



The cost of non-Europe in the area of legal migration

STUDY

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The EU seeks to build a comprehensive immigration policy in which legally residing non-EU nationals, referred to as third-country nationals (TCNs), should be treated fairly and in a non-discriminatory manner. The EU has adopted secondary legislation covering different categories of TCNs and various stages of the migration process. However, a number of gaps and barriers can still be identified. These concern notably the lack of incorporation and implementation of international and EU human rights and labour standards. Furthermore, they stem from the sectoral approach taken in the EU legal framework, not covering all TCNs and not in the same way, and in part leaving parallel national schemes in place. Different treatment between TCNs and further barriers result in differences in their employment rate, over-qualification, lower job quality, lower earnings and poorer long-term integration outcomes. At societal level, these deficiencies undermine the EU's ability to attract workers, to tackle EU labour market shortages in specific sectors or occupations, to address demographic changes (an ageing population), and to boost innovation and growth. Further EU action in this area could address these gaps by better implementing and enforcing existing standards, gradually extending the EU legislation to include other sectors, or revisiting the idea of adopting a binding immigration code covering all TCNs. Depending on the policy option pursued, some €21.75 billion in individual and economic benefits could be achieved each year.

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Executive summary

State of play, gaps and barriers in EU action and cooperation in the area of legal migration

In accordance with the Tampere conclusions on the creation of an area of freedom, security and justice in the European Union, the EU seeks to build a comprehensive immigration policy in which legally residing non-EU nationals, referred to as third-country nationals (TCNs), should be treated fairly and comparable to EU citizens.¹ The European Parliament has furthermore highlighted the need for a comprehensive labour migration policy for TCNs, and for better integration of TCN migrants, in order to meet the European Union's goals for smart, sustainable and inclusive growth, as well as to fill gaps identified in the European Union's labour market.²

In 2001, the European Commission submitted a proposal covering conditions of entry and residence for all TCNs for the purpose of employment, which however was not supported by the Council.³ Consequently, the EU has adopted several 'sectoral' directives relating to TCNs' admission and residence in an EU Member State. The directives cover different categories of TCNs and regulate different stages of the migration process:

- The Family Reunification Directive: Admission and residence of family members of TCNs legally residing in EU Member States;⁴
- The Long-term Residence Directive: Allowing TCNs who have legally and continuously resided in a Member State for five years to obtain an 'EU long-term resident' status and associated rights;⁵
- Admission and residence of highly-skilled TCNs, and their families;⁶
- EU rules for a single application/permit and equal treatment provisions for TCNs;⁷
- Admission and stay of TCNs admitted temporarily to carry out seasonal work;⁸
- Admission and stay of TCNs, and their families, employed outside of the EU by a group of undertakings posted to a subsidiary in an EU Member State for a maximum of three years;⁹ and

¹ [Tampere European Council 15 and 16 October 1999, Presidency conclusions](#), para.18: 'The European Union must ensure fair treatment of third country nationals who reside legally on the territory of its Member States. A more vigorous integration policy should aim at granting them rights and obligations comparable to those of EU citizens. It should also enhance non-discrimination in economic, social and cultural life and develop measures against racism and xenophobia.'

² Resolution of 12 April 2016 [on the situation in the Mediterranean and the need for a holistic EU approach to migration](#), [P8_TA\(2016\)0102](#), paragraphs 121 and 123, European Parliament.

³ Proposal for a Council Directive on the conditions of entry and residence of third-country nationals for the purpose of paid employment and self-employed economic activities, COM (2001) 386, OJ 332 E, 27.11.2001, p. 248 - 256.

⁴ Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification.

⁵ Council Directive 2003/109/EC as amended by Directive 2011/51/EU, OJ L 132, 19.5.2011, p. 1–4.

⁶ Council Directive 2009/50/EC of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment, OJ L 155, 18.6.2009, p. 17–29.

⁷ Directive 2011/98/EU of the European Parliament and of the Council of 13 December 2011 on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State, OJ L 343, 23.12.2011, p. 1–9.

⁸ Directive 2014/36/EU of the European Parliament and of the Council of 26 February 2014 on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers, OJ L 94, 28.3.2014, p. 375–390.

⁹ Directive 2014/66/EU of the European Parliament and of the Council of 15 May 2014 on the conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer, OJ L 157, 27.5.2014, p. 1–22.

- Entry and residence of TCNs for the purposes of research, studies, training, voluntary service, and pupil exchange schemes or educational projects and au pairing.¹⁰

However, a number of legal gaps and practical barriers may still be identified. These result from the lack of incorporation and implementation of international and EU human rights and labour standards and the sectoral approach taken in the EU legal framework, not covering all TCNs and not in the same way, and in part leaving parallel national schemes in place. This cost of non-Europe report particularly highlights a number of obstacles TCNs face including as regards equal treatment, entry and re-entry conditions, work authorisation, residence status, intra-EU mobility, social security coordination, family reunification and the recognition of qualifications.

Beyond giving rise to discrimination in comparison to EU citizens, these obstacles result in income losses at individual level and lost tax revenue at societal (aggregate EU) level. The greatest impacts are due to unequal treatment with regard to access to employment, employment conditions including remuneration and the barriers imposed on family migrants.

Table 1 – Summary of monetised annual economic impacts at individual and aggregate level

Gap/barrier	Lost annual income, net (individual impact on TCNs)	Lost annual tax revenue at aggregate EU level (economic impact)
Intra-EU labour mobility of TCNs	€31.2 million	€8.5 million
Recognition of qualifications	€3.2-5.3 billion	€1.4-2.3 billion
Re-entry and circular migration	No estimate made	
Secure residence	Estimated 100 000 people affected; no estimate made	
Work authorisation	€1.1-2.3 billion	€445-891 million
Family reunification	€6.9-8.7 billion	€2.6-3.2 billion
Social security	Estimated 100 000 people affected; no estimate made	
Equal treatment	€21 billion	€8 billion

Source: Annex I, Research paper on the cost of non-Europe in the area of legal migration, CEPS, 2019, chapter 6.

At societal level these deficiencies also undermine the ability of the EU to attract workers, in particular to address shortages in particular

EU labour market sectors or occupations, to address demographic changes (an ageing population), and to boost innovation and growth. These deficiencies all negatively impact GDP growth.

¹⁰ 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, p. 21–57.

Options for action and cooperation at EU level that could address the identified gaps and barriers

Further EU action in this area could address these gaps by better implementing and enforcing existing standards, gradually extending the EU legislation towards other sectors, or revisiting the idea of adopting a binding immigration code covering all TCNs. Depending on the policy option pursued, €21.75 billion in individual and economic benefits could be achieved each year. Further details on the assumptions and limitations of this estimation are provided in chapter 4.

Table 2 – Summary of estimated benefits of policy options

	OPTION 1: Better enforcement	OPTION 2: Gradual extension	OPTION 3: Non-binding immigration code	OPTION 4: Legally binding immigration code
Intra-EU labour mobility	€7.8 million individual benefits and €2.125 million economic benefits	€15.6 million individual benefits and €4.25 million economic benefits	€15.6 million individual benefits and €4.25 million economic benefits	€23.4 million individual benefits and €6.375 million economic benefits
Recognition of qualifications	€1.6-2.65 billion individual benefits and €0.7-1.15 billion economic benefits	€0.8-1.325 billion individual benefits and €0.35-0.575 billion economic benefits	€0.8-1.325 billion individual benefits and €0.35-0.575 billion economic benefits	€1.6-2.65 billion individual benefits and €0.7-1.15 billion economic benefits
Work authorisation	€0.55-1.15 billion individual benefits and €222.5-445.5 million economic benefits	€0.55-1.15 billion individual benefits and €222.5-445.5 million economic benefits	€0.275-0.575 billion individual benefits and €111.25-222.75 million economic benefits	€0.825-1.725 billion individual benefits and €333.75-668.25 million economic benefits
Family reunification	€1.725-2.175 billion individual benefits and €0.65-0.8 billion economic benefits	€3.45-4.35 billion individual benefits and €1.3-1.6 billion economic benefits	€1.725-2.175 billion individual benefits and €0.65-0.8 billion economic benefits	€5.175-6.525 billion individual benefits and €1.95-2.4 billion economic benefits
Equal treatment*	€5.25 billion individual benefits and €2 billion economic benefits	€10.5 billion individual benefits and €4 billion economic benefits	€10.5 billion individual benefits and €4 billion economic benefits	€15.75 billion individual benefits and €6 billion economic benefits

Source: Annex I, Research paper on the cost of non-Europe in the area of legal migration, CEPS, 2019, chapter 7. Individual benefits refers to benefits for the TCNs in question. Economic benefits are aggregated at EU level.

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1. Background and methodology

The notion of the 'cost of non-Europe' was introduced by Michel Albert and James Ball in a 1983 report commissioned by the European Parliament. It was also a central element of a 1988 study carried out for the European Commission by the Italian economist Paolo Cecchini on the cost of non-Europe in the single market.¹¹ This approach was revisited in a cost of non-Europe in the single market report of 2014.¹² In the 2016 Interinstitutional Agreement on Better Law-making it was agreed that analysis of the potential 'European added value' of any proposed Union action, as well as an assessment of the 'cost of non-Europe' in the absence of action at Union level, should be fully taken into account when setting the legislative agenda.¹³

Cost of non-Europe (CoNE) reports are designed to examine the possibilities for gains and/or the realisation of a 'public good' through common action at EU level in specific policy areas and sectors. They attempt to identify areas that are expected to benefit most from deeper EU integration, and for which the EU's added value is potentially significant.

On 4 October 2016, coordinators of the European Parliament Committee on Civil Liberties, Justice and Home Affairs (LIBE) requested that the European Added Value Unit within the European Parliamentary Research Service (EPRS) produce a report on the cost of non-Europe in the Area of Freedom, Security and Justice. In response to that request, the European Added Value Unit is preparing a report, which will give an overview of the current state of play in the main policy areas covered by the Area of Freedom, Security and Justice (AFSJ) within the competence of the LIBE Committee. The report will map the current gaps and barriers and estimate their impacts in the establishment of this area. Those impacts will be measured in terms of both economic impacts and impacts on individuals in terms of protecting their fundamental rights and freedoms.¹⁴ Finally, it will provide options for action at EU level to address the identified gaps and barriers together with an estimation of their potential costs and benefits.

The following areas will be covered in the report:

- Asylum, migration, border control;
- Police and judicial cooperation in the fight against crime and terrorism; and
- Fundamental rights.

A number of relevant studies have already been published covering the added value of an EU mechanism to monitor and enforce democracy, the rule of law and fundamental rights in the Member States and within EU institutions;¹⁵ the benefits of further EU action and cooperation to

¹¹ See Europe 1992, the Overall Challenge, SEC (1988) 524, Commission on the European Communities.

¹² Z. Pataki, [The Cost of Non-Europe in the Single Market](#), Cecchini Revisited, An overview of the potential economic gains from further completion of the European Single Market, EPRS, European Parliament, 2014.

¹³ Interinstitutional Agreement between the European Parliament, the Council of the European Union and the European Commission on Better Law-Making, OJ L 123, 12.5.2016, p. 1–14, recital 5

¹⁴ C. Moraes, '[A Europe of Costs and Values in the Criminal Justice Area](#)', EUCRIM 2016/2, p. 88: 'Nowadays, in the context of global economic and humanitarian crises, many voices are questioning the role and the very existence of the Union. It is therefore time to look back on Professor Cecchini's report and reflect on the cost of non-Europe in the area of freedom, security and justice in order to calculate its economic value -not always an easy task- and the cost to citizens in terms of their fundamental rights and freedoms'.

¹⁵ W. van Ballegooij, T. Evas, [An EU mechanism on democracy, the rule of law and fundamental rights](#), EPRS, European Parliament, 2016.

ensure free movement within the Schengen Area;¹⁶ enhanced police and judicial cooperation in the fight against organised crime, corruption¹⁷ and terrorism;¹⁸ procedural rights and detention conditions;¹⁹ as well as equality and the fight against racism and xenophobia.²⁰ A briefing summarising the interim results was produced in October 2017.²¹

This cost of non-Europe report focuses on legal migration, with an emphasis on the 'sectoral' directives covering conditions for entry, residence and work for certain categories of TCNs. The common European asylum policy,²² border control and visa policy are covered by separate cost of non-Europe reports.

The report takes into account the need to incorporate economic costs, as well as costs to individuals in terms of protecting their fundamental rights and freedoms resulting from the gaps and barriers to European cooperation and action, as well as the benefits of fully using the potential for EU action and legislation, in accordance with the Treaties.

It seeks to answer the following questions:

- What is the current state of play, and what are the gaps and barriers in European cooperation and action, in the area of migration?
- What is the impact of the current gaps and barriers in action and cooperation at EU level?
- What are the options for action at EU level that could address the gaps and barriers identified, and what are their potential costs and benefits?

In terms of methodology, the report mainly relies on desk research, which includes comparative studies of Member States' legal systems, and reports on their implementation of relevant EU law. EPRS also commissioned a research paper from CEPS, which conducted desk research, semi-structured interviews with relevant stakeholders, fielded an e-questionnaire that was answered by 61 respondents, discussed the main issues, challenges and options among experts in accordance with the Delphi-method, and quantified the impacts of gaps and barriers in the area as well as the costs and benefits of policy options to address them where feasible and appropriate. This research paper is annexed to this cost of non-Europe report.

¹⁶ W. van Ballegooij, [The Cost of Non-Schengen: Civil Liberties, Justice and Home Affairs aspects](#), EPRS, European Parliament, 2016.

¹⁷ W. van Ballegooij, T. Zandstra, [The Cost of Non-Europe in the area of Organised Crime and Corruption](#), EPRS, European Parliament, 2016.

¹⁸ W. van Ballegooij, P. Bakowski, [The Cost of Non-Europe in the Fight against Terrorism](#), EPRS, European Parliament, 2018.

¹⁹ W. van Ballegooij, [The Cost of Non-Europe in the area of Procedural Rights and Detention Conditions](#), EPRS, European Parliament, 2017.

²⁰ W. van Ballegooij with J. Moxom, [The Cost of Non-Europe in the area of Equality and the Fight against Racism and Xenophobia](#), EPRS, European Parliament, 2018.

²¹ W. van Ballegooij, [Area of freedom, security and justice: untapped potential](#), EPRS, European Parliament, 2017.

²² W. van Ballegooij, C. Navarra, [The Cost of Non-Europe in Asylum Policy](#), EPRS, European Parliament, 2018.

2. State of play, gaps and barriers in EU action and cooperation in the area of legal migration

Key findings

The EU seeks to build a comprehensive immigration policy in which legally residing TCNs should be treated fairly and in a non-discriminatory manner. Secondary legislation has been adopted covering different categories of TCNs and various stages of the migration process.

However, a number of gaps and barriers can still be identified. These result from the lack of incorporation and implementation of international and EU human rights and labour standards. Furthermore they stem from the sectoral approach taken in the EU legal framework, not covering all TCNs and not in the same way, and in part leaving parallel national schemes in place. TCNs face a number of obstacles, including as regards equal treatment, entry and re-entry conditions, work authorisation, residence status, intra-EU mobility, social security coordination, family reunification and the recognition of qualifications.

Migration is an integral part of human history. Whether moving as individuals, families or tribes, migration is an age-old response to the physical need for food, shelter and security. However, there is still no formal legal definition of a migrant, even if most experts agree that an international migrant is someone who changes his or her country of usual residence, irrespective of the reason for migration or legal status.²³

At present there are approximately 258 million international migrants around the world, representing 3.1 % of the global population.²⁴ In the European Union (EU), there are currently around 21.6 million third-country nationals (TCN), representing 4.2 % of the EU-28 population.²⁵

As underlined by the European Parliament, this human mobility represents challenges and opportunities for the EU.²⁶ It occurs mainly in two different ways: legal migration and irregular migration. While irregular migration regards the movement of persons to a new place of residence or transit using irregular or illegal means, legal migration occurs through recognised and authorised channels.

This Cost of non-Europe report focuses on EU legal migration alone, referring to regulated stays in the EU of more than three months²⁷ by third-country nationals (TCNs).²⁸ The EU policies related to

²³ [Refugees and migrants](#), United Nations Department of Economic and Social Affairs website, 13 December 2018.

²⁴ [International Migration Report 2017](#), United Nations, 2017.

²⁵ Eurostat ([migr_pop3ctb](#)).

²⁶ Resolution of 5 April 2017 on [addressing refugee and migrant movements: the role of EU External Action](#), paragraph 1, European Parliament.

²⁷ For short-term stays in the Schengen area (i.e., for up to 90 total days in a 180-day period), TCN can obtain a Schengen visa or a temporary resident permit allowing the holder to circulate throughout the Schengen area without control at the border. In contrast, short-term visas or temporary residence permits issued in non-Schengen EU Member States (Bulgaria, Croatia, Cyprus, Ireland, Romania and the UK) are not valid for travel to the Schengen area. These dispositions are not considered to be part of the EU legal migration framework for the purpose of this study.

²⁸ TCN is here understood as any person who is not a citizen of the EU within the meaning of Article 20(1) of the [Treaty on the Functioning of the European Union](#), as they are defined in [Council Directive 2009/50/EC \(Blue Card Directive\)](#), [Directive 2003/86/EC \(Family Reunification Directive\)](#), [Directive 2003/109/EC \(Long Term Residents Directive\)](#), and [Directive \(EU\) 2016/801 \(Students and Researchers Directive\)](#).

legal migration are framed by international standards (2.1) and encompass an EU framework (2.2) which still includes gaps and barriers (2.3).

2.1. State of play

2.1.1. International standards

Migration has marked all periods of human history. Until the 19th century, before the advent of centralised sovereign states, individuals enjoyed substantial freedom in crossing borders. The number of migrants grew, starting from the industrial revolution with the development of faster and cheaper means of transport. After the two World Wars, with millions of displaced and stateless persons, a range of international human rights instruments emerged, addressing rights and freedoms to be enjoyed by everyone, including migrants. These included two international covenants²⁹ with legal effect, in addition to the non-legally binding statements of the Universal Declaration.³⁰ Specific human rights treaties followed, directed at specific groups of vulnerable persons (including children, women, refugees and migrants), or arising from particular repugnant practices (torture, racial discrimination, etc.).

The international legal framework on migration then evolved in a variety of principles and rules deriving mainly from human rights law, humanitarian law, and international labour law.³¹ This wide range of legal norms relevant to migration is embodied in multilateral treaties and conventions, regional agreements, and customary international law. They provide the normative foundations for the rule of law and constitute a fundamental pillar for the rights-based approach to migration.

