned in Regulation (EEC) No 1612/68 (Article 1), which limits equal treatment to nationals of Member States.

¹⁵⁵ Case 238/83 *Meade* (1984) EU:C:1984:250 (the CJEU decided that Article 45 TFEU prohibiting discrimination on nationality to ensure free movement of workers only applies to nationals of Member States).

¹⁵⁶ Regulation (EEC) No 1612/68, now replaced by Regulation (EU) No 492/2011. Directive 2004/38 also affirms the right to equal treatment of family members.

¹⁵⁷ For a comparative analysis of the rights of EU mobile workers and TCNs, see: Wollenschläger et al. (2018).

¹⁵⁸ On this fragmented approach, see: Eisele (2014).

¹⁵⁹ Case C-508/10 *European Commission v Kingdom of the Netherlands* (2012) EU:C:2012:243.

assistance, tax benefits, access to goods and services, freedom of association and affiliation, and free access to the entire territory of the Member States¹⁶⁰. In the case, *European Commission vs the Netherlands*, the Court made it clear that the right to equal treatment is the general rule under the LTRD. As a result, when derogations from that right are possible¹⁶¹, according to the Directive, Member States can only rely on them if they have stated clearly that they intended to do so¹⁶².

All of the other migration directives contain equal treatment rules, but they not as extensive as those contained in the Directive benefiting long-term residents. The equal treatment provision of Article 14 BCD, for instance, has a more limited scope, allowing restrictions regarding study and maintenance grants and loans, as well as regarding procedures for obtaining housing and access to university and post-secondary education. More importantly, equal treatment can be subject to residence on the territory¹⁶³, a limit that the Court of Justice has interpreted restrictively but could not completely set aside¹⁶⁴. The equal treatment provision of the SWD does not cover housing or study and maintenance grants and loans, and restrictions can apply to the benefiting of rights or advantages in the field of education and vocational training.

Although it has the most extensive applicability, in most aspects, equal treatment granted by the LTRD does not lead to general assimilation of TCNs with nationals: equal rights are only granted in the precise domains listed in the Directive (at Article 11, mentioned above). When, for instance, Member States choose to oblige long-term residents to pass a civic integration examination, this obligation is not, as such, considered incompatible with the equal treatment rule¹⁶⁵. The Court of Justice only requires that Member States make sure that achievement of the Directive's objectives is not jeopardised by the payment of a fine in the event of failure to comply with this obligation, in addition to the costs incurred in sitting the examination.

¹⁶⁰ Article 11(1) reads as follow: 'Long-term residents shall enjoy equal treatment with nationals as regards:

- (a) access to employment and self-employed activity, provided such activities do not entail even occasional involvement in the exercise of public authority, and conditions of employment and working conditions, including conditions regarding dismissal and remuneration;
- (b) education and vocational training, including study grants in accordance with national law;
- (c) recognition of professional diplomas, certificates, and other qualifications, in accordance with the relevant national procedures;
- (d) social security, social assistance and social protection as defined by national law;
- (e) tax benefits;
- (f) access to goods and services and the supply of goods and services made available to the public and to procedures for obtaining housing;
- (g) freedom of association and affiliation and membership of an organisation representing workers or employers or of any organisation whose members are engaged in a specific occupation, including the benefits conferred by such organisations, without prejudice to the national provisions on public policy and public security;
- (h) free access to the entire territory of the Member State concerned, within the limits provided for by the national legislation for reasons of security.

¹⁶¹ Social benefits can be made dependent upon a condition of residence on the territory (Article 11(2)); proof of appropriate language proficiency can be required for access to education and training, and access to university can be subject to the fulfilment of specific educational prerequisites (Article 11(3)(b)).

¹⁶² CJEU, Case C-571/10 *Kamberaj* (2012) EU:C:2012:233. See also, CJEU, C-303/19, *Istituto Nazionale della Previdenza Sociale* (2020).

¹⁶³ Article 14(2) Directive 2009/50/EC.

¹⁶⁴ For a restrictive interpretation of the condition of residence of family members, to benefit from social security benefits: CJEU, C-302/19, *Istituto Nazionale della Previdenza Sociale* (2020).

¹⁶⁵ Case C-579/13 P and S (2015) EU:C:2015:369.

Another important limit in the LTRD lies in the possibility for Member States to limit equal treatment in respect of social assistance and social protection, to 'core benefits' (Article 11(4))¹⁶⁶. The Court of Justice decided that this limit must be conceived strictly¹⁶⁷, and it construed the notion of core benefits extensively¹⁶⁸. Moreover, the decision required the notion of core benefits to be interpreted in the light of Article 34 CFR, which lays down the right to social and housing assistance to ensure a decent existence for all those who lack sufficient resources¹⁶⁹. As a result, all benefits that fulfil the purpose set out in Article 34 CFR constitute core benefits under the LTRD. This ruling has limited the power of Member States to restrictively interpret the right to equal treatment regarding social assistance and social protection of long-term residents. But it has not called in question the limit enshrined in Article 11(4) LTRD.

As far as social security is concerned, this is covered by the equal treatment clause of the LTRD. But exportability to a third country is not mentioned (within the EU, coordination of social security systems has applied to TCNs since the adoption of Regulation 1231/2010, which ensures exportability of benefits to another Member State). Other directives contain provisions on the right to equal treatment with nationals of the host state as regards the export of pensions, when TCNs move to a third country, or for TCNs' survivors when they reside in a third country¹⁷⁰. Exportability of these benefits is guaranteed insofar as this is provided for nationals of the Member State involved and at the same rate applied to the latter.

The directives do not contain any provisions on the aggregation of periods of insurance, employment or residence. As a result, TCNs who fulfil such periods working in a third country before their employment in a Member State, cannot bring these into account to obtain the right to benefits such as old-age, invalidity or survivors' pensions, unless they can rely on provisions in a bilateral agreement concluded by a Member State with a third country. They can only rely on Regulation 1231/2010 if they were employed in two or more Member States.

Knowing that the national legislation of several Member States requires the fulfilment of a certain period of employment and payment of contributions for entitlement to the benefits mentioned above, it is quite likely that the TCNs affected will not be able to make the necessary contributions during their limited period of work in the host Member State. Consequently, they will contribute to national social security systems, without being entitled to such benefits themselves. To avoid such an outcome, one option would be to provide for aggregation of periods of insurance.

To summarise, one way forward in terms of equal treatment consists of standardising the equal treatment rule in all directives, and limiting restrictions, in line with the approach used for long-term residents. For social security, a provision inspired by more favourable directives (the BCD, for instance) and the coordination of social security systems of Member States for social security could be added. This evolution requires amendments to all of the migration directives, which can be adopted on the same legal basis used for the adoption of the directives: Article 79 TFEU.

¹⁶⁶ Article 11(4) Directive 2003/109/EC (LTRD). In this respect, recital 12 to this directive states that 'with regard to social assistance, the possibility of limiting the benefits for long-term residents to core benefits is to be understood in the sense that this notion covers at least minimum income support, assistance in case of illness, pregnancy, parental assistance and long-term care'.

¹⁶⁷ CJEU, Kamberaj, cited above.

¹⁶⁸ These benefits include, according to the Court: 'social assistance or social protection benefits granted by the public authorities, at national, regional or local level, which enable individuals to meet their basic needs such as food, accommodation and health'.

¹⁶⁹ Ibid.

¹⁷⁰ Article 14(1)(f) Directive 2009/50/EC (BCD); Article 12(4) Directive 2011/98/EU (SPD); Article 23(1) Directive 2014/36/EU final paragraph (SWD); Article 18(2)(d) Directive 2014/66/EU (ICTD).

2) Adopting a new legislative instrument concerning equal treatment of third-country workers (on the model of Regulation 1612/68)

Another option to ensure extensive equal treatment, and possibly grant other rights to TCN workers, would be to adopt a regulation like the one adopted in 1968 to ensure the free movement of workers¹⁷¹, but including TCNs. Such an instrument would guarantee that TCN workers benefit from equal treatment for all social advantages (and even more extensively if the model of Regulation 1612/68 is followed).

Article 7 section 2 of Regulation 1612/68 (now Regulation 492/2011) concerning free movement of workers is devoted to 'employment and equality of treatment', and requires that workers who are nationals of a Member State are not treated differently from national workers of the host country by reason of their nationality in respect of 'any conditions of employment and work, in particular as regards remuneration, dismissal, reinstatement or re-employment'. They shall enjoy 'the same social and tax advantages as national workers' and also 'by virtue of the same right and under the same conditions as national workers, have access to training in vocational schools and retraining centres'. The regulation also states that any clause of a collective or individual agreement, or of any other collective regulation concerning eligibility for employment, remuneration and other conditions of work or dismissal, must be null and void, insofar as it lays down or authorises discriminatory conditions in respect of workers who are nationals of the other Member States, according to the same provision.

Under this same regulation, workers of other Member States must also enjoy equality of treatment 'as regards membership of trade unions and the exercise of rights attaching thereto, including the right to vote and to be eligible for the administration or management posts of a trade union' (Article 8). They can only be excluded 'from taking part in the management of bodies governed by public law and from holding an office governed by public law' but shall have the right of eligibility for workers' representative bodies in the undertaking. Housing is also covered, including ownership (Article 9).

In addition, the text grants rights to children: workers' children must be admitted to general educational, apprenticeship and vocational training courses under the same conditions as the nationals of that state, if their children are residing in its territory. Member States must encourage all efforts to enable such workers' children to attend these courses under the best possible conditions (Article 10).

A text including similar provisions to those included in Regulation 492/2011 could be adopted to cover TCNs, who remain, for now, out of the scope of application of Regulation 1612/68 (492/2011), using Article 79 and/or Article 45 TFEU (free movement of workers) as a legal basis. Since the text would concern the social rights of workers of third countries, Article 153 (1) g), which gives the EU competence to adopt minimum requirements concerning 'conditions of employment for third-country nationals legally residing in Union territory' would also provide a proper legal basis.

Another possibility could be to simply amend Regulation 492/2011, to extend its scope of application *ratione personae* so that it also includes TCN workers. This would only require a modification of Article 1(1) of this regulation, to dismiss the reference to 'national of a Member State' and simply replace it by 'worker' residing on the territory of a Member State. But such an amendment would go beyond equal treatment and social rights for TCNs, since Regulation 492/2011 includes the right to free movement within the EU, meaning intra-EU mobility for access to employment in

¹⁷¹ Regulation (EEC) No 1612/68, which was replaced by Regulation (EU) No 492/2011.

another Member State. Thus, if the aim is only to ensure equal treatment, it is preferable to adopt a new regulation covering only TCNs and limited to equal treatment rights.

3) Adopting a directive prohibiting discrimination on nationality (including nationality of a TCN)

EU non-discrimination law can also be a step towards ensuring equal treatment of TCNs. The model, if this path is chosen, can be either Directive 2000/43 on racial discrimination¹⁷² or Directive 2000/78 establishing a general framework for equal treatment in employment and occupation¹⁷³, the latter having a less extensive field of application than the former (*ratione materiae*), excluding housing and the provision of goods and services.

Directive 2000/78 covers:

- (a) conditions for access to employment, to self-employment or to occupation, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotion;
- (b) access to all types and all levels of vocational guidance, vocational training, advanced vocational training, and retraining, including practical work experience;
- (c) employment and working conditions, including dismissals and pay;
- (d) membership of – and involvement in – an organisation of workers or employers, or any organisation whose members practise a particular profession, including the benefits provided for by such organisations.

An extension of the scope of application, in line with Directive 2000/43, would provide larger coverage of equal treatment, since it could include, in addition:

- (e) social protection, including social security and health care;
- (f) social advantages;
- (g) education;
- (h) access to and supply of goods and services available to the public, including housing.

The advantage of using a non-discrimination law instrument is that it includes a definition of the concept of discrimination, which extends to harassment and victimisation. It would also incite an interpretation by the courts, especially the CJEU, in conformity with the interpretation of Directives 2000/43 and 2000/78, which in most cases is rather progressive.

A directive on discrimination on nationality could also take advantage of the recent development of theories on intersectional discrimination, and include this notion (currently not in Directive 2000/43 or Directive 2000/78). This would efficiently serve the objective of protecting TCNs against discrimination, since nationality often combines with other discriminatory grounds to increase exclusion and vulnerability (see 3.2.2.2 above).

A directive prohibiting discrimination on nationality could not be based on Article 19 TFEU, which does not mention nationality among the discriminatory grounds on which the EU has the power to legislate. A possible legal basis would be Article 18, according to which:

¹⁷² Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ L 180, 19 July 2000, p. 22.

¹⁷³ Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ L 303, 2 December 2000, p. 16.

Within the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited.

The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may adopt rules designed to prohibit such discrimination.

Since the Directive would concern employment and working conditions, another legal basis could be Article 153 (1) g), which, as mentioned above, gives the EU competence to adopt minimum requirements concerning 'conditions of employment for third-country nationals legally residing in Union territory'.

4) Inciting Member States to ratify the ILO Convention on Migration for Employment

The protection of TCNs' labour and employment rights can be ensured through the conclusion and ratification of the ILO Conventions by Member States. Although the EU cannot sign these Conventions, it can push its Member States to ratify them. In the framework of the strategy for the eradication of trafficking in human beings, for example, the Commission has called on Member States to ratify all international legal instruments, agreements and obligations to improve the effectiveness, coordination and coherence of the fight against trafficking in human beings, including the Domestic Workers Convention, 2011 (Convention 189). Some ILO Conventions have been ratified by all Member States (this is the case for the eight fundamental Conventions), but there are several others, including important ones, that have not been ratified by many (Convention 189, in particular).

To protect TCN workers, ratification by Member States to ratify, in particular, Convention 97 on Migrant Workers' Rights (revised), 1949, would be useful. Several Member States (18 of them, in fact¹⁷⁴) have not yet ratified this Convention, which seems particularly appropriate to ensure the equal treatment of TCN workers.

The Convention requires that:

1. Each Member for which this Convention is in force undertakes to apply, without discrimination in respect of nationality, race, religion, or sex, to immigrants lawfully within its territory, treatment no less favourable than that which it applies to its own nationals in respect of the following matters:

(a) in so far as such matters are regulated by law or regulations, or are subject to the control of administrative authorities

(i) remuneration, including family allowances where these form part of remuneration, hours of work, overtime arrangements, holidays with pay, restrictions on homework, minimum age for employment, apprenticeship and training, women's work, and the work of young persons;

(ii) membership of trade unions and enjoyment of the benefits of collective bargaining;

(iii) accommodation;

(b) social security (that is to say, legal provision in respect of employment injury, maternity, sickness, invalidity, old age, death, unemployment and family responsibilities, and any other contingency which, according to national laws or regulations, is covered by a social security scheme), subject to the following limitations:

(i) there may be appropriate arrangements for the maintenance of acquired rights and rights in course of acquisition;

¹⁷⁴ AT, BG, CZ, DK, EE, EL, FI, HR, IE, HU, LV, LT, LU, MT, PL, RO, SK, SE.

(ii) national laws or regulations of immigration countries may prescribe special arrangements concerning benefits or portions of benefits which are payable wholly out of public funds, and concerning allowances paid to persons who do not fulfil the contribution conditions prescribed for the award of a normal pension;

I employment taxes, dues or contributions payable in respect of the person employed; and

(d) legal proceedings relating to the matters referred to in this Convention.

The provision on equal treatment is more efficient, as it can be directly invoked in the courts (if national constitutional laws allow it), as illustrated in a French case¹⁷⁵.

To incite Member States to ratify the ILO Convention, the European Commission or the Council could adopt a recommendation, which requires no specific power.

Policy option 3B: better enforcement of TCNs' rights

Practical implementation
<ul style="list-style-type: none"> • Fostering judicial enforcement of rights (adopting a directive extending the protecting provisions of the SWD to other TCN workers). • Creation of bodies to support enforcement of rights, namely of non-discrimination on nationality. • Possible extension of the role of ELA. • Reinforcing the role of trade unions or associations in charge of migrants.

Better enforcement of TCN workers' rights is a necessity: their vulnerability and increased dependence on their employer, when their residence and work permit require that the relationship is maintained, can be a source of exploitation. TCN workers face higher risks for their health and safety, resulting from violation of applicable rules in this domain (see above). This has been observed for both seasonal and posted workers (see above). The CoNE study highlights the problems of enforcement or implementation of TCNs' rights at national level. It underlines the difficulties concerning access to justice for TCNs, not only when they are undocumented workers, but also more generally, as claims in courts or other institutions threaten the relationship with their employer, on whom their residence permit depends.

Measures to ensure TCN workers' rights are respected can take different forms. The most obvious means to enforce rights is action in courts, but it is not always the easiest and most effective, especially for people who have limited knowledge of the judicial system, and limited resources. Another path involves third parties to the work contract, such as labour inspectors, trade unions or NGOs, or independent bodies in charge of dissemination of information and enforcement of rights.

1) Judicial enforcement

Currently, procedural guarantees granted to TCN workers by existing directives mostly concern decisions on their legal status in the host state. The LTRD, for instance, requires a motivation for decisions rejecting applications for the status of long-term resident, or withdrawing that status¹⁷⁶. It also requires that the TCN concerned is notified of the decision, and is given information on available redress procedures, as well as the time within which he or she may act¹⁷⁷. The SPD explicitly mentions that negative decisions can be contested before a court or an administrative authority (the LTRD and

¹⁷⁵ CE, Ass., 11 April 2012, *GISTI et FAPIL*, n° 322326.

¹⁷⁶ Article 10(1) Directive 2003/109/EC.

¹⁷⁷ Ibid.

BCD do not mention this point)¹⁷⁸. None of these procedural rights concern the enforcement of labour and employment rights, or more generally the social rights of TCN workers.

The SPD only touches on these rights when it stipulates that the beneficiary of a permit has the right to be informed about his or her rights linked to the permit (conferred by the Directive and/or national law). According to the Directive, Member States must also provide information to the public about the conditions of TCNs' admission and residence on the territory for work purposes (Article 14). The same is true for the ICTD and SRD, which also require that access to information about entry and residence rights and conditions is easily accessible¹⁷⁹.

The enforcement of social rights has been taken more seriously for seasonal workers. Facilitation of complaints is required by the SWD¹⁸⁰: effective mechanisms must exist, through which seasonal workers may lodge complaints against their employers either directly or through third parties having a legitimate interest in ensuring compliance with the Directive, or through a competent authority of the Member State in which they are employed. In addition, the Directive states that third parties that have a legitimate interest in ensuring compliance with the Directive under national law may engage on behalf – or in support – of a seasonal worker in administrative or civil proceedings. Protection against victimisation also applies.

One way to tackle the issue of enforcement of rights would be to amend the migration directives to extend the protective provisions of the SWD to all TCN workers. This would be in line with the objective of coherence and consistency. Article 79 TFEU would, of course, be an appropriate legal basis for such harmonisation of the EU *acquis*.

To go beyond this harmonisation of *acquis* and increase enforcement mechanisms to better protect workers from third countries, other existing EU instruments could be a source of inspiration. Among them, the Victims of Crime Directive¹⁸¹, which constitutes an example of how to address 'the justice gap' mentioned in the CoNE study. The Directive contains minimum standards on the rights, support and protection of victims of crime, including hate crime.

The CoNE study also takes the example of the EU Returns Directive¹⁸², which obliges Member States to provide legal aid free of charge. Some elements of the Employer Sanctions Directive (Directive 2009/52) ensuring the protection of 'illegally staying third-country nationals' could also be extended to legal migrants. For instance, the right to receive 'back payment' from employers and mechanisms to ensure that illegally employed TCN can introduce a claim on this basis¹⁸³ and, more generally, the provisions concerning the 'facilitation of complaints', under which Member States are supposed to set up mechanisms allowing effective actions by migrants against their employers¹⁸⁴. These new rights, inspired by the Employer Sanctions Directive, could be included in existing migration directives through amendments, or granted to all legally resident migrant workers. This would require either an amendment of the Employer Sanctions Directive to extend its scope of application (*ratione personae*) or a new directive covering TCNs who are staying in the EU legally. It must be added that the right to effective judicial protection has also been clarified and given extensive

¹⁷⁸ Article 8 Directive 2011/98/EU.

¹⁷⁹ Article 10 Directive 2014/66/EU; Article 35 Directive 2016/801/EU.

¹⁸⁰ Article 25 Directive 2014/36/EU.

¹⁸¹ Directive 2012/29/EU.

¹⁸² Directive 2008/115/EC.

¹⁸³ Article 6.

¹⁸⁴ Article 13.

interpretation by the recent case-law of the ECJ¹⁸⁵. This protective case-law could be codified to become more visible and accessible.

In summary, improving the enforcement of rights of TCN workers could be achieved by generalising the provisions applying to seasonal workers, to which elements of legislation in other domains and CJEU case-law could be added. This could look, for instance, like Directive 97/80 of 15 December 1997 on the burden of proof in cases of discrimination based on sex; a text that aims to implement rights through the facilitation of actions in courts.

Such a directive could be based on Article 79 TFEU or, since it concerns the enforcement of social rights, Article 153 (1) g), which gives the EU competence to adopt minimum requirements concerning 'conditions of employment for third-country nationals legally residing in Union territory.

2) Enforcement supported by third parties

To foster respect of TCNs' social rights, national bodies could be created. These could be equality bodies in charge of enforcing non-discrimination on nationality, comparable to the existing equality bodies. Alternatively, independent bodies of the same nature as equality bodies in charge of enforcing migrants' rights (not only non-discrimination on nationality) could be established. An extension of the role of ELA is another possibility that should be considered. Lastly, the EU could play a role in reinforcing the role of trade unions or other associations in charge of migrants' rights. These three possibilities, which could be combined for increased efficiency, are detailed in the following paragraphs.

Concerning equality bodies, these have largely contributed to ensuring the enforcement of non-discrimination rights in Member States since their origin (which dates back to Directive 2000/43 on discrimination on race and ethnic origin¹⁸⁶). Equality bodies are public organisations in charge of assisting victims of discrimination, monitoring and reporting on discrimination issues, and contributing to an awareness of rights and a societal valuing of equality. In all of these actions, especially when they assist victims of discrimination in finding settlements or acting for redress before administrative authorities, or courts, equality bodies contribute to the enforcement of equality and non-discrimination principles.

So far, EU law has only legally required that Member State create equality bodies to deal with discriminatory grounds addressed by Directives 2006/54 on gender discrimination and 2000/43 on discrimination on race and ethnic origin, i.e., gender, race and ethnicity. However, many Member States have gone beyond these requirements and ensured that equality bodies can also deal with discrimination based on other grounds, i.e., those covered by Directive 2000/78 establishing a general framework for equal treatment in employment and occupation (religion or belief, disability, age and sexual orientation).

To ensure that there are national equality bodies contributing to the enforcement of TCNs' rights, including the right not to be discriminated against based on their nationality, it is not necessary for Member States to set up a specific body in charge of these rights: the missions of existing equality bodies can simply be extended to cover migrants' rights and/or discrimination on nationality (which is already the case in France, for instance). If a new directive concerning discrimination on nationality is adopted to ensure that the right to equal treatment is recognised (see above), it could include, like

¹⁸⁵ See: ECJ, *Országos*, C-924/19 PPU and C-925/19 PPU (Grand Chamber), 2020 (on Directive 2008/115/EC on common standards and procedures for returning illegally staying third-country nationals: right to judicial review and not only an appeal before an administrative authority); ECJ, *Torubarov*, C-556/17, 2019 (on Directive 2013/32/EU on common procedures for granting and withdrawing international protection: the judgment of a court cannot remain ineffective because the court does not have any means of securing observance of that judgment).

¹⁸⁶ Cited above.

Directive 2000/43, a chapter on ‘bodies for the promotion of equal treatment’ requiring Member States to provide support to victims through an equality body in charge of eliminating discrimination on nationality or TCNs’ rights.

As far as the role of the new ELA is concerned, this could be enlarged to take care of the protection of migrants’ rights. For now, ELA’s mission is limited to the enforcement of EU rules on labour mobility and social security coordination. It does not include the protection of TCNs’ social rights *per se*, but it does not exclude this either, since its mission includes cases of posting of workers within the EU and tackling undeclared work. For instance, its actions cover the participation of TCNs in activities involving mobility within the EU.

ELA relies on cooperation between national authorities, in particular labour inspectorates and social partners, to ensure that EU social law and free market rules are respected. It could also contribute to fostering involvement of national inspectorates and social partners (or other national authorities in charge of enforcing labour law) in the protection of TCNs’ rights, if the scope of its tasks were amended to include this mission.

The mission of ELA already consists of supporting Member States in capacity building aimed at promoting the consistent enforcement of the Union law for which it is competent (Article 11 Regulation 2019/149 establishing a European Labour Authority). To achieve this objective, Regulation 2019/49 envisages that ELA will carry out the following activities:

- in cooperation with national authorities and, where appropriate, social partners, develop common non-binding guidelines for use by Member States and the social partners, including guidance for inspections as well as shared definitions and common concepts, building on relevant work at national and Union level;
- promote and support mutual assistance, either in the form of peer-to-peer or group activities, as well as staff exchanges and secondment schemes between national authorities;
- promote the exchange and dissemination of experiences and good practices, and develop sectoral and cross-sectoral training programmes, including for labour inspectorates, and dedicated training material, including through online learning methods;
- promote awareness-raising campaigns, including campaigns to inform individuals and employers of their rights and obligations.

All of these activities could also contribute to better enforcement of TCNs’ rights, if ELA’s mission was extended to include this.

Reinforcing the role of trade unions or other associations in charge of migrants’ rights would also be appropriate. This could be ensured through EU intervention. A source of inspiration could be the Commission proposal for a directive on adequate minimum wages in the EU¹⁸⁷. This text aims to frame and support sectoral collective bargaining at national level. This is an example of the type of initiative that the EU can work out to foster the role of collective actors on the ground and, at the same time, manage necessary sectoral adjustments. In the field of migration, the role of the EU could be to foster sectoral negotiations on TCNs’ social rights between social partners at national level, and the means to ensure, via trade unions or ad hoc enforcement bodies, that their rights are respected.

All of these developments related to the enforcement of TCNs’ social rights could be based on either Article 79 (2) b) TFEU (definition of the rights of third-country nationals residing legally in a Member

¹⁸⁷ COM (2020) 682 final, 28 October 2020.

State) or Article 153 (1) g), which gives the EU competence to adopt minimum requirements concerning 'conditions of employment for third-country nationals legally residing in Union territory'.

Policy option 3C: reducing uncertainty with respect to obtaining long-term resident status

Practical implementation
<ul style="list-style-type: none"> • Allowing more TCNs to access long-term resident status. • Harmonising national legislation on long-term residence.

Long-term resident status is the most protective legal status offered to TCNs residing in the EU: the right of residence is secured, and a broad clause of equality aims to foster their integration in the host society. This is also beneficial for the host society, as integration is a key element in promoting economic and social cohesion, a fundamental objective of the EU.

True, there are significant problems in the implementation and functioning of the LTRD, as highlighted by the Commission Fitness Check on EU legal migration legislation¹⁸⁸, and in the Commission's 2019 implementation report¹⁸⁹. Too many obstacles impede intra-EU mobility, and Member States almost exclusively issue national long-term residence permits unless TCNs explicitly ask for the EU permit. This is the reason why the Commission has announced a revision of the LTRD for the end of 2021.

Despite these limits, however, it remains true that long-term resident status expresses fairness to those migrants who have resided in a Member State for a long time, and have created links with the host society. It also provides 'denizenship' to those TCNs for whom the acquisition of full citizenship of the host state is impossible. Therefore, an efficient solution to increase TCN workers' rights and protection is to facilitate and secure access to the long-term resident status. The EU should adopt a new directive to amend Articles 3 and 4 of the current LTRD and adopt a recommendation to provide guidelines for the uniform interpretation of the Directive.

Facilitating and securing access to long-term resident status would help reduce different gaps and barriers. First, it would reduce the inequality gap described in the report (section 3.2.2.1). Indeed, the equality clause in the LTRD (Article 11) is broad, covering access to employment, education, social security, tax benefits, goods and services, etc. Securing access to the long-term resident status would thus provide benefits for TCNs who have spent time in the EU but remain excluded from rights granted to nationals. Second, facilitating access to the long-term resident status would equalise the situation of TCNs. As noted in the CoNE study, the fragmentation of EU labour migration creates inequalities among migrants. Allowing more TCNs to access the same legal status would reduce the differences between them. In addition, allowing more TCNs to access this status would partly solve the problems resulting from the fact that migrants are often 'stuck in a legal regime' with little possibility of seeing their legal status evolve. This situation is often the result of the formulation of EU law and the fragmentation of the legal *acquis*.

Article 79 TFEU provides a proper legal basis for EU action in this domain¹⁹⁰. The objective is a common immigration policy 'aimed at ensuring (...) fair treatment of third-country nationals residing legally in Member States'. Under Article 79(2), the European Parliament and the Council are competent to adopt measures concerning 'the definition of the rights of third-country nationals

¹⁸⁸ Commission Staff Working Document, Fitness Check on EU legislation on legal migration, SWD (2019)1056 final, 29.3.2019

¹⁸⁹ Report from the Commission to the European Parliament and the Council on the implementation of Directive 2003/109/EC concerning the status of third-country nationals who are long-term residents, COM/2019/161 final.

¹⁹⁰ Article 79 TFEU corresponds to former Article 63, points 3 and 4 of the Treaty establishing the European Community (TEC), which was the LTRD's legal basis.

residing legally in a Member State, including the conditions governing freedom of movement and of residence in other Member States’.

To facilitate and secure access to long-term resident status, the EU could take two paths. First, it could allow new categories of TCNs to be granted long-term resident status¹⁹¹. This expansion of the personal scope of the LTRD would require amending Articles 3 and 4 LTRD. Second, the EU could further harmonise national legislation on long-term residence.

1) Allowing new categories of migrants to become long-term residents: revising Articles 3 and 4 LTRD

Amending Articles 3 and 4 LTRD is recommended. Indeed, despite the 2011 amendment to the Directive, Article 3(2) still excludes important categories of TCNs from the scope of the Directive: seasonal workers, students and service providers who reside in Member States on a temporary basis¹⁹². Article 4 also limits the potential beneficiaries of the long-term resident status. Its first paragraph requires having ‘resided legally and continuously’ within the national territory ‘immediately prior’ to the submission of the application. Pursuant to its second paragraph, periods of residence spent as an au pair, seasonal worker or posted worker are not considered for the purpose of calculating the period of residence. Finally, for students, the same paragraph states that only 50 % of the period of residence for study is counted.

The rationale underpinning these exclusions from the benefit of long-term resident status assumes that TCNs who have been residing and working under a temporary regime of residence could/should neither see their legal situation evolve favourably nor access a regime of permanent residence¹⁹³. Consequently, a large number of workers are stuck in a legal regime with no possibility of evolution. But this approach neglects the fact that people who have been allowed to reside temporarily in a Member State as seasonal workers, or to provide cross-border services, have in fact cumulated long periods of residence within the EU¹⁹⁴. Often, these TCN workers (or students) have started to learn the host state language and formed ties with members of the host society. Counting only 50 % of students’ time of residence is also at odds with the fact that under national schemes, students are generally entitled to permanent status after five years of residence. Therefore, rather than excluding

¹⁹¹ A recent study suggests that long-term resident status could serve as a template for the general status of TCNs residing in the EU: Bast, von Harbou & Weesees (2020).