All the main international instruments are based on the principle of equality of treatment between third-country workers and national workers. Three fundamental notions characterise the protection in international law for migrant workers:

- **Core universal human rights** apply to all migrants, regardless of their status, unless exceptional distinctions serve a legitimate state objective and are proportional to the achievement of that objective.³² As a principle, migrants enjoy all of the unalienable rights applicable in international law.³³ Additional rights are conveyed by the International Covenant on Economic, Social and Cultural Rights³⁴ and the International Convention on the Elimination of All Forms of Racial Discrimination,³⁵ and illustrates the narrow nature of exceptions to the general principle of equality.³⁶

²⁹ The [International Covenant on Civil and Political Rights](#) (ICCPR), and [International Covenant on Economic, Social and Cultural Rights](#) (ICESCR) both opened for signature on 16 December 1966.

³⁰ [Universal Declaration of Human Rights](#) (UDHR), proclaimed by the United Nations General Assembly in Paris on 10 December 1948.

³¹ Such as international human rights conventions and international labour standards.

³² The 1948 [Universal Declaration of Human Rights](#) recognises this principle in its Article 2(1): '[e]veryone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'.

³³ The [International Covenant on Civil and Political Rights](#) (ICCPR) includes in such basic rights the right to life, liberty and security; the right not to be held in slavery or servitude; the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment; the right not to be subjected to arbitrary arrest, detention or exile; the right to marry and to found a family.

³⁴ [International Covenant on Economic, Social and Cultural Rights](#), 1966.

³⁵ [International Convention on the Elimination of All Forms of Racial Discrimination](#), 1965.

³⁶ The [International Convention on the Elimination of All Forms of Racial Discrimination](#) indicates that States may make distinctions between citizens and non-citizens, but requires all non-citizens to be treated similarly.

- **Equality of treatment and non-discrimination** between regular migrant/immigrant workers and nationals in the realm of employment and work.
- The broad array of **international labour standards** providing protection in treatment and conditions at work – safety, health, maximum hours, minimum remuneration, non-discrimination, freedom of association, maternity, etc. – apply to all workers.³⁷

The main principles deriving from these instruments are equality of treatment and non-discrimination regarding labour and working conditions among workers, and between third-country and national workers. Any limitation or derogation from these principles must be duly justified and proportionate, necessary and legitimate, both in goals and impacts.

2.1.2. EU policy framework

Europeans³⁸ and the European Parliament³⁹ favour an EU approach to legal migration in order to manage human mobility in a sustainable way. However, legal migration policy – being a core expression of territorial sovereignty – has long remained under the sole responsibility of the Member States. As legal migration has become a shared competence, a fragmented approach was adopted to regulate conditions for TCNs' legal entry and residence.

Progressive development of an EU framework

In 1999, the entry into force of the Amsterdam Treaty introduced, for the first time, shared EU competences for the area of freedom, justice and security, and facilitated the regulation of TCNs' entry and residence in the EU as well as their employment rights. The same year, at the European Council meeting in Tampere (Finland),⁴⁰ EU leaders called for a common migration policy, organised under three major headings:

- 'management of migration flows', concerning border controls and combating illegal migration issues;
- 'fair treatment of third-country nationals,' regarding admission and integration issues; and
- 'partnership with countries of origin', regarding the external dimension of migration policy.

The European Commission wanted to implement the Tampere Milestones, with a draft directive providing shared norms for labour migration for all categories of TCNs, and a non-legally binding policy tool for launching an Open Method of Coordination (OMC) on legal migration. Both initiatives were withdrawn due to a lack of support from Justice and Home Affairs (JHA) Council members.

³⁷ These standards include the eight [fundamental rights conventions](#) of the ILO identified in the 1998 [ILO Declaration on Fundamental Principles and Rights at Work](#); standards of general application, such as those addressing protection of wages and occupational safety and health, as well as the governance conventions concerning labour inspection, [employment policy](#) and [tripartite consultation](#); and instruments containing specific provisions on migrant workers such as the [Private Employment Agencies Convention, 1997 \(No 181\)](#), the [Domestic Workers Convention, 2011 \(No 189\)](#) and social security instruments. More specifically related to movements of people across borders are provisions granting rights in the [Convention Regarding the Status of Refugees](#), the [Convention against Torture](#), the [Convention on the Rights of All Migrant Workers and Members of their Families](#) (ICRMW), the [Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children](#) and the [Protocol against the Smuggling of Migrants by Land, Sea and Air](#), both of which supplement the [United Nations Convention against Transnational Organized Crime](#).

³⁸ [Eurobarometer](#), European Parliament, 2015.

³⁹ Resolution of 12 April 2016 on [the situation in the Mediterranean and the need for a holistic EU approach to migration](#), European Parliament.

⁴⁰ Tampere European Council [Conclusions](#), 1999.

Nonetheless, the Tampere programme was followed by the Hague Programme (2004-2009),⁴¹ where the European Council stressed the need for greater coordination of national integration policies and EU initiatives. It agreed on 'common basic principles' and paved the way for the European Commission's first 'Common agenda for integration' of 2005, further acknowledging the external dimension of EU migration policy.

The entry into force of the Lisbon Treaty in 2009 extended the application of the ordinary legislative procedure to EU migration policy and incorporated the Tampere Programme milestones. The same year, the European Council, meeting in Stockholm in December 2009, invited the Commission to identify European modules to support the integration process and to develop core indicators for monitoring the results of integration policies. It recognised the potential of migration for building a competitive and sustainable economy and set out, as a political objective, the effective integration of legal migrants.

In March 2014, the European Commission published a new communication setting out its vision on the future agenda for the AFSJ, entitled 'An open and secure Europe: making it happen'.⁴² The European Council then defined the 'strategic guidelines for legislative and operational planning within the area of freedom, security and justice' for the 2014-2020 period that stress the need to adopt a holistic approach to migration, making the best possible use of legal migration, affording protection to those who need it, combating irregular migration and managing borders effectively.

The current fragmented approach

Currently, the EU legal migration framework is mainly based on Title V of the Treaty on the Functioning of the European Union (TFEU). Article 67.2 TFEU states that the Union shall establish a common immigration policy 'which is fair towards third-country nationals'.⁴³ Article 79 TFEU reaffirms the long-standing EU commitment to develop a common policy founded on the fair treatment paradigm of 'legally residing third-country nationals', while Article 79(2) TFEU provides a legal basis for the regulation of entry and residence conditions, including long-term residence permits and family reunification, as well as of the rights of TCNs legally resident in the EU, including their free movement in the EU. Article 79(4) TFEU provides for EU competence to support Member State action to legally integrate resident immigrants, and Article 79(5) TFEU clarifies that Member States remain solely responsible for determining the volumes of TCNs they admit for the purpose of work.

Title V TFEU should also be read in light of the EU Charter of Fundamental Rights (EU CFR) that has the same legally binding value as the Treaties. Articles 15(3) and 31 stipulate that every worker has the right to 'equivalent', 'fair' and 'just' working conditions. In addition, Article 45 EU CFR provides for intra-EU mobility of legally residing TCNs.

These legal bases allow the EU legal migration framework to set the conditions of entry and residence for TCNs. The framework is composed of seven directives. However, it should be noted that the United Kingdom and Denmark are not bound by these directives.⁴⁴

⁴¹ The Hague European Council of November 2004.

⁴² Communication on 'An open and secure Europe: making it happen', [COM\(2014\) 154](#), European Commission, 2014.

⁴³ The word 'shall' implies an obligation.

⁴⁴ Consolidated version of the Treaty on the Functioning of the European Union Protocol (No 21) on the position of the United Kingdom and Ireland in respect of the Area of Freedom, Security and Justice., OJ C 202, 7.6.2016, p. 295–297 Consolidated version of the Treaty on the Functioning of the European Union, Protocol (No 22) on the position of Denmark, OJ C 326, 26.10.2012, p. 299–303

- Family Reunification Directive (FRD)⁴⁵ regulating admission and residence of family members of TCNs (sponsors) legally residing in Member States,
- Long-Term Residents Directive (LTRD)⁴⁶ allowing TCNs who have legally and continuously resided in a Member State for five years to obtain an 'EU long-term resident' status and associated rights,
- EU Blue Card Directive (BCD)⁴⁷ regulating the admission and residence of highly-skilled third-country workers, and their families,
- Single Permit Directive (SPD)⁴⁸ establishing EU rules for a single application/permit and equal treatment provisions for TCNs applying for a residence and work permit in a Member State, as well as a common set of rights to be granted to legal immigrants. This is a 'framework' or 'horizontal' Directive that covers third-country workers also admitted to a Member State according to national migration law,
- Seasonal Workers Directive (SWD)⁴⁹ regulating the admission and stay of third-country nationals admitted temporarily to carry out seasonal work,
- Intra-corporate Transferees Directive (ICTD)⁵⁰ covering third-country workers, and their families, employed outside of the EU by a group of undertakings and posted to a subsidiary in an EU Member State for a maximum of three years,
- Students and Researchers Directive (SRD)⁵¹ covering the conditions of entry and residence of TCNs for the purposes of research, studies, training, voluntary service, pupil exchange schemes or educational projects and au pairing.

The EU legal migration framework also includes an external dimension, and is present in a number of EU international agreements, such as association agreements, some of which contain more favourable conditions for certain TCNs, depending on their nationality.⁵² In addition, special arrangements apply to citizens of the European Economic Area (EEA), who enjoy the right of free movement of workers as under Article 21(1) TFEU. For reasons of clarity, these international agreements and special arrangements are not included in the scope of this research paper.

At the moment of writing, the European Commission is conducting a 'fitness check'⁵³ to evaluate and assess the existing EU legislation on legal migration. It was launched in September 2016 and results are expected in the first semester of 2019. The fitness check notably assesses the continued relevance of the current legal migration *acquis* in view of the needs in the areas of labour migration, education and research as well as the integration of TCNs, socio-economic cohesion, the protection of family life and unity, as well as the enhancement of intra-EU mobility, coherence, effectiveness, efficiency and EU added value.

⁴⁵ Council [Directive 2003/86/EC](#) of 22 September 2003 on the right to family reunification.

⁴⁶ [Long-Term Residents Directive \(2003/109/EC\)](#), as amended by [Directive 2011/51/EU](#).

⁴⁷ [EU Blue Card Directive \(2009/50/EC\)](#).

⁴⁸ [Single Permit Directive \(2011/98/EU\)](#).

⁴⁹ [Seasonal Workers Directive \(2014/36/EU\)](#).

⁵⁰ [Intra-Corporate Transferees Directive \(2014/66/EU\)](#).

⁵¹ [Students and Researchers Directive \(EU\) 2016/801](#), recast of [Directives 2004/114/EC](#) and [2005/71/EC](#).

⁵² K. Eisele, *The External Dimension of the EU's Migration Policy*, Brill, 2014.

⁵³ [REFIT – Legal Migration Fitness Check](#), European Commission.

In addition, in December 2018, the European Economic and Social Committee (EESC) adopted an opinion⁵⁴ underlining the positive influence of immigration and stating that 'the EU and the Member States must go beyond the current model and ensure that regular ways of entry are promoted that facilitate orderly migration and successful inclusion'.

2.2. Gaps and barriers

There are a number of significant structural weaknesses and shortcomings in the design and implementation of EU migration policy.⁵⁵ Indeed, entry into the EU labour market for TCNs is subject to numerous gaps and barriers related to equal treatment, entry and re-entry conditions, work authorisation, residence status and mobility within the EU/Member State, social security coordination, family reunification and recognition of qualifications.

Table 3 – Summary table of gaps and barriers

Benchmark area	Gaps	Barriers
Equal treatment	Gaps in equal treatment (G1) <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 	Barriers to equal treatment (B1) <ul style="list-style-type: none"> • Lack of implementation and enforcement at the national level • Unfair remuneration and working conditions
Entry and re-entry conditions (circular migration)	Gaps in entry conditions (G2): by design, inherent to the sectoral directives – certain categories are omitted Gaps with regards to different re-entry options (G2): Circular migration restrictions	Barriers to entry: (B2) <ul style="list-style-type: none"> • Requirement for migrants to apply from outside the EU • Labour market tests • Requirement to provide address Barriers to different re-entry and circular migration options under the Directives (B3): <ul style="list-style-type: none"> • Applying 'cooling off' periods. • Penalising longer absences
Work authorisation	Gaps concerning change of employer (G3):	Barriers concerning change of employer (B4):

⁵⁴ [The costs of non-immigration and non-integration](#), European Economic and Social Committee, 2018.

⁵⁵ Communication on Towards a reform of the Common European Asylum System and enhancing legal avenues to Europe, [COM\(2016\) 197](#), European Commission, 6 April 2016; For an overview of relevant studies and briefings on the topic see [Migration and asylum: a challenge for Europe](#), Directorate-General for Internal Policies/Directorate-General for External Policies of the Union, European Parliament, 2015; [The EU's Refugee crisis](#), EPRS, European Parliament; [Legal Migration in the EU-From Stop-Gap Solutions to a Future-Proof Policy](#), European Political Strategy Centre, 2015.

	<ul style="list-style-type: none"> Changes of employer are limited or subject to prior authorisation. Intra-corporate Transfer Directive (ICTD) permit holders are bound to their employer. <p>Gaps in the consequences of unemployment (G4):</p> <ul style="list-style-type: none"> Unemployment leads to permit withdrawal, unless BC holder; Lack of possibility to seek alternative work, unless BC holder. 	<ul style="list-style-type: none"> Fear of loss of employment and dependency from employer. Different labour inspectorate enforcement capacities at the national level. <p>Barriers concerning the consequences of unemployment (B5): 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 (G5): SWD does not provide sufficient guarantees to address employer-organised accommodation.</p> <p>Gaps in residence status (G6): ICTD and SWD permit holders,, as well as other TCNs residing on temporary and formally limited permits excluded from access to LTR.</p> <p>Gaps in intra-EU mobility (G7): ICTD and SRD allow for temporary mobility, whereas LTRD, ICTD, BCD, SRD allow long-term mobility.</p>	Legal gaps in many cases lead to practical obstacles, therefore the barriers in this area are not discussed further.
Social security coordination	<p>Gaps in social security coordination (G8):</p> <ul style="list-style-type: none"> Provisions on export of benefits differ between the directives and there are no provisions in that 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): Coordination of social security at the national level is subject to conclusion of bilateral agreements between Member States and third-countries, which provide for the actual entitlements. Their number varies between Member States.</p>

Family reunification	Gaps in family reunification provisions (G9): <ul style="list-style-type: none"> • No rights: seasonal workers, students, temporary workers with permits for less than one year • Rules for family reunification: for workers with residence permit valid for one year or more and for LTR in the first Member State • Privileged rules: Blue Card Holders, researchers and ICTD • Free admission: family members of LTRD TCN admitted in first Member State free to move with the LTRD TCN to the second Member State. 	Barriers to family reunification (B7): <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	Gaps in recognition of qualifications (G10): <ul style="list-style-type: none"> • Equal treatment only once authorisation has been obtained, but not before • Limited recognition of qualifications versus skills 	Barriers to recognition of qualifications (B8): Long waiting periods, in particular for regulated professions

Source: Annex I, Research paper on the cost of non-Europe in the area of legal migration, CEPS, 2019, chapter 3.

2.2.1. Gaps and barriers related to equal treatment

Among their goals and legal provisions, a majority of legal migration directives include the equality of treatment of third-country nationals with respect to Member States' nationals with regard to remuneration and working conditions.

This principle is however subject to a set of differentiated restrictions or conditions that are linked to particular categories of TCN workers, the length of their regular stay, or their residence. In particular, there are restrictions and derogations regarding education, vocational training and social security.

2.2.2. Gaps and barriers related to entry and re-entry conditions (circular migration)

The rules on admission conditions vary across the directives. In some cases, differences are a logical reflection of the specific situation of the categories of TCNs covered by each directive. In other cases, the differences between directives are more difficult to explain.

This report identifies the requirement for migrants to apply from outside the EU, the need for a labour market tests, and the requirement to provide an address as the main barriers. Barriers with regards to different re-entry and circular migration options under the directives also include the application of 'cooling off' periods and penalties for long absences.

Table 4 – Differences in admission conditions for TCNs based on the legal migration directives

Admission condition	Directives concerned
Sufficient resources	<p>All directives require TCNs to have sufficient resources to support themselves. How this is judged differs, however – significantly, with a salary threshold under the BCD and ICT.</p> <p>Regarding the quantification of 'sufficient' resources, only the SRD allows Member States to set a 'reference amount'.</p>
Sickness insurance	All directives require TCNs to have sickness insurance, but slightly different descriptions are included as to what this entails.
Adequate accommodation and proof of address	Three directives (FRD, SWD and SRD) require proof of accommodation, while the LTRD, BCD, SRD and ICTD allow Member States to require the provision of an address in the territory of the Member State concerned.
Valid travel document	All directives require TCNs to present a valid travel document. All directives except LTRD and FRD allow Member States to require the period of validity of the travel document to cover at least the initial duration of the authorisation.
Public policy, public security and public health	All directives stipulate that TCNs who are considered to pose a threat to public policy, public security or public health shall not be admitted.
No risk of overstaying/ensuring costs of return are covered	The SWD requires Member States to verify that TCNs do not present a risk of irregular immigration, while the SRD requires evidence of sufficient resources to cover return costs. The other directives do not contain comparable provisions.
Integration conditions	Two directives (FRD and LTRD) stipulate that Member States may require compliance with integration 'measures' or 'conditions'.
Right to admission	Some of the directives do not specify clearly whether Member States are obliged, upon fulfilment of all admission conditions, to grant an authorisation, while the most recently adopted ones are clear (SWD, ICTD, and SRD). This regulatory gap was filled by European Court of Justice (ECJ) jurisprudence: In its judgment in Case C-540/03, the ECJ clarified that the FRD imposes precise positive obligations, with corresponding clearly defined individual rights, on the Member States, since it requires them, in the cases determined by the directive, to authorise family reunification of certain

	members of the sponsor's family, without leaving a margin of appreciation. In case C-491/13, the ECJ ruled that the conditions for the admission of students listed in the SWD are exhaustive, meaning that Member States are not allowed to introduce additional conditions. The reasoning set out in these two judgments applies to all legal migration directives, without prejudice to Article 79(5) TFEU for those directives regulating admission for work purposes.
Admission conditions for the purpose of work	The three main directives covering specific categories of TCNs who wish to migrate for the purpose of work require, as an admission condition, the presentation of a valid work contract (BCD, SWD, ICTD), a binding job offer (BCD, SWD), or a training agreement (in the case of ICTD trainee employees, as well as trainees under the SRD).
Labour market tests	For ICTD, no labour market test can be carried out. The FRD links access to the labour market to the rights of the sponsor and allows for additional limitations during the first 12 months. In other directives (SWD, BCD, SRD for those considered workers, mobile LTRD), access to the labour market is subject to an optional labour market test.

Source: Annex I, Research paper on the cost of non-Europe in the area of legal migration, CEPS, 2019, chapter 3.

2.2.3. Gaps and barriers related to work authorisation

This report identifies several important gaps concerning the possibility to change employer, since such possibilities are limited for most third-country workers or subject to prior authorisation. Most importantly, ICTD permit holders are bound to their employer.

For third-country workers, the consequences of unemployment can be devastating, as it leads to residence permit withdrawal in most cases – unless they are a BCD holder. The impossibility of seeking alternative work is a huge gap in the EU legal migration framework. It leads to third-country workers being highly dependent on their employer, with the risk of possible abuse that this situation could entail.

2.2.4. Gaps and barriers related to residence status and mobility within the EU

According to the Schengen Convention, TCNs who are in possession of a valid travel document and a residence permit or a long-stay visa issued by a Member State applying the Schengen *acquis* in full are allowed to enter into and move freely within the territory of the Member States applying the Schengen *acquis* in full, for a period up to 90 days in any 180-day period. However, this 'Schengen mobility' does not provide for a right to work in other Member States, and it is regulated by the EU legal migration policy framework and some competing national schemes. However, these conditions are not regulated in a coherent way, thereby hampering TCNs' access to the entire EU labour market.

Only four directives allow for intra-EU mobility: the BCD, ICTD, LTRD and SRD.

Among these, the BCD is the only one to require prior residence in the first Member State. Blue Card Directive permit holders may benefit from the facilitated intra-EU mobility procedure provided for under the BCD after 18 months of residence in the first Member State. If they wish to move to

another Member State before that period, they must apply for a new blue card in the second Member State, as if it was a first application.

Regarding the length of stay in a second Member State, the ICTD and SRD (for researchers) provide for two types of mobility provisions: short-term mobility and long-term mobility. There is no provision for short-term mobility for work purposes under the BCD, nor is there under the SRD for students.

- The ICTD defines short-term mobility as a period of up to 90 days in any 180-day period per Member State. Under the SRD, short-term mobility for researchers can last up to 180 days in any 360 days.
- The LTRD, the ICTD, the BCD and the SRD provide for long-term intra-EU mobility. A maximum duration of mobility is only set in the SRD as regards students, at 360 days per Member State. Member States may also set a limit for researchers, which cannot be lower than 360 days.

Other differences exist, such as the procedural requirements for exercising mobility (application or notification), the substantive requirements, the type of documentary evidence required, or the accompanying family members.

2.2.5. Gaps and barriers related to social security coordination

Legal migration directives are relevant to TCNs' social security rights, but are not instruments that coordinate social security systems. Social security coordination agreements between Member States and third countries are the relevant instruments to which to refer when the actual entitlements for TCNs are examined in practice.⁵⁶ As discussed in the annexed research paper, this raises clarity and comprehensibility issues, particularly in relation to portability of rights and family benefits.

2.2.6. Gaps and barriers related to family reunification

The main gap in family reunification rights is the absence of a right to family reunification in several situations, for: seasonal workers, students, and temporary workers with permits for less than one year.

However, provisions on family reunification can be found in the FRD, the BCD, and the ICTD, as well as in the SRD (for researchers). The SPD and the SWD do not provide for any special rules on family reunification and the general regime of the FRD applies. Specific rules on family reunification in the LTRD are provided only in relation to intra-EU mobility. The FRD only sets minimum standards for family rights and applies without prejudice to more favourable provisions under national law.

The FRD provides the option for Member States to apply conditions for integration for children aged over 12 years who arrive in the EU independently from the rest of their family, before authorising entry and residence. For all other family members under the FRD, Member States may require TCNs to comply with integration measures, in accordance with national law. In the case of family members of highly-skilled migrants who have an EU blue card, of ICTDs, as well as of researchers under the SRD, the integration measures can only be applied after the family member enters the Member State.

⁵⁶ See for instance, B. Spiegel, [Analysis of Member States' Bilateral Agreements on Social Security with Third Countries](#), European Commission, 2010.

Under the FRD, the Member State's competent authorities shall provide the applicant with written notification of its decision no later than after nine months. This time limit is reduced to six months under the BCD and 90 days under the ICT and the SRD.

Under the FRD, Member States may, for the first 12 months of residence, restrict family members' access to the labour market. Contrary to the FRD, the BCD, the ICTD and the SRD do not impose any time limit in respect to labour market access. The SRD, however, allows Member States to restrict access to the labour market in exceptional circumstances, such as particularly high levels of unemployment.

In addition, the rather narrow definition of 'family members' and the wide discretion afforded to Member States often leads to long waiting periods, prior integration requirements and restrictions on family members working in the EU.

2.2.7. Gaps and barriers related to recognition of qualifications

Despite the existence of EU instruments in the field of recognition of qualifications, this report shows that the recognition systems continue to differ depending upon which Member State is in charge of the recognition procedure. This administrative barrier is experienced by TCN wishing to work in regulated professions. As a result, in some Member States, TCN undertake 'medium to low qualified' jobs in order to support themselves during the long and cumbersome process of recognition of their qualification, increasing the risk of de-qualification.

3. Impact of the current gaps and barriers in EU cooperation and action

Key findings

Beyond giving rise to discrimination, the gaps and barriers in EU action and cooperation in the area of legal migration result in income losses at individual level and lost tax revenue at societal (aggregate EU) level. The greatest impacts are due to unequal treatment with regard to access to employment, employment conditions including remuneration, and the barriers imposed on family migrants.

At societal level these deficiencies undermine the EU's ability to attract workers, and especially to address shortages in particular sectors or occupations in the EU labour market, as well as the effects of demographic change (an ageing population), and to boost innovation and growth. These deficiencies all negatively impact GDP growth.

3.1. Introduction

In the previous chapter, gaps and barriers in EU cooperation and action in the area of legal migration were identified as regards equal treatment, entry and re-entry conditions, work authorisation, residence status and mobility within the EU, social security coordination, family reunification and the recognition of qualifications. Beyond giving rise to discrimination, these gaps and barriers result in income losses at individual level and lost tax revenue at societal (aggregate EU) level. The greatest impacts are due to unequal treatment with regard to access to employment, employment conditions including remuneration, and the barriers imposed on family migration. These impacts will be discussed further in chapter 3.2 below. Chapter 4 of the annexed research paper also discusses the impact of negative public attitudes towards migration in relation to discrimination and labour exploitation.

Beyond the impact on TCNs already resident in the EU, these deficiencies undermine the EU's ability to attract further 'qualified'/'wanted'/'needed' TCNs, especially to address shortages in particular sectors or occupations in the EU labour market, as well as the effects of demographic change (an ageing population), and to boost innovation and growth. These deficiencies all negatively impact GDP growth. This matter will be discussed in more detail in chapter 3.3 below.

3.2. Social and economic impacts of the gaps and barriers identified at individual and aggregate level

Differences in outcomes between TCNs and EU nationals

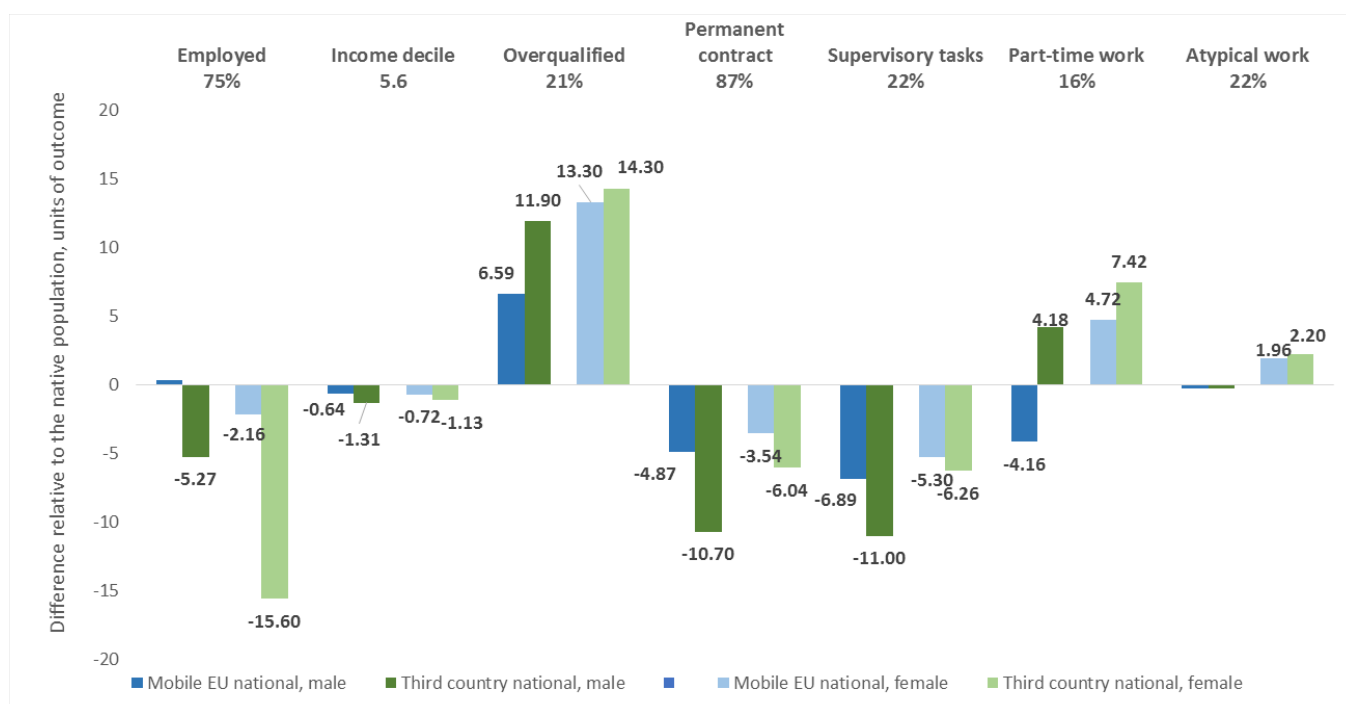
As illustrated in figure 1 below, and discussed in further detail in chapter 5 of the annexed research paper, restricted access to the labour market and limitations to labour mobility has an economic impact, leading to some differences in economic outcome between TCNs and mobile EU citizens with similar observable characteristics.⁵⁷ Drawing from the European Labour Force Survey, it is estimated that the employment rates of TCN men are 5.5 percentage points lower than those of native men and mobile EU men. The employment rates of women TCNs are 16 percentage points

⁵⁷ For further details on the economic analysis see Annex I, Research paper on the cost of non-Europe in the area of legal migration, CEPS, 2019, annex 5.

lower than those of native women and 13.5 percentage points lower than those of mobile EU women. Even though the labour market restrictions usually apply to TCNs in the first year(s) since their arrival in the EU, they can leave a longer-term scarring effect and lower later labour market attachment.⁵⁸ For TCN women, legal restrictions appear to strongly influence their employment rates. This is related to the fact that about 55 % of TCN women come to the EU for family reasons; especially during the first years following arrival, and therefore might still face legal restrictions on accessing the labour market.⁵⁹

Third-country nationals also report lower wage incomes than natives and mobile EU citizens. The reported wage income of TCN men is 0.7 decile lower when compared to mobile EU men. The reported wage income of TCN women is 0.4 decile lower when compared to mobile EU women. Furthermore, on average, TCNs are more likely to be overqualified for their job and to work part-time. At the same time, they are less likely to have a permanent job or to exert supervisory responsibilities. In the case of TCN men, this difference does not disappear once a control for industry and occupation is made (the line of work they are in). This might be explained by the fact that legal restrictions reduce their bargaining power. For TCN women, differences do disappear, which however could also be explained by the fact that harsher barriers to the entry to the labour market make it unfeasible (or less worthwhile) for women TCNs to pursue a job of low quality.⁶⁰ Barriers to recognition of qualifications are considered by 21 % of TCNs as the main obstacle to getting a job matching their skills. These barriers are higher for TCNs than for mobile EU citizens (barriers to recognition of qualifications are mentioned as a main obstacle by 12 %).⁶¹

Figure 1 – Conditional differences in work-related outcomes between third-country nationals and mobile EU nationals (nationals, referred to as 'native population' in the text, is a reference group)



Source: Annex I, Research paper on the cost of non-Europe in the area of legal migration, CEPS, 2019, chapter 5.

⁵⁸ Annex I, Research paper on the cost of non-Europe in the area of legal migration, CEPS, 2019, chapter 5.

⁵⁹ Annex I, Research paper on the cost of non-Europe in the area of legal migration, CEPS, 2019, chapter 5.3.

⁶⁰ Annex I, Research paper on the cost of non-Europe in the area of legal migration, CEPS, 2019, chapter. 5.1.2.

⁶¹ Annex I, Research paper on the cost of non-Europe in the area of legal migration, CEPS, 2019, chapter 5.2.1.

Differences in quality of life

On the basis of European social survey data, differences in quality of life between TCNs and EU nationals can be observed. European social survey data reveals that TCN men are 18 percentage points more likely to report discrimination than both native men and mobile EU men. And TCN women are almost 15 percentage points more likely to report discrimination than native women, and 9 percentage points more likely to report discrimination than mobile EU women. Third-country nationals also report lower health and lower happiness than mobile EU nationals. However, these differences are not statistically significant.⁶²

Differences in intra-EU mobility

The various gaps that lead to an incomplete/fragmented legal framework impact intra-EU mobility for TCNs. While differences between TCNs and EU nationals are present for all skills groups, low- and medium-skilled individuals' mobility seems to be particularly constrained. Hypothetically, were the gaps fully eliminated, this would mean an additional 11 000 low-skilled, 15 000 medium-skilled and 8 000 highly-skilled TCNs would exercise intra-EU mobility in a given year.⁶³ An overview of the qualitative impacts of the gaps and barriers in EU action in the area of legal migration at the individual and societal level is presented below.

Table 5 – Gaps and barriers directly related to the employment and work conditions of third-country nationals in the EU

Gaps and barriers	Direct consequences	Direct individual impacts	Societal impacts
Work authorisation – restricted access to the labour market ('Entry' – Gap 2 & Barrier 2) Limitations: change employers (Gap 3, Barrier 4); also as a consequence of unemployment (Gap 4, Barrier 5)	Limited employment opportunities Lower job mobility → lower adjustment Lower bargaining power → lower wages	Unemployment Over-qualification Lower job quality Lower earnings	GDP loss Budget burden
Limitations on re-entry and circular migration (Gap 2, Barriers 2 and, B3)	Lower geographic mobility → lower adjustment to economic shocks Fear of unemployment → lower bargaining power, acceptance of low-quality jobs	Over-qualification Lower job quality Lower earnings	GDP loss due to over-qualification
Insecure residence status (Gaps 5 and 6)	Uncertain time horizon in the destination country → underinvestment in country-specific skills	Poorer long-term integration outcomes (employment, earnings, social integration)	GDP loss Budget burden Negative attitudes toward immigrants

⁶² Annex I, Research paper on the cost of non-Europe in the area of legal migration, CEPS, 2019, chapter 5.1.3.

⁶³ Annex I, Research paper on the cost of non-Europe in the area of legal migration, CEPS, 2019, chapter 5.1.4.

Recognition of qualifications (Gap 10, Barrier 8)	Employers experience difficulties in recognition of foreign qualifications Difficulty to find a matching job	Unemployment Over-qualification Lower earnings	GDP loss due to unemployment and over-qualification
Barriers to intra-EU mobility (Gap 7)	Lower intra-EU mobility of non-EU immigrants Lower adjustment to economic shocks	Unemployment Lost earnings (due to lost job opportunities)	GDP loss due to unemployment Productivity loss due to lower knowledge spillovers EU less attractive to third-country national workers

Source: Annex I, Research paper on the cost of non-Europe in the area of legal migration, CEPS, 2019, chapter 5.

Monetising the impact of the status quo

Drawing from the findings of the econometric analysis, chapter 6 of the annexed research paper then quantifies and monetises the impacts of several gaps and barriers for TCNs as compared with the native population.⁶⁴ The analysis focuses on two key impacts – employment and income – and assessed the implications for earnings of individual migrants (**individual impacts**) as well as tax revenue (**economic impacts**).

Table 6 below presents a summary of the estimated annualised monetised economic impacts, both at individual and aggregate level, resulting from the identified gaps and barriers. The estimates of lost annual income and tax revenue refer to the population of TCN workers residing legally in the EU. The greatest impacts were seen for barriers imposed on family migration, which were mainly due to limited employment opportunities for spouses of third-country nationals. Barriers to family reunification may be associated with a loss in net earnings of €6.9-8.7 billion and a loss in tax revenue of €2.6-3.2 billion. The estimated loss to individuals and society due to poor recognition of qualifications was also relatively large. With the assumption based on data from the Fundamental Rights Agency that states that 30-50 % of the unexplained employment gap between highly-skilled TCNs and highly-skilled national workers can be explained by poor recognition of qualifications, lost earnings associated with this barrier were estimated to be in the order of €3.2-5.3 billion, while lost tax revenue amounts to €1.4-2.3 billion. Assuming that free labour mobility within the EU would increase the employment rate of TCNs by 9 % – and that these individuals would earn the average EU-level wage – overall net earnings could increase by €31.2 million, while the estimated tax revenue would grow by €8.5 million.⁶⁵ With regards to gaps in work authorisation and the associated loss in bargaining power for wages, a hypothetical scenario was considered in which the wage level was 1-2 % higher for low- and medium-skilled TCNs. Under this scenario, earnings and tax revenue would increase by €1.1-2.3 billion and €445-891 million respectively.⁶⁶ Finally, the impacts associated with the overall lack of equal treatment between native citizens and TCNs was assessed based on the gap in employment between TCNs and natives, as well as the lower wages among TCNs and natives. These two gaps were translated to calculate lost employment, lost income and tax revenue, and aggregated across all skills groups. This results in a cumulative estimate of €21 billion in lost earnings and €8 billion in lost tax revenue.

⁶⁴ Annex I, Research paper on the cost of non-Europe in the area of legal migration, CEPS, 2019, annex 5 and 6.