¹⁹² Article 3(2). This directive does not apply to TCNs who:

- (a) reside to pursue studies or vocational training;
- (b) are authorised to reside in a Member State based on temporary protection or have applied for authorisation to reside on that basis and are awaiting a decision on their status;
- (c) are authorised to reside in a Member State based on a subsidiary form of protection in accordance with international obligations, national legislation or the practice of the Member States or have applied for authorisation to reside on that basis and are awaiting a decision on their status;
- (d) are refugees or have applied for recognition as refugees and whose application has not yet given rise to a final decision;
- (e) reside solely on temporary grounds such as au pair or seasonal worker, or as workers posted by a service provider for the purposes of cross-border provision of services, or as cross-border providers of services or in cases where their residence permit has been formally limited;
- (f) enjoy a legal status governed by the Vienna Convention on Diplomatic Relations of 1961, the Vienna Convention on Consular Relations of 1963, the Convention of 1969 on Special Missions, or the Vienna Convention on the Representation of States in their Relations with International Organisations of a Universal Character of 1975.

¹⁹³ The SWD is the most explicit text on this matter: the legislator aimed to prevent workers overstaying, or temporary stay becoming permanent (§7 of the Preamble).

¹⁹⁴ In conformity with Article 14 SWD, seasonal workers can spend up to nine months a year in one Member State.

categories of workers *ex ante*, time spent in the EU could be considered, and the integration that results from it could be valued. Therefore, the path to be followed is to amend Articles 3 and 4 LTRD.

Departing from a static and purely arithmetical calculation of residence periods spent in one Member State, emphasis would thus be on the level of integration. The intensity of the relationships some TCNs have with their host society would count as much as the exact number of days spent within the EU. Following this logic, two options can be considered: a limited and a more intensive reform.

Looking first at a 'soft' amendment of Articles 3 and 4, *au pairs*, students, seasonal workers and posted workers would not be excluded from the scope of the Directive as a matter of principle. But Member States would be allowed to maintain a specific regime for their access to the long-term resident status. Different criteria can be envisaged to condition access to this status, ranging from a new threshold for residence duration (seven years instead of five) to an alternative criterion to five years of continuous residence (a ratio between time spent in and outside the EU, for instance). In the latter case, Article 4(3), which states that 'periods of absence from the territory of the Member State concerned shall not interrupt the period referred to in paragraph 1 and shall be taken into account for its calculation where they are shorter than six consecutive months and do not exceed in total 10 months within the period referred to in paragraph 1', will have to be modified.

A more ambitious move would consist of deleting the provisions that exclude some categories of TCN. Every TCN having legally resided 'at least' five years 'in the EU' would acquire long-term resident status. The requirement of 'continuous residence' would be removed. Article 3(2) would have to be deleted and Article 4(2) amended. At the same time, alignment of the LTRD with sectoral directives will have to be reconsidered, and technical modifications could prove necessary for consistency purposes. But both the objective and wording of the LTRD lead us to consider that this evolution is needed. The objective of the Directive is to confer a protective status to those persons who have 'put down roots in the country'. The current meaning of 'continuity' of residence excludes all those TCNs who have spent a lot of time in the EU and have developed ties with its society. The reform assumes that integration requires time, but does not exclude mobility between the EU and a third state.

2) Limiting Member States' discretion when conferring the long-term resident status

As noted in the CoNE study, the LTRD, which is a minimum harmonisation directive, coexists alongside national schemes for long-term residence permits. States are allowed a wide margin of interpretation of the Directive's provisions¹⁹⁵. To reduce this leeway, which has led to a fragmented approach to long-term residence in the EU, the EU could limit the margin for manoeuvre that the Member States derive from the wording of Article 5 LTRD¹⁹⁶.

The solution to explore is a 'soft' approach. The EU would indeed adopt a recommendation, in which guidelines would be provided to support national authorities and courts. The recommendation would guide national authorities in their interpretation of the conditions contained in Article 5 for access to the long-term resident status. Notions like having 'stable and regular resources, which are

¹⁹⁵ The discretion granted to Member States concerns the conditions required to access long-term resident status, its withdrawal, and the conditions for intra-EU mobility.

¹⁹⁶ Article 5 LTRD, Conditions for acquiring long-term resident status: '1. Member States shall require third-country nationals to provide evidence that they have, for themselves and for dependent family members: (a) stable and regular resources which are sufficient to maintain himself/herself and the members of his/her family, without recourse to the social assistance system of the Member State concerned. Member States shall evaluate these resources by reference to their nature and regularity and may consider the level of minimum wages and pensions prior to the application for long-term resident status; (b) sickness insurance in respect of all risks normally covered for his/her own nationals in the Member State concerned. 2. Member States may require third-country nationals to comply with integration conditions, in accordance with national law'.

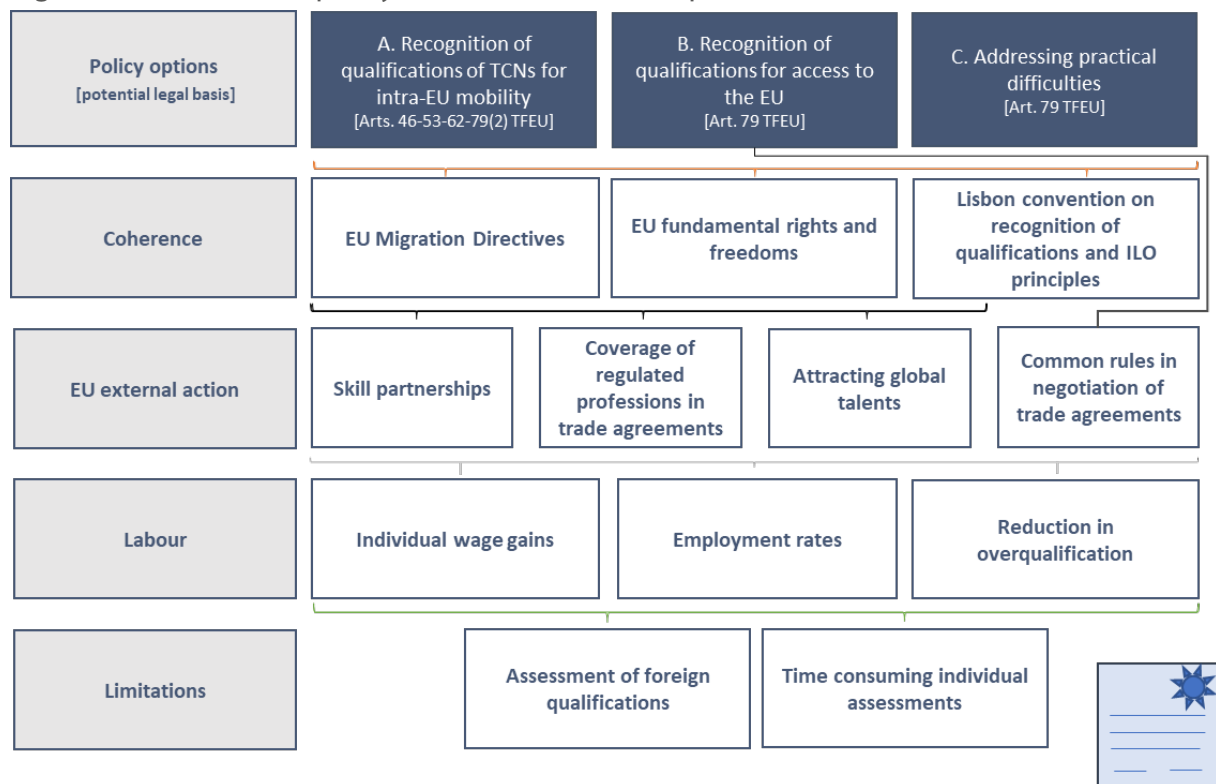
sufficient to maintain' the TCN worker and his or her family members would be defined at EU level. Accordingly, the requirement Member States may impose to 'comply with integration conditions' needs to be clarified. For this, the EU can draw on the CJEU's case law. But going beyond the Court's case-by-case approach would be preferable. Based on a comparative analysis of Member States' policies, the Commission could provide guidance on a common interpretation of these notions.

5 Assessment of policy cluster 1: harmonise rules for recognition of qualifications

In the following, we provide an assessment of the three policy options under the first policy cluster, which envisages the harmonisation of the rules for recognition of qualifications. For each of the policy options, both the legal and economic aspects are assessed.

The policy options and main impacts are summarised in the figure below.

Figure 30: Overview of policy cluster 1 and main impacts



Source: authors' analysis.

5.1 Legal aspects

In the following, we provide the potential legal basis for the adoption of the policy options under the first policy cluster. Moreover, we assess their complementarity and coherence with the EU's common migration policy, the Charter of Fundamental Rights of the European Union (CFR) and the EU's aims, values and international labour rights (e.g., ILO) more generally. Finally, we assess the potential contribution that each policy option could make to the EU's external relations and attractiveness.

5.1.1 Legal basis, subsidiarity and proportionality

The potential legal basis, as well as adherence to the principles of subsidiarity and proportionality presented in Article 5(3) of the Treaty on European Union (TEU), are now analysed for each policy option.

5.1.1.1 Policy option 1A: recognition of qualifications of TCNs for intra-EU mobility

The extension of the scope of application of Directive 2005/36/EC, the removal of the limits currently enshrined in the text concerning qualifications obtained outside the EU, and the codification and extension of the case-law on recognition of qualifications, skills and previous learning could use the same legal basis. This legal basis is the one used for the same directive concerning the free movement of workers, freedom of establishment and freedom to provide services (Articles 46, 53 and 62 TFEU).

These EU actions could also use Article 79 TFEU as a legal basis: under Article 79, 'the Union shall develop a common immigration policy aimed at ensuring, at all stages (...) fair treatment of third-country nationals residing legally in Member States'. According to Article 79 (2) b), the European Parliament and the Council can adopt measures concerning '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'.

The same legal basis can be used for a sectoral approach to recognition.

Harmonisation of recognition of qualifications, skills and previous learning aims to facilitate intra-EU mobility. This objective cannot be achieved sufficiently by the Member States acting alone (at national, regional and local level). Union intervention is necessary considering the scale and effects of a system of recognition that would remove (or limit) national requirements and replace them with mutual recognition.

Economic efficiency also weighs in favour of EU action. Recognition ensured by EU regulation minimises the administrative burden for migrants who obtain qualifications or recognition in one Member State and want to exercise their activity in another. The administrative burden for the Member States can also be alleviated (namely in cases of automatic recognition). In such a case, recognition requires no procedure at all, since the qualification obtained abroad is automatically considered equivalent to the national one.

Harmonisation requires changes in the recognition conditions and procedures, which are not without cost for the organisations concerned (administrative and financial). But, for a large part (the alignment of solutions concerning TCNs with the ones applying to EU nationals), the evolution will rather reduce costs by converging a dual track into one single system of recognition for both TCNs and EU nationals. In addition, the harmonisation of recognition should help address labour market shortages, by facilitating the mobility of TCN workers across the EU.

The actions envisaged constitute an appropriate way to ensure harmonisation of recognition across the Union, just as Directive 2005/36/EC was justified for EU nationals. Insofar as recognition of qualifications and skills are concerned, the fact that the workers concerned are non-EU nationals makes no difference. The objectives of recognition are the same for EU nationals as they are for TCNs: creating conditions to limit the number of procedures and facilitating mobility.

A non-binding instrument would not achieve the same outcome. Limiting procedural obstacles to access professional activity in another Member State and facilitating mobility require that Member States have an obligation to accept qualifications (or skills), or to limit requirements for their recognition once these qualifications (or skills) have been recognised in a Member State. If this solution was only optional, the risk would be high that the status quo remains. Indeed, resistance from professional orders in particular could block progress in this area.

In addition, a directive concerning recognition of qualifications (and other requirements to access employment) leaves some margin of discretion to Member States, for instance in the type of compensating measures, as Directive 2005/36/EC shows.

5.1.1.2 Policy option 1B: recognition of qualifications for access to the EU

Articles 79 and 79(2) b) TFEU constitute an appropriate legal basis for harmonisation of national systems of recognition of qualifications, skills and previous learning obtained outside the EU.

Without common rules on recognition at EU level, each Member State applies different rules and procedures to recognise previous qualifications, skills and learning obtained outside the EU. This is not only an obstacle for immigration to the EU for skilled workers in particular, but also constitutes a barrier to mobility within the EU (cf. policy option 1A), since there is no certainty that the rules of recognition applied by one Member State will comply with the recognition rules of another. A common system of recognition for TCNs entering the EU would thus facilitate intra-EU mobility. Because of its impact on intra-EU mobility, this policy can only be efficiently achieved at EU level. Another justification for EU action is that common recognition rules and procedures are a means to attract talent to the EU, in line with EU immigration policy.

The facilitation of intra-EU mobility can only be addressed by EU legislation on recognition of qualifications, skills and previous learning. Directives could be adopted, for some professions or in some sectors, that would leave some margin of discretion to Member States in the design of their national systems of recognition, considering the objectives and requirements determined at EU level. National institutions and procedures would play an important role, keeping EU intervention to a minimum.

5.1.1.3 Policy option 1C: addressing practical difficulties

Article 79 TFEU provides an appropriate legal basis for this policy option, which consists of removing practical difficulties faced by TCNs when they try to obtain recognition of their previous learning, skills and qualifications. It is also possible to resort to provisions of the TFEU on free movement of workers, freedom of establishment and freedom to provide services, since facilitating recognition of TCNs' qualifications, skills and previous learning would also contribute to their free movement within the EU.

Creating an EU network to support coherent and simpler systems of recognition in Member States cannot be achieved at national level. There is a clear European dimension to this policy. The existence of a European Convention, namely the Lisbon Convention on the Recognition of Qualifications concerning Higher Education in the European Region (1997), might lead one to think that EU action is unnecessary, even more so as all Member States but Greece have ratified it. The Lisbon Convention could be considered sufficient, but EU intervention would nonetheless be useful, for different reasons. First, it would foster proper and harmonised implementation in the EU, ensuring that Member States, as parties to the Convention, abide by their commitments in an efficient way. Second, it would allow for developments in the EU that go beyond the objectives of the Lisbon Convention, which is limited to higher education. A dual European system (CoE and EU) is not problematic as such. It exists in many domains, the most famous being the protection of human rights, where the existence of the European Convention on Human Rights (ECHR) was not considered an obstacle to the adoption of the CFR.

Coordinating national bodies to establish a European network seems necessary to ensure that support, information and knowledge flow as efficiently as possible between national authorities. For EU action to remain as limited as possible, a directive requiring Member States to give powers to national bodies in charge of facilitating recognition by competent authorities, along the lines defined in the directive, could be adopted. The EU could rely on the ETF, which oversees the

development of recognition of qualifications and the validation of skills, competencies and prior learning of migrants in EU partner countries. The ETF could coordinate the functioning of the new network of national bodies.

5.1.2 Complementarity and coherence

This section assesses the complementarity and coherence of the policy options with i) EU legal migration *acquis*; ii) other EU legal norms, namely non-discrimination law, fundamental rights law, EU migration law, labour law and free movement law; and iii) international law in particular international human rights law.

5.1.2.1 Policy option 1A: recognition of qualifications of TCNs for intra-EU mobility

Complementarity and coherence with EU migration *acquis*

Recognition of qualifications is needed to harmonise and complete the migration directives. Directives on immigration already ensure a certain degree of harmonisation, but this is insufficient and inconsistent (see section 4.1).

Recognition of qualifications is a key condition of intra-EU mobility. It will thus increase the attractiveness of the EU to skilled workers, which is a central objective of current EU immigration policy (cf. the BCD, 'skill partnerships', etc).

The difficulties faced in the revision of the BCD¹⁹⁷ reflect the feasibility of an extension of the field of application of Directive 2005/36/EC. These difficulties give a realistic view of what can be achieved in terms of recognition. The recent compromise worked out between the Parliament and the Council has acknowledged the refusal of the Council to shift to a mere notification procedure to the second Member State, without verification of the Blue Card holder's professional qualifications. The final compromise maintains a prior examination by the second Member State of the mobility application (shortened to 30 days, but may be extended by an additional 30 days in cases justified by the complexity of the application). However, the compromise allows the applicant to start working in the second Member State at the latest 30 days after submitting the complete application. For unregulated professions, the second Member State may require Blue Card holders to present documents attesting their higher professional qualifications, but only where the Blue Card holder has worked for less than two years in the first Member State. For regulated professions, Blue Card holders must provide evidence of the fulfilment of the conditions set out under national law for the exercise of the relevant profession, regardless of how long they have been a Blue Card holder¹⁹⁸.

Extending recognition to skills and not limiting it to qualifications was also a source of strong disagreement in the current reform of the BCD. In 2018, inter-institutional negotiations were blocked by a proposal of the Parliament to require mandatory recognition of professional skills in addition to educational qualifications. With a view to reaching a compromise, the choice of a sectoral approach was made: only the IT sector would be affected by an enlarged harmonisation of recognition requirements, including skills. The nuanced solutions worked out for Blue Card holders suggest that it might be easier to move on progressively, and on a sectoral basis, towards recognition.

¹⁹⁷ 19 May 2021.

¹⁹⁸ Ibid.

Complementarity and coherence with other EU norms, in particular non-discrimination law and fundamental rights (CFR)

Harmonisation of recognition of qualifications would have a positive impact on the protection of fundamental rights in the EU. It would contribute to respecting the principles of equality and non-discrimination (Articles 20 and 21 CFR), freedom to choose an occupation and the right to engage in work (Article 15 CFR) and freedom to conduct a business (Article 16 CFR).

This policy option would also complement the system of recognition already in force for EU workers, in line with the objective of mobility of persons within the single market.

Complementarity and coherence with international law, in particular international human rights law

The proposed action is consistent with developments taking place within the CoE on recognition of professional qualifications (namely the Lisbon Convention)¹⁹⁹.

It is also in line with action at ILO level to ensure non-discrimination (one of the four core principles of the ILO Declaration on Fundamental Principles and Rights at Work) and to protect migrant workers under Convention 97 on migration for employment²⁰⁰.

More precisely, the ILO Multilateral Framework on Labour Migration (2006) states that it aims to promote 'the recognition and accreditation of migrant workers' skills and qualifications and, where that is not possible, provide a means to have their skills and qualifications recognised'²⁰¹. The Conclusions of the ILO Tripartite Technical Meeting on Labour Migration (2013) also call for skills recognition, including among other actions to '...explore mechanisms for mutual recognition of skills, and certification of credentials'.

5.1.2.2 Policy option 1B: recognition of qualifications for access to the EU

Complementarity and coherence with EU migration *acquis*

The harmonisation of recognition of qualifications is needed to harmonise and complete the existing migration directives. If these instruments were associated with instruments determining the rules for access to employment and economic activities in the EU, the EU territory would appear more clearly as an attractive destination for immigration.

Harmonisation of recognition of qualifications and skills obtained outside the EU is needed for the development of skill partnerships and an EU talent pool, the latter being heavily dependent on common conceptions of the qualifications or skills of migrants to be included in the pool (see above, policy options 2G and 2H).

As far as the feasibility is concerned, one may doubt that common criteria for recognition can be worked out for all countries of origin and all economic sectors at the same time. It is probably more realistic to initiate this initiative on a sectoral basis, with third countries with which the EU is currently developing relationships in the framework of its neighbourhood policy.

¹⁹⁹ On the activity of the CoE in this domain, see: www.coe.int/en/web/higher-education-and-research/qualifications.

²⁰⁰ According to its Article 4, 'measures shall be taken as appropriate by each Member, within its jurisdiction, to facilitate the departure, journey and reception of migrants for employment'.

²⁰¹ Principle VI – Prevention of and Protection against Abusive Migration Practices.

Complementarity and coherence with other EU norms, in particular non-discrimination law and fundamental rights (CFR)

This policy option would ensure the protection of Fundamental rights and freedoms mentioned in the CFR: 'Freedom to choose an occupation and right to engage in work (Article 15) and Freedom to conduct a business (Article 16).

Complementarity and coherence with international law, in particular international human rights law

As regards coherence and compatibility with international law, and in particular international human rights law, the policy option is consistent with developments taking place in the CoE on recognition of professional qualifications (namely the Lisbon Convention).

It is also in line with actions developed at ILO level. Among them, Convention 97 on migration for employment²⁰²; the ILO Multilateral Framework on Labour Migration (2006), which includes actions 'promoting the recognition and accreditation of migrant workers' skills and qualifications and, where that is not possible, providing a means to have their skills and qualifications recognised'²⁰³; and the Conclusions of the ILO Tripartite Technical Meeting on Labour Migration (2013), which, as mentioned above, call for skills recognition, including to '...explore mechanisms for mutual recognition of skills, and certification of credentials'.

5.1.2.3 Policy option 1C: addressing practical difficulties

What has been said for policy options 1A and 1B also applies to this policy option, which aims to support recognition of qualifications, skills and previous learning.

5.1.3 Contribution to the EU's external relations and attractiveness

This section discusses the likely impact of the policy options on the EU's international relations and negotiations (within international organisations and neighbouring and other third countries) and the attractiveness of the EU territory for migrant workers.

5.1.3.1 Policy option 1A: recognition of qualifications of TCNs for intra-EU mobility

By facilitating intra-EU mobility, harmonisation of recognition is one of the most important factors in increasing the EU's attractiveness for migrants, especially skilled workers. This policy is necessary for the development of skill partnerships with neighbouring countries or other EU partners.

However, as Directive 2014/66/EU on intra-corporate transfers indicates, some trade agreements negotiated at EU level can include restrictions on access to regulated professions made by the Union, or by the Union and its Member States²⁰⁴. The harmonisation of recognition would thus have to take the specific provisions of these agreements into account in order to avoid inconsistencies.

²⁰² According to its Article 4, 'measures shall be taken as appropriate by each Member, within its jurisdiction, to facilitate the departure, journey and reception of migrants for employment'.

²⁰³ Principle VI – Prevention of and Protection against Abusive Migration Practices.

²⁰⁴ On this issue, see: Howard Davies (2016), EUA Special Update on EU Trade Agreements and on the Recognition of professional qualifications.

5.1.3.2 Policy option 1B: recognition of qualifications for access to the EU

This policy goes along with EU relations with neighbouring countries or other third countries on the mobility of persons. Conditions for accessing employment and economic activities in the EU are part of EU trade agreements²⁰⁵, and developing common rules would facilitate the identification of common ground in negotiations at EU level.

However, any action concerning requirements in terms of recognition of qualifications would have to consider provisions found in existing trade agreements, which can include restrictions on access to regulated professions made by the Union, or by the Union and its Member States, in order to ensure coherence between EU trade and immigration policies.

5.1.3.3 Policy option 1C: addressing practical difficulties

Like policy options 1A and 1B, this policy option (1C) would contribute to increasing the EU's attractiveness as a destination by facilitating intra-EU mobility. It raises the same issues of coherence with EU trade agreements, which contain restrictions on the recognition of qualifications.

5.1.4 Summary

The table below summarises the main findings of the legal aspects analysed for the first policy cluster.

Table 5: Summary of the legal analysis for policy cluster 1

Target group	Policy action	Potential effects	Limitations and costs	EU added value
<ul style="list-style-type: none"> - Skilled TCNs already in the EU - Skilled TCNs outside the EU 	<ul style="list-style-type: none"> - Recognition of TCNs' qualifications, skills and previous learning, for intra-EU mobility - Recognition of qualifications, skills and previous learning for access to the EU - Addressing practical difficulties (i.e., creating procedures for fair and quick recognition of qualifications) 	<ul style="list-style-type: none"> - Attract skilled workers and reduce labour shortages - Reduce downskilling and de-skilling - Increase TCNs' integration in the host society - Contribute to intra-EU mobility and the achievement of the internal market 	<ul style="list-style-type: none"> - Not all professions can use automatic recognition - Does not ensure full equality in qualification recognition 	<ul style="list-style-type: none"> - Contribution to attracting talent - Necessary for implementing other actions in favour of orderly skilled migration (EU talent pool, skills mobility partnerships, etc.) - Contribution to EU action in favour of education - Contribution to the implementation of fundamental rights - Common rules to facilitate common ground in negotiation of trade agreements - Contribution to international action for skilled migrants

Source: authors' analysis.

²⁰⁵ Ibid.

5.2 Economic aspects

This section assesses the expected economic impact of the first policy cluster, considering the impact on labour market outcomes and possible limitations and enhancement of effectiveness.

5.2.1 Impact on labour market outcomes

Harmonised and improved rules for the recognition of professional qualifications of TCNs are likely to have significant positive effects on the labour market integration of TCNs. The target group for this policy option are TCNs with a professional qualification. Recognition and licensing²⁰⁶ of a professional qualification can provide access to a restricted segment of the labour market and improve employment opportunities through better signalling of qualifications to potential employers. The main impact is a reduction in the barriers to occupational choice for TCNs, which in turn improves employment probabilities and wages. As seen in Chapter 3, a lack of recognition of professional qualifications is the second biggest obstacle in the job search process among unemployed TCNs, contributing to increased levels of overqualification. By improving the recognition process and reducing this obstacle, the share of TCNs with professional qualifications working in low-skilled professions can be reduced. In addition, the harmonisation of rules for the recognition of qualifications has the potential to increase the EU mobility of TCNs. This ensures a better allocation of workers, as TCNs are free to move to the places with the largest demand for their skills.

Previous literature has shown that three years after obtaining recognition, immigrants in Germany earn almost 20 % higher wages and are 25 percentage points more likely to be in employment compared to similar immigrants who did not obtain recognition (Brücker et al., 2021). These better labour market outcomes are the result of two different mechanisms described in the study. First, recognition of professional qualifications gives TCNs access to occupations and labour market segments that they were previously not allowed to enter. These regulated segments of the labour market often pay higher wages due to higher returns on skills and monopoly rents (Gittleman, Klee and Kleiner 2018). Second, recognition of professional qualifications provides a quality signal to potential employers, who can better assess the skills of the applicant. These two mechanisms thus allow better job matching for TCNs and a lower prevalence of overqualification.

Interestingly, Brücker et al. (2021) find that ‘occupational recognition is particularly beneficial for foreign doctoral degree holders as well as physicians, dentists, veterinarians, and pharmacists, for whom recognition is mandatory to practice their profession’ (Brücker et al., 2021). Our descriptive analysis using the EU LFS (2014 ad hoc module) shows that over 30 % of highly skilled TCNs with a degree in health and welfare report lack of recognition as a major obstacle to finding a job in the EU. However, recognition of professional qualifications also has positive labour market impacts in segments without mandatory recognition requirements.

Further studies confirm these large positive wage and employment effects in the context of other countries, professions and time periods. Chapman and Iredale (1993) provide evidence for the recognition of professional qualifications in Australia, and show that immigrant men who successfully apply for recognition earn 15 to 30 % higher wages than unsuccessful migrants from the control group. Tani (2021) is also studying the case of Australia and finds that successful licensing increases hourly wages by about 20 % and reduces the prevalence of over-education by about 30 %.

²⁰⁶ There is a difference between recognition and licensing. Recognition only concerns individuals with a foreign qualification, whereas licensing also affects natives, as access to an occupation is restricted in numbers. In both cases, however, access to an occupation is limited and individual wage and employment probability gains can be achieved if access is simplified. For immigrants, licensing can be an additional hurdle after the recognition process.

Kugler and Sauer (2005) study the case of physicians in Israel and find that licensing more than doubles the income of physicians.

Our own simple correlational analysis with data from the EU LFS (2014 ad hoc module) compares wages for TCNs who are overqualified (we use both self-reported and observational measures²⁰⁷) with those who are not. We control for age group, marital status, education, field of study, country of residence, region of origin, years of residence in the destination, language skills and reason for migration, thus keeping the compared groups as similar as possible (see Table P1 in Quantitative Annex B for men and women). We find that medium-skilled TCN men who report overqualification are 6.5 percentage points more likely to earn wages in the lowest decile, while highly skilled TCN men are 12.2 percentage points less likely to earn wages in the 9th to 10th deciles if they report overqualification, and 23.7 percentage points less likely to earn wages in the top two deciles when an observational measure is used²⁰⁸. The results for women are even more pronounced. Medium-skilled TCN women who report overqualification are 13.8 percentage points more likely to earn wages in the lowest decile. Highly skilled overqualified TCN women are 9.9 (15.3) percentage points more likely to earn wages in the lowest decile and 6.1 (24.1) percentage points less likely to be among the top earners (depending on whether self-reported or observational measure are used). It is important to keep in mind that a lack of qualification recognition is not the only reason why a TCN might be overqualified for his or her position. The results should therefore be interpreted with care and as an upper bound. They are, however, in line with the presented literature.

One approach to quantifying the possible impact of the policy option cluster is to benchmark overqualification of TCNs against mobile EU nationals with otherwise similar characteristics. Once we control for baseline characteristics, as well as for important migration covariates (such as language skills, migration reason and years of residence), we can assume that the remaining differences in self-reported and observational overqualification between TCN and mobile EU nationals are at least partly due to the more restrictive legislation that the former group faces. TCN men are on average 7.7 percentage points more likely to report overqualification than similar mobile EU nationals. This result is fully driven by medium-skilled (9 percentage points) and highly skilled (20 percentage points) TCN men. Observational overqualification measured for highly skilled individuals is very similar: TCN men are 19.3 percentage points more likely to work in low- and medium-skilled occupations than comparable mobile EU nationals. For women, the corresponding gaps are similar: medium-skilled TCN women are 5.5 percentage points more likely to report overqualification, while for highly skilled TCNs this figure is 6.9 percentage points. Interestingly, highly skilled TCN women are 24.1 percentage points more likely to work in low or medium-skilled occupations. Such discrepancy between self-reported and observational overqualification for TCN women can be driven by several factors: their choice to work in lower occupations (e.g., to have more time for their family), stronger skill depreciation (e.g., TCN women are more likely to stay at home in the first years after arrival due to either childcare or legal restrictions for family migrants), or lower self-confidence. While with rich LFS data we are able to control for many individual characteristics, we caution that other unobservable factors can also contribute to our result and bias it upwards.

Besides the positive wage and employment effects for the individual migrant, better recognition opportunities can also be good for society more generally. A better use of skills will improve productivity and innovation. Higher wages increase gross domestic product (GDP) and lead to a higher tax income, thus improving macroeconomic outcomes. More competition in licensed

²⁰⁷ The observational measure is calculated for individuals with a tertiary degree: the variable is equal to 1 if a highly skilled individual works in a low- or medium-skilled occupation; otherwise the variable is equal to 0.

²⁰⁸ This analysis of overqualification cannot be conducted for low-skilled individuals because, by definition, they do not have a professional qualification and therefore cannot be overqualified and there is no lack of recognition.

occupations could also reduce consumer prices. In addition, Kugler and Sauer (2005) find that decreasing the cost for immigrant physicians to obtain a medical licence may increase average physician quality. The reason for this is that high barriers to recognition prevent the most skilled immigrant physicians from going through the lengthy recognition process, and incentivises them instead to seek employment opportunities as non-physicians due to other good opportunities for the generally talented.

Better recognition opportunities could also increase the attractiveness of the EU as a destination for highly skilled workers. The EU is increasingly competing with other destinations (for instance the US, Canada, Australia and New Zealand) for the best minds. Gomez et al. (2015) have argued for the case of Canada that when choosing their destination, potential new immigrants may be discouraged by worries about lengthy and complicated recognition processes.

To assess the economic impact of better recognition of professional qualifications, we assume that an individual overqualified middle or highly skilled TCN worker experiences a wage gain of 20 %, an employment probability gain of 25 percentage points and a reduction in overqualification of 30 % if their professional qualifications are recognised (numbers are from Brücker et al., 2021). From our estimates based on the EU LFS, we assume that the overqualified TCNs concerned who could benefit from professional recognition constitute 9 % of medium-skilled TCN men, 20 % of highly skilled TCN men, 5.5 % of medium-skilled TCN women and 6.9 % of highly skilled TCN women (in excess of the overqualification reported by similar mobile EU nationals). In the following, we assume that all sectors and all overqualified middle and highly skilled TCNs could benefit from the recognition of professional qualifications²⁰⁹. The estimates can therefore be interpreted as an upper bound. These improvements are likely to have positive effects on other outcomes such as productivity, collected taxes and consumer prices, but these precise effects are difficult to measure.

5.2.2 Limitations

The main reason why a thorough recognition process is often required is to ensure the quality of the service provided. In professions where it is difficult for consumers to judge the quality, and at the same time the quality is important (for instance where health and safety are concerned), governments often require workers to have certain certifications to practice a profession. Often consumer protection agencies push for occupational regulation when the negative consequences of mistakes at work are severe (Bryson and Kleiner, 2010). They hope that recognition and licensing improve the average quality of service offered by practitioners when the entry of less competent practitioners is prohibited, or when practitioners who lack certain skills are forced to undertake additional training. Compensation measures such as re-training or bridging courses for immigrants that who certain aspects in their professional qualification might therefore be necessary and can pose additional costs. While facilitating and harmonising the recognition of qualifications, the regulating authority needs to keep a fine balance with keeping up certain necessary quality standards.

Determining the quality of foreign qualifications is a difficult task, especially when TCNs immigrate from countries where the regulating authorities have little experience. Foreign languages and foreign curricula are not always easy to transfer, and individual assessments can be time consuming and costly. One option is to share the costs with those immigrants applying for recognition, for

²⁰⁹ We assume that low-skilled workers do not benefit from this policy option as they typically do not have professional qualifications to be recognised. We also assume that only TCNs who are overqualified for their current position can benefit from this policy. If they currently work in a position that fits their skill level, they have probably already obtained recognition or work in a sector that does not need any formal recognition. While this is a rough approximation, it is the closest estimate we can obtain for the percentage of affected workers.

instance through an application fee. This ensures that only those immigrants who expect large benefits from recognition apply. Through harmonisation at EU level, however, the process could become more efficient.

5.2.3 Summary

The table below summarises the main findings of the economic aspects analysed for the first policy cluster.

Table 6: Summary of the economic analysis for policy cluster 1

Target group*	Policy scope**	Potential effects	Limitations and costs	EU added value
<p>Overqualified medium- and highly skilled TCNs:</p> <ul style="list-style-type: none"> - 48 % of <i>highly educated</i> TCNs work in low- or medium-skilled jobs (EU LFS, 2019) ~465 000 per year²¹⁰ - 34 % of <i>all</i> TCNs self-report overqualification (EU LFS, 2014) ~765 000 per year²¹¹ 	<p>'Excess' overqualification of TCNs:</p> <ul style="list-style-type: none"> - 9 % for medium-skilled and 20 % for highly skilled TCN men - 5.5 % for medium-skilled and 6.9 % for highly skilled TCN women 	<p>Documented effects from granting recognition (Brücker et al., 2021)</p> <ul style="list-style-type: none"> - Wage gain of 20 % - Employment probability gain of 25 % - Reduction in overqualification of 30 % 	<ul style="list-style-type: none"> - Ensuring equivalence in qualifications between TCN qualifications and destination country qualifications - Cost to the EU to define what is relevant for the assessment - Costs of recognition process (possibly borne by applicant) - Costs of compensation measures (e.g., retraining, or bridging courses) 	<ul style="list-style-type: none"> - Economies of scale through a harmonised recognition process at EU level - Potentially a larger number of recognised degrees through a harmonised approach - Efficiency gain if qualifications recognised in one EU Member State are automatically recognised in all other Member States - Lower administrative burden for individual Member States and TCN

Note: * Target group includes all TCNs who are observed or self-report to be overqualified. Important: the reasons behind these numbers are multiple and should not be only attributed to the existing legal gaps and barriers (some reasons are common to employees in general, whilst some are common to all migrants in general).

** The existing gap in reported overqualification between TCNs and mobile EU nationals is conditional on observable characteristics (see regression output in Table 3 in the Quantitative Annex) and thus could serve as an upper bound estimate of the policy's scope, assuming that the difference in overqualification between TCNs and mobile EU nationals could be attributed to specific barriers that TCNs face.

²¹⁰ Assuming three million new TCNs arrive per year in the EU, 75 % are of working age (20-64), 43.1 % of recent TCN immigrants are highly educated (see T1, T3, T4 in Data Annex). $3 \times 0.75 \times 0.431 \times 0.48 = 0.465$ million individuals per year.

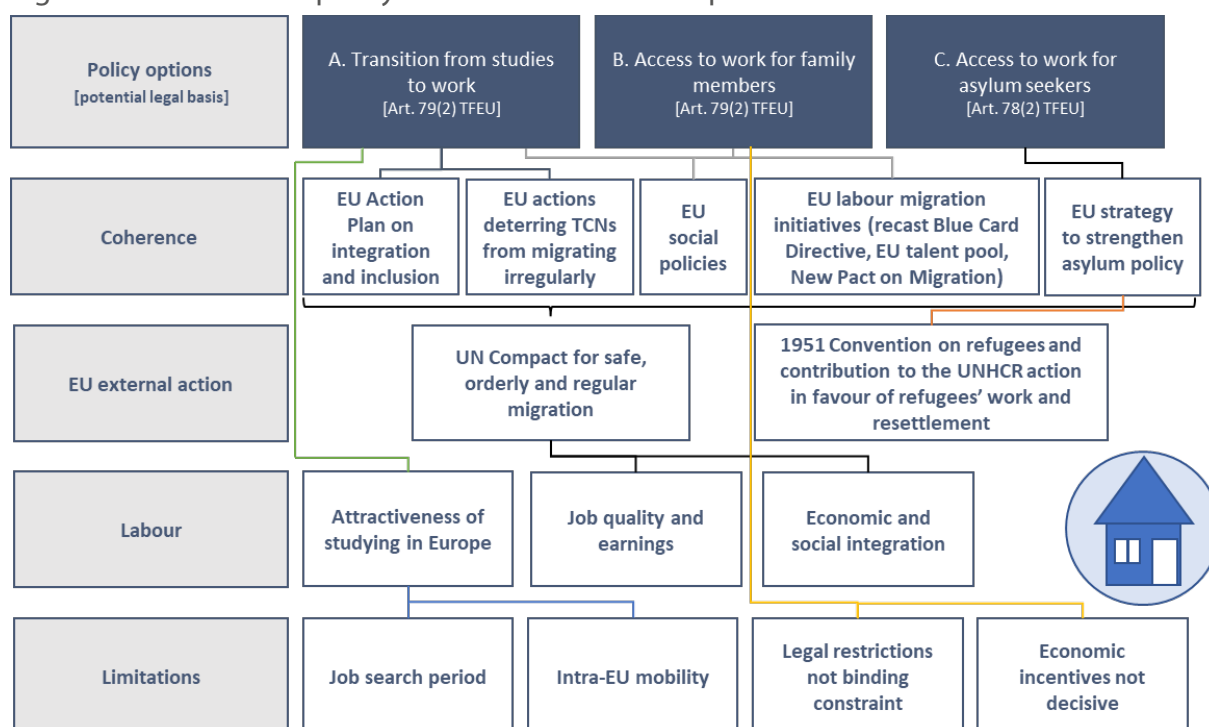
²¹¹ Assuming three million new TCNs arrive per year in the EU, 75 % are of working age (20-64). $3 \times 0.75 \times 0.34 = 0.765$ million.

6 Assessment of policy cluster 2A: introduce new legal channels for labour migration for TCNs in the EU

This chapter provides an assessment of the policy options in the second policy cluster, which envisages the introduction of new legal channels for access to regular employment for TCNs who are already present in the EU. For each of the policy options, both the legal and economic aspects are assessed.

The policy options and the main impacts are summarised in the figure below.

Figure 31: Overview of policy cluster 2A and main impacts



Source: authors' analysis.

6.1 Legal aspects

This section provides the potential legal basis for the adoption of the policy options under the first policy cluster. Moreover, it assesses the complementarity and coherence with the EU's common migration policy, the CFR and EU aims, values and international labour rights (e.g., ILO) more generally. Finally, it assesses each policy option's contribution to the EU's external relations and attractiveness.

6.1.1 Legal basis, subsidiarity and proportionality

In the following, the potential legal basis and adherence to the principles of subsidiarity and proportionality presented in Article 5(3) TEU are discussed.

6.1.1.1 Policy option 2A: transition from studies to work

To grant TCNs who have graduated the right to remain in the EU to find employment, Article 79 TFEU provides the adequate legal basis for action. Pursuant to the second paragraph, the European

Parliament and the Council are indeed competent to adopt measures that define '(a) the conditions of entry and residence, and standards on the issue by Member States of long-term visas and residence permits'.

To evaluate whether the actions to be taken by the EU respect the principle of subsidiarity required by Article 5 TEU, the three different actions described (extending the residence period allowed to search for a job, opening the possibility to search for a job anywhere in the internal market and limiting states' discretion to interpret the notions of the SRD) must be clearly distinguished.

A decision at EU level to extend the residence period allowed to TCNs to search for a job requires action at EU level. Indeed, the strong diversity of policies across Member States that control TCN graduates' access to work prevent TCNs from having a clear view of their work opportunities after studying in the EU. In Hungary, non-EU/EEA students who have completed a degree from a Hungarian university – or any other higher education institute – are eligible for a study-to-work visa, which allows them to stay in the country for nine months after graduation and cannot be extended. In France, TCNs have 12 months (which cannot be extended) after graduation to find a job, while Germany allows 18 months to search for a job. Other rules apply in other Member States²¹². This situation contrasts with that of states such as the US or Canada, which only have one legislation and are EU's main competitors in the race for talent. Therefore, in creating a standard all over Europe for the extension of the residence period allowed to search employment, the EU would simultaneously increase students' chances of finding a job and the EU's attractiveness and competitiveness in the race for talent.

The call for EU guidance to interpret the different notions used in the SRD also appears to meet the subsidiarity requirement. The goal of elaborating guidelines is to approximate national interpretations of the SRD, an action that cannot be taken by Member States individually.

Finally, the incorporation into the SRD of the possibility to search for employment on the territory of any Member State requires action at EU level. Introducing the right to search for employment in the whole EU increases TCNs' chances of finding a job, as success in finding a job often requires jobseekers to be present in a Member State to meet with employers, create networks, etc. This action, which can be found appropriate and suited to reaching the objective of smoothing the transition from studies to work, cannot be achieved by Member States acting alone: it necessitates EU action.

As regards proportionality, it is also important to distinguish between the three different actions.

First, revising the SRD to extend the residence period allowed to search for a job does not breach the principle of proportionality. Indeed, the choice of allowing 18 months – rather than the current nine months – to find a job can be deemed proportionate because a year and a half offers TCNs a substantial chance to find a job, which is consistent with the fact that graduate TCNs often lack professional experience and can find it difficult to find their first job. An alternative solution would be to remove the time-limit condition from the Directive and to allow students unlimited time to search for employment. But this solution would create stronger interference with Member States' competence in the field of labour migration. Moreover, the instrument chosen is a directive, which is required to modify the existing directive. As a binding instrument, it will also constrain Member States to effectively approximate their national legislation while leaving them a certain margin of discretion at the application stage.

²¹² See Scottish Government (2019), Post study work visa options: an international comparative review, www.gov.scot/publications/post-study-work-visa-options-international-comparative-review/pages/1/.

Second, adopting a communication (a soft law instrument) offering guidance for the interpretation of the different notions used by the Directive guarantees limited EU intervention.

Finally, evaluating the proportionality of the last option (incorporation into the SRD of the possibility to search for employment on the territory of any Member State) requires some clarification. To secure the right to move and search for a job, the EU has two main possibilities. The first option is to allow TCNs to reside in the 'second' Member State with the residence permit delivered by the 'first' Member State (the state where they studied). The second option is to impose an obligation on the second Member State to deliver a residence permit for the purpose of employment research. While the former option only imposes an obligation to recognise the residence permit delivered by another state, the latter option relies on administrative action. To deliver a residence permit generates administrative costs. It could therefore be deemed less proportionate.

6.1.1.2 Policy option 2B: ease access to work for family members

Because securing family members' access to work can be deemed to both ensure 'the efficient management of migration (and) fair treatment to third-country nationals residing legally in Member States', and contribute to preventing irregular immigration, the proposed policy option can be based on Article 79 TFEU. More specifically, Article 79(2) c) provides the adequate legal basis to act, insofar as allowing family members to progressively acquire an autonomous right to employment, and prohibiting restrictions to employment access related to the 'rights of third-country nationals residing legally in a Member State'.

The action proposed (revision of Article 14 of the Family Reunification Directive - FRD) respects the principle of subsidiarity. The goal is indeed to reduce the disparities in Member States' national legislation, which create two difficulties that the EU action will tackle. First, (more) harmonised national legislation will contribute to making the EU an attractive destination for skilled migrants insofar as TCNs will get a clearer picture of the opportunities offered to family members in the entire EU, and a more secure legal environment due to less fragmentation. This evolution can have an impact on their decision to settle in the EU. Such harmonisation of the legal framework for family members cannot be achieved by each Member State individually. Second, substantial disparities between different Member States' national legislation can fuel a race for talent and trigger competition between Member States, when competition should instead be directed towards other competitors like the US or Canada.

The instrument chosen for the policy option is the adoption of a new directive to amend the FRD. This instrument is well suited to harmonising national legislation. As a binding norm, it is the appropriate instrument to grant family members an autonomous 'right' to access employment: it creates obligations for Member States to ensure that this right is respected. But, at the same time, because the right to access employment is autonomous only after the family members have 'created a link with the national labour market', Member States retain a margin of manoeuvre to establish the criteria for 'having a link with the labour market'. The balance between the legal security offered by the reform, the expected convergence of national legislation, and the degree of discretion allowed to the Member States, suggests that the envisaged reform meets the proportionality test.

6.1.1.3 Policy option 2C: ease access to work for asylum seekers

Article 78(2) TFEU, which provides that the European Parliament and the Council shall adopt measures regarding '(f) standards concerning the conditions for the reception of applicants for asylum or subsidiary protection', confers competence to the EU to facilitate access to work for asylum seekers. Indeed, facilitating access to work for asylum seekers is related to the asylum seekers'

‘reception conditions’. This notion covers so-called ‘material reception conditions’²¹³ (which include housing; food and clothing provided in kind or as financial allowances or vouchers, or a combination of the three; and a daily expenses allowance) and other benefits like education for minors and access to employment.

The action proposed (further harmonising national legislation on asylum seekers’ access to work, including deleting the conditions imposed to be able to work, and helping asylum seekers find a job), meets the subsidiarity principle. First, an action at EU level, insofar as it would reduce the disparities between Member States’ legislation and practices, can reduce incentives for secondary movements within the EU²¹⁴. It can also mitigate the negative consequences of the Dublin Regulation, which denies asylum seekers the right to choose their state of protection. These effects cannot be achieved through national actions.

Second, further harmonisation of the reception conditions in the EU can ensure that the treatment of applicants is improved right across the EU, and respects human dignity guaranteed by Article 1 CFR, which is particularly important in the Member States where persistent problems exist.

This policy option can also be beneficial to rejected asylum seekers. Indeed, some EU countries, like Sweden, Spain, Italy and Germany, have developed so-called ‘track-change’ procedures, whereby migrants who are legally working during the asylum procedure can obtain legal residence even if their asylum application is rejected. The track-change procedure is based on the assumption that because of long waiting periods for asylum decisions, some asylum seekers are fully integrated in the labour market (their employer can be willing to keep them at work) and in the host society. The proposed EU approach, in favour of easing quick access to work for asylum seekers, is based on the same logic as these national policies, which value the role of work in facilitating migrants’ inclusion. Third, only an action at EU level can prevent Member States from instrumentalising asylum law for other purposes than protection. Member States are indeed constantly tempted to impose stringent conditions (for access to work) for the sole purpose of inciting asylum seekers to choose another Member State as their destination country. Reducing disparities, which can prevent the emergence of a process of regulatory competition between Member States, is an objective that cannot be reached satisfactorily without action at EU level.

The action can be deemed proportionate for different reasons. First, the choice of harmonising legislation on access to work, while it affects national competence, does not go beyond what is needed to reduce the persistent differences among Member States’ legislation. Spontaneous convergence is indeed very unlikely given the evolution of national legislation in the last two decades (and despite the adoption of harmonisation measures). Recent years have also exposed the need to ensure greater consistency in reception conditions across the EU. Moreover, the proposed action can be deemed to be more proportionate than the 2016 Reception Conditions Directive proposal (recast), which relies on greater control and more sanctions to reduce secondary movements. Rather, the proposed action assumes that harmonising conditions for access to work is a more efficient strategy: it reduces incentives to change country while having limited impacts on asylum seekers’ rights. In addition, the proposed changes are limited and targeted: the proposed reform concerns only material reception standards.

Moreover, according to the proposed policy option, the EU will support asylum seekers’ immediate access to employment (i.e., will decide when work authorisation should start) but it does not decide if and when authorisation to work should stop. It indeed leaves to the Member States the decision

²¹³ Listed in Article 2.G of the Reception Conditions Directive.

²¹⁴ See Brekke & Borchman (2015).

to implement amnesty programmes, which can imply that rejected asylum seekers are allowed to keep working even if their asylum application is rejected.

Finally, as regards the form of Union action, the choice of instrument is considered to be coherent with the objective. A directive is indeed adapted to revise a directive. Finally, the other instruments to be used, (EU skills profile tool, the ETF) already exist and can participate efficiently in the overall strategy to help asylum seekers and refugees access the labour market.

6.1.2 Complementarity and coherence

This section assesses the policy option's complementarity and coherence with the i) EU legal migration *acquis*; ii) other EU legal norms, namely non-discrimination law, fundamental rights law, EU migration law, labour law and free movement law; and iii) international law, in particular international human rights law.

6.1.2.1 Policy option 2A: transition from studies to work

Complementarity and coherence with EU migration *acquis*

The first purpose of the proposed action is to increase the EU's capacity to win the race for talent. Revising Article 25 SRD would thus complement other actions currently being taken by the EU, like the negotiation of the recast BCD²¹⁵ or the setting up of the EU talent pool (see policy option 2H). As regards employers, they would have more opportunities to recruit skilled workers, with qualifications acquired after studies in their mother tongue. However, in the case of intra-EU mobility (which is the preferred option), a difficulty can emerge. Given the limited recognition of qualifications for TCNs and the limited knowledge employers have on skills acquired in the other Member States, important limits remain in supply matching demand.

Complementarity and coherence with other EU norms, in particular non-discrimination law and fundamental rights (CFR)

The proposed policy option is fully in line with the EU Action Plan on Integration and Inclusion²¹⁶, which supports inclusion through work. Yet, in the case of intra-EU mobility, the integration benefits expected from keeping students who have studied in the EU (knowledge of the national language(s), social integration, professional network, etc.) are much less likely to materialise if graduate TCNs decide to search for a job in another Member State. To be fully efficient, the action must thus be complemented by EU action on recognition of qualifications (see policy option 1A).

The action is also fully coherent with EU social policy. Easing students' access to work is in line with the principles of the European Pillar of Social Rights, namely the first principle on 'Education, training and life-long learning'²¹⁷ and the fourth principle on 'active support for employment'²¹⁸.

²¹⁵ The EU is acting in different area to improve its attractiveness, such as revising the SPD to simplify the procedures for low- and medium-skilled workers and revising the LTRD to strengthen the rights of residents to move and work in different Member States.

²¹⁶ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Action plan on Integration and Inclusion 2021-2027 COM (2020) 758 final, p. 11.

²¹⁷ 'Everyone has the right to quality and inclusive education, training and life-long learning to maintain and acquire skills that enable them to participate fully in society and manage successfully transitions in the labour market.'

²¹⁸ 'Everyone has the right to timely and tailor-made assistance to improve employment or self-employment prospects. This includes the right to receive support for job search, training, and re-qualification. Everyone has the right to transfer social protection and training entitlements during professional transitions. Young people have the right to continued

In addition, **the action is consistent with human rights protection, both at EU and international level.** Easing students' access to work respects fundamental rights granted in the CFR. It would have a positive impact in respect of, in particular, freedom to choose an occupation and right to engage in work (Article 15 CFR), and could ensure that the principle of fair and just working conditions is respected (Article 31 CFR). To a certain extent, it would also ensure respect of the prohibition of forced or compulsory labour (Article 5 CFR).

The main effect to be expected from the policy option is indeed lower risk of exploitation by employers. Increased opportunities to find a job, coupled with less time pressure to find one, will indeed reduce the risk of TCNs taking the first job they find out of fear of losing their right of residence.

Nevertheless, allowing students to remain in the EU for longer periods to search for a job requires a solution to be found to guarantee a minimum standard of living during this period. This requirement is particularly important in the case of intra-EU mobility, because graduate TCNs are at greater risk of losing access to social protection in the second Member State where they have decided to look for a job.

Complementarity and coherence with international law, in particular international human rights law

The action is consistent with the International Covenant on Economic, Social and Cultural Rights, adopted by the United Nations General Assembly in 1966, a text that provides for the recognition of *inter alia* the right to work, including 'the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts'. The UN Pact on Civil and Political Rights (1966) (UN Pact) also requires that appropriate steps are taken to progressively achieve the full realisation of this right. The ILO also promotes, through different instruments²¹⁹, the employability of young workers.

Finally, the action is coherent with European and international instruments granting the right to decent working conditions. One may indeed start from the assumption that giving graduate TCNs more time and opportunity to find a job is likely to reduce the likelihood of them taking a first job too fast, with the risk of downskilling, wage loss and poor working conditions overall.

6.1.2.2 Policy option 2B: ease access to work for family members

Complementarity and coherence with EU migration *acquis*

The policy option is fully consistent and compatible with other EU actions in the field of migration, and fits in well with the general pattern of the FRD.

Complementarity and coherence with other EU norms, in particular non-discrimination law and fundamental rights (CFR)

Given its contribution to enhancing women's autonomy and possibility of self-realisation by work, policy option 2B can also contribute to ensuring respect of the principle of non-discrimination on ground of gender, granted in Article 21 CFR, and also to equality between men and women, required by Article 23 TFEU.

education, apprenticeship, traineeship or a job offer of good standing within four months of becoming unemployed or leaving education.'

²¹⁹ E.g., Employment Policy Convention, 1964 (No 122); Employment Policy (Supplementary Provisions) Recommendation, 1984 (No 169).

This policy option is fully consistent with EU social policy in favour of work-life balance, which aims to achieve equality between women and men by fostering the ability of women to pursue their careers and gain financial independence, without being held back by family life obligations²²⁰.

In addition, it can contribute to the protection of the rights of the child (Article 24 CFR) by improving the situation of their parents, who ensure that the child benefits from the protection and care necessary to its well-being.

Complementarity and coherence with international law, in particular international human rights law

This policy option is also consistent with the objectives of the UN Convention on the Elimination of All Forms of Discrimination against Women (1979), in particular its Article 11, according to which:

1. States Parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights, in particular:

(a) The right to work as an inalienable right of all human beings;

(b) The right to the same employment opportunities (...)

The action concurs with the UN Global Compact, whose 16th objective requests that States ‘e) empower migrant women by eliminating gender-based discriminatory restrictions on formal employment, ensuring the right to freedom of association and facilitating access to relevant basic services, as measures to promote their leadership and guarantee their full, free and equal participation in society and the economy’.

It contributes to respect of the UN Convention on the Rights of the Child (1989), in particular its Article 3(2), which requires that ‘States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures’.

6.1.2.3 Policy option 2C: ease access to work for asylum seekers

Complementarity and coherence with EU migration *acquis*

The proposed policy action is consistent with the EU strategy to strengthen the Union’s asylum policy, aimed at being a robust and effective system for sustainable migration management for the future, which is fair to both host societies and asylum applicants.

Following Directive 2003/9/EC on minimum standards for the reception of asylum seekers, the EU strategy to achieve this aim is to reduce discrepancies in Member States’ legislation. The recast Reception Conditions Directive is about to be adopted (Slingenberg, 2021). But it is more than likely that this revision is just one step in a longer process of construction of the Common European Asylum System. Additional amendments should be expected in the future.

Complementarity and coherence with other EU norms, in particular non-discrimination law and fundamental rights (CFR)

This policy option will play a part in the effective implementation of the fundamental rights guaranteed at EU level. The proposed reform of the Reception Conditions Directive seeks to ensure

²²⁰ See Directive 2019/1158 of 20 June 2019 on work-life balance for parents and carers, OJ L 188, 12.7.2019, p. 79.

full respect for human dignity, which promotes the application of Articles 1 (respect and protection of human dignity) and 18 (right to asylum) CFR.

Complementarity and coherence with international law, in particular international human rights law

The reform is consistent with Article 6(1) of the International Covenant on Economic, Social and Cultural Rights, which provides for the right to work and includes ‘the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts’.

6.1.3 Contribution to the EU’s external relations and attractiveness

This section discusses the likely impact of the policy options on EU international relations and negotiations (within international organisations and with neighbouring and other third countries) and the attractiveness of the EU territory for migrant workers.

6.1.3.1 Policy option 2A: transition from studies to work

The proposed action is likely to contribute to the objectives announced in the UN Global Compact, in particular the fifth objective²²¹ (to enhance availability and flexibility of pathways for regular migration) and the 16th objective²²² (to empower migrants and societies to realise full inclusion and social cohesion). Following this path would place the EU in a better position than in 2018, when it lost its momentum to speak with one voice in the final conference in Marrakech and at the UN General Assembly (Vosyliute, 2019).

6.1.3.2 Policy option 2B: ease access to work for family members

According to the OECD, the status granted to family members is one of the most important elements in attracting talent²²³. Considering the importance of work for a person’s well-being and the family’s wealth, one may expect that increasing family members’ opportunities to access employment can improve the attractiveness of the EU.

6.1.3.3 Policy option 2C: ease access to work for asylum seekers

The proposed reform would align the EU’s position with that of the UNHCR, which has consistently²²⁴ promoted asylum seekers’ access to employment. The UNHCR’s main argument is that poor material reception conditions, coupled with lack of employment opportunities during the asylum procedure, ‘can lead to a vicious circle of isolation, discrimination and poor integration prospects. This can have a negative impact on asylum seekers’ physical and psychological health, leaving them demoralised after recognition as refugees, or unprepared to return if their applications are rejected’. Easing and facilitating access to employment through concrete measures will meet the UNHCR’s expectations

²²¹ The signatories commit (para 21) to adapting options and pathways for regular migration ‘in a manner that facilitates labour mobility and decent work reflecting demographic and labour market realities, optimises education opportunities (...) with a view to expanding and diversifying availability of pathways for safe, orderly and regular migration’. The text also incites signatories to: ‘b) facilitate regional and cross-regional labour mobility through international and bilateral cooperation arrangements, such as free movement regimes, visa liberalisation or multiple-country visas’.

²²² The signatories (para 32) commit to ‘empower migrants to become active members of society’ and to ‘d) work towards inclusive labour markets and full participation of migrant workers in the formal economy by facilitating access to decent work and employment for which they are most qualified’.

²²³ www.oecd.org/migration/talent-attractiveness/.

²²⁴ UNHCR, Response to the European Commission’s Green Paper on the Future Common European Asylum System, September 2007, available at: www.unhcr.org/refworld/docid/46e159f82.html; then UNHCR Annotated Comment to Directive 2013/33/EU of the European Parliament and Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast).

and increase the EU's credibility as an entity that has developed a common policy on asylum 'in accordance with the Geneva Convention of 28 July 1951', as required by Article 78 TFEU.

6.1.4 Summary

The table below summarises the main findings of the legal aspects analysed for part of the policy options covered under the second policy cluster.

Table 7: Summary of the legal analysis for policy cluster 2A

Target group	Policy action	Potential effects	Limitations and costs	EU added value
Skilled TCNs regularly residing in the EU: - Students - Family members - Asylum seekers and refugees	- Allow intra-EU mobility to search for a job (for students only) - Reduce waiting period before access to work - Extend residence period to search for a job - Take concrete measure to facilitate access to employment	- Attract skilled workers and reduce labour shortages - Reduce downskilling and de-skilling - Limit dependency on employer	- Allowing a job search in the whole of the EU requires complementary action to secure right of residence - Action does not resolve the qualification recognition issue: to couple with policy option 2A - Revising Reception Conditions Directive does not cover refugees - Early skill-screening could interfere with evaluation of asylum application	- Contribution to attracting talent - Contribution to EU action against irregular migration - Contribution to EU action in favour of decent labour conditions - Contribution to EU policy in favour of TCNs' integration

Source: authors' analysis.

6.2 Economic aspects

This section assesses the expected economic impact, considering the impact on labour market outcomes and possible limitations and enhancement of effectiveness.

6.2.1 Impact on labour market outcomes

6.2.1.1 Policy option 2A: transition from studies to work

Increasing the period of stay after graduation and simplifying intra-EU mobility for TCNs who receive their education in the EU can impact the EU labour markets through several channels. First, by relaxing time constraints for job searching and broadening the job search geography, it can allow young and qualified TCNs to find a job that better suits their skills and qualifications. As shown in Chapter 3 and Quantitative Annex A (Tables 6-7), young TCNs – both men and women – are 9 percentage points less likely to work in a job that fits their education, are more willing to commute for more than one hour for a job (by 3 percentage points for women and 6 percentage points for men), are more likely to report wages in the lowest decile (young TCN women by 5 percentage points) and are less likely to report wages in the highest deciles (young TCN men, by 5 percentage points) than citizens with similar observable characteristics. Young TCN men and women are also more likely to work part time and in atypical hours. The gap between young TCN people and similar

mobile EU nationals is smaller, but still statistically significant for most indicators: young men are 2.3 percentage points less likely to report wages in the highest deciles and young women are one percentage point more likely to report a wage in the lowest decile²²⁵. Part of the observed gap in job quality and earnings can be attributed to a reduced time span for job searching, which puts young TCNs under pressure to accept a (suboptimal) job offer faster to obtain their residence permit.

There is no estimate how the duration of the job search visa after graduation affects graduates' probability of staying or their employment outcomes. Staying rates vary by destination country, degree type and nationality, and seem to be highest in Canada (33 %) followed by Czechia (32 %), France (31 %) and Australia (30 %), and rather low in Austria and Spain (between 15 and 20 %) (OECD, 2011)²²⁶. In France, almost 40 % of new labour migrants come via the student channel (OECD, 2014). A survey cited in Hawthorne (2018) indicates that while most students migrate to obtain an internationally recognised high-quality education, the opportunity to stay after graduation has a large effect on prospective student opinion and expectations (see also MacGregor, 2012). A study on Finland by Mathies and Karhunen (2021) found that employed international graduates had a 13 % increased probability of staying in Finland after graduation compared with those who were unemployed. Their results further show that those who worked in a white-collar job had a slightly higher probability of staying (15 %).