⁶⁵ Annex I, Research paper on the cost of non-Europe in the area of legal migration, CEPS, 2019, chapter 6.1.

⁶⁶ Annex I, Research paper on the cost of non-Europe in the area of legal migration, CEPS, 2019, chapter 6.2.

Table 6 – Summary of monetised annual economic impacts at individual and aggregate level

Gap/barrier	Lost annual income, net (individual impact)	Lost annual tax revenue at aggregate EU level (economic impact)
Intra-EU labour mobility	€31.2 million	€8.5 million
Recognition of qualifications	€3.2-5.3 billion	€1.4-2.3 billion
Re-entry and circular migration	No estimate made	
Secure residence	Estimated 100 000 people affected; no estimate made	
Work authorisation	€1.1-2.3 billion	€445-891 million
Family reunification	€6.9-8.7 billion	€2.6-3.2 billion
Social security	Estimated 100 000 people affected; no estimate made	
Equal treatment	€21 billion	€8 billion

Source: Annex I, Research paper on the cost of non-Europe in the area of legal migration, CEPS, 2019, chapter 6.

3.2. Impacts on the EU's ability to attract TCNs

The fragmented national policies in the legal migration area also undermine the EU's ability to attract workers. The positive impacts of migration on the destination economies are especially found in the areas of demographic development, labour markets, and innovation and growth.⁶⁷

Demographics

There is wide evidence that immigration in the EU has the positive effect of increasing the ratio between the working age and the retired population (Peri, 2011).⁶⁸ Indeed, Eurostat data predict that the EU working age population will decline by 12 million by 2030⁶⁹ (see figure below).

⁶⁷ A. Stuchlik, E. Poptcheva, [Third-country migration and European labour markets: Integrating foreigners](#), EPRS, European Parliament, 2015

⁶⁸ G. Peri, 'Immigration and Europe's Demographic Problems: Analysis and Policy Considerations', *CESifo DICE Report*, 9(4), 3-8, 2011.

⁶⁹ [People in the EU, population projections \(2016-2080\)](#), Eurostat.

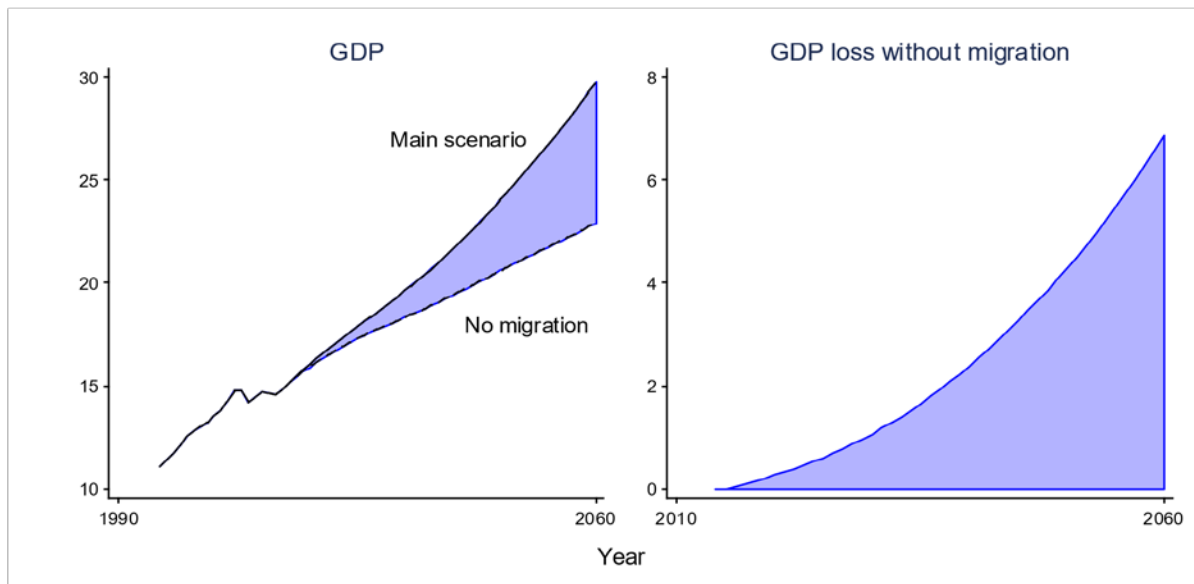
Table 7 – People in the EU, population projections (2016-2080)

	Children (0-14 years)(% of total population)	Working-age population (15-64 years)(% of total population)	Elderly (65 years and over)(% of total population)	Total population	Working-age population (15-64 years)	Diminution of WAP - Baseline scenario (millions)
2016	15,6	65,3	19,2	510	333	0
2020	15,5	64,2	20,4	516	331	-2
2025	15,1	62,8	22,1	520	326	-7
2030	14,9	61,2	23,9	524	321	-12
2035	14,8	59,5	25,7	526	313	-20
2040	14,7	58,3	27,0	528	308	-25
2045	14,8	57,3	27,9	528	303	-30
2050	14,8	56,7	28,5	529	300	-33
2055	14,9	56,3	28,8	527	296	-37
2060	14,9	56,1	29,0	525	294	-39
2065	15,0	56,2	28,9	523	294	-39
2070	15,0	56,2	28,8	520	292	-41
2075	15,1	55,9	29,0	520	290	-43
2080	15,2	55,6	29,1	519	288	-45
Note: 2016, estimates. 2020-2080: projections.						
Source: Eurostat (online data codes: demo_pjanbroad and proj_15ndbims)						

A study produced by the European Commission Joint Research Centre estimates that, if the EU received no international migrants until 2060, the EU28 population would be 75 million lower than with current levels of migration a net migration flow to the EU of around one million (main scenario), meaning a reduction in the population of 14 %. The working age population would be 20 % lower.⁷⁰ A hypothetical scenario of zero migration to the EU (excluding the resident population with a TCN background) would lead to a 23 % decrease in GDP with respect to the main scenario of about 7 trillion in 2060. This is due to the combination of a decrease in labour (main effect), a decrease in capital accumulation, changes in savings because of demographic structure, and effects on productivity.

⁷⁰ I. Mongelli., J-C. Ciscar, [Economic consequences of zero international migration in the EU](#), Joint Research Centre, European Commission, 2018.

Figure 2 – GDP and GDP loss projections without migration



Source: JRC, I. Mongelli., J-C. Ciscar, 2018.

The estimated economic consequences of this hypothetical population scenario will be discussed in the following sections.

Labour markets

A recent study by Edo et al. surveys the vast literature on the effects of immigration on the labour market in the destination countries.⁷¹ Studies mainly find that immigration has a negligible average impact on the wages and employment of national workers (belonging to the native population), despite possible differences by category of workers and timeframe. In the same direction, Peri (2012)⁷² finds no evidence that migrants crowd-out employment and hours worked by 'natives'.

Studies that disaggregate labour markets by sector underline the importance of labour shortages in the EU, which may well coexist with overall unemployment.⁷³ This point was also underlined by the Commission in its September 2018 communication on enhancing legal pathways to Europe: and represent an indispensable part of a balanced and comprehensive migration policy: 'While this is still not felt evenly across Europe, there are a rising numbers of unfilled vacancies in several Member States and evidence of structural skill shortages in some economic sectors, such as information and communication technology, or health, as well as in specific occupations'.⁷⁴

A clear example where migrant workers are currently filling labour demand is the home and health services sector. In several EU countries, especially in southern Europe, a large part of these services

⁷¹ A. Edo et al., *The Effects of Immigration in Developed Countries: Insights from Recent Economic Research* (No. 2018-22), CEPR Research Center, 2018.

⁷² G. Peri, 'The effect of immigration on productivity: Evidence from US states', *Review of Economics and Statistics*, 94(1), 348-358, 2012.

⁷³ I. Martín et al., [Exploring new avenues for legislation for labour migration to the European Union](#), Directorate-General for Internal Policies, European Parliament, 2015.

⁷⁴ Communication on enhancing legal pathways to Europe: an indispensable part of a balanced and comprehensive migration policy, COM(2018) 635 final, European Commission, 12 September 2018, p.2.

is already performed by immigrants. In the absence of immigrants, it is likely that women would be obliged to leave the labour market to take up responsibility for carrying out these services.⁷⁵

Empirical evidence shows that countries able to facilitate fast labour market access experience a positive contribution from immigrants to state finances,⁷⁶ particularly in the long-term.⁷⁷ In this regard, Organisation for Economic Co-operation and Development (OECD) studies show that migrants can become net contributors to the public coffers.⁷⁸ The majority of immigrants arrive as young adults,⁷⁹ and as a result, their taxes and social security contributions could generally exceed their consumption of public goods and services. However, this result depends on immigrants accessing the labour market, their employment rate, and their labour market performance. These factors are intrinsically linked with the measures Member States take in these areas, as discussed in the previous section.

Innovation and growth

Several studies find immigration has a positive effect on innovation, especially via high-skilled migration.⁸⁰ Peri (2012) particularly finds that migration has a positive effect on productivity (measured by total factor productivity).

As the European Commission points out, so far, the EU has been less competitive than other OECD countries – the EU's most obvious competitors in terms of economic profile – in attracting workers, punching well below its weight, in particular in terms of attracting highly-skilled migrants. Of all the migrants residing in OECD countries in 2015-2016, only 25 % of those with a high level of education chose an EU destination, while 75 % chose a non-EU destination (mainly the USA, Canada, Australia).⁸¹

Monetising deficiencies in the EU's ability to attract TCNs

Overall, many studies analyse the positive impacts of migration on GDP, as a measure of overall output of destination countries. A 2016 International Monetary Fund (IMF) report finds that immigration increases the GDP per capita of receiving economies, mostly by raising labour productivity.⁸² The estimated effect is economically significant: a 1 percentage point increase in the share of migrants in the adult population can raise GDP per capita by up to 2 percent in the long-term. Both high- and low-skilled migrants contribute, in part by complementing the existing population's skill set of the population.

It is, however, very difficult to estimate a monetised benefit of the EU attracting further TCNs. This is due to the many factors to take into account, especially when making longer-term predictions. With an ageing population, further debates concerning the pension age (which has already risen in several Member States) can be expected. Workforce and labour output will also be affected by technological developments, as discussed by the IMF: 'Technology has boosted productivity, which, in turn, has driven strong per-capita GDP growth and has been associated with expanding

⁷⁵ G. Peri, A. Romiti & M. Rossi, 'Immigrants, domestic labor and women's retirement decisions', *Labour Economics*, 36, 18-34, 2015.

⁷⁶ [International Migration Outlook 2018](#), OECD.

⁷⁷ A. Kanc and P. Lecca, [Long-term social, economic and fiscal effects of immigration into the EU: The role of the integration policy](#), Economics and Econometrics Research Institute, 2016.

⁷⁸ [Is migration good for the economy?](#), OECD, May 2014.

⁷⁹ [Statistics explained: migration and migrant population statistics](#), Eurostat,

⁸⁰ Annex I, Research paper on the cost of non-Europe in the area of legal migration, CEPS, 2019, annex 9.

⁸¹ Communication on enhancing legal pathways to Europe: an indispensable part of a balanced and comprehensive migration policy, COM(2018) 635 final, European Commission, 12 September 2018, p. 3.

⁸² M. Jaumotte, K. Koloskova, M. Saxena, [Impact of migration on income levels in advanced economies](#), International Monetary Fund, 2016.

employment. However, the gains in employment and income can come in spurts and tend to favour different sectors over time. This forces deep and sometimes painful structural adjustment, with jobs changing or disappearing in some areas while new jobs are being created elsewhere'.⁸³ The interrelation with the arrival and labour market integration of refugees, whose numbers are difficult to predict⁸⁴ must also be taken into account, as well as the extent to which intra-EU mobility might fill labour market needs in certain Member States.

Finally, particularly in the context of this cost of non-Europe report, it must be pointed out that, in accordance with Article 79(5) of the TFEU, Member States retain the competence to determine the volumes of TCN admissions to their territory in order to seek work, whether employed or self-employed. However, this does not altogether exclude EU action.⁸⁵ As the European Commission points out 'the EU has a single market, and it should therefore also act as a single player towards the outside world to create economies of scale and hence better compete with other major destinations for attracting skilled and particularly highly-skilled, workers'. Furthermore, 'for the benefit of Europe, more should be done at European level in terms of improving job matching, recognition of foreign qualifications and facilitating labour mobility of migrants across the single market'.⁸⁶ This latter comment brings us back to the items discussed in section 3.1, which beyond improving the lives of TCNs already resident in the EU, could also enhance the attractiveness of the EU for potential migrants.

⁸³ Group of twenty, '[Technology and the future of work](#)', IMF, 2018

⁸⁴ W. van Ballegooij, C. Navarra, [The Cost of Non-Europe in Asylum Policy](#), EPRS, European Parliament, 2018.

⁸⁵ Migration Policy Centre team with the contribution of P. Bosch, 'Towards a pro-active European labour migration policy, concrete measures for a comprehensive package', European University Institute, 2015, section III. Helping migration to address unmet needs.

⁸⁶ Communication on enhancing legal pathways to Europe: an indispensable part of a balanced and comprehensive migration policy, COM(2018) 635 final, European Commission, 12 September 2018, p. 4.

4. Options for action and cooperation at EU level that could address the gaps and barriers

Key findings

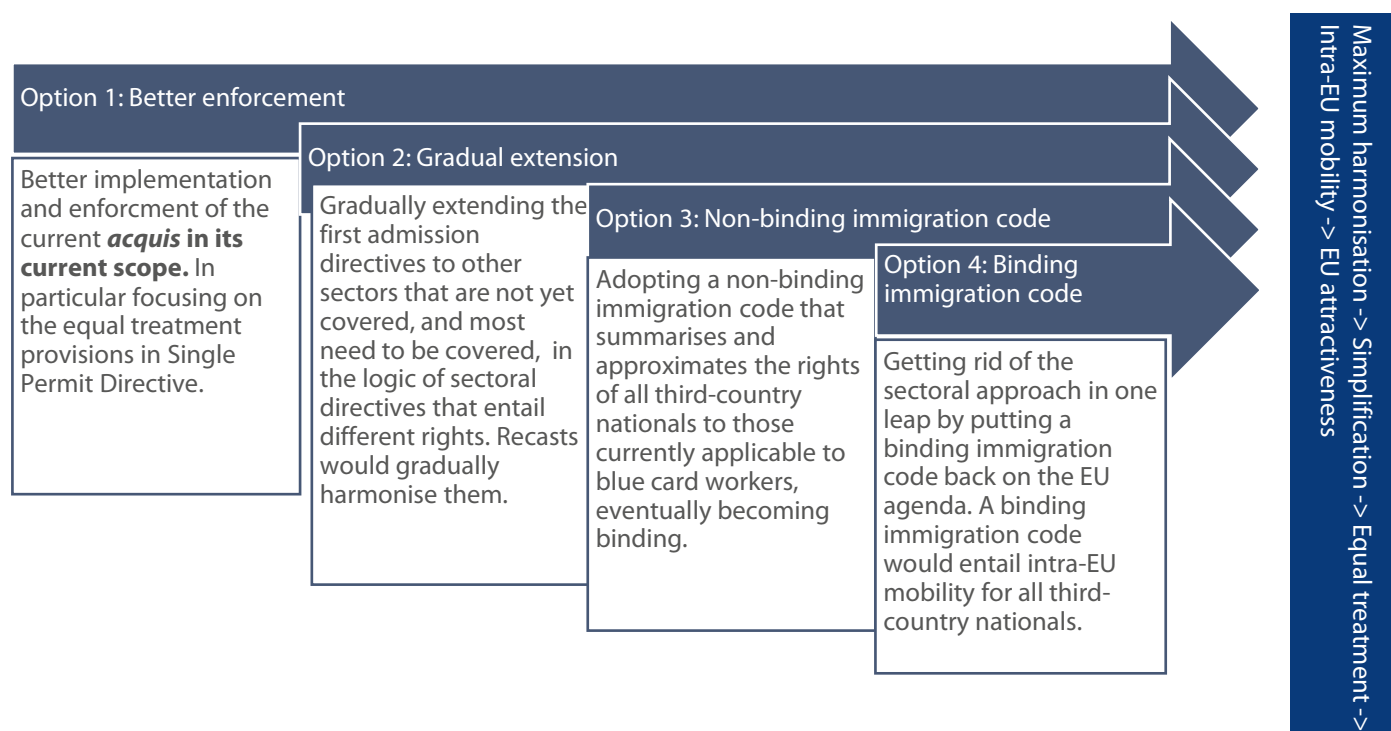
Further EU action in this area could address the gaps by better implementing and enforcing existing standards, gradually extending EU legislation towards other sectors, or revisiting the idea of adopting a binding immigration code covering all TCNs. Depending on the policy option pursued, some €21.75 billion in individual and economic benefits could be achieved each year.

A number of inter-related and increasingly ambitious options for enhancing action and cooperation at EU level in the area of legal migration, addressing the gaps and barriers identified include:

1. Better enforcement and practical delivery of common EU rules and rights laid out in existing sectoral directives;
2. Gradual extension of the current sectoral directives;
3. Adoption of a non-binding immigration code in the area of legal migration, facilitating a 'one-stop-shop' for all existing EU rules and instruments on legal and labour migration; and
4. Adoption of a binding immigration code on the conditions and rights of all TCN workers in the EU, which similarly to the area of free movement of EU citizens, would bring together all secondary legal instruments into a single legal act.

These options – a combination of which might also be implemented – are detailed in figure 3 below:

Figure 3 – Difference in time moving towards maximum harmonisation



Source: Annex I, Research paper on the cost of non-Europe in the area of legal migration, CEPS, 2019, chapter 7.

Better enforcement would not close the gaps identified, but it would address some of the practical barriers, such as lengthy procedures and administrative difficulties. It could moderately contribute to the recognition of qualifications, work authorisation and social security coordination. Better enforcement would however have a low positive impact on re-entry, circular migration and secure residence, as rules are stringent for different categories of workers. Improving non-discrimination litigation avenues would be beneficial to those who currently lack access to justice. Nevertheless major issues such as parallel national schemes under the BCD would remain unaddressed.

The gradual extension of labour standards and rights within the logic of the sectoral directives could have a moderate impact on secure residence and work authorisation, particularly on the categories that are not yet covered by any sectoral directives. It could also potentially raise the level of rights enabling intra-EU mobility and equal treatment. This option would have only minor positive impacts on the recognition of qualifications, re-entry and circular migration, as well as social security, as these areas would require a separate approach.

A non-binding immigration code would be a prelude to a binding immigration code. As explained in more detail in chapter 7 of the annexed research paper, this document could be drafted following the example of the Charter of Fundamental Rights of the European Union. It would bring together all existing EU legal instruments covering legal and labour migration. Its impact would, however, only be moderate, given its non-binding nature. Nevertheless, such EU level guidance could affect Member State action in the area of family reunification and intra-EU mobility, as well as triggering further reflections in other areas, such as social security coordination and recognition of qualifications.

A binding immigration code would imply abandoning the sectoral approach and adopting a directive covering all TCNs, regardless of their skills status. The code would however need to live up to the ambition of eliminating inconsistencies and unjustified variations as well as raising rights standards to have a high positive impact on issues such as intra-EU labour mobility, the recognition of qualifications, family reunification and equal treatment overall. An important condition for that would be a change in narrative around legal migration – away from the currently dominant security perspective – towards one that (also) highlights the economic, social, educational and cultural opportunities for the European Union and focuses on promoting the attractiveness of the EU for legal and labour migration. In this context, the link with asylum, border control and visa policies could also be highlighted. It could be assumed that enabling legal and safe pathways to Europe would reduce irregular migration and allow Member States to shift their attention away from border and crime control towards social and economic policies.

Table 8 below provides an overview of the policy options' potential benefits in addressing key gaps and barriers. 'Low impact' is assigned to potential benefits considered to be 25 % effective; 'moderate' to those considered 50 % effective; and 'high' to those considered 75 % effective. The estimated benefits may not be realised immediately, but may take several years to be achieved. The figures have been annualised. Detailed explanations of the scores given are provided in chapter 7.2 of the annexed research paper by CEPS.

Table 8 – Overview of policy options' potential benefits in addressing key gaps and barriers

	Option 1:	Option 2:	Option 3:	Option 4:
Gaps and barriers	Better enforcement	Gradual extension	Non-binding code	Binding Immigration Code
Intra-EU labour mobility (Gap 7)	+	++	++	+++
Recognition of qualifications (Gap 10, Barrier 7)	++	+	+	++
Re-entry and circular migration (Gap 2, Barrier 3)	+	+	+	++
Secure residence (Gaps 5 and 6)	+	++	++	++
Entry (Gap 2, Barrier 2) and work authorisation (change of employer (Gap 3, Barrier 4); unemployment (Gap 4, Barrier 5)	++	++	+	+++
Family reunification (Gap 9, Barrier 7)	+	++	++	+++
Social security (Gap 8, Barrier 6)	++	+	+	++
Equal treatment (Gap 1, Barrier 1)*	+	++	++	+++

Notes: Level of positive impact over identified areas: +++ high; ++ moderate; + low. *Equal treatment overlaps with other gaps and barriers.

Source: Annex I, Research paper on the cost of non-Europe in the area of legal migration, CEPS, 2019, chapter 7.

In table 9 below, a subsequent monetised summary is provided of the estimated benefits of the various policy options. It should be pointed out that equal treatment overlaps with other gaps and barriers.⁸⁷

⁸⁷ Annex I, Research paper on the cost of non-Europe in the area of legal migration, CEPS, 2019, chapter 7.2.

Table 9 – Summary of estimated annual benefits per policy option

	OPTION 1: Better enforcement	OPTION 2: Gradual extension	OPTION 3: Non-binding immigration code	OPTION 4: Binding immigration code
Intra-EU labour mobility	€7.8 million individual benefits and €2.125 million economic benefits	€15.6 million individual benefits and €4.25 million economic benefits	€15.6 million individual benefits and €4.25 million economic benefits	€23.4 million individual benefits and €6.375 million economic benefits
Recognition of qualification	€1.6-2.65 billion individual benefits and €0.7-1.15 billion economic benefits	€0.8-1.325 billion individual benefits and €0.35-0.575 billion economic benefits	€0.8-1.325 billion individual benefits and €0.35-0.575 billion economic benefits	€1.6-2.65 billion individual benefits and €0.7-1.15 billion economic benefits
Work authorisation	€0.55-1.15 billion individual benefits and €222.5-445.5 million economic benefits	€0.55-1.15 billion individual benefits and €222.5-445.5 million economic benefits	€0.275-0.575 billion individual benefits and €111.25-222.75 million economic benefits	€0.825-1.725 billion individual benefits and €333.75-668.25 million economic benefits
Family reunification	€1.725-2.175 billion individual benefits and €0.65-0.8 billion economic benefits	€3.45-4.35 billion individual benefits and €1.3-1.6 billion economic benefits	€1.725-2.175 billion individual benefits and €0.65-0.8 billion economic benefits	€5.175-6.525 billion individual benefits and €1.95-2.4 billion economic benefits
Equal treatment*	€5.25 billion individual benefits and €2 billion economic benefits	€10.5 billion individual benefits and €4 billion economic benefits	€10.5 billion individual benefits and €4 billion economic benefits	€15.75 billion individual benefits and €6 billion economic benefits

Source: Annex I, Research paper on the cost of non-Europe in the area of legal migration, CEPS, 2019, chapter 7.

5. Conclusions

The different treatment between TCNs and further barriers to their access to the EU labour market result in differences in their employment rate, their over-qualification, lower job quality, lower earnings and poorer long-term integration outcomes. Further EU action in the area of legal migration could address these gaps through better implementation and enforcement of existing standards, the gradual extension of EU legislation to other sectors, or revisiting the idea of adopting a binding immigration code covering all TCNs. Depending on the policy option pursued, these options could result in up to €21.75 billion in benefits. Additional gains could be made by addressing the fragmented national policies in this area, which are currently undermining the ability of the EU as a whole to attract the workers and researchers it needs.

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ANNEX

The Cost of Non-Europe in the Area of Legal Migration

Research Paper

ABSTRACT

This Research Paper is a contribution to a wider cost-of non-Europe assessment in the Area of Freedom Security and Justice requested by the European Parliament's Committee on Civil Liberties. The research takes stock of the state of play in European Union cooperation in the area of legal immigration. The Research Paper identifies gaps and barriers of current sectorial and fragmented EU legal immigration acquis. It assesses their economic impacts and impacts at individual level in terms of fundamental rights protection and non-discrimination laid down in international, regional and EU human rights and labour standards. The research highlights the need for 'more EU' in upholding equal treatment standards between third country workers with EU nationals in relation to working and living conditions. The Research Paper elaborates on the potential benefits, cost drivers and feasibility of different policy options for the EU ranging from: better enforcement, to the gradual extension of EU legislation towards other labour market sectors, or bringing back to the idea of a Binding Immigration Code. The research concludes that EU internal market, national administrations as well as EU and Third Country Citizens would benefit from more homogenous policy approach in the area of legal migration.

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ABBREVIATIONS AND ACRONYMS

AFSJ	Area of Freedom, Security and Justice
BCD	Blue Card Directive 2009/50/EC
CJEU	Court of Justice of the European Union
CMW	Committee on Migrant Workers
CoE	Council of Europe
CoR	Committee of Regions
DG HOME	European Commission's Directorate General for Migration and Home Affairs
ECHR	European Convention of Human Rights
ECSR	European Committee of Social Rights
ECtHR	European Court of Human Rights
EESC	European Economic & Social Committee
EMPL	European Parliament's Committee on Employment and Social Affairs
EP	European Parliament
ESC	European Social Charter
ESC(r)	European Social Charter (Revised)
EU CFR	European Union Charter of Fundamental Rights
FRA	Fundamental Rights Agency of the European Union
FRD	Family Reunification Directive 2003/86/EC
ICCPR	International Covenant of Civil and Political Rights
ICESC	International Covenant of Economic, Social and Cultural Rights
ICRMW	International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families
ICT	Intra Corporate Transferee
ICTD	Intra Corporate Transfers Directive 2014/66/EU
ILO	International Labour Organization
IOM	International Organisation for Migration
JHA	Justice and Home Affairs
KNOMAD	Global Knowledge Partnership on Migration and Development
LCD	Least Developed Countries
LIBE	European Parliament's Committee on Civil Liberties, Justice and Home Affairs
LTR	Long Term Residence Directive 2003/109/EC
NMS	New EU member states (post-2004 enlargement countries)
OMC	Open Method of Coordination
RD	Researchers Directive 2005/71/EC
S&RD	Students and Researchers Directive (EU) 2016/801
SPD	Single Permit Directive 2011/98/EU
SWD	Seasonal Workers Directive 2014/36/EU
TCN	Third Country National
TEU	Treaty of the European Union
TFEU	Treaty Functioning of the European Union
UDHR	Universal Declaration of Human Rights
UNCTAD	UN Conference on Trade and Development

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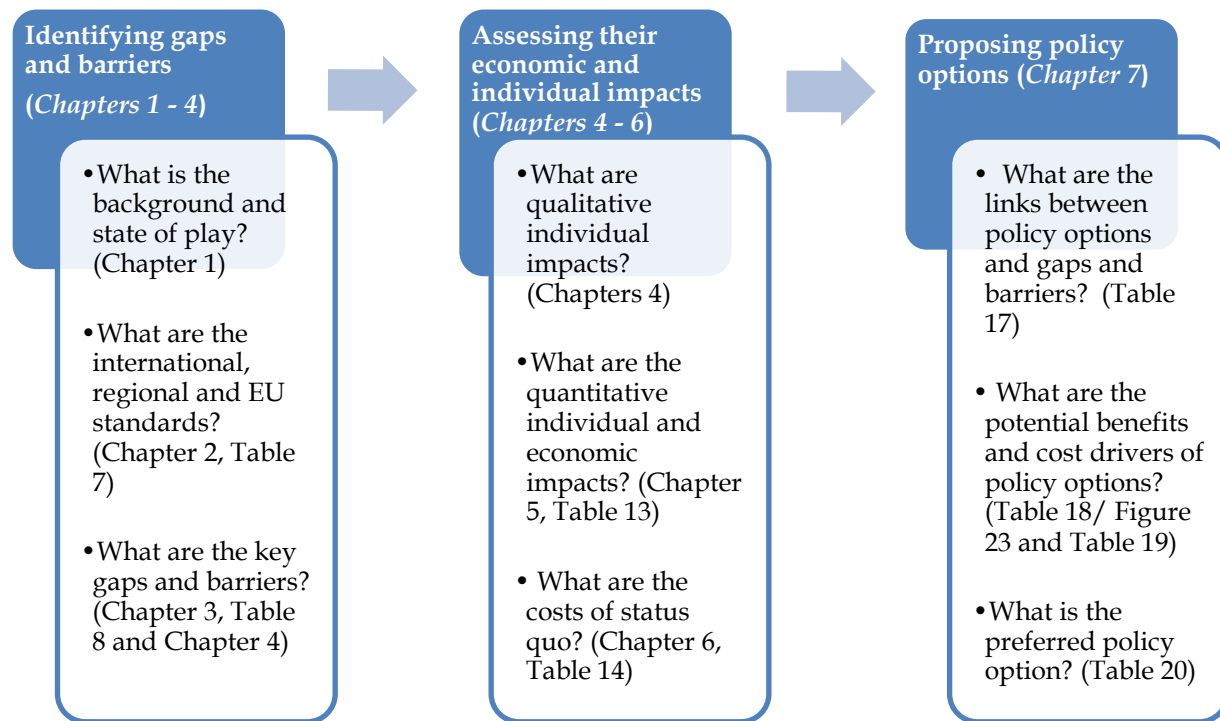
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EXECUTIVE SUMMARY

This Research Paper examines ‘the cost of non-Europe’ in the area of legal migration. It is a contribution to a Cost of Non-Europe report on the matter, which in its turn feeds into a wider Cost of Non-Europe assessment in the Area of Freedom Security and Justice, requested by the European Parliament’s Committee on Civil Liberties. Figure 1 below illustrates our approach in this research - the key steps and main components comprising and structuring the ‘cost of non-Europe’ on legal migration.

Figure 1. Steps in identifying the ‘cost of non-Europe’ in the area of legal migration



Source: Authors, 2018.

Firstly, the Paper provides an overview of the state of play in European cooperation and action in the area of legal migration. It then elaborates on the legal gaps and practical barriers of current EU legal migration policies. The gaps and barriers are established against the international, regional and EU legal benchmarks and standards. The paper highlights that there is an acute need for ‘more EU’ in upholding EU, regional and international standards, in particular, on equal treatment provisions applicable to third country nationals admitted on different national and EU schemes.

Secondly, the Paper continues by assessing the economic and individual impacts of these gaps and barriers. Among ‘individual impacts’ we include fundamental rights, income, employment, health, living conditions etc. We understand ‘economic benefits’ as more societal – they relate to tax revenue and GDP generated. We further assess the costs of these individual and economic impacts in a *status quo* situation. The Paper identifies that EU’s internal market, and thus EU citizens are losing from keeping the fragmented and patchy EU’s acquis in the area of legal migration. Therefore, there is a need for action/legislation at the EU level as opposed to Member States acting alone.

Thirdly, the Paper elaborates on the key benefits, key cost drivers and feasibility of different policy options for the EU. Policy options for future intervention are proposed on the basis of academic and policy debates. It is further assessed on whether and to which extent they address the individual and economic impacts

resulting from gaps and barriers. The research paper further identifies the preferred policy option on the basis of this assessment. We conclude that EU's internal market, national administrations and society via social support and pension schemes as well as third country national would benefit from closing the gaps and barriers at the EU level. More homogenous policy approach in the area of legal migration would lead to simplified procedures, more legal certainty, higher intra-EU mobility and thus would increase EU's attractiveness.

This Executive Summary further outlines in a greater detail the 'key findings' of the interdisciplinary analysis, following the steps indicated above. It then synthesises the main policy options for future EU level intervention in the area of legal migration.

1. IDENTIFYING GAPS AND BARRIERS

1.1. BACKGROUND: A DYNAMIC DEVELOPMENT OF EU LEGAL MIGRATION POLICY

The Tampere European Council Conclusions of October 1999 set the first EU political agenda for the progressive building of a common EU immigration policy. Following the entry into force of the Amsterdam Treaty that same year, representatives of EU Member States adopted the 'Tampere Programme' which called on the European Commission to present legislative proposals for the progressive harmonisation of common rules on conditions of entry and residence of third-country nationals (TCNs) for reasons of employment and their rights at work. The Tampere Programme put special emphasis on the development of a common EU immigration policy firmly rooted in the principles of fair and non-discriminatory treatment between third-country workers and national workers. October 2019 will be the 20th anniversary of the Tampere Programme, which will also coincide with the taking over by Finland of the EU Presidency. This Research Paper is a timely contribution to take stock on where we are in the area of legal migration 20 years after the Tampere Council Conclusions.

Since 1999, mainly representatives of ministries of interior have been ambivalent about this policy, showing resistance to the fulfilment of the 1999 European Council's agenda. The European Commission started to implement the Tampere Milestones, with the presentation of a 2001 legislative initiative for a directive providing shared norms for labour migration for all categories of third-country nationals, and a (non-legally binding) policy tool for launching an Open Method of Coordination (OMC) on legal migration. Both initiatives were withdrawn after suffering a lack of support by Justice and Home Affairs (JHA) Council members, although public support for international and EU-level decision-making on migration was at its height among EU citizens. As the binding EU wide scheme for all third-country nationals was not implemented, the EU value added of having 'more EU' in the area of legal migration was never fully demonstrated. This could potentially explain, why EU level decision making has increasingly become so challenging (see also Figure 2 below).

Despite expectations to the contrary, however, the difficult kick-off of EU policy in this area did not prevent Member States from progressively and dynamically enacting a common EU policy on legal and labour migration. The EU took a sectoral approach – the legal migration *acquis* is now composed of a wide array or 'patchwork' of EU directives (see Table 4. Types of EU legal migration directives). Some of these directives, namely Blue Card Directive (2009/05/EC), and Commission proposal for revision in June 2016 (COM(2016) 378 final), Seasonal Workers Directive (2014/36/EU), Intra-Corporate Transferees Directive (2014/66/EU), Students and Researchers Directive ((EU)2016/801 – recast), can be qualified as 'first admission' directives, covering the conditions of entry and residence, as well as the rights at work, for certain categories of third-country nationals in the Union.

Other directives, namely Single Permit Directive (2011/98/EU), Long-Term Residents Directive (2003/19/EC) and Family Reunification Directive (2003/86/EC) provide for a common procedure for issuing work-residence permits, EU long-term residence status and a right to family reunification. A key

positive contribution emerging from these directives is that they provide for a common set of standards, protections and rights below which national governments cannot go in their domestic migration policies. These include a body of shared EU norms focusing on guaranteeing security of residence, family life, common administrative procedures for issuing residence/work permits and intra-EU mobility for TCNs legally residing and working in the EU. The interviewees, in particular those representing Member States, has acknowledged the EU added value in having the Single Permit Directive, as it indeed has simplified the administrative procedures and thus increased the speed and transparency in this process. Although, Single Permit Directive's potentials for protecting the rights of third country workers were sometimes seen as compromised by national or EU admission categories and not always evident among on-line survey respondents as well as Delphi method discussants representing trade unions, employers and civil society.

The European Parliament has played a decisive role in the building of a common EU legal and labour migration policy framework, and ensuring its democratic accountability. This has been particularly the case since the official recognition of its role as co-legislator in this area only in the very end of 2009, as

EU policies dealing with legal and regular immigration fell outside the expansion of the 2004 Council Decision expanding the ordinary legislative procedure to Title IV EC Treaty. The Lisbon Treaty has filled this gap by extending the latter and QMV [Qualitative Majority Vote] to these domains. A new Article 79.5 TFEU has been also incorporated, which refers to the exclusive right hold by Member States 'to determine the volumes' of admission of TCNs coming to seek work."¹

The Lisbon Treaty consolidated the European Parliament's role in the area of legal migration. According to Peers, it not only confirmed EU's competence on these policy domains, but it also indicated that EU competences could cover all remaining aspects of admission for labour-related purposes other than 'volumes of admission'.²

The European Parliament has subsequently strengthened its position as co-owner of the EU migration policy agenda and priorities. The relevant Parliament Committees (LIBE and EMPL) have further placed emphasis on the need to develop a *general* EU policy framework of intervention and address the vulnerability and labour exploitation risks of third-country nationals in the EU, as well as securing their employment rights and equal treatment. The European Parliament has also called for a 'holistic approach' in the area of migration namely that "the Union will need to establish more general rules governing the entry and residence for third country nationals seeking employment to fill gaps identified in the Union labour market".³

1.2. STATE OF PLAY: INCOHERENCY, SELECTIVITY AND SECTORALITY

The 'Europeanisation' of this policy area has meant a number of 'trade-offs' in the final forms that feature the EU legal and labour immigration *acquis*. These mainly relate to several instances of 'minimum harmonisation' in and among the adopted directives, which often leave a wider margin of manoeuvre to Member States during the domestic transposition and implementation phases. They also relate to a high degree of fragmentation and complexity of currently existing legal acts and systems, both in EU and domestic arenas. For instance, EU and national regulations and residence/worker permits for the highly

¹ Carrera, S. (2011). The impact of the treaty of Lisbon over EU policies on migration, asylum and borders: the struggles over the ownership of the Stockholm programme. In Guild E. and P. Minderhoud (eds.) *The First Decade of EU Migration and Asylum Law* (pp. 227-254). Brill, p. 246.