The following box highlights an additional channel to improve the outcome for TCN graduates, and illustrates the complementarity between different policy options, here in particular between channels to keep students and high-skilled work visas such as the Blue Card.

Box 1 Work permit regulations and labour market outcomes, by Qendrai and Kraft (2021)

Qendrai and Kraft (2021) analyse how the introduction of the Blue Card has affected entry-level wages of TCNs in Germany. The Blue Card is targeted at non-EU university graduates with degrees received or recognised in Germany. It provides immediate residence to students with a working contract that pays above clearly announced and regularly updated wage thresholds. To estimate the causal effect of the Blue Card, Qendrai and Kraft (2021) analyse how differences in entry wages between national and EU graduates on the one hand, and TCN graduates who were affected by the Blue Card introduction on the other hand, have changed since the introduction of the Blue Card.

The introduction of the Blue Card increased entry-level wages of non-EU graduates relative to non-affected national and EU graduates by approximately 2 % of the pre-treatment entry-level wages. These results are not related to higher-skilled graduates entering the German labour market. The introduction of the Blue Card also did not make non-EU graduates stay longer in Germany. Instead, the Blue Card salary threshold acted as a reference point in wage negotiations. The wage thresholds act as information on what specific occupations can pay in the German labour market, and thus change the graduates' aspired wage level. These changes in aspired wage levels increased actual entry level wages.

Second, this policy can help to retain qualified young TCNs in the EU. The prospect of a more secure stay after studying can encourage students to invest more in destination-specific skills (e.g., language), which can later further improve their economic and social integration.

²²⁵ A smaller gap between TCNs and mobile EU nationals, on the one hand, could reflect that these migrant groups share common barriers in foreign labour markets. On the other hand, it could result from differences in the migrant composition: due to stricter residence rules for TCNs, they are more likely to leave the EU if they do not manage to find a job or secure their residence by other means relatively fast. Thus, young TCNs could be selected more positively compared with young mobile EU nationals, who do not face such restrictions.

²²⁶ OECD, 2011 International Migration Outlook.

Third, less bureaucracy and better labour market prospects can help EU Member States to attract a larger pool of prospective TCNs willing to study – and later to work – in the EU. Kato and Sparber (2013), for instance, illustrate that the restrictive immigration policy can discourage high-ability international students from pursuing an education in the US.

There are certain limitations to consider, however, that can restrict the positive impact of the policy option. First, extending the job search period might not be sufficient to guarantee the smooth transition of TCNs to work. TCN students can be too financially constrained to be able to afford a long stay in the EU while searching for a job that fits their education. Therefore, measures to ensure the smooth transition of graduate TCNs to the labour market should already be taken before graduation, for instance, by fostering acquisition of work experience during their studies. As discussed in Chapter 3, young TCN men and women are 13 percentage points less likely to obtain paid or unpaid work experience during their studies relative to similar citizens. They are also less likely to directly approach EU employers when searching for a job, instead relying more on networks of friends and relatives, which might be less efficient. Supporting the acquisition of practical work experience and job search activities by TCN students can thus be critical.

Second, when discussing the benefits of intra-EU mobility, it is important to keep in mind that only slightly more than 6 % of young respondents have moved or are willing to move within the EU for a job. While TCNs are about one percentage point more willing to move to another EU Member State than citizens, the share of potentially mobile TCNs is low to generate tangible economic effects. Possible reasons for this could be lack of awareness about job opportunities in other EU Member States, as well as the perceived difficulties with recognition of qualifications and language barriers. It would therefore be effective to combine this policy option with the policy options in cluster 1 that enhance the recognition of qualifications.

6.2.1.2 Policy option 2B: ease access to work for family members

Supporting and promoting family members' autonomous access to employment would contribute to improving TCNs' economic and social integration through several channels. First, it provides additional financial security to a TCN household, in case the sponsor (the spouse who first enters the EU, e.g., for work or research reasons) loses or wants to change his or her job or further invest in human capital. By making the TCN household less dependent on the work contract of the sponsor, this policy option could increase the income of TCN households, both directly (by fostering employment opportunities for family migrants) and indirectly (by allowing sponsors more flexibility on the job market). Second, this policy option makes the economic position of family migrants (who are predominantly women)²²⁷ less vulnerable in case of unforeseen family situations such as divorce, sickness or death of a spouse. Third, by reducing future uncertainty (as residence and work permits of a family member no longer depend on the residence of the spouse) this option could stimulate human capital investments in family migrants with the relevant skills for the destination.

Legal barriers for newly arrived family migrants represent one of the reasons behind their low employment rates in the first years after arrival. About 8 % of unemployed or inactive family migrants cite legal restrictions as the major obstacle in finding a job (see Figure 26). Even if the restrictions are temporary (no more than 12 months after arrival), they can have negative long-term implications. One factor at play could be that individuals try to enter the labour market during a recession when there are fewer job opportunities available. For instance, Barsbai et al. (2021), using data on US family migrants, show that those who arrive during a recession and thus cannot easily find a job in the first year after their arrival face a lower wage income in both the short and longer run. They also show that this is mainly associated with occupational downgrading. Another possible reason is that EU

²²⁷ 67 % of TCNs who arrived in the EU for family reasons are women (EU LFS 2014).

employers might not be willing to hire a family migrant, even one with the right skills and qualifications, without an automatic work permit due to perceived high bureaucratic costs (i.e., such as those associated with submitting documents for a labour market test). As a result, family migrants might be more likely to find a job via their ethnic networks, which does not always result in the best fit (Battist et al., 2021).

For family migrants from more conservative countries, such legal restrictions may not represent the binding constraint. Values and social norms are hard to change in the short term (Laurentsyevea and Venturini, 2017). A general problem for family migrants (both TCNs and mobile EU nationals) is that their decision to migrate is not driven by economic considerations, therefore timing and labour market conditions might not be optimal given the skills and qualifications of family migrants, who are more likely to give up their careers and downgrade when they follow their partners.

6.2.1.3 Policy option 2C: ease access to work for asylum seekers

Asylum seekers and refugees, over all other TCNs, face the largest barriers related to legal restrictions. Policy option 2C focuses on: 1) fostering labour market access for asylum seekers by removing (or substantially relaxing) temporary employment bans; and 2) allowing a track change for rejected asylum seekers.

1. Fostering labour market access for asylum seekers by removing (or substantially relaxing) temporary employment bans

In a recent study, Fasani et al. (2021) find that exposure to a ban upon arrival reduces refugee employment probability in the post-ban years by 8.9 percentage points, or 15 %. Even though the ban applies to asylum seekers in the first months after their arrival, Fasani et al. (2021) document that the impacts of this policy last up to 10 years, and thus affect the labour market integration of people already recognised as refugees. The effects are not mechanical, and increase non-linearly in ban length. The impact is driven primarily by subsequent lower labour market participation by recognised refugees. Temporary employment bans are concentrated among less-educated refugees, translate into lower occupational quality, and seem not to be driven by changes in migration patterns. The authors of the study estimate a EUR 37.6 billion output loss over an eight-year period from the bans imposed on asylum seekers who arrived in Europe during the 2015-2016 refugee crisis.

Another problem slowing down the subsequent labour market integration of refugees are the long waiting periods for asylum decisions and associated periods of uncertainty about labour market status. Even if employment bans are abolished, the desired labour market effect might be hampered due to the long duration of asylum procedures. Fasani et al. (2018) use EU LFS data from 2008 and 2014 to analyse the labour market outcomes of refugees. They find that entry cohorts admitted when refugee status recognition rates are relatively high integrate better into the host country labour market. Hainmueller et al. (2016) use Swiss data and find that one additional year of waiting for the asylum decision reduces the subsequent employment rate of already recognised refugees by 4 to 5 percentage points, a 16-23 % drop compared to the average rate. The effect is similar for different groups of refugees differentiated by gender, origin, age at arrival and assigned language region. This pattern is consistent with the idea that waiting in limbo (waiting time for the asylum decision) dampens refugee employment through persistent psychological discouragement, rather than a skill loss mechanism. Havrylchuk and Ukrayinchuk (2017) use French data to show that limbo slows down the socioeconomic integration of refugees. For the probability of investing in human capital (whether an asylum seeker has pursued an education, including language courses, in France after his or her arrival), the difference due to the duration of limbo is 31 % for women and 44 % for men. While the probability of being employed is much higher for men, limbo has a larger negative

impact on them (-7 %) than on women (-4 %). They also find a particularly adverse impact of limbo on the likelihood of finding new friends and studying in France.

For refugees who have already been granted legal status, uncertainty relates to the temporary nature of a residence permit and, hence, to the outcome of its renewal every one to three years. This concerns refugees receiving humanitarian status or subsidiary protection – about 50 % of all positive decisions by the EU27 in 2020. Uncertainty can have a detrimental effect on individuals, as it gives a reason to postpone investment, consumption and employment decisions until uncertainty is resolved (Balta et al., 2013). During this uncertain period, refugee migrants might experience a sense of insecurity or temporariness, and lack the motivation to invest in destination-specific human capital or engage in an active job search. For instance, Adda et al. (2015) develop a model that includes endogenous skills accumulation, which demonstrates that policies that create uncertainty among immigrants regarding their chances of remaining permanently in the destination country may lead to ex post suboptimal human capital investment.

2) *Allowing a track change for rejected asylum seekers*

Devillanova et al. (2018) find that immigrants who are potentially eligible for legal status under the amnesty programme have a significantly higher probability of being employed relative to undocumented immigrants who are not eligible. The size of the estimated effect is equivalent to about half the increase in employment normally experienced by undocumented immigrants in the sample during their first year in Italy. Kaushal (2006) finds that the US NACARA Act (legalisation) had a modest effect on the employment of immigrant men, raising their real wage by 3 % and weekly

Box 2 Employers' perspective in Germany (based on Randstad-ifo-Personnel Manager Survey, 2017)

A decisive factor when it comes to the labour market integration of refugees is the hiring behaviour of firms. It is therefore interesting to study the hiring of refugees by firms, as well as the reasons hindering firms from hiring refugees. In this survey of approximately 1 000 personnel managers in Germany, most firms indicated that they initially hired refugees via internships (43 %) or as support staff (40 %). A third of firms employed refugees as trainees and a further 8 % as skilled workers.

The hiring of refugees is made burdensome by a number of bans and restrictions. First, all asylum seekers are banned from working in the first three months upon arrival. In addition, those asylum seekers who come from so-called 'safe origin countries' have an employment ban for the whole duration of their asylum process. Currently, the following countries are considered safe origin countries: EU Member States, Albania, Bosnia Herzegovina, Ghana, Kosovo, Macedonia, Montenegro, Senegal and Serbia. For all other origin countries, certain German States perform a priority check for asylum seekers and tolerated refugees, which means that the public employment agency only grants a work permit if they cannot find an equally fitting German or EU national to fill the position for which the work permit has been requested.

For most companies, the residence permit status of refugees is a major hurdle (45 %), followed by the duration of administrative procedures (36%), the ban on employment for refugees from safe countries of origin (34 %), official governmental work permit approval (31 %), recognition of foreign vocational and higher education qualifications (22%), the effort of in-house supervision (19 %), the priority check (18 %) and internal administrative costs of the examination procedure (14 %). These answers show that governments can facilitate firms' hiring of refugees by facilitating administrative procedures.

Source: Anita Jacob-Puchalska, *Jedes fünfte Unternehmen hat bereits Geflüchtete beschäftigt*, ifo Schnelldienst 12/2017 70. Jahrgang 29. Juni 2017.

earnings by 4 %. The effect was driven by men with at least a high school diploma. Monras et al. (2018) study the consequences of the Spanish Government legalising about 600 000 migrants in 2004. They find that each newly legalised immigrant increased local payroll-tax revenues by EUR

4 189 on average. Furthermore, the policy change deteriorated the labour-market outcomes of some low-skilled natives and immigrants, and improved the outcomes of highly skilled natives and immigrants. Dustmann et al. (2017) find that undocumented immigrants consume about 40 % less than documented immigrants, conditional on background characteristics. Roughly one quarter of this decrease is explained by undocumented immigrants having lower incomes than documented immigrants. The findings imply that legalisation programmes may have a potentially important effect on immigrants' consumption behaviour, with consequences for both the source and host countries. Baker (2015) shows that legalisation caused a reduction in crime across US States. At the same time, the Immigration Reform and Control Act (1986) enforced stronger control over the hiring of undocumented immigrants, creating obstacles to the employment of those who were not legalised. Mastrobuoni and Pinotti (2015) look at variations in legal status across pardoned prison inmates in Italy after the EU enlargement of January 2007. They find that after enlargement, recidivism declined markedly – from 5.8 % to 2.3 % over a six-month period – among inmates from the new EU member countries (who were granted legal residence), whereas no change occurred in a control group of inmates from EU candidate countries. Pinotti (2017) uses a sharp discontinuity design in the Italian context to show that legal status reduces crime rates by an average of 0.6 percentage points (given a baseline crime rate of 1.1 %).

Besides these channels and policies showing that granting status supports the labour market and social integration, there is also another policy that goes in the opposite direction, i.e., successful labour market integration can be helpful in obtaining residence status. This is the case for the so-called 'track change'. Migrants who are legally working during their asylum process or limbo phase can obtain legal residence even if their asylum application is rejected. As these policies are relatively new and have just been implemented in a small number of countries, no comprehensive impact assessments have been conducted to date. These policies also vary by destination country and set different criteria for the conversion from asylum to work residence permit. One of the pioneer countries that has implemented the possibility of such a track change is Sweden. In 2020, Sweden granted 1 360 work permits to people in Sweden whose asylum application had been refused²²⁸. This represents 9 % of total work permits granted. In 2019, this number was lower (4 %), which can be explained by two factors. First, the track change is becoming increasingly important, and second, there was less migration from abroad due to the COVID-19 pandemic. During the pandemic it thus became even more important to integrate those migrants who were already present in the country.

By definition, the impact on the affected individual is that employment probability increases from zero (no work permit granted after asylum rejection) to close to 100 (work permit granted after asylum rejection) because the eligibility criterion for a track change is that the person will be employed. Apart from this direct impact, there are also indirect impacts from the policy option of a track change. First, it gives the potential employer of an asylum seeker some security that the person hired during the asylum process can stay at work even in the case of a rejected asylum application. It thus reduces uncertainty for employers, which makes the hiring of refugees more likely. Second, it provides additional motivation for asylum seekers to integrate into the labour market faster because it provides a pathway to legal residence even if the asylum application is rejected.

To measure the percentage of rejected asylum seekers who could be affected by the policy option of a track change, we compare the number of work permits granted to rejected asylum seekers in Sweden in 2020 (1 360) to the number of rejected asylum seekers in Sweden in 2020 (12 270)²²⁹,

²²⁸ www.migrationsverket.se/English/About-the-Migration-Agency/Statistics/Work.html.

²²⁹ In Sweden in 2019, 58 % of asylum decisions were rejected.

which gives us 11 % of rejected asylum seekers who made use of the track change. One year earlier, this number was 5 %.

According to Eurostat, in the EU27 in the last three years around one million asylum applications were rejected, among which 635 000 were from applicants between 18 and 64 years old. In the same time period, fewer than half (approximately 360 000) have left the EU following an order to leave. In March 2021, 543 400 applications for asylum (from applicants between 18 and 64 years old) were still under consideration by national authorities in the EU27²³⁰. Thus, there seems to be a large potential target group.

One potential limitation on the effectiveness of the track change is that it is tied to strict administrative rules. Examples are a minimum employment duration before the asylum rejection, a minimum duration for the employment contract, salary thresholds, language skill requirements and similar hurdles. While these are supposed to ensure that only self-sufficient rejected refugees with good employment prospects can make use of the track change, it also limits the potential pool of eligible refugees.

6.2.2 Summary

The table below summarises the main findings of the economic aspects analysed for the first part of the second policy cluster.

Table 8: Summary of the economic analysis for policy cluster 2A

Target group	Policy scope*	Potential effects (qualitative)	Limitations and costs	EU added value
Policy option 2A: transition from studies to work				
TCN students: ~800 000 residing in the EU27 as at 2019**	<p>Existing gap between young TCNs and similar citizens (mobile EU nationals):</p> <ul style="list-style-type: none"> - Young men: 5 % (2.3) lower probability of earning wage in the 9th-10th deciles - Young women: 5 % (1) higher probability of earning wage in the 1st decile - Young men and women: lower job quality along several dimensions 	<ul style="list-style-type: none"> - Reduce gap in job quality and earnings due to longer job search and broader geography - Retain qualified young TCNs in the EU and encourage country-specific human capital investment - Attract a larger pool of TCNs willing to study and later to work in the EU 	<ul style="list-style-type: none"> - Limited willingness for (or awareness of) intra-EU mobility among TCNs - Financial constraints to afford a long job search for TCNs (need measures to ensure adequate living standards during job search) - Trade-off between intra-EU mobility and investment in destination-specific skills - Costs of tools to favour transition between studies and employment 	<ul style="list-style-type: none"> - Economies of scale by attracting a larger pool of new high-potential young TCNs - Economies of scale through the retention of current students

²³⁰ Eurostat (migr_asypenctzm).

Policy option 2B: ease access to work for family members				
Family members of TCNs in the first year after arrival: ~147 000 - 162 000 TCNs enter the EU27 annually to join non-EU partner or spouse***	<p>Compared to similar mobile EU nationals:</p> <ul style="list-style-type: none"> - TCN family migrants (both men and women) are 10 % less likely to be employed than mobile EU family members - TCN family migrant men are 7.25 % more likely to receive a wage in the lowest decile and 11 % less likely to receive a wage in the top deciles - TCN family migrant women are 5 % less likely to earn a wage in the top deciles <p>*****</p>	<ul style="list-style-type: none"> - Higher employment and wages, higher income of a migrant household - Better possibilities to invest in country-specific human capital 	<ul style="list-style-type: none"> - Other important factors: timing and destination of migration is not driven by economic considerations; lower quality of foreign degrees - Cultural values and norms particularly related to gender (about 15 % of TCN family migrants are women from North Africa and the Middle East) 	<ul style="list-style-type: none"> - Economies of scale by attracting a larger pool of migrants - Better labour market integration and better use of human capital
Policy option 2C: ease access to work for asylum seekers				
<ul style="list-style-type: none"> - Asylum seekers in their first year after arrival: ~ 284 500 first-time asylum applicants (18-64 years old) in the EU27 in 2020**** - Recently recognised refugees: ~ 346 500 people (18-64 years old) 2018-2020***** - Rejected asylum seekers ~ 635 000 (18-64 years old) 2018-2020***** 	<p>Compared to similar TCNs, refugee men are 20 % and refugee women are 30 % less likely to be employed (EU LFS 2014)</p>	<ul style="list-style-type: none"> - Better labour market integration (Fasani et al., 2021) - Exposure to a ban reduces employment probability in post-ban years by 8.9 %; the effect lasts up to 10 years post arrival (Fasani et al., 2021) <p>Estimated effects of a track-change option in Sweden:</p> <ul style="list-style-type: none"> - 5-11 % of rejected asylum seekers can obtain a work permit - Indirect effects through earlier labour market 	<ul style="list-style-type: none"> - Pressure to accept a bad job fast and underinvest in destination-specific skills - Equal treatment of all refugees - Large administrative hurdles for track change 	<ul style="list-style-type: none"> - Externalities: avoid race to the bottom among Member States by harmonising reception conditions - Foster exchange of best practices and experiences

		participation of asylum seekers Effects of a longer- term perspective: - policies that create uncertainty about immigrants' chances of remaining permanently in the destination country may lead to ex post suboptimal human capital investment (Adda et al., 2016)		
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Note: * the existing gap in earnings and job quality between young TCNs and citizens (similar mobile EU nationals) is calculated conditional on observable characteristics (see Tables 6-7 in the Quantitative Annex) and thus could serve as an estimate of the policy's scope, assuming that the difference in outcomes between TCNs and citizens (mobile EU nationals) could be attributed to specific barriers faced by TCNs. ** stock of TCNs holding residence permits for studies as at 2019. *** The existing gap in employment and earnings between TCN family migrants and family migrants from other EU Member States is calculated conditional on observable characteristics (see Table 9 in the Quantitative Annex) and thus could serve as an estimate of the policy's scope, assuming that the difference in outcomes between TCNs and mobile EU nationals could be attributed to specific barriers faced by TCNs. **** among these 284 500, about 40 % are likely to be recognised as a refugee or a humanitarian migrant (average EU recognition rates were 40 % on applications lodged in 2020, https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Asylum_statistics). ***** total decisions (rejections) among all first instance decisions (individuals between 20 and 64 years old) between 2018 and 2020. Among positive decisions, about 50 % concerned refugee status according to the Geneva Convention status, the other half concerned humanitarian status or subsidiary protection.

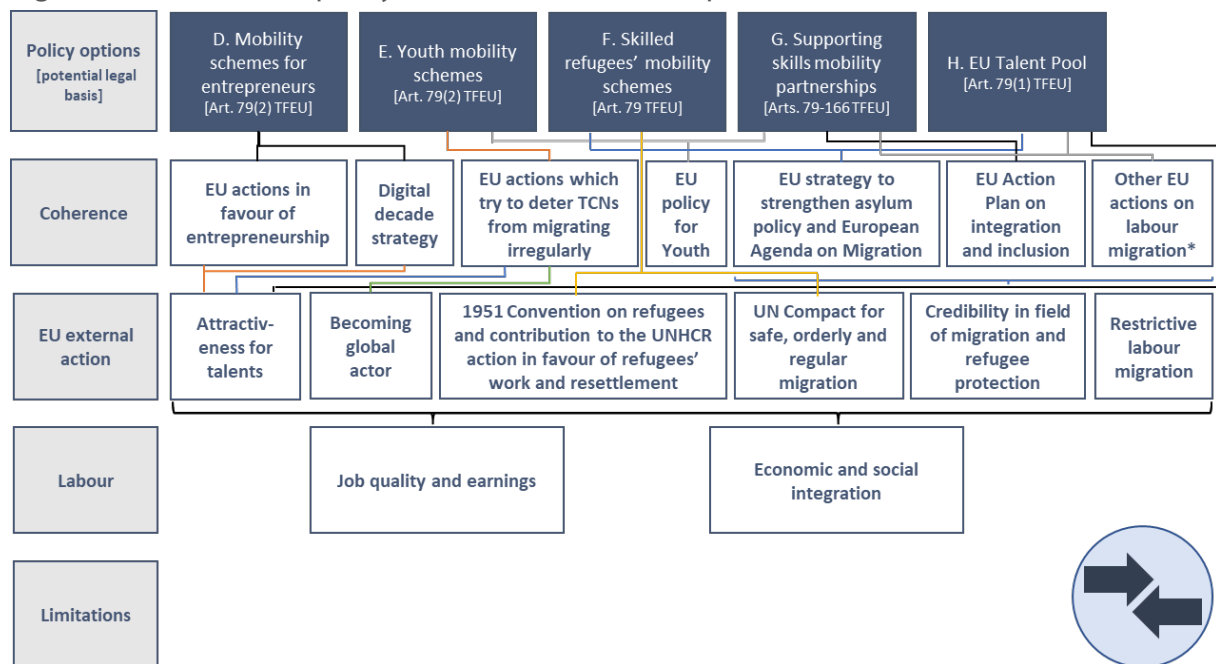
Sources: Eurostat (migr_resvalid, migr_asyappctza, migr_refam and migr_asydcfsta)

7 Assessment of policy cluster 2B: introduce new legal channels for labour migration to the EU

This chapter provides an assessment of the policy options aiming to create legal pathways to the EU for TCNs residing outside the EU. For each of the policy options, both the legal and economic aspects are assessed.

The policy options and the main impacts are summarised in the figure below.

Figure 32: Overview of policy cluster 2B and main impacts



Note: *recast BCD, EU talent pool, New Pact on Migration and Asylum.

Source: authors' analysis.

7.1 Legal aspects

This section provides the potential legal basis for the adoption of the policy options under the first policy cluster. Moreover, it assesses the complementarity and coherence with the EU's common migration policy, the CFR and EU aims, values and international labour rights (e.g., ILO) more generally. Finally, it assesses each policy option's contribution to the EU's external relations and attractiveness.

7.1.1 Legal basis, subsidiarity and proportionality

The report now evaluates the possible legal basis for the different actions proposed, and whether these actions would meet the principles of subsidiarity and proportionality enshrined in Article 5(3) TEU.

7.1.1.1 Policy option 2D: mobility schemes for entrepreneurs

Creating an entrepreneur mobility scheme at EU level, or supporting the development of national schemes, can be based on Article 79 TFEU. The action, whatever final form is chosen, would consist of delivering a long-term visa (for more than 90 days) and residence permit to TCNs for the purpose

of economic activity. The Union can base its action on Article 79(2) a), which explicitly provides that the EU legislator shall adopt measures concerning the conditions of entry and residence, and standards on the issue by Member States of long-term visas and residence permits.

Policy option 2D does not raise any objections as regards its respect of the principle of subsidiarity. Creating an EU entrepreneur scheme or developing EU support for national schemes is an action that can hardly be taken at national level. The objective is indeed to offer entrepreneurs the possibility to develop their activity in the entire internal market. In addition to its European scope, the action also addresses the issues resulting from the diversity of national schemes.

As regards proportionality, the two different approaches (EU scheme or support for national schemes) must be distinguished. At first glance, supporting national schemes can be deemed as more proportionate than creating an EU visa for entrepreneurs. The latter solution will have a stronger impact on the Member States, given that the conditions and regime for access to work in Member States will be decided at EU level: admission criteria, assessment and the kind of support or incentives that should be associated with the programme will no longer belong to Member States' competences.

In contrast, action limited to supporting national schemes leaves much more leeway to the Member States, which remain free to adapt their programmes to the specificity of their labour market and economy (in particular in the field of innovation). However, this latter option is also less likely to guarantee intra-EU mobility, which can be assumed to play a role in the entrepreneurs' decision to choose the EU for their activities, unless action is taken at EU level to guarantee that intra-EU mobility is associated with support for national schemes. Thus, if support for national schemes is preferred, it would have to be associated with an EU instrument ensuring that, when TCNs benefit from national schemes supported by the EU, they have the right to move to another Member State for the purpose of developing their activity. Such an instrument, based on the idea of mutual recognition of the selection of promising entrepreneurs, would ensure through these national schemes that the objective of the policy option is fulfilled, with limited encroachment upon Member States' competences. It would indeed pass the proportionality test more easily than an EU scheme.

7.1.1.2 Policy option 2E: youth mobility schemes

Supporting or creating youth mobility schemes is expected to contribute to curbing irregular migration, to reduce EU labour shortages and also to participate in the EU's endeavour to increase the skills of people residing in the EU, whatever their nationality. In the frame of Erasmus+, the EU can contribute to the implementation of the New Skills Agenda for Europe, which is devoted, among other goals, to developing skills that sustain jobs and growth, as well as helping with the educational and training aspects of newly arrived migrants' integration. The youth mobility schemes that the EU would support, or create, can thus be analysed as one element of a broader action for youth. Article 79(2)(a) TFEU provides the legal basis for the proposed actions. Youth mobility schemes are agreements in which visas and residence and work permits are delivered to young workers not having the nationality of the state of destination. Whether the EU creates EU-wide youth mobility schemes or limits its action to coordinating and benchmarking national youth mobility schemes, Article 79(2)(a) appears to be the right basis for action: this provision indeed grants competence to the EU to enact measures related to 'visa and residence permits' for TCNs. A tricky issue is the limit to be considered, which is mentioned in Article 79(5): this provision prevents the EU from 'affect(ing) the right of Member States to determine volumes of admission of third-country nationals coming from third countries to their territory in order to seek work, whether employed or self-employed'. The difficulty comes from the fact that, generally, the admission volumes of young labour migrants are precisely defined in youth mobility schemes, based on reciprocal agreements. The contracting parties decide on the maximum number of young people who are annually allowed to move. Therefore, if the EU decides to create EU youth mobility schemes, attention will be paid to leaving

the volumes of admission outside the scope of the text. The regulation will define the conditions for participating in the mobility scheme, as well as the rights and obligations attached to the scheme, but the EU will leave its Member States to unilaterally define these volumes of admission later, probably when concluding youth mobility agreements with third countries.

The proposed policy option respects the principle of subsidiarity insofar as it supposes actions that can hardly be taken at national level. First, the EU is better placed than its Member States to benchmark their different practices, and to identify solutions adapted to the European context. The EU is likely to gather information at a scale Member States cannot reach. Second, Member States are less able than the EU to identify the situations in which the conclusion of multilateral – instead of bilateral – agreements, would be a more efficient strategy to negotiate with third countries and to attract young professionals. Third, the difficulty in attracting young skilled workers is a problem that is widespread across Europe: offering TCN students the opportunity of moving and working freely within the EU, which is a solution likely to increase the EU's attractiveness, requires EU action. Fourth, the possibility to have a unified EU mobility scheme would avoid divergence between Member States' schemes and avoid harmful competition. Finally, alignment of Member States' youth mobility schemes and the EU's external policy in the field of migration, which is required for coherence purpose, can only be determined at EU level. Given the high number of agreements already concluded by the EU and its Member States with states of origin or states of transit, coordination of actions at EU level would be appropriate.

As regards the proportionality requirement, the conclusion depends on the action taken by the EU. If the EU limits its action to benchmarking and inciting its Member States to coordinate their mobility schemes, the intensity of its intervention will remain low and will not excessively interfere with Member States' competence. Member States will indeed remain the main actors who: decide whether (or not) to conclude youth mobility schemes; select third-country partners; decide on the number of young workers covered by the agreement; and define the entry, residence and work conditions. The Union will intervene only as a promoter and a coordinator. One may expect that the Commission will adopt a recommendation, in which guidelines will suggest a certain type of youth mobility scheme, define the situation in which multilateral action is best suited to attract young TCNs, and incite Member States to select certain partners. Such guidelines are useful instruments to promote coordination and spontaneous convergence between Member States' practices. At the same time, they leave Member States ample leeway to act according to their preference. One may thus consider that the proportionality requirement is met.

Alternatively, if the EU's choice is to enact a regulation to create an EU youth mobility scheme, the action will interfere more with Member States' competences. However, this action is needed to achieve the goal pursued insofar as the objective is to offer young TCNs a uniform regime, including the right to move within the EU. As regards the choice of instrument, one may argue that a regulation is needed in order to create rights and obligations, and to ensure uniform application across the whole of the EU.

7.1.1.3 Policy option 2F: skilled refugees' mobility schemes

Identifying the legal basis for this policy option is a complex issue, which leaves room for discussion. In the TFEU, there is a divide between Article 78, devoted to the protection of people asking for protection, and Article 79, which addresses 'general' migration (mainly admission, rights and return). At first glance, Article 78 can be deemed the appropriate legal basis for the EU acting in favour of skilled refugee mobility to the EU. However, one may encounter difficulties in grounding any EU action supporting refugees' admission to the EU on Article 78, which mostly deals with protection and asylum seekers' rights.

Therefore, another path can be explored: to base the action on Article 79. The objective of the refugee schemes is indeed neither to provide protection nor to create a uniform status for the beneficiaries of protection. The schemes' goal is to allow people recognised as refugees, who will be resettled in one Member State, to be admitted in the EU. The action thus concerns admission (visa and residence permit), and skilled refugees are considered labour migrants. Such reasoning makes it feasible that EU action could be based on Article 79(2) c).

True, this reasoning has its limits. One may first ask to what extent this approach would respect the divide that the Treaty has constructed between Articles 78 and 79 TFEU. Second, at conceptual and normative levels, this solution assumes that the people covered by the action are defined based on labour market needs more than on their need for protection.

EU action in support of refugee mobility schemes respects the principle of subsidiarity. To benchmark Member States' practices, and to identify the best solutions to be recommended and extended, can be better achieved by EU action than by national action. The use of techniques already deployed by the EU in other EU policies (like setting up networks and high-level groups) could indeed enable information to be gathered at a scale that Member States – acting individually – would not be able to reach. In addition, fostering dissemination of information on existing programmes, providing help to private sponsors on qualifications and scaling up existing schemes can best be achieved at EU level.

In addition, the EU action is not replacing the action of Member States, which remain the central actors, with the EU acting as a promoter and supporter of their action. The EU's financial intervention in particular, supporting the capacity-building of civil society actors, will complement Member States' action.

The action can also be deemed to meet the proportionality requirements. Benchmarking the different national refugee mobility schemes and supporting them financially can be considered a proportionate action. It indeed does not go beyond what is necessary to achieve the goals pursued. This approach is likely to increase the number of refugees, whilst at the same time respecting Member States' diversity, which is important given that private sponsors (with specific goals, values and interests) play a central role in the development of these schemes. In addition, supporting the involvement of private sponsors through financial help and subsidising the refugees' training costs can be deemed an efficient strategy to support the development of new refugee mobility schemes, as the Canadian experience has shown.

As regards the instruments needed for EU action, soft law instruments should be preferred. The EU will provide guidelines (based on a recommendation), leaving Member States the power to decide differently.

7.1.1.4 Policy option 2G: supporting skills mobility partnerships

Supporting the development of SMPs supposes both the creation of safe pathways for labour migrants and organisation of training structures to increase TCNs' skills. Because of this double facet, two different legal bases for action are available to the EU: Articles 79 and 166 TFEU.

Under Article 79 TFEU, '1. The Union shall develop a common immigration policy aimed at ensuring, at all stages, the efficient management of migration flows (...) and the prevention of, and enhanced measures to combat, illegal immigration'. Developing SMPs certainly contributes to efficiently managing migration. However, it is difficult to find in the second paragraph of Article 79 a clear basis for grounding the EU action in favour of SMPs. Article 79(2) TFEU indeed mentions EU action only for: (a) the conditions of entry and residence, and standards on the issue by Member States of long-term visas and residence permits; (b) the definition of the rights of third-country nationals residing

legally in a Member State; (c) illegal immigration and unauthorised residence; and (d) combating trafficking in persons. None of these perfectly corresponds to the action in support of SMPs.

Article 166 TFEU could thus be deemed to be more suitable as a basis adapted for the action in favour of SMPs, given that their main objective is training. This provision indeed gives the EU competence to implement a vocational training policy in support of – or supplementing – the action of its Member States, and its third paragraph incites the Union and its Member States to ‘foster cooperation with third countries and the competent international organisations in the sphere of vocational training’.

Different reasons allow us to consider that the principle of subsidiarity is not breached by the proposed actions. First, the EU is better placed than its Member States to benchmark their practices and recommend the best solutions. The use of techniques already deployed by the EU in its other policies (like setting up networks and high-level groups) will indeed enable information to be gathered at a scale that Member States – acting individually – would not reach.

Second, the EU is in a better position than its Member States to implement common or joint actions, like the conclusion of multilateral SMPs.

Third, aligning the development of SMPs with EU external policy in the field of migration and development, which also supposes privileging certain partners, requires EU intervention. Experience of mobility partnerships has indeed shown that Member States tend to select the sole partners with which they have a special relationship²³¹.

As far as proportionality is concerned, one may reasonably consider that the content and form of Union action does not go beyond what is necessary to meet the EU’s objectives. Considering that the EU’s aim is to increase the number of legal pathways to migrant workers to the EU, action to increase the number of SMPs is necessary. Experience with mobility partnerships has indeed shown that some Member States are reluctant to develop guest-worker programmes. This reality justifies multifaceted action, which implies mobilising EU funds, EU structures and entities.

The proposed EU intervention for the implementation and monitoring of SMPs can also be deemed appropriate, and not excessive, to ensure the smooth functioning of the programmes and their effective development: the experience of mobility partnerships has indeed taught us that many obstacles impede the functioning of mobility partnerships. The EU action thus does not appear to go beyond what is necessary to achieve the result pursued.

In addition, the proposed policy option consists of supporting Member States’ action. By gathering and disseminating information across the EU, the Union acts as a coordinator and facilitator: it does not aim to create purely EU SMPs. Moreover, SMPs are based on Member States’ voluntary participation, and the action taken by the EU requires little change from the Member States involved: they remain free to determine the project, partner, number of trainees, professions concerned, duration, etc.

The instruments chosen are also proportionate. The choice is made to use soft-law instruments (communication), which do not encroach on Member States’ competence. True, this non-binding instrument could produce disappointing results, but one may consider that the efficiency of the EU action will result from the combination of instruments: among others communication, funds, and many EU entities and structures involved.

²³¹ See Parkes (2009).

7.1.1.5 Policy option 2H: EU talent pool

EU action in this field could be based on Article 79 (1) TFEU, which gives the EU competence to develop a common immigration policy aimed at ensuring, at all stages, the 'efficient management of migration'. This is an adequate legal basis for the development of a talent pool, whose aim is precisely to manage migration.

It must be noted that the system envisaged would have to consider the fact that Member States have kept exclusive competence on the issuing of permits, and on deciding on the number of migrant workers they want to accept on their territory (Article 79 (5)). As a result, an EU talent pool cannot determine the volume of migrants who will be in line to obtain a permit to reside and work in the EU.

Regarding subsidiarity, if the EU talent pool replaced similar existing or envisaged systems at national level, it would allow requests to be treated at EU level, which would ensure a consistent EU approach and reduce costs through economies of scale. Creating such a mechanism to attract, select and rank migrants in view of their admission for work in the EU cannot be achieved as efficiently at national level.

However, the capacity to constitute a pool at EU level depends on a common system of assessment and recognition of qualifications or skills for migrants entering the EU at the external border: the pool, from which employers from all Member States should be able to draw, must be created based on common criteria for selecting migrants. This requires a common approach concerning the assessment of qualifications, skills and experience upon entry on the territory of the Union. If this common approach is not possible, the EU talent pool may not lead to better outcomes than national systems functioning separately, except for possible savings resulting from economies of scale in the (technical) conception of the system. As a result, subsidiarity would not be respected.

If the pool was limited to certain sectors (health professionals or IT engineers, for instance), where harmonisation of qualifications already exists (either formally or industry-based), it would be possible to envisage a truly European pre-screening of candidates, including assessment of their qualifications at EU level, which could be associated with intra-EU mobility. The sectoral EU talent pool could be combined with a skills development component, when training is needed to ensure that candidates fulfil the criteria for the pool. This last option, though narrower, would pass the subsidiarity test more easily: attracting, selecting and ranking migrants in view of their admission for work in the EU.

One aspect of the talent pool that could, in all cases, be considered more efficient than a national system of the same sort is its function as an employment-matching platform to identify a potential employer, who would also have access to the pool. Such a platform relies on a large amount of data, so for efficiency an EU-level platform is more appropriate in this regard. It remains to be seen whether this is enough to justify the cost of creating an EU system, including a database.

In terms of proportionality, since the EU talent pool necessitates the adoption of a regulation, it would not leave much margin of discretion to Member States. But there is no other way – less encroaching upon national competences – to reach the objective of creating an EU system for the selection and ranking of candidates.

7.1.2 Coherence with other EU and international action

This section presents the results of the assessment of complementarity and coherence with i) EU legal migration *acquis*; ii) other EU legal norms, namely non-discrimination law, fundamental rights law, EU migration law, labour law and free movement law; and iii) international law, in particular international human rights law.

7.1.2.1 Policy option 2D: mobility schemes for entrepreneurs

Complementarity and coherence with EU migration *acquis*

Developing a visa for entrepreneurs at EU level is consistent with the EU migration policy. So far, EU action has mostly been focused on employed workers. However, there is a need for a more encompassing approach towards migration, which opens legal avenues to Europe for independent workers and investors. The action will also complement the EU's efforts to attract talent.

Altogether, the current reform of the BCD and SPD, and the project to set up an EU talent pool, form a coherent policy aimed at attracting skilled or talented TCNs. The EU is repeatedly calling attention to the necessity to regain competitiveness in the race for talent. An entrepreneur scheme is an important missing piece in the EU strategy.

This action is also in line with EU policies aiming to deepen and upgrade the single market. As stressed in the Commission Communication, 'Upgrading the Single Market: more opportunities for people and business', the single market would benefit from attracting more innovators from the rest of the world. The proposed action is also fully coherent with EU actions in favour of entrepreneurship (e.g., Erasmus for young entrepreneurs) and with the Digital Decade Strategy, which presented a vision and avenues for Europe's digital transformation by 2030.

Complementarity and coherence with other EU norms, in particular non-discrimination law and fundamental rights (CFR)

Facilitating exercise of an economic activity in the EU is in line with EU protection of fundamental rights, in particular Article 15 CFR on the right to choose an occupation, and Article 16 CFR, which protects 'freedom to conduct a business'.

The instrument adopted to achieve this policy option would need to include procedural guarantees enabling migrants to contest decisions that affect them, in order to be compatible with Article 47 CFR (the right to an effective remedy and to a fair trial).

Complementarity and coherence with international law, in particular international human rights law

EU action concerning entrepreneurs, who are self-employed migrants, should consider the UN Convention on the rights of migrant workers and their families (1990), which also covers self-employed workers and considers their specific situation. It would need to include procedural guarantees enabling migrants to contest decisions that affect them, to be consistent with the right to a fair trial protected by Article 6 ECHR and Article 14 of the UN Pact.

7.1.2.2 Policy option 2E: youth mobility schemes

Complementarity and coherence with EU migration *acquis*

EU action in support of youth mobility schemes is complementary to other actions taken by the EU. The proposed approach, which is fully in line with increased EU efforts to win the race for talent, would complement current legislative actions (like the negotiation of the recast BCD²³² or the setting up of the EU talent pool called for in the New Pact on Migration and Asylum).

²³² Blue Card revision. The EU is also acting in different directions to improve its attractiveness: revising the SPD to simplify the procedures for low- and medium-skilled workers; and revising the LTRD to strengthen the right of residents to move and work in different Member States.

In addition, because youth mobility schemes are legal pathways to Europe for young TCNs, they are likely to complement the numerous actions (e.g., awareness campaigns) aiming to deter young TCNs from migrating irregularly.

Developing youth mobility schemes can also help meet other EU objectives, like the EU Youth Strategy, which is the framework for EU youth policy cooperation in 2019-2027, based on the Council Resolution of 26 November 2018²³³. The action can also be deemed complementary to the New Skills Agenda for Europe and Erasmus+ (2021-2027), the Union programme for education, training, youth and sport.

Complementarity and coherence with other EU norms, in particular non-discrimination law and fundamental rights (CFR)

The EU action in favour of youth mobility would respect several rights protected by the CFR, in particular the right to education, which includes the right to vocational and continuing training (Article 14), and the right to choose an occupation (Article 15).

To be compatible with Article 47 CFR (the right to an effective remedy and to a fair trial), the instrument adopted to achieve this policy option would have to include procedural guarantees enabling the young migrants concerned to contest decisions that affect them.

Complementarity and coherence with international law, in particular international human rights law

As regards consistency with international actions, this policy contributes to the fifth objective of the UN Global Compact, which enhances availability and flexibility of pathways for regular migration²³⁴. By agreeing on the Compact, the signatories have accepted to adapt options and pathways for regular migration ‘in a manner that facilitates labour mobility and decent work reflecting demographic and labour market realities, optimises education opportunities (...) with a view to expanding and diversifying availability of pathways for safe, orderly and regular migration’.

The inclusion of an intra-EU mobility clause is also in line with the text of the Compact, which suggests the facilitation of regional and cross-regional labour mobility through international and bilateral cooperation arrangements, such as free movement regimes, visa liberalisation or multiple-country visas.

The instrument adopted would need to include procedural guarantees enabling the young migrants concerned to contest decisions that affect them, to be consistent with the right to a fair trial protected by Article 6 ECHR and Article 14 of the UN Pact.

7.1.2.3 Policy option 2F: skilled refugees’ mobility schemes

Complementarity and coherence with EU migration *acquis*

The proposed policy action would contribute to EU action in favour of the resettlement of refugees. Resettlement is indeed found to be ‘a key component of the comprehensive approach to migration

²³³ Resolution of the Council of the European Union and the Representatives of the Governments of the Member States meeting within the Council on a framework for European cooperation in the youth field: The European Union Youth Strategy 2019-2027, ST/14944/2018/INIT, OJ C 456, 18.12.2018, pp. 1-22.

²³⁴ Under para 21, the signatories commit to adapting options and pathways for regular migration ‘in a manner that facilitates labour mobility and decent work reflecting demographic and labour market realities, optimises education opportunities (...) with a view to expanding and diversifying availability of pathways for safe, orderly and regular migration’. The text also incites its signatories to: ‘b) facilitate regional and cross-regional labour mobility through international and bilateral cooperation arrangements, such as free movement regimes, visa liberalisation or multiple-country visas’.

we need to continue developing, including strong partnerships with third countries”²³⁵. Since the European Agenda on Migration, proposed on 13 May 2015, the EU has strived to step up its refugee resettlement efforts. The goal is to frame a permanent and structured EU policy on resettlement. In July 2016, the Commission submitted its proposal for a Union resettlement framework, aimed at complementing the existing ad hoc multilateral and national resettlement programmes (by providing common EU rules on the admission of TCNs, resettlement procedures, types of status to be accorded by Member States, decision-making procedures for the implementation of the framework and financial support for Member States’ resettlement efforts). But, despite the partial provisional agreement, reached on 13 June 2018 between the Parliament and the Council, adoption of the text remains blocked.

Setting up private sponsorship schemes for refugees, with a major role given to employers, can create another path to resettle refugees in the EU. The Canadian experience, with more than 350 000 refugees resettled since the 1970s, is a good example of the impact of private sponsors on the increased admission of refugees²³⁶. The model is also deemed to have played an important role in Canada welcoming many Syrian refugees.

However, the Canadian experience also suggests that precautions are required. In the last decade alone, the number of privately sponsored refugees has become much greater than the number of government-assisted refugees, and this trend is expected to continue in the next years. A shift has thus been observed from the supplementary role of private sponsors with respect to the substitution of public sponsorship over the past few years (Martani, 2021).

The EU should take this evolution seriously, because there is a clear risk (Leboeuf, 2021) of preferential treatment being given to the group composed of skilled refugees, at the expense of others with similar or higher protection needs. To put it differently, in a privately sponsored scheme based on labour skills, the risk is that priority is given to the refugees with the best integration prospects on the EU labour market, rather than to the most traumatised ones. Therefore, the EU should be vigilant and support the development of private sponsorship programmes only based on complementarity with ‘traditional’ public resettlement programmes and other humanitarian admission programmes. The EU should constantly require and organise return to the ‘principle of additionality’ of different refugee schemes.

Complementarity and coherence with other EU norms, in particular non-discrimination law and fundamental rights (CFR)

This policy action is tightly related to Article 18 CFR on the right to asylum. According to this provision of the CFR, the right to asylum must be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees. Article 17 of the Geneva Convention requires that contracting states ‘accord to refugees lawfully staying in their territory the most favourable treatment accorded to nationals of a foreign country in the same circumstances, as regards the right to engage in wage-earning employment’. Interestingly, its third paragraph refers to programmes of labour recruitment or immigration schemes for refugees²³⁷.

²³⁵ Commissioner for Home Affairs Ylva Johansson, https://ec.europa.eu/commission/presscorner/detail/en/ip_19_6794.

²³⁶ See Agrawal (2019).

²³⁷ Article 17(3) requires that the Contracting parties ‘give sympathetic consideration’ to assimilating the rights of all refugees with regard to wage-earning employment to those of nationals, ‘in particular of those refugees who have entered their territory pursuant to programmes of labour recruitment or under immigration schemes’.

This action can also contribute to the respect of the right to choose an occupation and engage in work (Article 15 CFR), which applies to TCNs.

It would also be necessary to consider Article 34 CFR, which requires that ‘everyone residing and moving legally within the EU is entitled to social security benefits and social advantages’ and that the EU combats social exclusion and poverty by recognising and respecting the right to social and housing assistance, so as to ensure a decent existence for all those who lack sufficient resources.

Complementarity and coherence with international law, in particular international human rights law

In increasing refugees’ opportunities to access employment, the proposed option is fully consistent with international norms, including, of course, the 1951 Geneva Convention on the Status of Refugees, especially its Article 17.

7.1.2.4 Policy option 2G: supporting skills mobility partnerships

Complementarity and coherence with EU migration *acquis*

The proposed action is consistent with other EU actions. In particular, SMPs are part of the safe legal pathways the Union is aiming to develop, as mentioned in the New Pact on Migration and Asylum.

The action can also be deemed coherent with the EU Action Plan on Integration and Inclusion, which supports migrants’ access to higher education and vocational training. It is, in particular, complementary to the Erasmus+ programme.

Complementarity and coherence with other EU norms, in particular non-discrimination law and fundamental rights (CFR)

Developing SMPs contributes to global EU action in favour of education and training. This is likely to increase the effectiveness of Article 14 CFR, which grants everyone a ‘right to education and to have access to vocational and continuing training’. In addition, assuming that women will participate equally in the training programmes funded by SMPs, this action is likely to contribute to the EU gender equality policy. It can contribute to the effectiveness of Article 23 CFR, which states that equality between men and women must be ensured in all areas, including employment, work and pay.

Complementarity and coherence with international law, in particular international human rights law

This policy option is consistent with the UNESCO Convention against Discrimination in Education (1960), especially its Article 4, under which action must be taken to make higher education equally accessible to all.

7.1.2.5 Policy option 2H: EU talent pool

Complementarity and coherence with EU migration *acquis*

The talent pool would complete the migration directives, which thrive to increase the attractiveness of the EU for skilled workers (cf. the BCD, skill partnerships, etc.). It is also in line with the EU decision to create safe pathways for labour migrants, as mentioned in the New Pact on Migration and Asylum. The talent pool is not conceived as a pathway in its own right but it substantially improves the functioning of the skilled migrants’ schemes.

The incorporation of a designated refugee track into the EU talent pool is also suggested. This would be fully coherent with the EU resettlement policy in the last years (including the attempt to adopt the proposal for a regulation establishing a Union resettlement framework).

Complementarity and coherence with other EU norms, in particular non-discrimination law and fundamental rights (CFR)

A talent pool that requires the collection and retention of personal data might encroach upon the fundamental right to the protection of private life and personal data. It would need to take into consideration requirements under Articles 7 and 8 CFR (as interpreted in the case-law of the Court of Justice) and EU legislative instruments, especially the GDPR.

Insofar as it would facilitate access to employment in the EU and limit the administrative burden of multiple national procedures, a talent pool could be considered a contribution to the right to good administration, protected by Article 41 CFR.

Complementarity and coherence with international law, in particular international human rights law

The proposed policy action is both coherent and compatible with international law, in particular the UN Global Compact. The fifth objective of the UN Global Compact is to 'enhance availability and flexibility of pathways for regular migration'. The signatories have agreed that options and pathways for regular migration are needed, 'in a manner that facilitates labour mobility and decent work reflecting demographic and labour market realities'.

7.1.3 Contribution to the EU's external relations and attractiveness

This section discusses the likely impact of the policy options on EU international relations and negotiations (within international organisations, and with neighbouring and other third countries) and the attractiveness of the EU territory for migrant workers.

7.1.3.1 Policy option 2D: mobility schemes for entrepreneurs

The proposed scheme for entrepreneurs can contribute to making the EU a global actor in the competition for talent and investment. Easing the recruitment of foreign entrepreneurs and investors is a major trend in recent immigration policies around the world²³⁸, and aims precisely to make the EU more attractive for entrepreneurs. According to the European Commission, rules on attracting entrepreneurs, combined with support measures helping them to operate in the single market, could make Europe a more attractive destination for innovators from outside the EU²³⁹.

7.1.3.2 Policy option 2E: youth mobility schemes

The very objective of developing youth mobility schemes is to encourage young (and often skilled) TCNs to select the EU for immigration purposes, rather than other world destinations, for short-time work periods. The proposed policy option would make the EU one 'region' where young TCNs would envisage spending one or two years. A more coherent and coordinated approach can indeed reinforce the EU's position vis-à-vis large countries like the US and Canada, or countries having a long tradition of youth mobility schemes, like Australia. As regards the EU's credibility, one may expect that its capacity to stimulate the emergence of safe legal pathways can help make the EU a global actor, which plays a prominent role in international migration debates.

7.1.3.3 Policy option 2F: skilled refugee mobility schemes

In supporting the development of refugee schemes, the EU would increase its international role in refugee protection. Since 2015, more than 65 000 vulnerable refugees have found protection in

²³⁸ See: OECD (2020) and Patuzzi (2019).

²³⁹ See European Commission (2016) impact assessment for the revision of the BCD.

Europe through the EU's resettlement schemes. In 2020, the European Commission announced financial support for Member States that collectively pledged more than 30 000 resettlement places. This collective pledge confirms the EU's role as a global leader in resettlement. So far, however, the path of private sponsorship is underdeveloped in the EU, in contrast with leading countries such as Canada. An EU action taking this path would confirm the its leading commitment to offering durable solutions for beneficiaries of protection, and the research of viable solutions implying multiple stakeholders.

The EU's international credibility would also be reinforced by its commitment to support refugees' access to employment, which is the durable solution the UNHCR is repeatedly calling for²⁴⁰. The UNHCR and OECD have developed a 10-point multistakeholder action plan for employers, refugees, government and civil society. This action plan contributes to the application of the Comprehensive Refugee Response Framework annexed to the New York Declaration for Refugees and Migrants adopted by the General Assembly in 2016, which is already applied in some countries. The EU's contribution to increasing refugee access to work would make the EU a leading actor, hence promoting its values.

7.1.3.4 Policy option 2G: supporting skills mobility partnerships

EU action can increase the EU's external credibility. The OIM, together with the ILO and different employer organisations and trade union confederations, has instituted Global Skill Partnerships for Migration in order to mobilise schemes such as SMPs. In supporting the development of SMPs, the EU would become a main global actor contributing to the achievement of the 18th objective of the UN Global Compact. In creating different forms of SMPs, developed as instruments combining migration management and development goals, the EU could improve its reputation. In the last decade, the EU has developed EU mobility partnerships with third countries – mostly migrants' countries of origin or transit. But these countries are increasingly reluctant to conclude agreements with – or under the auspices of – the EU. The agreements, which are increasingly perceived as instruments for the externalisation of migration control (Brozca & Paulhart, 2015), are indeed viewed as unbalanced and unfair to low-income countries and migrants (Frelick, Kysel & Podluck, 2016). SMPs, on the other hand, which include a development aspect, could be viewed as offering a more balanced approach towards the EU's relationship with third countries in the field of migration. But they should be designed in a way that does not mix up aims. The EU should ensure that no conditionality on border control is included in the SMPs.

7.1.3.5 Policy option 2H: EU talent pool

An EU talent pool should increase the attractiveness of the EU as a destination for (talented) migrants by facilitating job matching and access to work and residence permits for 'talented' TCN workers in the Member States. This attractiveness will be further enhanced if migrant workers have EU-wide opportunities, resulting from the right to intra-EU mobility and recognition of their qualifications, skills and experience (see policy options 1A and 1B), as well as from increased protection on the basis of equal treatment and better enforcement of migrants' rights (see policy options 3A and 3B).

As regards the 'refugee track', this would prove an important tool for the implementation of the refugee schemes (See policy option 2F). EU action taking this path would confirm its commitment to offering durable solutions for beneficiaries of protection. In so doing, the EU would become a leading actor supporting the UNHCR's endeavour to find durable solutions for refugees, and would ensure that its values are visible on the international scene.

²⁴⁰ See para 70 et seq. of the 2018 Global Compact on Refugees.

7.1.4 Summary

The table below summarises the main findings of the legal aspects analysed for part of the policy options under the second policy cluster.

Table 9: Summary of the legal analysis for policy cluster 2B

Target group	Policy action	Potential effects	Limitations and costs	EU added value
Skilled TCNs residing outside the EU: - Entrepreneurs - Young TCNs - Refugees - TCNs willing to acquire new qualifications	- Support and coordinate national mobility schemes - Create EU mobility schemes - Create an EU talent pool - Involve multiple stakeholders in refugees' integration in the labour market - Actions in favour of TCNs' acquisition of qualifications	- Attract skilled workers and reduce labour shortages - Reduce irregular migration - Reduce downskilling and de-skilling - Increase TCNs' skills - Increase TCNs' integration in the host society - Complement EU action for resettlement	- Some mobility schemes will affect limited numbers of migrants (e.g., entrepreneurs, refugees) - Limited effect if not coupled with action for qualification recognition and intra-EU mobility rights - For refugee mobility schemes: risk of competing with EU action in favour of resettlement - Action needed to avoid TCNs being tied to employers	- Contribution to attracting talent - Contribution to EU action against irregular migration - Contribution to EU action for the protection of fundamental rights - Contribution to the EU's reputation - Contribution to international action for regular and orderly migration, and refugee protection

Source: authors' analysis

7.2 Economic aspects

This section assesses the expected economic impact, considering the impact on labour market outcomes.

7.2.1 Impact on labour market outcomes

7.2.1.1 Policy options 2D and 2H: attracting entrepreneurs and TCNs with relevant skills

Policy options 2D and 2H aim to attract TCNs with high economic potential (entrepreneurs or individuals with relevant skills) to the EU. As illustrated in section 3.1.1.2, dedicated EU or national schemes for highly skilled individuals account for less than 7 % of all issued work permits (as at 2019), while the actual share of highly educated TCNs and those working in highly skilled occupations is much higher. A lack of appropriate legal pathways increases costs for both EU employers and potential TCN migrants, and leads to migration through suboptimal channels or to lower than optimal migration. At the same time, extensive economic literature documents a positive effect of skilled migration on firm productivity and innovation in the destination countries. For instance, Bosetti et al. (2015) use EU LFS data to show that a 1 % increase in the share of skilled migrants in an occupation increases patenting by 0.89 %. Mitaritonna et al. (2017), using French data, find that a 10 % increase in the share of (mainly highly skilled) employed immigrants in a district corresponds to about a 1.7 % increase in productivity growth for the average firm. Beerli et al. (2021) use Swiss data to argue that immigration increases firm productivity and growth by reducing skill shortages. Other relevant studies pointing in the same direction include Kerr and Kerr (2013), Kerr et al. (2014), Kerr and Kerr (2020), Peri (2012), Ottaviano et al. (2018) and Paserman (2013).

Policy option 2E aims to facilitate the matching of EU employers with prospective TCN employees through a single platform ('pool') of talented migrants. This one-stop shop for TCN workers, EU employers and national administrations could help to reduce matching and information frictions on both sides and thus reduce search and hiring costs. While this policy option does not create a new migration pathway, it has the potential to enhance migration from third countries to the EU, both on the extensive margin (more migrants) and intensive margin (better matching of TCN workers to EU employers and thus better labour market outcomes).

There are at least three channels for this effect. First, the talent pool could serve to pre-screen the candidates (in terms of language and professional skills) and in doing so reduce the screening costs of the EU employers. The platform could also have the function of certifying the relevant skills to reduce information frictions. One barrier that is often mentioned is low trust among employers of foreign degrees and underestimation of immigrants' language skills, which results in a lower call back rate (Oreopoulos, 2011). This problem could be mitigated by immigrants' skills being certified by a trustworthy platform. Such a platform is relevant not only for candidates still residing in their countries of origin, but also for immigrants already present in the EU and struggling to find a suitable job, or a job at all.

The second potential channel relates to the facilitation of access to national administrations and civil organisations working in the area of immigration. Battisti et al. (2019) provide suggestive evidence that one of the barriers for firms are the perceived high hiring costs associated with bureaucratic procedures (e.g., for obtaining a work permit or passing a labour market test)²⁴¹. In particular, for smaller firms, such costs could be a decisive factor in not hiring migrants at all. The platform could

²⁴¹ There is also a famous anecdote from the US: Bill Gates testified before the US Senate Committee on Health, Education, Labor and Pensions in 2007 that Microsoft had hired four employees to support each H-1B worker (Kerr, 2019).

compensate for this by providing accurate information an administrative procedures and matching employers to the relevant public authorities and NGOs, which could provide further support.

Third, as an EU project, the talent pool could benefit from synergies with other initiatives, one of these being the joint Cedefop and Eurostat project Skills OVATE (Online Vacancy Analysis Tool for Europe)²⁴², which collects (and constantly updates) information from more than 100 million online job advertisements in the EU27. This information can be used to inform potential migrants about skill demand in the EU, and allow them to identify the relevant regions and/or sectors in which to search for a job. In the medium and longer term, it could help to better target the acquisition of human capital prior to migration²⁴³. Both should improve matching between TCNs and their potential EU destinations. Furthermore, Skills OVATE can be used by public institutions to monitor the extent of hiring barriers (e.g., by looking at the share of job adverts explicitly asking for EU/EFTA citizenship) or to estimate demand for foreign workers (e.g., by looking at the share of job adverts in a foreign language).

Policy option 2D focuses on attracting TCNs who intend to start or develop their business in the EU. Evidence with regard to TCN entrepreneurship in the EU is scarce. TCNs in the EU27 are less likely to be self-employed compared to similar citizens and, if they are self-employed, it is more likely to be out of necessity. This contrasts with findings from the US. Fairlie and Lofstrom (2015) review a significant number of studies, and find that immigrants in the US have a higher probability of being self-employed and starting firms, relative to natives. Burchardi et al. (2020), Hunt and Gauthier-Loiselle (2010) and Kerr and Lincoln (2010) show that immigrants in the US are more likely to be active in patenting and innovation than comparable natives. In a recent paper, Azoulay et al. (2021), using administrative data for the US, show that immigrants exhibit a higher entrance rate into entrepreneurship. This finding applies to firms of every size. The total number of jobs created by immigrant-founder firms (per immigrant in the population) is 42 % higher than that of native-founder firms (per native in the population). Firms with an immigrant founder are also roughly 35 % more likely to have a patent than firms that do not have an immigrant founder. These EU-US differences can mostly be explained by differences in returns to skills, which are considerably higher in the US and result in more positive self-selection of migrants (e.g., Akcigit et al., 2016). In addition, evidence from Italy shows that cultural diversity of entrepreneurs is associated with greater sectoral variety of newborn firms (Colombelli et al., 2020). Another constraint is the start-up infrastructure and access to venture funding. However, part of the migrants' self-selection patterns in the EU can be explained by the mere absence of a pathway for entrepreneurs to EU Member States.

To estimate the potential effects of a new pathway for entrepreneurs, we consider experiences of individual Member States that have already introduced similar schemes. The challenge in drawing quantitative estimations is twofold: first, most schemes have only been implemented recently and the results have not yet materialised; and second, we cannot fully distinguish whether the implemented schemes have managed to attract new TCN migrants or simply allowed TCN migrants (who would have arrived anyway) to choose a better fitting scheme.