² Peers, S. (2008). Finally 'Fit for Purpose'? The Treaty of Lisbon and the End of the Third Pillar Legal Order. *Yearbook of European Law*, 27(1), 47.

³ European Parliament (2016), Resolution of 12 April 2016 on the situation in the Mediterranean and the need for a holistic EU approach to migration (2015/2095(INI)).

skilled third country workers, and also some short-term and seasonal work-like schemes that run in parallel (see Figure 7),⁴ which results in fragmentation and incoherency. The Figure 2 below illustrates that current state of play in the area of legal migration is defined by the ‘minimum harmonisation’ approach that further prevents from unleashing the full potential of EU added value - ensuring a fair level playing field, increasing intra-EU mobility and EU’s attractiveness. Limited current experience This further translates in the challenge to bring ‘more EU’ in the area of legal migration, and in particular, in labour migration.

A case in point illustrating such ‘self-informing’ loop of ‘minimum harmonisation’ preventing more EU is the current EU Blue Card system. While its main goal was to set up an EU-wide regime for the admission of highly skilled TCNs, it still allows Member States to keep using their own national highly skilled schemes and permits. For example, in 2016, EU Member States issued only 8,988 work permits under the EU Blue Card Directive (1% out of all work related permits), 10,921 work permits for researchers under the EU Students and Researchers Directive (1.3% of all work-related permits), and - 35,961 work permits for highly skilled under national schemes (4.2% of all work-related permits) (also see Figure 5 and Figure 6).⁵ Nevertheless, even abovementioned national and EU schemes altogether amount only for 6.5% work permits issued for highly skilled persons and researchers.

A new legislative proposal revising the EU Blue Card was presented in 2016 by the Commission. Commission’s Impact Assessment accompanying this legislative proposal indicated that the schemes are underused - “the very low overall numbers of permits issued to highly skilled foreign workers clearly show that neither the national schemes nor the EU Blue Card – and the two combined – are sufficiently effective in attracting highly skilled workers”.⁶ It is currently in inter-institutional negotiations. The European Parliament’s negotiating mandate is supporting the Commission’s initiative for establishing an EU-wide scheme for highly skilled workers and abolishing parallel national schemes, going further in broadening the scope and reinforcing rights, notably for intra-EU mobility. This is proving to be the most controversial issue in the area of legal migration inside JHA Council rooms, which has led to the quasi-freezing of negotiations on the proposal.

While, some EU Member States consider that they can better fix shortcomings of the EU Blue Card scheme by continuing using their national systems for highly skilled third country workers, EU Member States alone could not unleash the potential of the completing fair level playing field for EUs businesses and intra-EU mobility, that has to be developed at EU level. As the the Commission Commission’s Impact Assessment has shown - the separate national schemes entail intra-EU competition without necessarily increasing the attractiveness of the EU as a whole.⁷ The authors of this Research Paper, as well as in previous research argue, that EUs ‘attractiveness’ for third-country nationals lies in equal treatment provisions, intra-EU mobility and simplified and transparent procedures.⁸ The later has been to some extent addressed by Single Permit Directive (2011/98/EU).

⁴ As for instance the interview for this Research Paper revealed that national short-term work permit scheme in Poland has been misleadingly accounted by Eurostat as ‘seasonal work’ while Poland is pending to transpose the Seasonal Work Directive..⁴ In 2014-16, over 95% of all permits appear to have been issued by Poland.

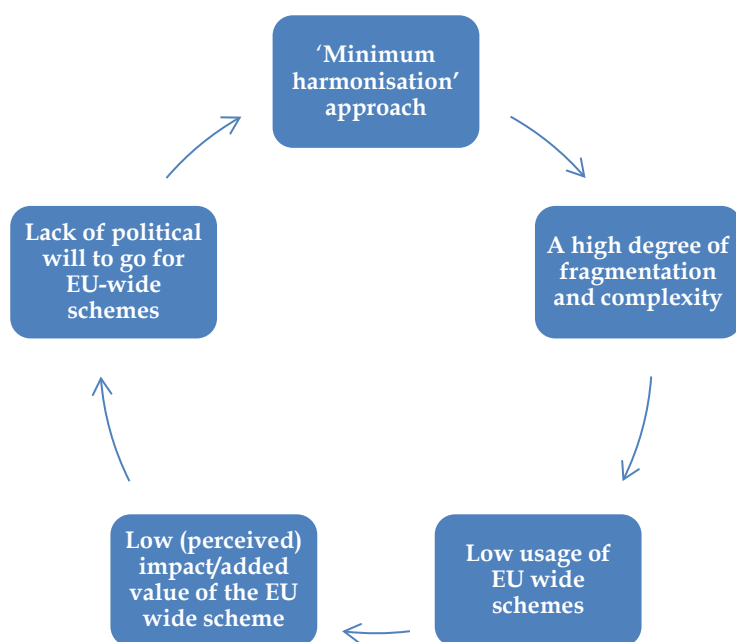
⁵ Eurostat (2018) Eurostat Databasse, migr_resocc Table for 2016. (<https://ec.europa.eu/eurostat/web/asylum-and-managed-migration/data/database>).

⁶ Commission Staff Working Document (2016), Impact Assessment accompanying Proposal for Directive, on the conditions of entry and residence of third-country nationals for the purposes of highly skilled employment, COM(2016) 378, Brussels, 7.6.2016, SWD(2016) 193 final, p. 7.

⁷ Commission Staff Working Document (2016), Impact Assessment accompanying Proposal for Directive, on the conditions of entry and residence of third-country nationals for the purposes of highly skilled employment, COM(2016) 378, Brussels, 7.6.2016, SWD(2016) 193 final, p. 7.

⁸ S. Carrera, E. Guild and K. Eisele (eds) (2014), *Rethinking Attractiveness of EU Labour Immigration Policies: Comparative Perspectives on the EU, the US, Canada and Beyond*, Brussels: CEPS; S. Carrera, A. Geddes, E. Guild and M. Stefan (eds)

Figure 2. State of Play: 'Minimum harmonisation' loop leading to 'less EU'



Source: Authors, 2018.

The authors of this Research Paper continue to argue that perhaps the highest price which has been paid for advancing 'Europeanisation' in this field has been the development of a worker-by-worker – or what we call 'sectoral' – approach.⁹ The toolbox of EU instruments comprises specific 'first entry' directives (a total of four so far) covering the conditions of entry and stay, and the rights at work, of different categories of 'migration administrative statuses' of third-country nationals. These broadly include the highly qualified, seasonal workers, intra-corporate transferees, and researchers. Such an approach has come about with the objective of prioritising certain categories of third-country nationals who are deemed by Member States' representatives as 'more useful' or 'needed' for perceived labour market needs, chiefly highly skilled workers.¹⁰ Although, in addition to long lasting criticisms from academia, there is an increasing acknowledgement of labour market shortages at various skill levels among the EU institutions. This was in particular, stressed by the European Parliament¹¹ and European Economic and Social Committee¹² that

(2017), *Pathways towards Legal Migration into the EU: Reappraising Concepts, Trajectories and Policies*, CEPS Paperback, Brussels;

⁹ S. Carrera and M. Formisano (2005), "An EU Approach to Labour Migration – What is the Added Value and the Way Ahead?", CEPS Working Document No. 232, CEPS, Brussels, October; S. Carrera, E. Guild and K. Eisele (eds) (2014), *Rethinking Attractiveness of EU Labour Immigration Policies: Comparative Perspectives on the EU, the US, Canada and Beyond*, Brussels: CEPS; S. Carrera, A. Geddes, E. Guild and M. Stefan (eds) (2017), *Pathways towards Legal Migration into the EU: Reappraising Concepts, Trajectories and Policies*, CEPS Paperback, Brussels; Vankova, Z. (2018), "Circular migration from the Eastern partnership countries to the EU – the rights of migrant workers in Bulgaria and Poland", PhD dissertation, Maastricht University, funded under the FP7-PEOPLE-2013-ITN call of the Marie Curie Actions – Initial Training Networks funding scheme (Project number – 608417).

¹⁰ A. Wiesbrock (2009), *Legal Migration to the European Union – Ten Years After Tampere*, Wolf Legal Publishers, Nijmegen, pp. 545-549. S. Carrera, E. Guild and K. Eisele (eds), *Rethinking Attractiveness of EU Labour Immigration Policies: Comparative Perspectives on the EU, the US, Canada and Beyond*, Brussels: CEPS;

¹¹ European Parliament (2016), Resolution of 12 April 2016 on the situation in the Mediterranean and the need for a holistic EU approach to migration (2015/2095(INI)).

¹² EESC (2016) Opinion [Towards a coherent EU labour immigration policy with regard to the EU Blue Card](#) adopted

overly narrow legal avenues lead to increase of irregular migration and undeclared work, at the same time unfilled vacancies present a 'bottle-neck' for growth of businesses and could potentially solve the depopulation of the rural areas in the rapidly ageing Europe.

The approach on legal migration in the EU has become salient and sensitive political issue in the aftermath of so called 'European Refugee Humanitarian Crisis', subject to various controversies and emotional debate, often lacking evidence. Academics, especially labour economists are proving that EU and its Member States would benefit from more legal migration that could fill in vacancies, to sustain current social welfare model, and to increase growth and innovation (see Annex 9 for detailed discussion).

Firstly, EU needs more workers from third-countries to fill in vacancies that are not filled by nationals (despite training and re-training efforts). Academics find that migrants are often complementary to national labour market, as they specialise in different production tasks due to different abilities and experiences. Peri highlights that therefore rather than causing lower wages or higher unemployment, they can instead complement the national workers and even make the latter more productive through occupational reallocation and specialisation in more advanced tasks.¹³ For example, Lithuanian ship-building and ship-repair industry is counting on the specially trained black-smiths from Belarus as these specialists are not prepared in Lithuania and when such vacancies are filled, companies can create more employment for local engineers and mechanics.¹⁴

Secondly, on another occasion Peri evidences that young third country nationals increase the ratio of working to retired population and hence improve the sustainability of the welfare systems in the EU Member States that are rapidly ageing and experiencing demographic change.¹⁵ In the labour markets, third country workers could provide the skills and the abilities for jobs to be performed by young workers, preserving the demand for complementary jobs performed by older population. In addition, third-country nationals have contributed to filling the labour demand relates to home and health services and in particular the needs of elderly population. In the absence of third country workers, these services would be performed mainly by stay-at-home women, affecting their labour force participation and their retirement decision.¹⁶

Thirdly, IMF in 2016 finds that immigration increases the GDP per capita of receiving economies, mostly by raising labour productivity.¹⁷ The estimated effect is economically significant: a 1 percentage point increase in the share of migrants in the adult population can raise GDP per capita by up to 2 percent in the long run. Both high- and low-skilled migrants contribute, in part by complementing the existing skill set of the population. Similarly, Alesina, Harnoss, and Rapoport and Ortega and Peri found that a higher share

14 December 2016; EESC (2017) State of implementation of legal migration legislation, SOC/553, adopted 5 July 2017.

¹³ Peri, G., & Sparber, C. (2009). Task specialization, immigration, and wages. *American Economic Journal: Applied Economics*, 1(3), 135-69. Cattaneo, C., Fiorio, C. V., & Peri, G. (2015). What Happens to the Careers of European Workers When Immigrants "Take Their Jobs"? *Journal of Human Resources*, 50(3), 655-693. Fogel, M., & Peri, G. (2016). Immigrants' effect on native workers: New analysis on longitudinal data. *American Economic Journal: Applied Economics*, 8(2), 1-34.

¹⁴ Žibas, K. (2007) Labour immigration in Lithuania: situation analysis, OIKOS Lietuvių migracijos ir diasporos studijos: 16-30, Vilnius (https://eltalpykla.vdu.lt/bitstream/handle/1/33248/ISSN2351-6461_2007_N_4.PG_16-30.pdf?sequence=1&isAllowed=y); Sipavičienė, A. and M. Jeršovas (2010) "Darbo Jėgos Migracija: Poreikis Ir Politika Lietuvoje" (Labour migration: Needs and Politics in Lithuania), IOM Vilnius.

¹⁵ Peri, G. (2011). Immigration and Europe's Demographic Problems: Analysis and Policy Considerations. *CESifo DICE Report*, 9(4), 3-8.

¹⁶ Peri, G., Romiti, A., & Rossi, M. (2015). Immigrants, domestic labor and women's retirement decisions. *Labour Economics*, 36, 18-34.

¹⁷ Jaumotte, M. F., Koloskova, K., & Saxena, M. S. C. (2016). *Impact of migration on income levels in advanced economies*. International Monetary Fund.

of third country nationals increases GDP per capita.¹⁸ The effect of migration appears to operate through an increase in total factor productivity, reflecting an increased diversity in productive skills and, to some extent, a higher rate of innovation. Looking at OECD countries, Aleksynska and Tritah also find a positive effect of immigration on income per capita and productivity of receiving countries, especially for prime-age immigrants.¹⁹

Despite the evidence of the existing and growing economic and societal needs for more immigration at the various skills levels, a 'selectivity' rationale in first admission schemes at both national and EU level has by-and-large disregarded medium- and low-skilled third-country nationals, such as migrant domestic workers, workers in constructions and the beauty industry, long-distance drivers. Second category concern self-employed persons in atypical situations, like for example, start-upers, touring artists, other talents in IT, creative and sports industries, whose entry and residence conditions are either not well defined in national legislations or do not take into account high mobility needs. If such categories are covered by the national admission schemes, the Single Permit Directive 2011/98/EU would cover them and they would be issued permits according to the EU procedure. Nevertheless, the EU Single Permit Directive does not provide an answer to the disproportionate levels of migrant workers falling into undeclared or irregular situation in these sectors, which is more often related to the absence/ or existence of narrow entry channels under national migration policies and schemes. Also, the EU Single Permit Directive does not contain intra-EU mobility and residence/labour rights in another EU Member State, which are crucial for atypical or new types of working arrangements, as it often happens with start-upers, touring artists, etc.

Seasonal workers in agriculture, hospitality and tourism sectors are covered by the EU 'seasonal workers scheme providing common EU rules covering seasonal third-country workers. Nevertheless, their rights are not adequate to those of Blue Card holders, intra-corporate transferees or researchers. After being admitted seasonal workers are restrained by the legal gaps in rights and practical barriers, for example, how the right to change employer or sector is transposed and implemented in practice, and lack of possibilities to bring their family members, to exercise intra-EU mobility, etc. Seasonal work directive address potential labour exploitation and unfair working conditions for medium- and low-skilled TCN workers, which is a bare minimum, often already covered by international and regional treaties (see further discussion on international standards in Chapter 2).

The 'embedded sectorality' at the foundations of EU legal migration policy also leads to differential treatment regarding working and living conditions, and rights at work, between different EU statuses of third-country nationals.²⁰ Our analysis of the provisions confirms above-mentioned selective rationale, 'better' and 'higher' conditions and rights at work are *only* on offer for 'the highly qualified'. This has often been justified at policy levels as a way to make the EU's and Member States' labour markets more 'attractive to foreign talent'.²¹ The inertia of this type of reasoning, can be seen in current political priorities. For

¹⁸ Alesina, Alberto, Johann Harnoss, and Hillel Rapoport. "Birthplace diversity and economic prosperity." *Journal of Economic Growth* 21, no. 2 (2016): 101-138. Ortega, F., & Peri, G. (2014). The aggregate effects of trade and migration: evidence from OECD countries. In *The Socio-Economic Impact of Migration Flows* (pp. 19-51). Springer, Cham.

¹⁹ Aleksynska, M., & Tritah, A. (2015). The Heterogeneity of Immigrants, Host Countries' Income and Productivity: A Channel Accounting Approach. *Economic Inquiry*, 53(1), 150-172.

²⁰ Friðriksdóttir, B. (2016) "What happened to equality: The construction of the Right to Equal Treatment of Third-Country Nationals in European Union Law on Labour Migration", Dissertation, Radboud University Nijmegen, 2016; M. van den Brink, S. Burri and J. Goldschmidt (eds) (2017), *Equality and Human Rights: Nothing but Trouble?*, Utrecht: Netherlands Institute of Human Rights (SIM), pp. 123-146. Vankova, Z. (2018), "Circular migration from the Eastern partnership countries to the EU – the rights of migrant workers in Bulgaria and Poland", PhD dissertation, Maastricht University, funded under the FP7-PEOPLE-2013-ITN call of the Marie Curie Actions – Initial Training Networks funding scheme (Project number – 608417).

²¹ S. Carrera, E. Guild and K. Eisele (eds), *Rethinking Attractiveness of EU Labour Immigration Policies: Comparative Perspectives on the EU, the US, Canada and Beyond*, Brussels: CEPS; S. Carrera, A. Geddes and E. Guild (2017), "Conclusions and Recommendations: Towards A Fair EU Agenda Facilitating Legal Channels for Labour Mobility", in

example, the President of the Commission has explicitly referred to the issue of the 'EU's attractiveness' as a main justification for the revision of the Blue Card Directive.²²

These conditions and rights at work for Blue Card holders already stand in stark contrast to those granted to other categories of third-country nationals, chiefly seasonal workers; they also leave a gap for medium skilled/qualified third-country nationals in the EU. The EU sectoral approach on labour migration results therefore in a *systemic differential treatment* among different administrative categories of third-country nationals, and between them and EU mobile citizens, that further increases complexity and fragmentation.

At the moment of completing manuscript, Commission is conducting a 'Fitness Check' that evaluates the EU legal migration *acquis* and pays close attention to assessing the main caveats and incoherencies that affect the current framework, including those identified in this Research Paper. The Fitness Check is a welcomed step forward. It has the potential to pave the way for further streamlining, filling gaps and guaranteeing a higher degree of uniformity among third-country nationals, and between them and EU mobile citizens, regarding human rights and labour standards.