As Table 10 below shows, existing national schemes to attract foreign entrepreneurs have not generated substantial numbers. The only exception is in Estonia, where residence permits issued to start-up founders and start-up employees accounted for 25 % of all residence permits issued for work reasons in 2019.

²⁴² www.cedefop.europa.eu/en/events-and-projects/projects/skills-online-job-advertisements.

²⁴³ Here, the platform would play an information role, as in the points-based immigration system: in the latter, a potential immigrant knows how many points are attributed to education, professional qualifications, language skills, etc., and thus has an indication of his or her chances of labour market success in a certain destination.

Table 10: Existing national schemes in EU Member States

Country	Scheme	Year of introduction	Number of TCNs who entered under the scheme since its introduction	Estimated value added to the economy (if available)
Ireland	STEP - Path to residence permission for migrant start-up founders and family	2012	2014-2018: 155	n/a
Spain	Residence permit for entrepreneurs	2013	2014-2018: 512	n/a
Italy	Italia Start-up Visa	2014	2015-2018: 204	n/a
Netherlands	Entry scheme for start-ups	2015	2015-2018: 184	n/a
France	'Talent passport' residence permit French Tech Visa	2016 2017	2016-2018: 86 founders and 317 start-up employees	n/a
Austria	Red-White-Red Card for start-up founders	2017	0	n/a
Cyprus	Cyprus Start-Up Visa	2017	2018: 18 founders	n/a
Estonia	Temporary residence permits and visas for start-up founders and start-up employees	2017	2017-2020: 697 founders and 2 237 start-up employees (both visas and residence permits) In 2019: the scheme accounted for 25 % of all residence permits issued for work reasons in Estonia.	226 start-ups 3 % of the start-up sector's turnover 4 % of the start-up sector's employment ²⁴⁴
Lithuania	Start-up visa for founders (from 2017) and employees (from 2019)	2017	2017-2021: 210	74 start-ups
Latvia	Residence permit for start-up founders	2017	2018: 9	n/a

²⁴⁴ All figures for Estonia are provided by <https://startupestonia.ee/blog/how-estonian-startup-visa-has-built-3000-bridges-in-4-years>, as at December 2020.

Portugal	Start-up visa for founders and employees	2017	2018: 8	n/a
Finland	Residence permit for a start-up entrepreneur	2018	2018: 18	34* start-ups

Note: * Numbers are available only until 2018.

Source: EMN (2019), Migratory pathways for start-ups and innovative entrepreneurs in the EU; dedicated websites of national schemes.

The proposal considers either developing a new EU scheme for entrepreneurship or providing EU support to national schemes. The economic rationale for a single EU scheme links to potential economies of scale and higher efficiency. First, it is likely that access to the single market would attract more high-potential TCN entrepreneurs. Second, Member States could pool their resources in promoting the scheme abroad. Third, it could increase efficiency in the allocation of TCNs across Member States: if a common scheme is applied, Member States would compete for talent based on economic factors, rather than legal peculiarities. However, developing a single EU scheme might become challenging given the high diversity of national schemes that already exist and a lack of causal evidence about the efficiency and effectiveness of particular policies. An alternative would be to support national policies in this area by disseminating knowledge and experience.

Box 3 Entrepreneurship Visas in Lithuania

The 'Startup Visa' – a streamlined migration procedure for non-EU startups – which is in its fifth year of operation in Lithuania, is attracting an increasing number of foreign startups' interest. Also, during the COVID-19 pandemic, when travel was restricted and state borders were closed for a long time, Lithuania received quite a number of applications from foreign startups.

The Startup Visa Lithuania programme was launched in 2017, since which time it has approved 210 applications from non-EU startups expressing a wish to relocate their business to Lithuania. Some 74 startups have relocated their business to Lithuania through the Startup Visa Lithuania programme. A new programme is being planned, which will offer EUR 30 000 to selected foreign startups to cover their relocation and business opening costs in Lithuania.

Source: Roberta Rudokienė, Head of the startup ecosystem development unit Startup Lithuania of the Public Institution Enterprise Lithuania.

7.2.1.2 Policy option 2E: youth mobility schemes

Youth mobility schemes can have several positive impacts, both on the destination country and the individual participant. For the destination country, it provides workers who can undertake work where there is a demand. It also has the potential to attract future workers, as participants gain some experience in the country and potentially pick up some language skills. For the individual it often provides good first work experience, potential orientation about future plans and the opportunity to finance travel at a young age, which can help foster cultural awareness and mutual understanding.

It is not possible to provide quantitative estimates about how many young workers such a scheme would attract, as this depends on the details of its implementation. The number of young workers attracted by the scheme would depend on the number of eligible partner countries, the duration of such a visa, and the severance of legal restrictions (e.g., duration with one employer). Given that the policy option does not propose creating an EU scheme but fostering national schemes at EU level, it is even harder to assess the economic impact, as it is unknown how the individual EU Member States would take up the recommendations.

The box below provides some insights into a successful and well-known example of a youth mobility scheme in Australia and, as a case study, gives an idea of the impact of such a scheme.

Box 4 Australia's working holiday maker programme

The working holiday maker (WHM) visa is a temporary visa for young people aged between 18 and 30 years who want to holiday and work in Australia for up to 12 months. Only certain nationalities are eligible for this type of visa – typically those that also accept Australian youths under similar schemes. Visa holders can work as much as they wish in full-time, part-time, casual, paid or voluntary work. However, working permits are restricted to a period of six months with a single employer. This can only be extended in exceptional cases. There are no caps on the number of WHM visas issued, and the number of visas granted has increased substantially over time.

According to the International Visitor Survey from December 2016, conducted by the Department of Immigration and Border Protection and Tourism Research Australia, around 321 000 young people arrive every year in Australia on a youth mobility scheme that combines work and holiday. The most frequent countries of origin are the UK, Korea, Germany and Taiwan. On average, visitors stay for 153 days in Australia and spend an average of AUD 10 000.

Some 55 % of programme participants spend more than half or more of their time working. The sectors they typically work in range from 32 % in agriculture to 17 % as waiters, 9 % as kitchen helpers and 9 % in construction. They are typically valued as very flexible and mobile workers who are often filling seasonal shortages.

7.2.1.3 Policy option 2F: skilled refugees' mobility schemes

Allowing skilled refugees to enter and work in the EU will have similar labour market effects to allowing other skilled workers to enter the EU. Skilled refugees, particularly in certain sectors, have the potential to alleviate skill shortages and thus improve the productivity of firms. On an individual level they contribute positively to public finances by paying taxes and social security contributions. Compared to non-refugee skilled migrants, refugees are likely to stay a longer period of time in the destination country and might thus be more attached to the labour market. Refugees are typically more likely to invest in human capital upon arrival, such as language skills, as they have a lower return perspective than migrants from other countries. Compared to non-refugees, refugees might be more likely to be suffering from psychological trauma, which could create challenges in their integration process and create health costs.

The target group for this policy option are skilled refugees. 'Skilled' could be defined in different ways and, depending on the definition, could have different economic impacts. One option would be to target the scheme at all refugees with a professional qualification; a second option could be to target specific sectors that are experiencing skill shortages; and a third option could be to tie it to an employment offer. The UNHCR estimates that more 1.47 million refugees will be in need of resettlement worldwide in 2022²⁴⁵. About 40 % of these are between 18 and 59 years old, totalling 588 000²⁴⁶. It is not clear what percentage of these would be qualified to enter under a skilled refugee mobility scheme, nor is it clear if all of them would be interested in moving to the EU. Aksoy and Poutvaara (2021) estimate that 18 % of irregular migrants who have arrived in the EU have a tertiary education²⁴⁷. This means that there are around 105 000 highly skilled refugees outside the EU who

²⁴⁵ www.unhcr.org/news/press/2021/6/60d32ba44/un-refugee-agency-releases-2022-resettlement-needs.html.

²⁴⁶ www.unhcr.org/refugee-statistics/download/?url=p9M8.

²⁴⁷ It is not clear whether this percentage can be transferred to refugees who are registered with the UNHCR outside the EU. However, given the lack of other estimates, we take it as a rough approximation.

are a potential target group for this policy option. This is likely to be an upper bound as some of those refugees might be able to participate in other resettlement programmes, for instance the Canadian or Australian one.

There is no comprehensive economic study that estimates the effects of skilled migration resettlement programmes like these. The precise effects will depend on their size and scope. To date, European programmes for sponsoring refugees have been very small in scale. Canada, Australia and the US have more experience with larger programmes. Studies for Canada have shown that ‘privately sponsored refugees earned more than comparable government assisted refugees during the initial years in Canada. However, this advantage disappeared after a decade in the country’ (Picot et al., 2019). These numbers from Canada are just suggestive though, as its sponsoring programme was not restricted to skilled refugees.

A positive side effect of this policy option is its potential to reduce irregular migration to the EU. Irregular migration creates significant costs, both for the EU and for the individual. By providing a legal pathway to the EU for skilled refugees, some of the costs related to the prevention of irregular migration could be reduced.

7.2.1.4 Policy option 2G: creating legal labour migration paths through skills mobility partnerships

The main idea of SMPs is that the country of origin obtains support to train people in skills specifically and immediately needed in both the country of origin and the country of destination. After the training, some participants will stay in the country of origin and benefit this country with their new skills (‘home’ track). Other participants will emigrate to the partnership country and benefit the destination country with their new skills (‘away’ track). This type of mobility partnership has the advantage of avoiding a brain drain.

To determine which skills are needed in origin and destination countries, it is useful to directly involve employers and, for instance, form a public-private partnership. So far, several Member States have implemented bilateral SMPs, which can provide some evidence of their economic impact and limitations. Previous examples have been small and limited to a specific sector. Germany, for instance, has several SMP programmes in the health sector. Within the framework of the ‘Triple Win’ project, the German Corporation for International Cooperation (GIZ) has organised the placement of nearly 3 000 nurses from Serbia, Bosnia-Herzegovina, the Philippines and Tunisia. However, this programme did not involve any training in the origin country. Training in the origin country has so far only been piloted with a small number of participants, for instance in Kosovo in the construction sector.

It is difficult to estimate the number of skilled migrants who would enter the EU as a result of the introduction of SMPs, as this number depends on the design and scope of those partnerships, as well as the training capacities of the country of origin. Even if the EU could precisely determine how many migrants to train in the origin country, it is unclear how many of the trained individuals would decide to migrate. This is likely to be very country and sector specific. Previous numbers from pilot studies do not exist yet.

Even though the economic impact of SMPs is difficult to measure due to varying definitions, implementation modes and the fact that it is a relatively new phenomenon, there is potential added value to an EU scheme. First, an EU scheme could leverage economies of scale through the exchange of best practices and harmonisation of curricula and training requirements. This standardisation process of partnership agreements could reduce costs for Member States. In addition, the EU could play a matching function between Member States with different labour market needs, and identify aggregate EU demand for certain skills, thus creating potential synergies. Given the relatively high

initial costs, the EU could provide funding to support pilot projects that serve as a model for the entire EU.

By promoting the benefits of regular labour migration, the EU would be helping to circumvent irregular migration.

7.2.2 Summary

The table below summarises the main findings of the economic aspects analysed for the second part of the second policy cluster.

Table 11: Summary of the legal analysis for policy cluster 2B

Target group	Policy scope	Potential effects	Limitations and costs	EU added value
Policy option 2D: mobility schemes for entrepreneurs; and policy option 2H: EU talent pool				
2D: TCNs with entrepreneurial potential and willingness to migrate 2H: TCNs with relevant skills and willingness to migrate	Defined by labour demand (destination and sector specific), see Table 6 in the Annex. For entrepreneurs the more relevant demand might be market demand, market size and suitable employees.	<ul style="list-style-type: none"> - Increase skilled migration to the EU, reduce skill shortages, increase productivity and innovation. - Mitaritonna et al. (2017): a 10 % increase in the share of (highly skilled) employed immigrants in a district corresponds to about a 1.7 % increase in productivity growth for the average firm. - Bosetti et al. (2015): a 1 % increase in the share of skilled migrants in an occupation increases patenting by 0.89 %. 	<ul style="list-style-type: none"> - Lower returns to skills (compared to the US or UK), less-developed start-up infrastructure, lower access to venture funds. - Differences in labour demand among Member States. - High diversity in admission criteria and contents of existing national schemes for entrepreneurs. 	<p>EU scheme for entrepreneurship:</p> <ul style="list-style-type: none"> - Intra-EU mobility for TCNs, access to the EU single market, foster knowledge transfer - Effective allocation of TCNs among Member States (based on economic considerations, rather than legal factors) - Harmonisation of standards for what is considered entrepreneurship, which can then be enforced <p>EU support of national schemes for entrepreneurship:</p> <ul style="list-style-type: none"> - Exchange of best practices and experience, collecting and sharing quantitative indicators on schemes' performance <p>EU talent pool:</p> <ul style="list-style-type: none"> - Synergies with other EU-level tools (e.g., Skills OVATE)

Target group	Policy scope	Potential effects	Limitations and costs	EU added value
Policy option 2E: youth mobility schemes; policy option 2F: skilled refugees' mobility schemes; and policy option 2G: supporting skills mobility partnerships				
<p>2E: young (18-30 years old) TCNs residing in their countries of origin</p> <p>2F: skilled refugees in need of resettlement: ~105 000 (upper bound)</p> <p>2G: TCNs residing in their countries of origin, qualified to participate in training programmes offered</p>	Defined by labour demand (destination and sector specific), see Table 6 in the Annex	<ul style="list-style-type: none"> - Increases in human capital for young workers - Reduce skill shortages in destination and origin countries - Create a legal labour migration pathway with a focus on medium-low skilled, which would fill a gap in the current framework 	<ul style="list-style-type: none"> - Unclear about possibilities for scaling up existing partnerships, high implementation costs - Unclear whether the scheme will foster temporary or longer-term migration 	<ul style="list-style-type: none"> - Exchange best practices, harmonise curriculum and training requirements, standardise partnership agreements - Aggregate EU demand for certain skills and potential synergies - Promote exchanges and best practices to support pilot projects and disseminate their results among Member States - Promote the benefits of regular labour migration and help circumvent irregular migration

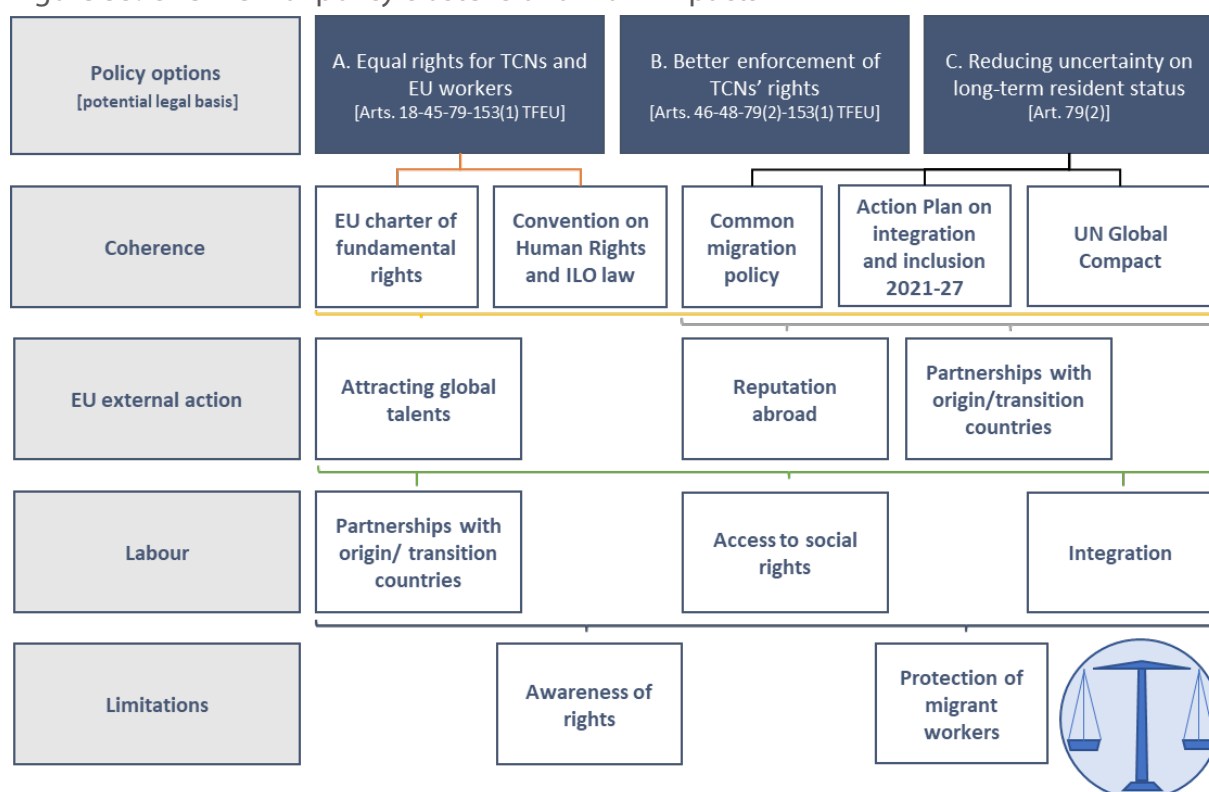
Source: authors' analysis.

8 Assessment of policy cluster 3: improve TCN workers' rights and employment conditions

This chapter provides an assessment of the three policy options under the third policy cluster, which envisages measures to improve TCN workers' rights and conditions of employment. For each of the policy options, both the legal and economic aspects are assessed.

The policy options and the main impacts are summarised in the figure below.

Figure 33: Overview of policy cluster 3 and main impacts



Source: authors' analysis.

8.1 Legal aspects

This section provides the potential legal basis for the adoption of the policy options under the third policy cluster, and assesses whether the policy options pass the subsidiarity and proportionality tests. In addition, it evaluates the complementarity and coherence of these policy options with other EU norms and with international law. Finally, it assesses each policy option's contribution to the EU's external relations and attractiveness.

8.1.1 Legal basis, subsidiarity and proportionality

This section discusses the potential legal basis for each option, as well as adherence to the principles of subsidiarity and proportionality presented in Article 5(3) TEU.

8.1.1.1 Policy option 3A: equal rights for TCNs and EU workers

Article 79 TFEU provides a proper legal basis for standardising equal treatment rules in all of the migration directives, limiting restrictions in line with the approach used for long-term residents, and including a provision on social security, inspired by the more favourable directives (the BCD, for instance) and the system of coordination of social security systems of Member States (Regulation 883/2004).

For the adoption of a text that includes similar provisions to those found in Regulation 492/2011 on free movement of workers, either Article 79 TFEU and/or Article 45 TFEU (free movement of workers) can serve as a legal basis. Since the text would concern the social rights of workers of third countries, Article 153 (1) g), which gives the EU competence to adopt minimum requirements concerning 'conditions of employment for third-country nationals legally residing in Union territory', would also provide a proper legal basis.

Articles 79 or 45 TFEU would also provide a proper legal basis for amending Regulation 492/2011, extending its scope of application *ratione personae* so that it also includes TCN workers. This would only require a modification of Article 1(1) of this regulation, to dismiss the reference to 'national of a Member State' and simply replace it by 'worker' residing on the territory of a Member State (a solution that would go beyond equal treatment and social rights for TCNs, since Regulation 492/2011 includes intra-EU mobility for access to employment in another Member State).

A possible legal basis for the adoption of a new directive prohibiting discrimination on nationality would be Article 18 TFEU, which prohibits discrimination on nationality in the field of application of the Treaty. Whilst it is indeed hard to draw a principle of non-discrimination on nationality applying to TCNs from Article 18 TFEU, this does not mean that Article 18 cannot be a proper legal basis for introducing legislation extending the prohibition of discrimination on nationality to TCNs. Direct application of Article 18 to discrimination on nationality against TCNs and use of Article 18 as a legal basis are two different things.

As far as direct application of Article 18 to TCNs is concerned, the CJEU decided, in a case delivered in 2009, that Article 18 TFEU does not 'apply to cases of a possible difference in treatment between nationals of Member States and nationals of non-member countries'²⁴⁸.

Even if in another, more recent, decision²⁴⁹, the CJEU was less explicit on the limited meaning of Article 18 TFEU, the direct application of Article 18 to TCNs remains uncertain and controversial among scholars²⁵⁰.

However, these uncertainties do not prevent the use of Article 18 as a legal basis for the adoption of an instrument prohibiting discrimination on nationality against TCNs²⁵¹. Indeed, the letter of Article 18 TFEU (which prohibits nationality discrimination 'within the scope of application of the Treaties') makes it a proper legal basis for an anti-discrimination directive, which would acknowledge

²⁴⁸ CJEU, 4 June 2009, *Vatsouras*, C-22/08, para 52. On the controversy concerning the limitation of the principle of non-discrimination, see: Brouwer and De Vries (2015).

²⁴⁹ CJEU, 13 June 2013, *Radia Hadj Hamed*, C-45/12, at para. 41. The case concerned differential treatment between legally residing TCNs and the nationals of a Member State with regard to the granting of family benefits. The CJEU held that Article 18 TFEU could not be applied 'as it stands' to a situation where a TCN is in possession of a residence permit in a Member State, pointing to the background of Article 18 TFEU, which concerns Union citizenship. But the language 'as it stands' seems to indicate that Article 18 TFEU could apply to TCNs if their situation was covered by EU law. In the case, the CJEU considered that the person invoking Article 18 TFEU (and Articles 20 and 21 CFR) did not fall within the categories of persons protected by EU law.

²⁵⁰ On this topic, see Bribosia & Weyembergh (1999), Groenendijk (2006) and Muir (2011).

²⁵¹ See Muir (2011), p. 150.

extensive interpretation of the scope of this Article (prohibition of discrimination on nationality also applying to TCNs). Moreover, the authors of the Treaty actually intended to expand its scope to make it applicable to TCNs²⁵².

Since the Directive would concern employment and working conditions, another legal basis could be Article 153 (1) g) TFEU, which gives the EU competence to adopt minimum requirements concerning 'conditions of employment for third-country nationals legally residing in Union territory'.

To incite Member States to ratify ILO Convention 97, a decision of the Council authorising the Member States to ratify the Convention would be necessary, since it addresses certain areas of Union law (rights of TCNs, equality and non-discrimination, where the degree of regulation has reached an advanced stage). In accordance with the rules on external competences that have been elaborated by the CJEU²⁵³, and more specifically on concluding and ratifying ILO Conventions²⁵⁴, the Member States alone are not in a position to ratify the Convention, as parts of it fall within Union competences pursuant to Article 3(2) TFEU. However, the EU cannot ratify an ILO Convention, because under the ILO Constitution, only states can become parties to a Convention. Therefore, the EU institutions and Member States must take the necessary measures to cooperate in ratifying the Convention and in implementing the commitments resulting from it²⁵⁵. The substantive provisions of the Convention do not cause concern in the light of the existing *acquis*. A Council Decision would have to authorise the Member States to ratify Convention 97 and recommend that they make efforts to do so without delay.

With regard to subsidiarity, EU law can be considered more appropriate than national laws to guarantee the equal treatment of TCNs in all Member States. Indeed, national laws ensuring equal treatment in employment and working conditions retain different conceptions of the scope of application of the equal treatment rule. As recent cases brought to the CJEU have made clear, migrants' rights are limited, in some Member States, by the application of conditions of residence²⁵⁶, for instance. These variations from state to state can only be eradicated by harmonisation at EU level, which goes together with the competence of the CJEU to interpret the notion and determine the scope of the principle of equality and non-discrimination.

In addition to ensuring the protection of migrant workers through non-discrimination on nationality, in conformity with Articles 20 and 21 CFR, an equal treatment rule applying across the EU would contribute to the good functioning of the internal market by levelling the playing field for EU employers.

Concerning proportionality, among the instruments suggested above to establish an equal treatment rule protecting the social rights of TCNs, some are more strictly tailored than others. Inciting all Member States to ratify ILO Convention 97, or ensuring consistency by generalising the most extensive equality clause of the migration directives (and possibly adding some elements of Regulation 883/2004 to ensure the exportation of benefits and aggregation of periods of work or contributions), are very narrowly focused on the objective envisaged.

²⁵² See Hublet (2009), p. 757 and De Witte (2010).

²⁵³ *AETR* judgment of the ECJ of 31 March 1971, C-22/70, ECR, 1971, 263.

²⁵⁴ Opinion 2/91 of the CJEU of 19 March 1993, ECR 1993-I, p. 1061 on the ILO Chemicals Convention No 170.

²⁵⁵ Opinion 2/91 of the CJEU, paras 36, 37 and 38.

²⁵⁶ CJEU, 25 November 2020, *Istituto Nazionale della Previdenza Sociale*, C-303/19 and C-302/19.

Comparatively, a directive based on Article 18 TFEU or a directive ensuring that TCN workers obtain similar rights to free movement to EU workers, reach beyond the objective of equal treatment in the domain of social rights. They could therefore be considered disproportionate.

8.1.1.2 Policy option 3B: better enforcement of TCNs' rights

Two Treaty provisions provide a proper basis for adopting a directive aimed at facilitating the enforcement of rights of TCN workers, by making it easier to bring actions to court: Article 79 (2) b) TFEU (definition of the rights of TCNs residing legally in a Member State) or, since it concerns the enforcement of social rights, Article 153 (1) g), which gives the EU competence to adopt minimal requirement concerning 'conditions of employment for third-country nationals legally residing in Union territory'. The same is true for the creation of national bodies in charge of eliminating discrimination on nationality to support TCNs' actions.

As far as the extension of the scope of ELA, it is possible to rely on the legal basis used for Regulation 2019/1149 establishing the authority: Articles 46 and 48 TFEU on free movement of workers. Article 153 (1) g) TFEU could be used as a basis for adopting a directive on adequate minimum wages, inspired by the Commission's proposal, which would reinforce the role of trade unions or other associations in charge of migrants' rights through EU intervention. Article 153 (1) g) gives the EU competence to adopt minimum requirements concerning 'conditions of employment for third-country nationals legally residing in Union territory'.

The arguments concerning subsidiarity with regard to equal treatment also apply to the enforcement of rights. Moreover, choosing options that rely on existing authorities or institutions at national level (unions, social partners and national equality bodies) is a way to limit EU intervention and ensure that proportionality is respected.

As far as proportionality is concerned, EU intervention would be limited to what is strictly necessary to strengthen the enforcement of TCN workers' rights: the role of national actors and the new powers granted to ELA could be strictly defined to respect the principle of proportionality.

8.1.1.3 Policy option 3C: reducing uncertainty with respect to obtaining long-term resident status

Article 79 TFEU provides a proper legal basis for EU action, which consists of expanding the personal scope of the LTRD and easing access to the protective status it confers. The goal of the reform is to increase the number of beneficiaries of the long-term resident status and to secure the rights that they will be granted on basis of this status. Considering that Article 79(2) gives the EU legislator the competence to adopt measures concerning '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', this provision can adequately ground the proposed action. In addition, the proposed reform consists of amending the long-term resident status, which was adopted based on Article 79(2).

One may also consider that the proposed policy option meets the subsidiarity requirement. The option consists of defining the beneficiaries of long-term resident status, a status created at EU level to approximate national legislation on long-term residence. Given that long-term resident status opens a right of mobility in the EU, it requires a significant degree of harmonisation of national legislation: harmonisation indeed 'promotes mutual confidence between Member States'²⁵⁷.

²⁵⁷ Following recital 17 to Directive 2003/109, and as recalled by the Court of Justice, 17 July 2014, *Shamim Tahir*, C-469/13, para. The recital goes on to state that permits with a permanent or unlimited validity issued on terms more favourable than those laid down by the Directive do not confer the right to reside in other Member States.

In addition, in our proposed ‘hard amendment’ of Articles 3 and 4 of the directive, the action requires EU intervention. Member States are indeed asked to count, for the evaluation of the period of residence, the time spent by TCN workers ‘in the other Member States’, which is an action Member States are usually reluctant to take. In the same vein, the policy option suggests restraining Member States’ discretion when they implement the directive, an action that Member States can hardly take themselves.

The action can also be deemed proportionate given its objective, which is to secure access to the long-term resident status. Many TCN workers, particularly those who exercise ‘atypical’ forms of migration (like seasonal workers, au pairs and even students) are currently excluded – even after years of residence in the EU – from the possibility of enjoying equality of treatment. Because it adapts the directive to ‘circular’ migrants and to all those who have spent sufficient time to create links with the host society, the proposed action will substantially improve the situation of categories of TCN workers who are frequently subject to hardship and exploitation.

As regards the revision of the conditions required to access long-term residence, one may distinguish between the ‘soft’ and the ‘hard’ approach. Under the ‘soft’ approach, Member States have a margin of discretion to assess the links that TCNs have made with the host society. The EU action is thus likely to respect national circumstances, which satisfies the condition of proportionality. Comparatively, the ‘hard’ approach, which consists of unifying the condition to access long-term resident status, is more constraining for the Member States: they will have to grant a long-term residence permit to every TCN residing on their territory if that TCN has spent ‘at least’ five years of legal residence ‘in the EU’. However, this hard option is more likely to achieve the goal pursued: opening the right to equal treatment for all TCN workers who have created links with the European society. It can thus also be considered proportionate.

The second aspect of the reform, which aims to reduce Member States’ margin of interpretation of the terms and notions of the LTRD, is a soft approach towards greater convergence in the implementation of the directive, and also abides by the proportionality principle. It is necessary to tackle the strong disparities in accessing long-term resident status across the EU²⁵⁸, arising from the persistent application of national schemes. Therefore, the approach taken is a realistic compromise between the need to harmonise national legislation and willingness to allow a margin of discretion to the Member States. For the same reason, the choice of instrument should pass the proportionality test.

8.1.2 Complementarity and coherence

This section presents the results of the complementarity and coherence assessment with i) EU legal migration *acquis*; ii) other EU legal norms; and iii) international law, in particular international human rights law.

8.1.2.1 Policy option 3A: equal rights for TCNs and EU workers

Complementarity and coherence with EU migration *acquis*

Equal treatment concerning social rights would contribute to the ‘fair treatment’ of TCNs, an objective mentioned at Article 79(1) TFEU and pursued by EU legal migration *acquis*.

²⁵⁸ EMN (2020), Long-term resident status in the EU.

Complementarity and coherence with other EU norms, in particular non-discrimination law and fundamental rights (CFR)

The proposed action would be in line with the CFR, especially; Articles 20 and 21 (equality and non-discrimination) and Article 31 (fair and just working conditions), and is consistent with several other provisions of the CFR: Article 27 (workers' right to information and consultation within the undertaking), Article 28 (right of collective bargaining and action), Article 29 (right of access to placement services), Article 30 (protection in the event of unjustified dismissal), Article 32 (prohibition of child labour and protection of young people at work) and Article 34 (social security and social assistance).

The policy option fosters freedom to choose an occupation and the right to engage in work, protected by Article 15 CFR. It would also ensure the good functioning of the single market, in fostering harmonisation of working conditions.

Complementarity and coherence with international law, in particular international human rights law

The proposed policy option can be deemed coherent and compatible with international law, in particular international human rights law. Equal rights for migrants are pursued by the CoE and the ILO. Among the instruments developed in the auspices of the CoE, the ECHR has been the source of important case-law of the European Court of Human Rights (ECtHR) on non-discrimination on nationality, based on Article 14 ECHR²⁵⁹. The European Social Charter (revised, 1996) is also worth mentioning here as it includes 'the right of migrants workers and their families to protection of assistance' (Article 19). This provision requires, namely, that migrants are not treated less favourably than nationals when their social rights are at stake.

The UN International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990) also requires 'non-discrimination with respect to rights' of migrants (Article 7) and calls for equal treatment concerning remuneration and working conditions (Article 25), rights to participate in trade union activities and join trade unions (Article 26) and social security (Article 27).

As far as the ILO is concerned, Convention 97 on Migration for Employment refers to the right to the equal treatment of migrants concerning employment, working conditions and social security (Article 6).

8.1.2.2 Policy option 3B: better enforcement of TCNs' rights

Complementarity and coherence with EU migration *acquis*

Concerning complementary and coherence issues, the analysis developed above on the extension of the principle of equal treatment to TCNs also applies to the enforcement of TCNs' rights.

Complementarity and coherence with other EU norms, in particular non-discrimination law and fundamental rights (CFR)

It is important to highlight that enforcement of TCNs' rights in courts is required by the fundamental right to effective judicial remedy, protected by Article 47 CFR and Article 6 ECHR.

²⁵⁹ See: ECtHR, 8 April 2014, *Dhabhi v Italy*, Appl. No 17120/09.

Complementarity and coherence with international law, in particular international human rights law

The enforcement of migrants' rights echoes Article 19(7) of the European Social Charter (revised, 1996), which requires that states guarantee legal proceedings to secure migrant workers' social rights that are not less favourable than the proceedings available to their nationals. Similarly, the UN International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990) requires that 'migrant workers and members of their families shall have the right to equality with nationals of the State concerned before the courts and tribunals' (Article 18).

This policy option is also consistent with the two ILO 'Labour Inspection Conventions' (Labour Inspection Convention 81 and Labour Inspection (Agriculture) Convention 129), which require that states maintain a system of labour inspection for workplaces to ensure that workers' rights are respected. It must also be mentioned that ILO Convention 97 on Migration for Employment requires that migrant workers benefit from legal proceedings to claim their social rights that are not less favourable than those granted to nationals (Article 6 d).

8.1.2.3 Policy option 3C: reducing uncertainty with respect to obtaining long-term resident status

Complementarity and coherence with EU migration *acquis*

The proposed measures are fully coherent with the EU's ambition to develop a common immigration policy aimed at ensuring 'fair treatment of third-country nationals residing legally in Member States', mentioned in Article 79 TFEU. In addition, allowing more TCNs to access the long-term resident status will reduce the number of cases where TCNs are stuck in the legal regime on which they first accessed the EU territory. By the same token, increasing the beneficiaries of the long-term resident status – and securing this access – will contribute to the EU's action for migrant integration. The very objective of the LTRD is indeed to promote inclusion through equality. This is fully in line with the EU's action in favour of inclusion, as defined in its Action Plan on Integration and Inclusion 2021-2027²⁶⁰. This evolution is important for circular migrants²⁶¹ who, like seasonal workers, have remained outside the scope of the long-term resident status. Because new conditions would be applied for calculating the time these seasonal migrants have spent in the EU, and for evaluating the links they have created with the host society, the EU's integration policy would be broadened and more effective. The proposed policy option could also be beneficial to those TCN workers who have temporarily accessed the EU labour market, like TCNs admitted under mobility partnerships or those who will be admitted under future SMPs (policy option 2F).

Complementarity and coherence with other EU norms, in particular non-discrimination law and fundamental rights (CFR)

Considering the broad scope of the principle of equality, enshrined in Article 11 LTRD, extending the beneficiaries of the long-term resident status can be seen as a major contribution to the EU's action in favour of equality between natives and migrants. It can also contribute to equalising all migrants' conditions, given that new categories of TCNs will have access to the protective status, hence contributing to protecting equality before the law, enshrined in Article 20 CFR.

In addition, this policy option would ensure the respect of Article 31 CFR (fair and just working conditions), Article 27 (workers' right to information and consultation within the undertaking),

²⁶⁰ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Action plan on Integration and Inclusion 2021-2027 COM (2020) 758 final.

²⁶¹ On circulation migration, see Triandafyllidou (2013) and Vankova (2020).

Article 28 (right of collective bargaining and action), Article 30 (protection in the event of unjustified dismissal) and Article 34 (social security and social assistance).

This policy option would also foster freedom to choose an occupation and the right to engage in work, protected by Article 15 CFR.

Complementarity and coherence with international law, in particular international human rights law

The proposed action is consistent with the UN's ambition to 'empower migrants and societies to realise full inclusion and social cohesion' mentioned in the 16th objective of its Global Compact. Among the signatories' commitment, one finds indeed the decisions to 'foster inclusive and cohesive societies by empowering migrants to become active members of society' and to 'strengthen the welfare of all members of societies by minimising disparities, avoiding polarisation and increasing public confidence in policies and institutions related to migration, in line with the acknowledgement that fully integrated migrants are better positioned to contribute to prosperity'.

8.1.3 Contribution to the EU's external relations and attractiveness

This section discusses the likely impact of the policy options on the EU's international relations and negotiations (within international organisations, and with neighbouring and other third countries) and the attractiveness of the EU territory for migrant workers.

8.1.3.1 Policy option 3A: equal rights for TCNs and EU workers

Equal rights for TCN workers would contribute to making the EU more attractive for migrants. The reasoning that was held for free movement within the EU for EU mobile workers can also apply here: mobility will be encouraged if migrants can trust that they will benefit from equal treatment concerning their employment and working conditions. For long-term residents, equal treatment is also considered a key factor of integration in the host country. For migrants who plan to move back, or move to other countries, equal rights as EU nationals for the exportation of their social security benefits, and the possibility of obtaining aggregation of periods of work or social contribution, should also contribute to fostering immigration²⁶².

8.1.3.2 Policy option 3B: better enforcement of TCNs' rights

What is stated in section 8.1.3.1 also applies to the attractiveness of the EU for TCNs.

8.1.3.3 Policy option 3C: reducing uncertainty with respect to obtaining long-term resident status

Increasing migrants' capacity to access long-term resident status is likely to increase their integration in the host society. This in turn is likely to have an impact on the EU's attractiveness, given that policy areas related to integration (e.g., employment, income and citizenship) indeed feature among the OECD Indicators of Talent Attractiveness²⁶³.

Likewise, increasing integration and equality for migrants is likely to improve the EU's reputation. The external EU migration policy has taken a restrictive turn, which emphasises the externalisation of migration controls and migration-control conditionality²⁶⁴. It is raising an increasing number of objections from the migrants' countries of origin and transit. By improving the rights and protection

²⁶² On this topic, see: Pauline Melin, *The External Dimension of EU Social Security Coordination, Towards a Common EU Approach*, Brill, 2019, who insist on the importance of social security coordination in labour mobility.

²⁶³ www.oecd.org/migration/talent-attractiveness/

²⁶⁴ See ECRE (2020).

granted to their nationals, the EU would be in a better position to deepen its partnerships with these countries. This is the approach followed by the 2021 Portuguese presidency, which aims to ‘foster the deepening of partnerships between the EU and the migrants’ countries of origin and of transit, including through constructive dialogue on the development of a policy to promote legal migration channels, which is a sustainable alternative’²⁶⁵ and considers the objective of integration.

8.1.4 Summary

The table below summarises the main findings of the legal aspects analysed for the third policy cluster.

Table 12: Summary of the legal analysis for policy cluster 3

Target group	Policy action	Potential effects	Limitations and costs	EU added value
All TCN workers	<ul style="list-style-type: none"> - Extend and generalise equality of treatment for TCN workers (through legislative instruments and/or incitement to ratify ILO Convention) - Better enforcement of TCNs’ rights (judicial enforcement and enforcement supported by third parties) - Ease access to EU long-term resident status 	<ul style="list-style-type: none"> - Attract skilled workers and reduce labour shortages - Improve TCNs’ labour conditions - Reduce exploitation - Contribute to EU law effectiveness - Necessary to fully implement other policy actions (e.g., mobility schemes) 	<ul style="list-style-type: none"> - Difficulty in tackling intersectional discrimination - Difficulty in identifying entities /people to sue 	<ul style="list-style-type: none"> - Contribution to EU action in favour of equality - Contribution to EU action in favour of TCNs’ inclusion - Contribution to implementation of fundamental rights - Contributes to EU’s attractiveness and reputation

Source: authors’ analysis.

8.2 Economic aspects

This section assesses the expected economic impact of the third policy cluster. It considers i) the impact on labour market outcomes, and ii) possible limitations and enhancement of effectiveness.

8.2.1 Impact on labour market outcomes

The improvement of TCN workers’ rights and employment conditions is likely to reduce the migrant wage gap, facilitate access to certain benefits and reduce discrimination. The target groups for these policy options are all TCN workers currently employed in the EU or who are seeking employment,

²⁶⁵ www.2021portugal.eu/media/e0rjnvjdj/programme-for-the-portuguese-presidency-of-the-council-of-the-european-union-en.pdf.

and all TCN workers who are moving from one Member State to another. By improving their rights and conditions, the legislator is putting pressure on firms not to exploit the position of TCNs, which for some TCNs is a more vulnerable one. For instance, by not linking employment visas to specific employers, exploitative situations can be reduced. The main impact is thus to create a more level playing field with natives on the labour market. As became evident in Chapter 3, TCNs have worse employment outcomes than both mobile EU workers and natives. One explanation, among others, is that they face discrimination in the labour market. By improving TCN workers' rights and employment conditions, different aspects of employment can be improved. One indicator to measure this is the immigrant wage gap.

There is a relatively large amount of literature studying the immigrant wage gap. Results vary across destination countries and depend on the skills and gender of the immigrant, language and cultural similarity between destination and origin, time since arrival and policies in the destination (for a detailed overview see Anderson and Huang, 2019). There are, however, some general tendencies found in the literature. Immigrants who are more different in terms of host country language, customs and institutions have larger entry-wage gaps and assimilate more slowly. A study for 15 Western European OECD countries found that at the time of arrival, the immigrant wage gap is around 40 % for men and 36 % for women (Adsera and Chiswick, 2007). This increases to 45 % for men and 39 % for women if only TCNs are considered. Having the same language in the origin and destination country reduces the wage gap by around 12 % for men and 9 % for women. Interestingly, the authors find a large variation in the wage gap by destination country, being highest for Denmark, Luxembourg, Ireland, Spain and Finland and lowest for Germany, the UK and Portugal. In addition, most studies find that the immigrant wage gap decreases slowly over time. Adsera and Chiswick (2007) find that it takes on average 19 years for immigrant men and 18 years for immigrant women to catch up to the wage level of natives.

A study on Spain (Rodríguez-Planas, 2012) differentiates by education of immigrants, and finds that the wage gap at entry is 50 % for highly skilled workers, falling to 30 % after 10 years. The wage gap at entry is only 21 % for low-skilled workers, falling to 14 % after 10 years. The author assumes that one of the reasons is the lack of recognition of qualifications, which has a more detrimental effect on the highly skilled. A study on Germany (Beyer, 2016) finds qualitatively the same but quantitatively smaller numbers for the wage gap. He concludes that immigrant workers at arrival earn on average 20 % less than natives with otherwise identical characteristics. The wage gap is lower for migrants from more similar countries, with good German language skills and a German degree. A study on Italy finds that the wage gap between natives and immigrants is around 30 % (D'Ambrosio et al., 2017). This wage gap can, of course, be explained by many different reasons, such as differences in skills, education or preferences, or by discrimination. Once the authors control for differences in observables, the wage gap shrinks to 10 %²⁶⁶. This difference is now likely to be due to either differences in unobservables (such as preferences) or discrimination.

A few studies estimate the part of the wage gap that is likely due to discrimination in specific countries. Hofer et al. (2017) break down the wage gap in Austria and find that discrimination amounts to approximately 3-5 % of total wages. Bartolucci (2014) uses detailed matched employer-employee data from Germany and finds that immigrants earn 13 % lower wages in the same firm due to discrimination. Nielsen (2004) studies the immigrant wage gap in Denmark and finds that the largest component of the wage gap is due to differences in qualifications and work experience. Wage discrimination in Denmark is negligible for men and only significant for TCN women. Across

²⁶⁶ However, differences in observables, such as sector or occupation, could also be the outcome of discrimination.

all considered studies, estimates of the wage gap range between 0 % and 13 %, depending on the destination country and the characteristics of the immigrant.

Another interesting wage gap to study is the one between undocumented and documented workers. Borjas and Cassidy (2019) study this wage gap in the US and find a wage penalty of 4 % for undocumented male immigrants in 2016 compared to observationally equivalent men. The authors find a large variation in the wage penalty over the life cycle across demographic groups, as well as across different legal environments and labour markets. Interestingly, the wage penalty reduces when legal restrictions on the employment of undocumented immigrants are softened, and increases when restrictions are tightened.

Whether policies that reduce discrimination have the potential to increase wages for affected individuals in general is controversial in the literature. To estimate the percentage of TCNs who would be affected, we revert to Chapter 3, which indicated from EU LFS data that 15.8 % of men and 11.7 % of women report discrimination at work. This is an upper bound of those affected as discrimination at work is not just about wage penalties.

Chapter 3 also showed that TCNs have lower employment rates and feel more discriminated against in the job search process. One way to test for discrimination in the hiring process is to look at field studies, where researchers send CVs of fictitious candidates with equivalent qualifications that only differ in the ethnic group or nationality of the applicant. It can be argued that differences in call back rates of equally qualified native and immigrant candidates can be explained by discrimination. Zschirnt and Didier (2016) compiled results from 42 studies from 18 countries and found that minority groups have a 40 % lower probability of being invited for a job interview compared to natives. To estimate those who would be affected, we revert to Chapter 3, which showed that more than 20 % of men and almost 20 % of women feel that they have been discriminated against in the job search. It is, however, not clear whether discrimination in the hiring process can be reduced through non-discrimination law. Zschirnt and Ruedin (2016) also compare results before and after the EU directives combating discrimination (Directives 2000/43/EC and 2000/78/EC) and, remarkably, do not find any reduction in discrimination levels. The authors hypothesise that extensive application packs providing more information on the candidate could be one way to reduce statistical discrimination. They also show that discrimination is lower in the public sector, possibly due to more standardised application procedures, non-discriminatory hiring practices and additional value added of a more diverse workforce.

Besides gaps in employment and financial outcomes, other outcomes are also interesting to compare. D'Ambrosio et al. (2017) show that in situations where migrants cannot be paid lower wages due to binding minimum wages, they tolerate worse working conditions and in particular lower workplace safety. In a follow-up study, D'Ambrosio et al. (2021) find that the success of a populist right-wing party in Italy has led to an increase in injuries at work for immigrant workers. The authors argue that the reason for this is a reallocation of dangerous tasks to immigrant workers when immigrants face higher job insecurity.

Beyond the above-mentioned effects at individual level, reducing the discrimination of TCNs can also have positive aggregate effects. As outlined in 'The cost of non-Europe in the area of legal migration'²⁶⁷ (EPRS, 2019), a reduction in discrimination can lead to increased tax revenue due to higher wages and employment. In addition, this policy option has the potential to reduce skill shortages through a better allocation of talent, and thus also increase productivity, GDP and potentially innovation in the longer term.

²⁶⁷ [https://www.europarl.europa.eu/RegData/etudes/STUD/2019/631736/EPRS_STU\(2019\)631736_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2019/631736/EPRS_STU(2019)631736_EN.pdf).

The provision of permanent residence rights is also an important factor and a vital incentive for highly skilled migrants. Across many possible OECD destinations, countries that provide a roadmap to permanent residence attract, on average, double the number of highly skilled migrants in comparison with those that do not. Permanent residence rights increase the possibility – and probability – of staying longer in the destination country, and expand migrants' future opportunities (Czaika and Parsons, 2017).

In addition, in the longer term, these policy options could make the EU a more attractive destination for TCN workers. Before making the decision to migrate, potential labour migrants take expected wages, access to benefits and legal rights into consideration. Improving these factors would therefore have a direct positive effect on attracting labour migrants.

8.2.2 Limitations and effectiveness enhancement

One of the challenges for the effectiveness of this policy option of improving working conditions for TCNs is the difficulty encountered in measuring and monitoring discrimination. As we have seen in Chapter 3, many TCNs are unaware of their rights, and even fewer go to court to enforce their rights. Therefore, a mere change in laws and regulations does not ensure equal rights for TCNs.

One condition that might be essential for the effectiveness of non-discrimination law is to bring employers on board. As employers are the ones who have the potential to reduce discrimination, it is important to understand why they pay different wages or have different hiring probabilities, and to create a dialogue with law and policy makers, as well as discriminated groups, to find out how discrimination can be reduced most effectively.

8.2.3 Summary

The table below summarises the main findings of the economic aspects analysed for the third policy cluster.

Table 13: Summary of the economic analysis for policy cluster 3

Target group	Policy scope	Potential effects	Limitations and costs	EU added value
Potentially all discriminated TCN workers (upper bound): - 15.8 % of men - 11.7 % of women	- Wage gap between 0 % and 13 % - 40 % less likely to be invited for a job interview	- Wage gap reduction - Less discrimination in the hiring process - Better skills matching and therefore higher productivity	- Lack of rights awareness - Currently lack rights enforcement (need to strengthen enforcement)	- Economies of scale through enforcement and monitoring by a joint EU agency - Positive externalities if non-discrimination law makes the EU a more attractive destination for talent - Positive externalities through peer pressure to reduce discrimination across Member States

Note: target group calculated with data from EU-MIDIS II 2016.

Source: authors' analysis.

9 Conclusions and policy implications

This study finds several gaps in addition to those identified by the CoNE study. They range from gaps in mobility to and within the EU, to gaps in accessing the EU labour market (work authorisations and lack of recognition of qualifications). The gaps and barriers also concern social security coordination, family reunification and equal treatment. This study emphasises three main obstacles that TCN workers face: lack of legal avenues to the EU for labour migration, gaps in the protection of fundamental rights, and lack of assurance of equal treatment (including insufficient action against exploitation). Parts of these obstacles derive from the insufficient alignment of the EU legal *acquis* on migration with other EU policies (namely social policy or the protection of fundamental rights).

To address these gaps and considering the proposals already put forward by the Commission, three policy clusters with 14 policy options were defined.

9.1 Policy clusters

The first policy cluster covers measures to **harmonise rules for recognition of qualifications**. These options aim to ease access for TCNs to jobs corresponding to their qualifications, and contribute to reducing practical difficulties faced by migrants in having their qualifications, skills or previous learning recognised.

The second policy cluster includes actions to **introduce new legal channels for labour migration to the EU**. These policy options introduce new legal channels for labour migration, on the one hand for TCNs in the EU, and on the other hand for TCNs from outside the EU. The actions should strengthen the position of the EU in the global competition for the best talent and avoidance of brain waste.

The third policy cluster contains measures to **improve TCN workers' rights and employment conditions**. The policy options contribute to better enforcement of existing rights, as well as a reduction in the uncertainty around the status of TCNs.

9.2 European added value across policy options

The impacts of the various policy options are summarised in the table below.

Table 14: Overview of European added value across policy options

Policy cluster	Policy option	European added value			Additional costs and limitations
		Contribution to EU policies	Contribution to the EU's external action	Labour market impact	
1. Harmonise rules for recognition of qualifications	1A. Recognition of qualifications of TCNs for intra-EU mobility	<ul style="list-style-type: none"> • Contribution to intra-EU mobility and achievement of internal market • Needed to harmonise and complete migration directives • Contribution to implementation of fundamental rights (Articles 15,16, 20 and 21 CFR) • Necessary for development of skills mobility partnerships • Consistent with Lisbon Convention and ILO principles and objectives • Contribution to EU action in favour of education 	<ul style="list-style-type: none"> • Increased EU attractiveness for migrants, esp. skilled workers • Contribution to international action for skilled migrants 	<ul style="list-style-type: none"> • Individual wage gain improvements • Employment rate increases • Reduction in overqualification 	<ul style="list-style-type: none"> • Not all professions can be covered by automatic recognition • Ensuring equality in qualifications • Costs of recognition process • Costs of retraining or bridging courses
	1B. Recognition of qualifications for access to the EU	<ul style="list-style-type: none"> • Contribution to intra-EU mobility and achievement of internal market • Needed to complete migration directives • Necessary for development of EU talent pool, skilled refugee mobility schemes and youth mobility schemes • Contribution to implementation of fundamental rights (Articles 15,16, 20 and 21 CFR) • Consistent with Lisbon Convention and ILO principles and objectives • Contribution to EU action in favour of education 	<ul style="list-style-type: none"> • Increased EU attractiveness for migrants, esp. skilled workers • Contribution to international action for skilled migrants • Common rules would facilitate identification of common ground in negotiation of trade agreements • Risk of inconsistencies with restrictions on access to regulated professions included in previous trade agreements 	<ul style="list-style-type: none"> • Increased tax revenue • Positive effects on productivity and potentially innovation 	

Policy cluster	Policy option	European added value			Additional costs and limitations
		Contribution to EU policies	Contribution to the EU's external action	Labour market impact	
	1C. Addressing practical difficulties	<ul style="list-style-type: none"> • Contribution to intra-EU mobility and achievement of internal market • Needed to complete migration directives • Contribution to implementation of fundamental rights (Articles 15,16, 20 and 21 CFR) • Consistent with Lisbon Convention and ILO principles and objectives • Necessary for development of skill partnerships 	<ul style="list-style-type: none"> • Increased EU attractiveness for migrants, esp. skilled workers 		
2A. Facilitate access to regular work for TCNs already present in the EU	2A. Transition from studies to work	<ul style="list-style-type: none"> • Contribution to attracting talent • In line with EU Action Plan on Integration and Inclusion • Contribution to EU policy aiming to protect fundamental rights (Articles 5, 15 and 31 CFR) and social rights, and limiting exploitation of younger workers 	<ul style="list-style-type: none"> • Contribution to EU attractiveness • Contribution to objectives of the UN Global Compact • Contribution to international protection of labour rights 	<ul style="list-style-type: none"> • Reduction in gap in job quality and earnings due to longer job search and broader geography • Retention of qualified young TCNs in EU and encourage country-specific human capital investment • Attract a larger pool of prospective TCNs willing to study and later to work in EU • Fill labour shortages 	<ul style="list-style-type: none"> • Limited willingness for intra-EU mobility • Financial constraints to afford long job search • Trade-off between intra-EU mobility and investment in destination-specific skills • Unclear direction for selection effects • Does not solve problem of limited qualification recognition if not linked with policy option 1B
	2B. Ease access to work for family members	<ul style="list-style-type: none"> • Contribution to attracting talent and increasing inclusion of TCNs • Contribution to EU social policy in favour of work-life balance 	<ul style="list-style-type: none"> • Improvement of EU attractiveness • Contribution to UN Global Compact 	<ul style="list-style-type: none"> • Exposure to ban reduces employment probability in post-ban years • Large economic loss due to employment bans 	<ul style="list-style-type: none"> • Timing and destination of migration not driven by economic considerations • Conservative gender values might prevent

Policy cluster	Policy option	European added value			Additional costs and limitations
		Contribution to EU policies	Contribution to the EU's external action	Labour market impact	
		<ul style="list-style-type: none"> • Contribution to protection of fundamental rights (Articles 21, 23 and 24 CFR) • Contribution to UN action for the Elimination of All Forms of Discrimination against Women • Contribution to respect of UN Convention on Rights of the Child 		<ul style="list-style-type: none"> • Avoidance of suboptimal human capital investment 	women from working even if allowed
	2C. Ease access to work for asylum seekers	<ul style="list-style-type: none"> • Contribution to EU action on asylum seekers' reception conditions • Contribution to TCN inclusion • Improved implementation of EU fundamental rights (right to asylum) • Contribution to EU action to tackle irregular work 	<ul style="list-style-type: none"> • EU and UNHCR alignment • Contribution to UN action on human rights (Pact on Economic, Social and Cultural Rights) • Increase in EU's credibility 	<ul style="list-style-type: none"> • Higher employment and wages, higher migrant household income • Better possibilities to invest in country-specific human capital • Tax income gained instead of benefits paid 	<ul style="list-style-type: none"> • Pressure to accept a bad job fast and underinvest in destination-specific skills • Timing and destination of migration not driven by economic considerations • Early skills-screening could interfere with evaluation of asylum application (strict separation of procedures is required)

Policy cluster	Policy option	European added value			Additional costs and limitations
		Contribution to EU policies	Contribution to the EU's external action	Labour market impact	
2B. Introduce new legal channels for labour migration to the EU	2D. Mobility schemes for entrepreneurs	<ul style="list-style-type: none"> • Contribution to EU action to attract talent, (in line with revision of BCD) • Contribution to filling gap in EU migration law concerning self-employed migrants • Contribution to EU action in favour of entrepreneurship • Complementarity with Digital Decade Strategy • Contribution to deepening and upgrading single market • Contribution to protection of fundamental rights (Articles 15 and 16 CFR) 	<ul style="list-style-type: none"> • Contribution to making EU a global actor in competition for talent and investment 	<ul style="list-style-type: none"> • Increase in skilled migration to EU and reduction in 'skill shortages' • Increased firm productivity and innovation 	<ul style="list-style-type: none"> • Differences in labour demand between Member States • Lower returns to skills and less developed start-up infrastructure compared to other destinations (UK, US) • High diversity in admission criteria and contents of existing national schemes for entrepreneurs • Limited volumes expected (given the scope of the action) particularly, if not combined with actions aimed at making environment attractive
	2E. Youth mobility schemes	<ul style="list-style-type: none"> • Contribution to EU objective of attracting talent • Complementarity with other actions to deter young TCNs from migrating irregularly • In line with EU Youth Strategy, including acquisition of new skills • Contribution to protection of fundamental rights (Articles 14 and 15 CFR) 	<ul style="list-style-type: none"> • Contribution to UN Global Compact • Reinforcement of EU position in attracting young talent • Contribution to making EU a global actor 	<ul style="list-style-type: none"> • Reduction in skill shortages in destination and origin countries • Creation of legal labour migration pathway • Attract future skilled workers 	<ul style="list-style-type: none"> • Unclear possibilities for scaling up existing partnerships, high implementation costs • Unclear whether scheme will foster temporary or longer-term migration

Policy cluster	Policy option	European added value			Additional costs and limitations
		Contribution to EU policies	Contribution to the EU's external action	Labour market impact	
	2F. Skilled refugee mobility schemes	<ul style="list-style-type: none"> • Contribution to resettlement of refugees (European Agenda on Migration and Migration Pact) • Contribution to EU action to curb irregular migration • Contribution to protection of fundamental rights (Articles 15 and 18 CFR) • Contribution to implementation of Geneva Convention (Article 17) 	<ul style="list-style-type: none"> • Increased EU international role in refugee protection (consistent with Geneva Convention) • Increased credibility of EU in refugees' access to employment 	<ul style="list-style-type: none"> • Increase in skilled migration in EU and reduction in skill shortages • Creation of labour migration pathway • Reduction in costly irregular migration, detention and return efforts 	<ul style="list-style-type: none"> • Risk of refugee's dependency on employer, if not coupled with action of policy option 3B • Risk that skilled refugee mobility schemes replace, rather than complement, EU resettlement programmes
	2G. Supporting skills mobility partnerships	<ul style="list-style-type: none"> • Contribution to EU action to curb irregular migration • Contribution to EU action in favour of education (complementarity with Erasmus+) • Contribution to EU action in favour of TCN inclusion (Action Plan on integration and inclusion) • Likely contribution to EU gender equality policy • Contribution to implementation of UNESCO Convention against Discrimination in Education (1960) 	<ul style="list-style-type: none"> • EU would become a main global actor in the UN Global Compact and in global skill partnerships for migration • Likely to counterbalance EU reputation as SMPs not based on conditionality (i.e., third-country obligation to control migration to EU) 	<ul style="list-style-type: none"> • Reduction in skill shortages in destination and origin countries • Targeted employer-driven immigration • Avoidance of brain drain in origin country • Creation of legal labour migration pathway 	<ul style="list-style-type: none"> • Unclear possibilities for scaling up existing partnerships, high implementation costs • Unclear whether scheme will foster temporary or longer-term migration • Unclear whether workers' rights at work are properly protected unless linked with policy option 3B • Doubt about effectiveness of employer-driven schemes to attract highly skilled migrants
	2H. EU talent pool	<ul style="list-style-type: none"> • Contribution to EU increased attractiveness for skilled workers • Contribution to EU action in favour of refugee resettlement in EU 	<ul style="list-style-type: none"> • Increased EU attractiveness for (talented) migrants 	<ul style="list-style-type: none"> • Increase in skilled migration to EU • Reduction in 'skill shortages' 	<ul style="list-style-type: none"> • Differences in labour demand among Member States • EU talent pool not a pathway of its own: to be

Policy cluster	Policy option	European added value			Additional costs and limitations
		Contribution to EU policies	Contribution to the EU's external action	Labour market impact	
		<ul style="list-style-type: none"> Contribution to right to good administration (Article 41 CFR) 	<ul style="list-style-type: none"> EU as a leading actor supporting UNHCR action in favour of durable solutions for refugees Contribution to international actions for fair and managed migration (UN Global Compact) 	<ul style="list-style-type: none"> Increase in firm productivity and innovation 	<ul style="list-style-type: none"> linked with admission policy Unclear if it can function without mechanism of qualification recognition (cf policy option 3B) Risk concerning data protection (Articles 7 and 8 CFR)
3. Improve TCN workers' rights and employment conditions, including policies on the demand side of the labour market	3A. Equal rights for TCNs and EU workers	<ul style="list-style-type: none"> Contribution to EU action in favour of equality and non-discrimination Contribution to protection of fundamental rights, esp. social fundamental rights (Articles 15, 20, 21 and 27-34 CFR) 	<ul style="list-style-type: none"> Increased EU attractiveness Increased reputation of EU as an entity where rights and values are respected 	<ul style="list-style-type: none"> Reduction in wage gap Potential increase in hiring of immigrants Better working conditions Potential to attract highly skilled migrants 	<ul style="list-style-type: none"> Difference between laws and implementation Lack of awareness of rights and no one to sue (if not combined with policy option 3B) Sometimes hard to differentiate between discrimination and differences in situations or characteristics
	3B. Better enforcement of TCNs' rights	<ul style="list-style-type: none"> Contribution to effective judicial remedy (Article 47 CFR) Consistent with ECHR (esp. Article 14 on non-discrimination, Article 6 on right to a fair trial) Contribution to EU action in favour of TCN integration Contribution to international action in favour of migrant workers (consistent with ILO law) 			
	3C. Reducing uncertainty with respect to obtaining long-term resident status	<ul style="list-style-type: none"> Contribution to EU action in favour of equality and non-discrimination 	<ul style="list-style-type: none"> Increased EU capacity to attract talent Consistent with UN Global Compact 		

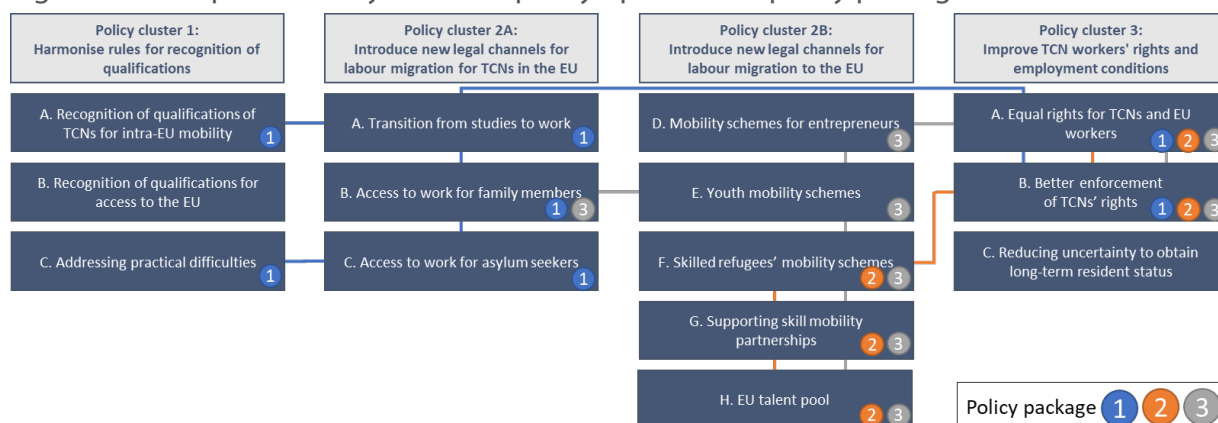
Policy cluster	Policy option	European added value			Additional costs and limitations
		Contribution to EU policies	Contribution to the EU's external action	Labour market impact	
		<ul style="list-style-type: none"> • Contribution to respect of fundamental rights, esp. social fundamental rights (Articles 15, 27, 28, 30, 31, 32 and 34 CFR) • Contribution to right to effective judicial remedy (Article 47 CFR) • Contribution to EU action on TCN inclusion (cf. Action Plan on Integration and Inclusion 2021-2027) 	<ul style="list-style-type: none"> • Improved EU reputation 		

Source: authors' analysis.