1.3. INTERNATIONAL, REGIONAL AND EU STANDARDS: FAIR AND NON-DISCRIMINATORY TREATMENT

EU policy on legal and labour migration does not exist in isolation of the international, regional and EU human rights principles and legal commitments and third-country worker labour standards to which a majority of EU Member States have willingly abided. The notion of 'fairness' and non-discrimination advanced in the 1999 Tampere Programme must be therefore read and interpreted in light of the standards provided by these instruments.

The Tampere Milestones and principles have found expression in EU primary law since the entry into force of the Lisbon Treaty in 2009. Article 79 TFEU, read in conjunction with the EU Charter of Fundamental Rights (EU CFR), stipulates that legally residing third-country nationals must be treated fairly and in a non-discriminatory manner when it comes to working conditions, which are deemed to be closely connected to workers' health, safety and dignity. They may also enjoy intra-EU mobility. The EU CFR is complemented by a set of international and regional human rights and labour standards to some of which Member States have committed themselves. Furthermore, Article 151 TFEU is a central legal basis for the promotion of employment, improved living and working conditions and combating social exclusion in the EU, irrespective of migration status. The entry point is the notion of 'worker', not 'migrant'.

All the main international and regional instruments of direct or indirect application to labour migration are based on the principle of equality of treatment between third-country workers and national workers. While States keep their sovereignty regarding admission for employment-related purposes, the United Nations and the Council of Europe offer a human rights and labour standards framework which limits States' discretion at times of discrimination against third-country nationals, in comparison to other foreigners and nationals, in domestic labour markets. The Research Paper identifies the UN International Covenants, the International Labour Organization (ILO) instruments, and the CoE human rights system as the most relevant parts of this framework. However, as Table 5 illustrates with the sample of nine EU Member States, not all relevant Treaties are ratified. Thus, although, regular and correct implementation of these legal

S. Carrera, A. Geddes, E. Guild and M. Stefan (eds), *Pathways to Legal Migration into the EU: Concepts, Trajectories and Policies*, Brussels: CEPS.

²² Juncker, J.-C. (2014) "A New Start for Europe: My Agenda for Jobs, Growth, Fairness and Democratic Change", Opening Statement in the European Parliament Plenary Session, Strasbourg, 15 July: "I want to promote a new European policy on legal migration. Such a policy could help us to address shortages of specific skills and attract talent to better cope with the demographic challenges of the European Union. I want Europe to become at least as attractive as the favourite migration destinations such as Australia, Canada and the USA. As a first step, I intend to review the "Blue Card" legislation and its unsatisfactory state of implementation."

instruments by States parties are moreover monitored by Treaty and human rights bodies, which also issue crucial guidelines and opinions, the EU cannot overly rely on them. There is a need for 'more EU' in ensuring equal treatment, in line with standards set by international and regional bodies that, carry crucial interpretive weight when assessing the lawfulness of States' policies.

The UN Global Compact on Migration, which is currently in negotiation, identifies as one of its objectives the facilitation of "fair and ethical recruitment and safeguard conditions that ensure decent work". The current second draft calls for States to recommit themselves to upholding these same standards. The Research Paper finds that there is a clear role for the EU to contribute to promoting and ensuring a common level playing field of international and regional human rights and labour standards protection (non-discrimination among workers) which otherwise could undermine the effectiveness of EU secondary law on labour migration. For example, international and regional standards are part of ensuring the 'fair level playing field' and from the standpoint of internal market it could be seen as not 'fair' when certain standards are binding some employers in the EU Member States in their treatment of third country workers, but not the others.

A key question is the extent to which the systematic differential treatment inherent to the current state of play of EU legal migration policy constitutes unlawful indirect discrimination in light of these standards. Such an assessment must take into account the extent to which such an inequality of treatment is necessary, proportionate and legitimate, both in its objectives and outcomes. Whereas, under international and EU law different treatment of third-country nationals on the basis of an objective justification can be legitimate, the sectoral approach produces discriminatory outcomes that are cannot always be justified under above mentioned criteria of proportionality and necessity.

The Research Paper concludes that in light of the individual impacts of the current EU sectoral approach, there is an inconsistency between the worker-by-worker directives and these international and regional labour rights and human rights standards. For example, the blanket restriction on family life for seasonal workers, that is different from Blue Card workers, raises questions of necessity and lack of proportionality.²³ Furthermore, in the Luxembourg Court Case C-540/03 *European Parliament v Council of the European Union* Advocate General Kokott Opinion confirmed that the wide appreciation given to EU Member States in the current EU directives is not always dully justified: "Since human rights must be protected effectively, and the law has to be clear, Article 8 of the [Family Reunification] Directive is contrary to Community law."²⁴In addition, on several occasions the ILO Committee of Experts expressly recognised *discrimination by design* in the EU's legal migration directives in their Report, "Promoting Fair Migration" to the International Labour Conference in 2016,²⁵ as well as in ILO Technical Note prepared on the Seasonal Migrants Directive.²⁶ ILO experts have expressed concerns about how these EU directives (and their impact assessments) have not duly taken into consideration and upheld ILO standards.

²³ Zoetewij-Turhan, M. H. (2017). The Seasonal Workers Directive: '... but some are more equal than others'. *European Labour Law Journal*, 8(1), 28-44.

²⁴ CJEU (2005) Opinion of Advocate General Kokott delivered on 8 September 2005 1(1), Case C-540/03 *European Parliament v Council of the European Union* supported by Federal Republic of Germany and Commission of the European Communities, para. 105.

²⁵ International Labour Office (ILO) (2016), General Survey concerning the migrant workers instruments, Report of the Committee of Experts on the Application of Conventions and Recommendations, International Labour Conference, 105th Session, Geneva, 22 February, para. 106; see also International Labour Office (ILO) (2014), "Fair Migration: Setting an ILO Agenda", Report of the Director General, International Labour Conference, 103rd Session, Geneva.

²⁶ ILO (2010), Proposal for a Directive of the European Parliament and of the Council on the conditions of entry and residence of third-country nationals for the purposes of seasonal employment, COM(2010) 379 ILO Note based on International Labour Standards with reference to relevant regional standards, Geneva.

The systemic discrimination resulting from ‘selectivity and utilitarian rationale’ in admission schemes is further amplified and nurtured by the wealth of evidence and research demonstrating that third-country nationals are indeed discriminated against in EU labour markets (on the basis of their migratory background, national or ethnic origin, religion), with third-country women being particularly exposed and often subject to sub-standard and vulnerable jobs and occupations.

1.4. KEY GAPS AND BARRIERS: THE RESTRICTIONS IN LAW AND PRACTICAL CHALLENGES TO ENJOY FAIR AND EQUAL TREATMENT AT WORK

The Research Paper takes the perspective of migrant workers and identifies some of the gaps and barriers concerning their rights and legal status stemming from the status quo in the area of legal migration at the EU level (see Table 8). The entry into the EU labour market for TCNs is subject to numerous gaps and barriers related to application procedures, labour market tests and other requirements. Entry and re-entry conditions depend on the profile and ‘legal status’ of the third-country nationals irrespective of their actual skills and qualifications, which in turn is a direct result of the sectoral approach to labour migration developed at the EU level. The analysis shows that Blue Card holders are the only category of third-country nationals who can benefit from extensive re-entry conditions referred to at the EU level as circular migration that allow for absences from the territory of the Member State while accumulating residence periods for access to long-term residence.

Gaps regarding the secure residence status and limitations to changing employers, especially for low- and medium-skilled temporary workers, as well as barriers related to different enforcement capacity at national level, are likely to increase labour exploitation, because bargaining power diminishes. While the EU Single Permit Directive provides equal treatment and procedural rights for third country nationals in employment relationships, it leaves out self-employed persons (unless they are already long term residents). It does not sufficiently address the challenges in sectors where disproportionate numbers of third country nationals lack safe, regular and orderly entry schemes at national levels to perform that type of work. The case of migrant domestic workers illustrates the very precarious situation of persons who are not covered by any of the first entry directives; they often enter as tourists, students, ‘au pairs’ and when over-staying their visas they are exposed to falling in irregularity – performing undeclared work without necessary work/residence permits (see Box 3. Case study of third-country nationals in domestic work sector).

Similar situations arise for long distance drivers, self-employed, as well as those working in services, such as delivery, beauty salons, etc. The Research Paper further identifies certain gaps between the different categories of migrant workers related to access to permanent residence, as well as various regimes for intra-EU mobility and family reunification. Here again, seasonal workers are the migrant category with the least rights – no right to family reunification, long-term residence or intra-EU-mobility – as opposed to more privileged categories of highly qualified workers.

Furthermore, the current EU legal migration *acquis* does not remedy barriers for all categories of workers in the field of recognition of qualifications and social security coordination related to the national instruments in the Member States. The Research Paper demonstrates that the first admissions directives, covering Seasonal Workers, highly qualified workers (EU Blue Card), Intra-corporate Transferees (ICTs) and Students and Researchers, are relevant to the social security rights of TCNs, in particular the Regulation 1231/2010 that extended such rights to TCN previously excluded solely on the basis of their nationality.²⁷ However, they lack important social security coordination principles, for example Article of Regulation

²⁷ Regulation (EU) No 1231/2010 of the European Parliament and of the Council of 24 November 2010 extending Regulation (EC) No 883/2004 and Regulation (EC) No 987/2009 to nationals of third countries who are not already covered by these Regulations solely on the ground of their nationality, JOL_2010_344_R_0001_01, 24 November 2010, Brussels.

1231/2010 only covers issues of social security in relation to family members and survivors that are “legally resident in the territory of Member State”, but not to those in the country of origin. The first admissions directives, as listed above, also fall short of addressing gaps and barriers, especially when it comes to procedures for recognition of qualifications in regulated professions. Equal treatment in these directives applies only once authorisation has been obtained, which could lead to periods of dequalification for highly qualified persons working in perceived ‘low-skill’ jobs while awaiting recognition. For example, as Vankova describes her findings from the focus group discussions - the recognition of diploma for a medical doctor from third country in Poland can take more than two years and in a meanwhile person has been opting to become seasonal workers.²⁸ This presents high costs for individual (getting low salary/ de-skilling), society (not having enough doctors/ quality healthcare) and economy (taxes paid).

The benchmark assessment part of this Research Paper showed that the EU is still some way off from developing a fair labour migration policy. In some of the EU Member States, negative public attitudes towards migration are hindering the efforts to reinvigorate approaches to EU legal migration. EU Member States that have higher percentages of third-country nationals seem to be more positive towards immigration from third countries for employment. Meanwhile, other EU Member States that are less exposed to migration and can be better defined as emigration countries, remain most restrictive towards immigration from third countries. The negative attitudes towards migration thus correlate with lack of experience of immigration. As explained in Figure 2 the complexity and low usage of EU wide schemes thus can be in turn feeding into negative public attitudes towards widening entry channels and rights of third country nationals.

2. WHAT ARE THE INDIVIDUAL AND ECONOMIC IMPACTS?

This gaps and barriers analysis should be understood in a broader context, not only the loss of possible tax revenues, loss of GDP related to difficulty to hire the right skills, loss of innovation opportunities, intra-EU mobility, increasing attractiveness of the EU region as a whole, but the overall impact also extends to social aspects - equal treatment, integration, long-term demographic trends, social cohesion.

The individual impacts resulting from the differential set of entry/residency conditions as well as rights of different categories of third-country nationals lead to differences in economic outcomes between the former and EU national workers with similar characteristics. The Research Paper demonstrates how gaps and barriers contribute to the differences in economic and individual outcomes between TCNs and the EU nationals. For example, gaps and barriers in equal treatment increases the likelihood of discrimination at work and when accessing services.

FRA MIDIS II survey findings confirm that one-third of North Africans and one-fourth of sub-Saharan Africans continue to experience discrimination based on their ethnic or migration background, the former related the experiences of discrimination due to Arabic-sounding name while the later – on their skin colour.²⁹ For most of them, discrimination is a recurring experience in various parts of life, particularly in the area of employment.³⁰ While this survey have not distinguished between the different categories of migrants according the first admission schemes (Blue Card or Seasonal), it should be noted, that third country nationals of all skills levels are more at risk of discrimination depending on where they are coming from, which in itself becomes a barrier of accessing and enjoying their equal treatment rights at the workplace. In addition, sub-Saharan Africans continue to be experiencing systemic discrimination in

²⁸ Vankova, Z. (2017), “Implementing the EU’s Circular Migration Approach: Legal and Migrant Perspectives on Entry and Re-Entry Conditions in Bulgaria and Poland”, *Robert Schuman Centre for Advanced Studies*, Research Paper No. RSCAS 2017/34, European University Institute, Fiesole.

²⁹ FRA (2017) Second European Union Minorities and Discrimination Survey, main results.

³⁰ Ibid.

possibilities to access the European Union. For example, the European Parliament report has highlighted the issue that:

only 2,1% of the beneficiaries of the EU Blue Card during the first phase of the implementation in 2012 came from Sub-Saharan Africa. This may indicate implicit racial bias applied preventing certain types of workers to access to some more favourable statuses and therefore enjoying equal treatment with other workers or other family members. The lack of diversity among the EU Blue Card holders may reflect national policies and practices which can perpetuate forms of direct, indirect or institutional discrimination towards new candidates.³¹

Recent Eurostat statistics on EU Blue Card decisions granted by citizenship confirm a trend of extremely low numbers of EU Blue Card holders from this region: in 2016 there were only 455 decisions to grant Blue Card to citizens of sub-Saharan Africa³² out of total 20.979 decisions to grant Blue Card. This amounts to only 2.2% of all granted decisions during 2016.³³

The European Commission's Impact Assessment focused on the impact of the EU Blue Card Directive on the Least Developed Countries (LDCs) and the 'brain drain' phenomenon. It concluded that: "Even though it is hard to estimate the real benefits or damages of 'brain drain' it can be assumed that small LDCs 95 close to powerful economic regions are more likely to suffer from 'brain drain' than larger countries. This type of emigration may put the state's economy at risk, and more directly, may affect the education system as well as the healthcare and engineering sector."³⁴ The Impact Assessment acknowledged the very low numbers of Blue Card applicants coming from LDCs – "In 2013, 188 out of 12 963 Blue Cards (1,45 %) were granted to citizens of LDCs." However, this Commission Assessment did not assess the barriers and obstacles for applicants from LDCs, such as direct, indirect or institutional discrimination. It did not either cover other costs such as lost remittances due to qualified nationals working underqualified work, falling into irregularity and becoming victims of human trafficking.

The econometric analysis implemented in Chapter 5 of this Research Paper shows that employment rates of male third-country nationals are lower compared to those of the native population and EU mobile citizens of the same age group and education level. They also report lower wage income. TCNs are, on average, more likely to be overqualified for their job and to work part-time. At the same time, they are less likely to have a permanent job and to exert supervisory responsibilities. The largest differences relate to women TCNs who are 16 percentage points less likely to be employed than native women and 13.5 percentage points less likely to be employed than mobile EU women with the same observable characteristics. There are also substantial differences relative to native women and mobile EU women in terms of wage income, contract duration, and part-time work. Legal gaps and barriers (restricted access to the labour market, restrictions on job mobility, re-entry and circular migration, insecure residence status) can indeed explain some of the reported differences in outcomes between TCNs and EU nationals.

³¹ European Parliament (2017) Report on the proposal for a directive of the European Parliament and of the Council on the conditions of entry and residence of third-country nationals for the purposes of highly skilled employment (COM(2016)0378 – C8-0213/2016 – 2016/0176(COD)), Rapporteurs: Claude Moraes (Committee on Civil Liberties, Justice and Home Affairs) Jean Lambert, (Committee on Employment and Social Affairs), 28 June, Brussels.

³² 'Sub-Saharan Africa' counted as 46 African countries, excluding Algeria, Egypt, Libya, Morocco, Somalia, Sudan and Tunisia and Western Sahara.

³³ Eurostat (2018) Table EU Blue Cards by type of decision, occupation and citizenship [migr_resbc1], last update: 30-10-2018. (<https://ec.europa.eu/eurostat/web/asylum-and-managed-migration/data/database>).

³⁴ Commission Staff Working Document (2016), Impact Assessment accompanying Proposal for Directive, on the conditions of entry and residence of third-country nationals for the purposes of highly skilled employment, COM(2016) 378, Brussels, 7.6.2016, SWD(2016) 193 final.

For instance, TCNs are more likely than mobile EU citizens to name ‘restricted access to the labour market’ as the main reason for being unemployed or overqualified for their job: 6.5% versus 2.2% and 7.1% versus 2.5%. Legal restrictions to access the labour market are associated with an employment rate 5.5 percentage points lower for men TCNs and 13.5% points lower for women TCNs (when compared to TCNs with same observable characteristics but not facing the restrictions). Even though the labour market restrictions usually apply to TCNs in the first year(s) since arrival in the EU, they can leave a longer-term scarring effect and lower labour market attachment.

Furthermore, a combination of legal gaps and barriers increases the likelihood of working part-time and results in a lower incidence of having a permanent contract. For men TCNs, legal gaps and barriers can also explain part of the wage gap (*vis-à-vis* similar EU nationals). Barriers to recognition of qualifications are considered by 21% of TCNs as the main obstacle to getting a job matching their skills. These barriers are tougher for TCNs than for mobile EU citizens. Barriers to intra-EU mobility indeed make TCNs less mobile than EU nationals. These barriers include, among others, the need to obtain new residence and work authorisations, a lack of status recognition, and the restriction on accumulating years of residence for long-term residence status. This might have negative implications for adjustment to changes in economic conditions, knowledge flows within the EU, and for EU attractiveness to skilled immigrants.

3. THE COSTS OF STATUS QUO: QUANTIFYING IMPACTS OF GAPS AND BARRIERS

Drawing from the findings of the econometric analysis, we then quantified and monetised the impacts of several gaps and barriers for TCNs as compared with the native population. The analysis focused on two key impacts – employment and income – and assessed the implications for earnings of individual migrants (*individual impacts*) as well as tax revenue (*economic impacts*). It is also worth noting that while our analysis focused on these two impacts other impacts are possible but were difficult to quantify and monetise for the purposes of this Research Paper. Such impacts included health and GDP.³⁵

A summary of these impacts are presented in Chapter 6 of this Research Paper. The key parameters are summarised in Annex 6 with the key parameters to assess impacts of gaps in employment and wages. We mainly used 2016 data for the translation of impacts into monetary figures. The greatest impacts were seen for barriers imposed on family migrants, which were mainly due to limited employment opportunities for spouses of third-country nationals. The estimated loss to individuals and society due to poor recognition of qualifications was also relatively large.