9.3 Policy packages contributing to main policy objectives

From the assessment of their impacts, a mix of policy options emerge that prioritise EU action in areas where the Member States are unlikely to achieve the same results. This strategy for EU action combines policy options in the three policy clusters to contribute to the main policy objectives.

Figure 34: Complementarity between policy options and policy packages



Source: authors' analysis.

9.3.1 First policy package: focus on intra-EU mobility of migrants

Mobility within the EU has been the core domain of EU action since the inception of the single market. The powers and legitimacy of the EU to create a common area for the mobility of economic actors, and more recently an area of freedom, security and justice for the purpose of ensuring the mobility of persons inside the EU, are broadly supported. Indeed, mobility within the EU has been achieved for the benefit of EU workers and citizens. But it can also be considered a basic, fundamental element of EU immigration policy, through which the EU complements the policies of its Member States. It is also quite obvious that EU action would be made easier in this domain because it already exists²⁶⁸.

What is needed is the identification of intra-EU mobility as the primary target of EU migration policy, for more resources to be allocated to the fulfilment of this objective, and for streamlining and developing EU action around it.

The 'package on migrants' intra-EU mobility' puts together a series of policy options:

- recognising TCNs' qualifications, skills and previous learning for intra-EU mobility (policy option 1A);
- addressing practical difficulties in recognition (policy option 1C);
- facilitating access to the EU labour market for students, asylum seekers and family members (policy options 2A, 2B and 2C);
- ensuring the respect of migrants' rights and combating exploitation of migrants moving within the EU in the framework of posting of workers (policy options 3A and 3B).

²⁶⁸ For instance, ELA is already in charge of combating fraud and abuse in the posting of migrant workers throughout the Union; the extension of its competence can thus be envisaged. And there are possibilities granted to migrants covered by the LTRD to move within the EU that could also be granted to other labour migrants.

The labour migration measures stimulating intra-EU mobility should consider the changes in demand for greater flexibility in changing employers, and in shifting from the status of employee to self-employed (and vice versa). Access to training and retraining for migrants to be able to adjust to labour market demand should also be ensured.

9.3.2 Second policy package: enhancing TCNs' rights and access to those rights

Violation of migrants' social rights, and social fundamental rights in particular, is a central concern at both EU and national level. Protecting the rights of TCNs is required by the CFR and connected with EU values incorporated in the CFR. The history of the EU has been one of growing protection of fundamental rights, and more recently fundamental social rights. This protection has always been linked not only to the recognition of rights, but also to their actual enforcement.

Protection of TCNs' fundamental rights, in particular their social rights, can also contribute to creating a level playing field for EU enterprises, thereby ensuring fair competition.

Equal (social) rights protect both TCNs and EU nationals by avoiding exploitation of the former, which can be (or can be perceived as) a source of competition with the latter.

Whilst the fundamental rights of migrants are already recognised to a large extent, the prohibition of discrimination on nationality (see policy option 3A) and prohibition of intersectional discrimination, which particularly affects migrants (especially women), are not always applied to TCNs. Discrimination is costly insofar as it can lead to poorer allocation of human capital, lower productivity and a cost for society.

Most importantly, the EU can build on its *acquis* on enforcement of rights to ensure that migrants' rights are properly enforced (policy option 3B). It can rely on the powers of existing agencies and bodies such as ELA and national equality bodies, which should benefit from increased resources to pursue their new task of better enforcing TCNs' social rights. In the same vein, the EU could rely on national trade unions and collective bargaining to improve and ensure the respect of TCN workers' rights.

EU action in support of rights' protection should also concern the development of legal pathways to the EU (see policy options 2F, 2G and 2H), to avoid mobility schemes aimed at filling EU labour market shortages and neglecting the rights and interest of TCNs. Specific attention is devoted, in this report, to avoiding the creation of situations where migrants are 'stuck' with one employer, which opens the door to possible exploitation (see policy options 2A, 2B and 2F).

9.3.3 Third policy package: de-fragmentation of EU labour migration policy

A major criticism of EU labour migration policy is its fragmentation, leaving largely unaddressed – or partially addressed – the situation of a number of workers, namely self-employed workers, workers' family members and the large group of workers with lower qualifications, who are 'essential' for the EU economy, as illustrated by the COVID-19 crisis.

The proposed actions do not assume that it is possible to construct all-encompassing legislation dealing with all aspects of every migrant worker's life. However, the different policy options proposed in this study are based on a more inclusive approach towards migrants covered by EU labour migration legislation than the current legal *acquis*.

The actions proposed are not constructed upon a divide between highly skilled and low- or medium-skilled TCN workers. Even if the international race for talent requires that the EU does not lag behind, access to the EU for migrants still not covered by EU legislation should not be limited to

skilled workers. This is the reason why the mobility schemes proposed (for entrepreneurs, young workers and refugees in options 2D, 2E and 2F) apply to TCN workers of all skill levels. The same logic applies to SMPs and the EU talent pool, which are conceived broadly (policy options 2G and 2H). In the same vein, the proposed actions on the recognition of qualifications, skills and previous learning are not limited to highly qualified workers (policy options 1A and 1B).

Fragmentation also derives from the divide, which is central to current EU migration law, between so-called 'forced migrants' and 'labour migrants'. Bridges can be built that would allow asylum seekers and refugees to become labour migrants, which would allow the migrants concerned to have access – and contribute – to the EU labour market (which is the objective of policy options 2B and 2F).

The proposed policy options also aim to address the situation of both TCN workers who are outside the EU, and those who are already in the EU. Recognition of qualifications, skills and previous learning should indeed not be limited to those acquired in the EU: the study also supports the recognition of qualifications obtained outside the EU (see policy options 1A and 1B). Likewise, 'attracting talent' and filling EU labour market shortages require that legal avenues (mobility schemes, options 2D, 2E, 2F and 2G) are created to attract TCN workers living outside the EU. EU action is also needed to keep the 'talent' already residing in the EU (policy options 2A, 2B and 2C).

Finally, fragmentation causes inequalities between migrants, which needs to be addressed, in particular where the enforcement of their rights is concerned. Convergence of EU migration law, i.e., privileging a comprehensive and horizontal approach rather than sectoral legislation, such as creating legal pathways that do not distinguish between skilled and non-skilled migrants, is likely to contribute to progressively reducing differences between the legal situation of skilled workers and that of highly skilled TCNs. In its current shape, EU migration law offers stronger protection and more effective rights to skilled workers. EU action should focus more on the protection of the rights of TCNs with lower qualifications, such as seasonal workers working in agriculture (see policy options 3A and 3B). In this respect, actions within the frame of policy options 1, 3A and 3B aim to provide the same rights and rules to all TCNs across and beyond the directives. The emphasis placed on allowing more TCNs to access long-term resident status (policy option 3C) also contributes to de-fragmenting EU labour migration law: it should prevent TCN workers from being stuck in a legal regime, and tends to equalise, in the medium term, the rights granted to all TCNs. Moreover, the different policy options mentioned in the second cluster (namely policy options 2A, 2B and 2C) can contribute to the strategies of 'regularisation by work' developed by some Member States.

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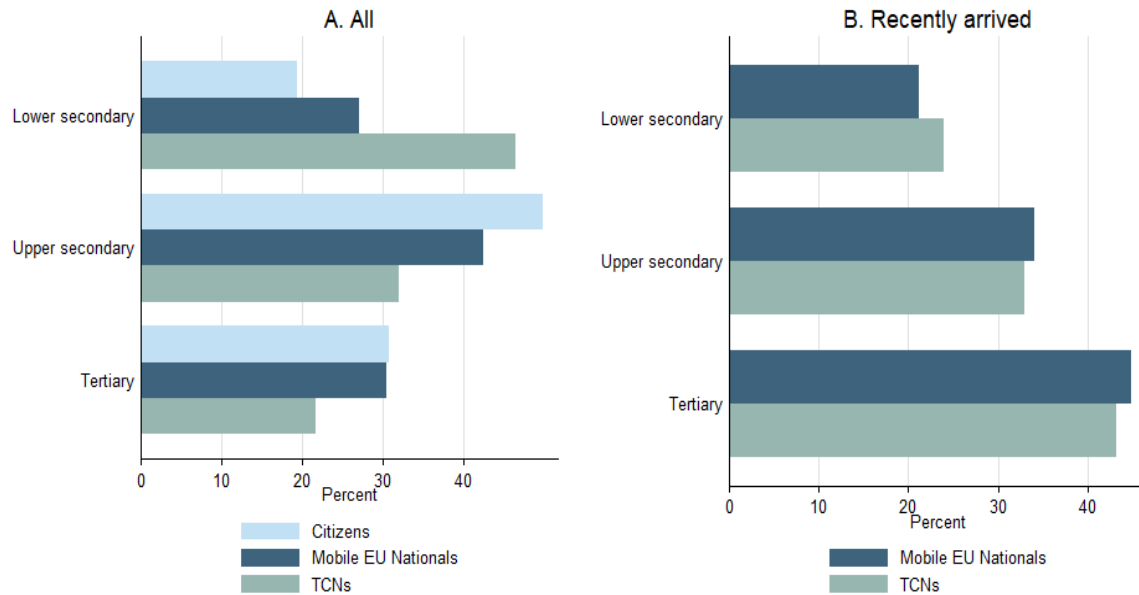
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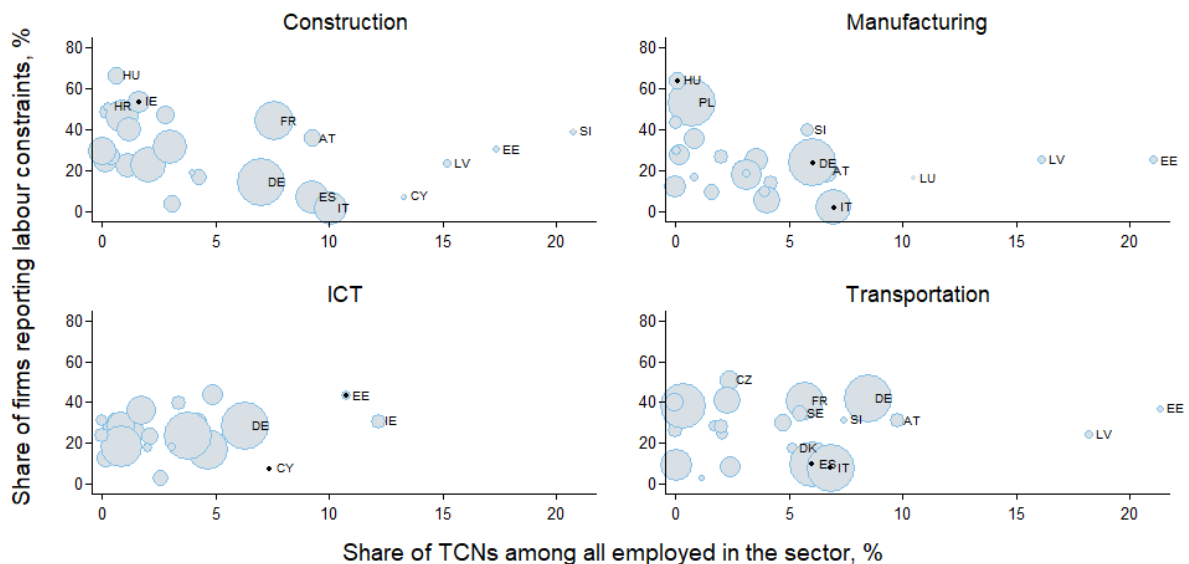
Additional tables/figures

Figure 35: TCNs, mobile EU nationals and citizens by education



Note: the sample is limited to mobile EU nationals and TCNs between 20 and 64 years old. For panel B, the sample is limited to those who, as at 2019, had resided for fewer than three years in an EU destination.
Source: EU LFS, 2019.

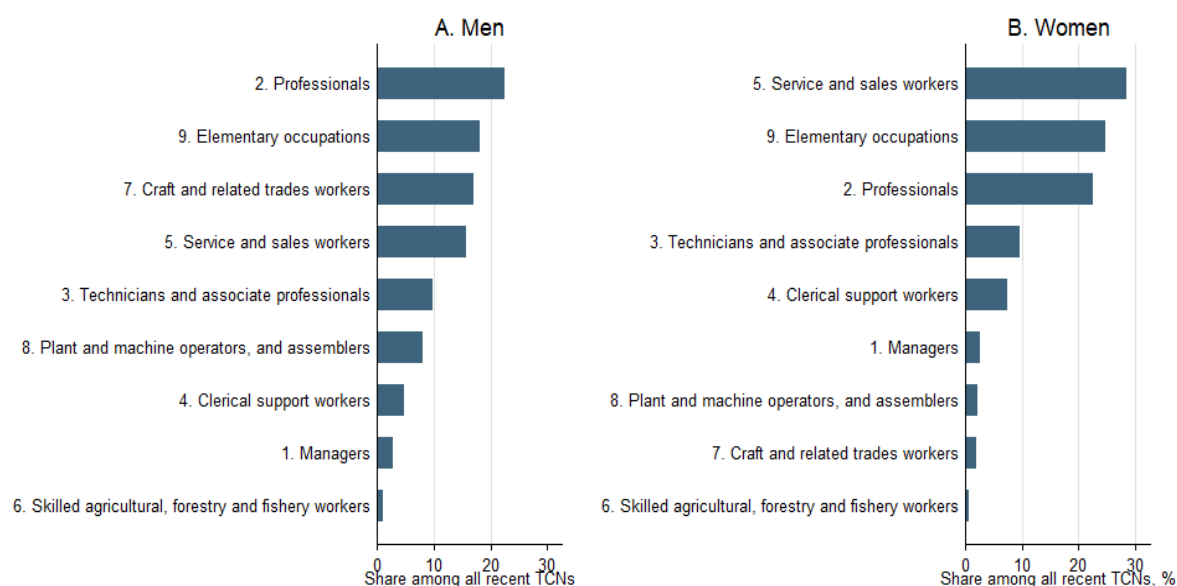
Figure 36: Concentration of TCNs in top four economic sectors reporting labour shortages, EU27 2019



Note: the size of the circle is proportional to the number of employed people in a sector. Sectors are defined at NACE Revision 2, 1-digit level: Construction – F, Manufacturing – C, ICT – Information and communication – J, and Transportation – H. These sectors were chosen as they had the largest number of firms reporting labour shortages in 2019.

Source: EU LFS 2019 and European Commission Business Survey.

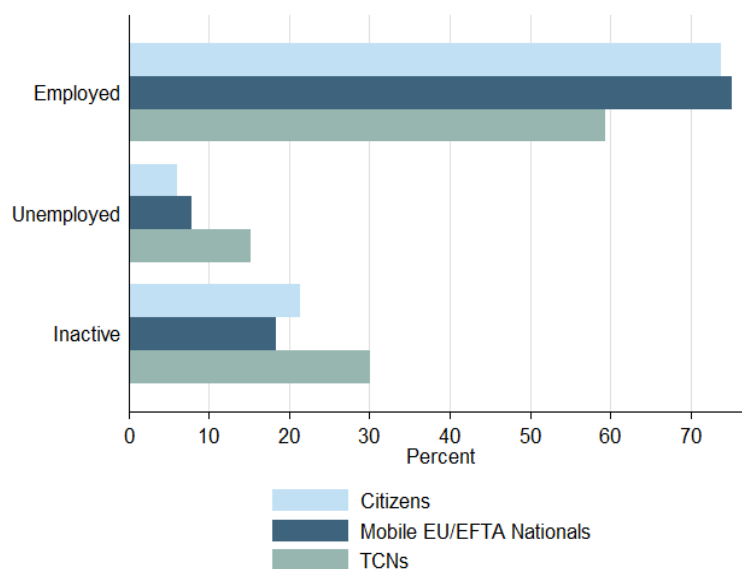
Figure 37: Professional occupations of recently arrived TCNs



Note: the sample is limited to TCNs between 20 and 64 years old, who as at 2019 had resided for fewer than three years in an EU destination. If at the moment of the survey a TCN was unemployed, we take the occupation from the previous employment (the ranking is not sensitive to limiting the sample to currently employed TCNs).

Source: EU LFS 2019.

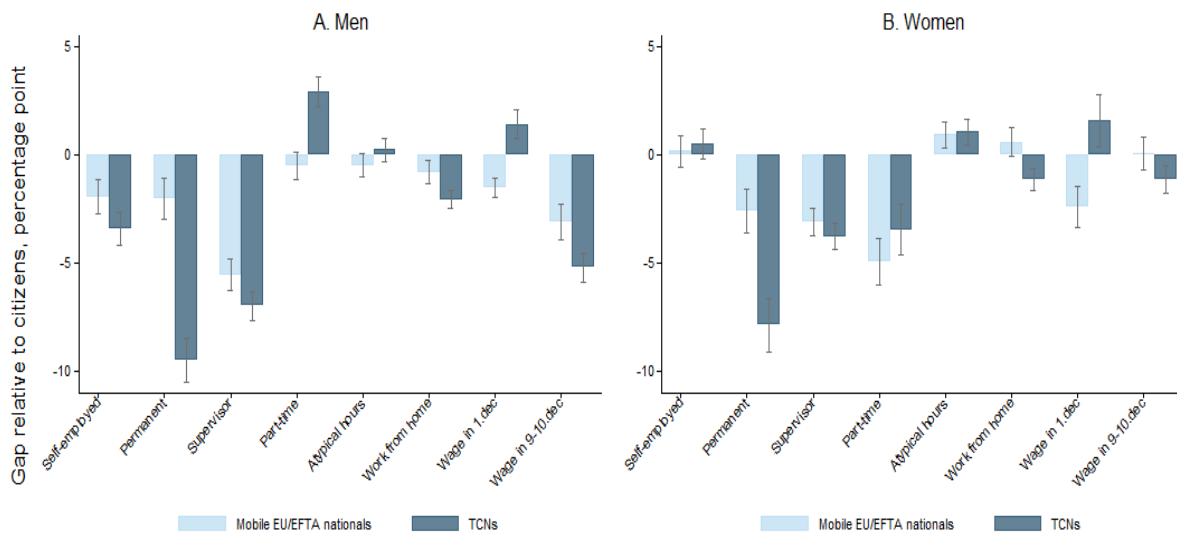
Figure 38: Employment of TCNs, mobile EU/EFTA nationals and citizens in the EU27, 2019



Note: sample EU27 between 20 and 64 years old. Mobile EU/EFTA nationals are migrants who are citizens of other EU Member States or EFTA. Employment and inactivity rates are calculated as a % of all the working-age population. The unemployment rate is calculated as a % of the active (employed and unemployed) working-age population.

Source: EU LFS 2019.

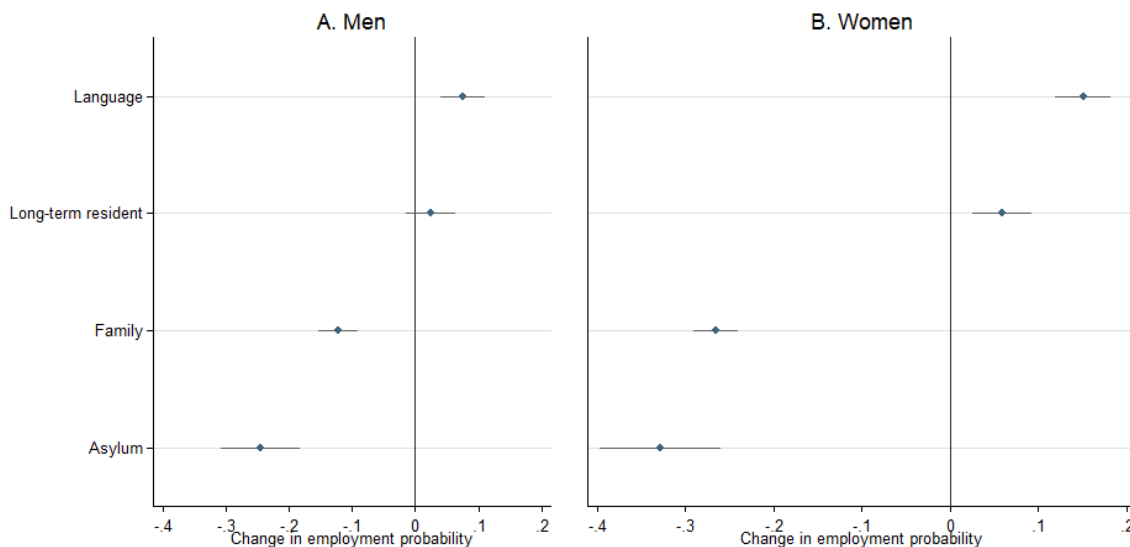
Figure 39: Labour market differences between EU migrants, TCNs and natives, 2019 (controlling for sorting)



Note: sample EU27 between 20 and 64 years old. Mobile EU/EFTA nationals are migrants who are citizens of other EU Member States or EFTA. The gap is conditional on age, marital status, education, field of study, occupation (isco3d), industry of work and country of residence.

Source: EU LFS 2019.

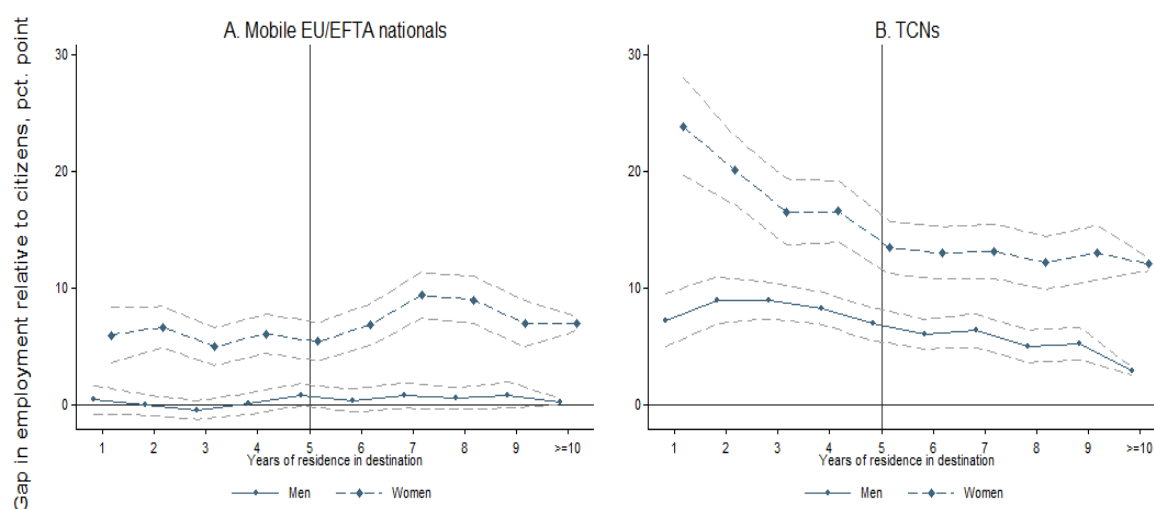
Figure 40: Employment gap: the role of migration reason (family, asylum), advanced language status (language) and long-term residence



Note: sample EU27: mobile EU nationals and TCNs. The regression controls for age group, education, marital status, field of study, country of residence and years of residence in destination.

Source: EU LFS, 2014 ad hoc module.

Figure 41: Differences in the probability of receiving a wage in the lowest decile between EU migrants, TCNs and citizens by years of residence



Note: the sample includes individuals residing in the EU27 between 20 and 64 years old. Mobile EU/EFTA nationals are migrants who are citizens of other EU Member States or EFTA. Baseline level – citizens. The gap is conditional on age, marital status, education, field of study, year and country of residence fixed effects. Source: authors' calculations based on EU LFS (2010-2019 waves).

Table 15: Top industries with labour shortages, by Member State

EU MS	Top five sectors according to reported labour shortages
AT	Food and beverage service activities; Services to buildings and landscape activities; Specialised construction activities; Employment activities; Accommodation
BE	Other manufacturing; Other professional, scientific, and technical activities; Land transport and transport via pipelines; Architectural and engineering activities; technical testing and analysis; Repair and installation of machinery and equipment
BG	Manufacture of other transport equipment; Manufacture of motor vehicles, trailers, and semi-trailers; Printing and reproduction of recorded media; Manufacture of rubber and plastic products; Manufacture of electrical equipment
CY	Manufacture of fabricated metal products, except machinery and equipment; Computer programming, consultancy and related activities; Services to buildings and landscape activities; Activities of membership organisations; Manufacture of rubber and plastic products
CZ	Manufacture of leather and related products; Postal and courier activities; Employment activities; Manufacture of other transport equipment; Services to buildings and landscape activities
DE	Services to buildings and landscape activities; Food and beverage service activities; Employment activities; Land transport and transport via pipelines; Accommodation
DK	Scientific research and development; Employment activities; Repair and installation of machinery and equipment; Legal and accounting activities; Repair of computers and personal and household goods

EU MS	Top five sectors according to reported labour shortages
EE	Manufacture of wearing apparel; Architectural and engineering activities; technical testing and analysis; Manufacture of machinery and equipment N.E.C.; Manufacture of furniture; Land transport and transport via pipelines
EL	Manufacture of fabricated metal products, except machinery and equipment; Office administrative, office support and other business support activities; Manufacture of paper and paper products; Legal and accounting activities; Information service activities
ES	Security and investigation activities; Computer programming, consultancy and related activities; Postal and courier activities; Employment activities; Repair of computers and personal and household goods
FI	Services to buildings and landscape activities; Computer programming, consultancy and related activities; Employment activities; Architectural and engineering activities; technical testing and analysis; Manufacture of other transport equipment
FR	Computer programming, consultancy and related activities; Repair and installation of machinery and equipment; Specialised construction activities; Land transport and transport via pipelines; Architectural and engineering activities; technical testing and analysis
HR	Manufacture of motor vehicles, trailers and semi-trailers; Manufacture of paper and paper products; Employment activities; Security and investigation activities; Services to buildings and landscape activities
HU	Manufacture of basic pharmaceutical products and pharmaceutical preparations; Other manufacturing; Repair and installation of machinery and equipment; Manufacture of wearing apparel; Manufacture of wood and of products of wood and cork, except furniture; manufacture of articles of straw and plaiting materials
IE	Manufacture of machinery and equipment N.E.C.; Manufacture of textiles; Financial service activities, except insurance and pension funding; Specialised construction activities; Services to buildings and landscape activities
IT	Food and beverage service activities; Repair of computers and personal and household goods; Land transport and transport via pipelines; Security and investigation activities; Computer programming, consultancy and related activities
LT	Manufacture of wearing apparel; Services to buildings and landscape activities; Employment activities; Information service activities; Security and investigation activities
LU	Manufacture of chemicals and chemical products; Manufacture of food products; Specialised construction activities; Printing and reproduction of recorded media; Manufacture of electrical equipment
LV	Services to buildings and landscape activities; Food and beverage service activities; Office administrative, office support and other business support activities; Manufacture of other transport equipment; Manufacture of wearing apparel
MT	Manufacture of basic pharmaceutical products and pharmaceutical preparations; Air transport; Services to buildings and landscape activities; Telecommunications; Repair and installation of machinery and equipment

EU MS	Top five sectors according to reported labour shortages
NL	Employment activities; Postal and courier activities; Services to buildings and landscape activities; Computer programming, consultancy and related activities; Security and investigation activities
PL	Manufacture of machinery and equipment N.E.C.; Manufacture of motor vehicles, trailers and semi-trailers; Manufacture of rubber and plastic products; Manufacture of other transport equipment; Manufacture of electrical equipment
PT	Manufacture of electrical equipment; Specialised construction activities; Repair and installation of machinery and equipment; Security and investigation activities; Manufacture of machinery and equipment N.E.C.
RO	Manufacture of machinery and equipment N.E.C.; Specialised construction activities; Manufacture of textiles; Repair and installation of machinery and equipment; Architectural and engineering activities; technical testing and analysis
SE	Legal and accounting activities; Architectural and engineering activities; Technical testing and analysis; Security and investigation activities; Computer programming, consultancy and related activities; Land transport and transport via pipelines
SI	Manufacture of machinery and equipment N.E.C.; Employment activities; Manufacture of leather and related products; Manufacture of other transport equipment; Manufacture of fabricated metal products, except machinery and equipment
SK	Employment activities; Manufacture of computer, electronic and optical products; Manufacture of machinery and equipment N.E.C.; Land transport and transport via pipelines; Services to buildings and landscape activities

Note: this survey is conducted in all EU Member States by the Directorate General for Economic and Financial Affairs (DG ECFIN). The survey addresses firms in the manufacturing, service, retail trade and construction sectors, and enquires about their assessment and expectations of business development. Among others, the survey's participants are asked to evaluate factors limiting their production (such as labour constraints). The Commission publishes information on a two-digit NACE industry level. Thus, the measure obtained is equal to the share of firms in each industry reporting that a 'shortage of labour force' is currently limiting production.

Source: European Commission Business Survey.

This paper is annexed to the European added value assessment (EAVA) written with the aim of providing support to the ongoing work on a European Parliament legislative-initiative report on legal migration policy and law (2020/2255(INL)). The assessment reviews the key issues concerning legal migration in the status quo (with a focus on labour migration) and discusses the reasons why the EU should take action.

This annex comprises legal and economic analysis carried out to review the state of play and the existing gaps and barriers in EU action. Based on its findings, the research paper defines 14 policy options. The legal and economic aspects of each policy option are assessed in qualitative and quantitative terms, drawing on a range of sources. The paper then assesses the impacts on fundamental rights protection, internal and external coherence, and on labour market outcomes.

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