Table 1. Summary of monetised individual and economic impacts - status quo

Gap/barrier	Estimates*	
	Lost annual income, net (individual impact)	Lost annual tax revenue at aggregate EU level (economic impact)
Intra-EU labour mobility	€31.2 million	EUR €8.5 million
Recognition of qualification	€3.2-5.3 billion	€1.4-2.3 billion
Re-entry and circular migration	No estimate made	
Secure residence	Est 100,000 people affected; no estimate made	
Work authorisation	€1.1-2.3 billion	€445-891 million
Family reunification	€6.9-8.7 billion	€2.6-3.2 billion

³⁵ Some studies have investigated this issue. For example, one study investigated the potential economic impact of reductions in migration due to Brexit. The study found that a decrease in net migration of 91,000 could result in a reduction in GDP estimated between 0.63% and 1.19%. Per capita GDP would fall by an estimated 0.22% to 0.78% (Portes and Forte, 2017).

Gap/barrier	Estimates*	
	Lost annual income, net (individual impact)	Lost annual tax revenue at aggregate EU level (economic impact)
Social security	Est. 100,000 people affected; no estimate made	
Equal treatment	€21 billion	€8 billion

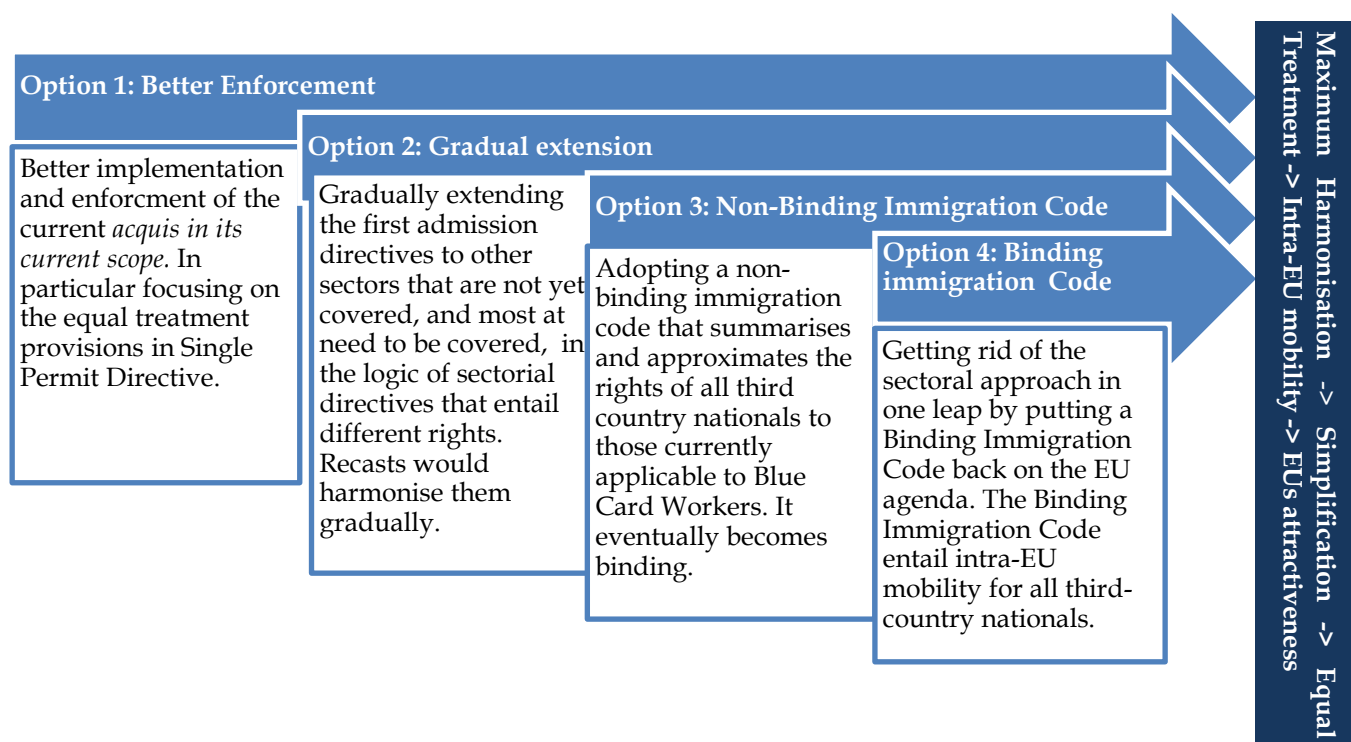
Notes: *Own calculations, unless otherwise noted, see detailed Table 14: Summary of monetised impacts in Chapter 6.
Source: Authors, 2018.

4. WHAT ARE THE PREFERRED POLICY OPTIONS?

4.1. IDENTIFYING THE POLICY OPTIONS

The Research Paper identifies four main policy options on the basis of ongoing academic and policy debates on the future of EU legal and labour migration. They present inter-related strategies with differences in ambition and speed on how to streamline the current EU legal migration *acquis* (length of arrows in Figure 3 is representing the speed of changes).

Figure 3. Difference in time moving towards maximum harmonisation



Source: Authors, 2018.

The benefits and costs of different policy options are discussed in light of how they address identified gaps and barriers, particularly those resulting from the sectoral approach, and how they remedy individual and economic impacts. (See Table 17. Overview of policy options' potential benefits in addressing key gaps and barriers in Chapter 7).

Option 1 focuses on ensuring better enforcement of current EU sectoral directives (including increasing awareness on the current provisions, enforcing current equal treatment and labour rights provisions as foreseen in Single Permit Directive/ monitoring at the EU level how the current ‘first entry’ Directives are implemented). It would essentially not close all gaps but would address some of the practical barriers, such as lengthy procedures and administrative difficulties. Nevertheless, major gaps and barriers resulting from the sectoral approach would remain unaddressed, as essentially Member States would continue to have the wide margin of appreciation on interpreting the directives and on which options they accept certain categories of third country workers. Therefore, it is working towards maximum harmonisation in a least ambitious way. It could take, for example more than 30 years until better enforcement of current acquis could achieve this goal.

Option 2 implies a gradual extension of categories of workers and their rights within the logic of sectoral first-entry directives, i.e. migrant domestic workers, construction, transport workers, those working in beauty industry, self-employed, who are over-represented among the undeclared and/or irregular migrant workers due to overly narrow entry channels at national and EU level, and therefore not covered by the EU Single Permit Directive. It would not close the overall gap but would narrow gaps and would lower certain barriers, particularly in relation to the entry and employment rights of newly added categories of third-country nationals, who often risk being exploited, and falling into irregular situation. This option would use re-cast of Directives as to bring them towards maximum harmonisation – it would take 30 – 20 years to recast all directives and to reach the level of rights as foreseen in the Blue Card Directive.

Option 3 entails the elaboration and adoption of a non-binding EU immigration code that would bring together all existing (and fragmented) EU rules in a one document. This option would aim to close the gap between sectoral directives in a long run by putting in place aspirational standards. This option is already moving out of the logic of the sectoral approach. It is rather a slower strategy, in comparison with Option 4 taking from 10 to 20 years towards the goal of maximum harmonisation. The non-binding immigration code could follow the precedent of the Fundamental Rights Charter which, in 2010 turned from a non-binding document summarising European Fundamental Rights into a binding legislation with Treaty of Lisbon.

Option 4 proposes the elaboration and adoption of a Binding Immigration Code that would imply abandoning the sectoral approach logic and adopting a global horizontal directive for all TCNs no matter their perceived skills status. This option would aim to close the gaps and barriers between different sectoral directives in a one leap taking 5 – 10 years to get first results of maximum harmonisation. This option would build on the success in the area of administrative procedures achieved with Single Permit Directive. It would go further - to unify the procedures and rights of all third country nationals presenting a major EU added value potential. A positive spillover would be the simplification of entry/residence and employment conditions for all TCNs, raising the awareness and improving the equal treatment clauses, leading towards increased intra-EU mobility and thus increased attractiveness of the EU as a whole in much shorter time-span.

4.2. THE PREFERRED POLICY OPTION: BENEFITS, KEY DRIVERS OF COSTS AND FEASIBILITY

Option 4 emerges with the greatest estimated benefits due to its strong orientation towards equal treatment and family reunification overall. The costs associated with unequal treatment between TCNs and nationals are substantial with lost income estimated to be over EUR 21 billion and family reunification over €6.9-8.7 billion. As the Table 2. Summary of estimated benefits of policy options below shows, that a Binding Immigration Code ensuring equality of treatment between third country workers and EU national workers would amount to over €15.75 billion individual benefits and €6 billion economic benefits.

The benefits and costs of different policy options are discussed in detail in Chapter 7, in light of how they address the gaps and barriers identified in Chapter 3 and how they remedy individual and economic

impacts studied in Chapters 3 through 6 (see Table 17 and Table 18). The assessment does not perform a fully-fledged economic cost-benefit analysis and are rather limited estimations.

Table 2. Summary of estimated benefits of policy options

	OPTION 1: Better enforcement	OPTION 2: Gradual Extension	OPTION 3: Non-binding Immigration Code	OPTION 4: Binding Immigration Code
Intra-EU labour mobility	€7.8 million individual benefits and €2.125 million economic benefits	€15.6 million individual benefits and €4.25 million economic benefits	€15.6 million individual benefits and €4.25 million economic benefits	€23.4 million individual benefits and €6.375 million economic benefits
Recognition of qualification	€1.6 - 2.65 billion individual benefits and €0.7 - 1.15 billion economic benefits	€0.8 - 1.325 billion individual benefits and €0.35 - 0.575 billion economic benefits	€0.8 - 1.325 billion individual benefits and €0.35 - 0.575 billion economic benefits	€1.6 - 2.65 billion individual benefits and €0.7 - 1.15 billion economic benefits
Work authorisation	€0.55 - 1.15 billion individual benefits and €222.5 - 445.5 million economic benefits	€0.55 - 1.15 billion individual benefits and €222.5 - 445.5 million economic benefits	€0.275 - 0.575 billion individual benefits and €111.25 - 222.75 million economic benefits	€0.825 - 1.725 billion individual benefits and €333.75 - 668.25 million economic benefits
Family reunification	€1.725 - 2.175 billion individual benefits and €0.65 - 0.8 billion economic benefits	€3.45 - 4.35 billion individual benefits and €1.3 - 1.6 billion economic benefits	€1.725 - 2.175 billion individual benefits and €0.65 - 0.8 billion economic benefits	€5.175 - 6.525 billion individual benefits and €1.95 - 2.4 billion economic benefits
Equal treatment*	€5.25 billion individual benefits and €2 billion economic benefits	€10.5 billion individual benefits and €4 billion economic benefits	€10.5 billion individual benefits and €4 billion economic benefits	€15.75 billion individual benefits and €6 billion economic benefits

Note: * Equal treatment is overlapping with other gaps and barriers, and therefore we refrain from summing up the

different benefits per option. It is based on author's own calculations taking into account Table 14: Summary of monetised impacts and Table 17. Overview of policy options' potential benefits in addressing key gaps and barriers, when 'low impact' is assigned to be 25%; 'moderate' - 50% and 'high' - 75%. These are all estimations. These benefits may not be realised immediately, but may take several years. The figures have been annualised.

Source: Authors, 2018.

A Binding Immigration Code would eventually increase EU 'attractiveness', as the EU would treat migrant workers with human dignity, in line with international human rights and labour standards, and not only on the basis of economic arguments and outputs. A Binding Immigration Code is also likely to increase intra-EU mobility among all categories of workers, who, as the econometric analysis shows, are willing to adapt to labour market situations.

The Table 3. Summary of policy options assessment below gives a rough assessment of the key benefits (see also Figure 21. Estimated economic benefits annually at aggregate EU level (EUR millions), cost drivers (Table 19) and feasibility of each policy option. The grounds for the assessment are defined in detail in Chapter 7.

Table 3. Summary of policy options assessment

	Key benefits	Key Costs	Feasibility
Option 1	Low	Moderate	High
Option 2	Moderate	High	Moderate
Option 3	Moderate	Moderate	Moderate
Option 4	High	Low	Low

Source: Authors, 2018.

The assessment on the basis of key drivers of costs and benefits confirms that Option 4 would be the fastest and most likely way to close the most gaps and barriers resulting from the sectoral nature of the EU's current legal migration design. However, such initiative requires great political commitment by EU institutions and the willingness of Member States. The feasibility was assessed during the interviews and Delphi method discussion, conducted for the purpose of this research paper. The interviewees and discussants have confirmed that feasibility in the current political climate is the key challenge for Option 4 to be realised. Some of the interviewees and discussants referred to freezing of the Blue Card revision due to the lacking of political support to address gaps and barriers for the highly qualified third country nationals across the EU. Although there are claims that some Member States believe those gaps and barriers are better addressed through national approaches, the Commission's Impact Assessment for the Revision of the Blue Card Directive has shown that both EU and Member States would benefit greatly by streamlining the rights and labour conditions of TCNs.³⁶

Among the concrete recommendations on how to overcome current feasibility challenges we highlight the following proposals:

Firstly, EU legislators should address the gap between EU legal migration law and international and regional standards, and the findings and recommendations issued by UN and CoE monitoring bodies, as this affects the effectiveness of EU secondary legislation in this area. It would help in cases where systematic (institutional) discrimination may exist. In addition, the Commission should convoke a permanent network of lawyers and judges to better enforce current standards.

Secondly, the EU legislators should take the responsibility over the shaping the evidence-based and rights-based narrative over the legal migration. The European Party Families could for example get sanctioned for spreading hate speech and xenophobia. For example, such MEPs would not be allowed to get EU funding, as it is not in line with EU's fundamental values. The current anti-migrant political climate and toxic populist and/or nationalistic discourses constitute major barriers to Binding Immigration Code, and lack of it is a source of EU's unattractiveness for third country nationals to choose the EU as their destination. The rights of migrants should be seen and embedded in a wider rule of law framework, as systemic differential treatment or discrimination has negative results, not only on the individuals concerned but also on societies, and is likely to result in rights standards backsliding for all workers and/or third country nationals and/or ethnic minorities and other vulnerable groups. Therefore, there is a need for 'more EU' in shaping a more robust and well-articulated rights-based discourse by EU institutions and agencies.

³⁶ European Commission (2016), Communication on the implementation of Directive 2009/50/EC on the conditions of entry and residence of third-country nationals for the purpose of highly qualified employment ("EU Blue Card"), COM(2014) 287 final, Brussels, 22.5.2014; European Parliament (2015), European Parliamentary Research Service, Briefing Implementation Appraisal, The EU Blue Card Directive, December (www.europarl.europa.eu/RegData/etudes/BRIE/2015/558766/EPRS_BRI%282015%29558766_EN.pdf).

Thirdly, a set of accompanying policy measures could be additionally explored, such as, a broadened social dialogue (social partners and civil society) so as to inform EU policies and evaluate their implementation and effectiveness. The broadened social dialogue could feed into and inform the increased role of the EU's Common Labour Authority in monitoring labour rights standards for TCNs across the EU and improving access to justice by third country workers. The latter could also be linked and feed into the EU's Rule of Law Mechanism proposed by the European Parliament.

INTRODUCTION

I. Background: 20 Years since the Tampere Programme

The European Union's legal migration policy is rooted in the first multi-annual programme on the Union's Area of Freedom, Security and Justice (AFSJ) agreed on 15-16 October 1999 in Tampere, Finland. Following the entry into force of the 1999 Amsterdam Treaty, and the transfer of migration policy to shared competence between Member States and the EU, the European Council laid down in the Tampere Programme the policy parameters or 'milestones' to drive the progressive development of a common EU migration policy in the years to come.

Such a common policy was expected to include the approximation of national policies on the conditions of entry and residence for third-country nationals (non-EU citizens, TCNs), and their rights in the EU. The Tampere Programme enshrined as a key policy goal "a fair treatment paradigm" in EU migration policy, according to which the EU should ensure "fair treatment" of all TCNs residing legally in its territory. It called for a "more vigorous integration policy" aimed at granting them rights and obligations comparable to those of EU citizens, and non-discrimination "in economic, social and cultural life and develop measures against racism and xenophobia".³⁷

The fair and non-discriminatory treatment paradigm now finds expression in the provisions of the 2009 Lisbon Treaty. Article 79.1 of the Treaty on the Functioning of the European Union (TFEU) proclaims that the Union shall develop a common immigration policy ensuring fair treatment of TCNs. The notion of 'fairness' in the context of legal migration (chiefly for employment and related purposes) must be read in light of the emphasis placed by the EU Treaties on the individual and the protection of her/his fundamental rights and human rights international labour standards in actions falling within the remits of EU policy.³⁸

The EU Charter of Fundamental Rights (EU CFR) stipulates in Article 31 that *every worker*, irrespective of administrative migration status, has the right to fair and just working conditions that respect his/her dignity, health and safety. Similarly, Article 15 EU CFR enshrines the obligation for states to ensure that TCNs authorised to work have "equivalent working conditions than those of EU citizens". Any limitation or derogation by EU member states to these human rights and labour standards, which would imply differential treatment among third-country nationals, and between them and EU citizens, must be well-justified, proportionate, necessary and legitimate so as not to incur unlawful discrimination contrary to international human rights law and labour law.

Labour and living standards is an area where the EU and its member states do not act in isolation. The concept of 'fairness' of TCNs in working conditions needs also to be read in light of a robust body of international and regional human rights standards to which the same EU member states have to abide. These standards have mainly emerged from various United Nations instruments and human rights treaties. International labour standards have been adopted in the context of the International Labour Organisation (ILO). ILO has called for a fair global governance of labour migration that ensures non-discrimination and the principle of equal treatment between third-country workers and national workers. It has placed special emphasis on the need for member states to develop equality policies towards third-country workers that address their vulnerability to various forms of discrimination and prejudices in domestic labour markets on grounds of nationality, which often are obscured by or intersect with other discrimination grounds such as race, ethnicity, colour, religion and gender.³⁹

³⁷ European Council, Conclusions Summit 15-16 October 1999, Tampere, paras 18-21.

³⁸ S. Carrera, A. Geddes and E. Guild (2017), "Conclusions and Recommendations: Towards a Fair Agenda facilitating Legal Channels of for Labour Mobility", in S. Carrera, A. Geddes, E. Guild and M. Stefan (eds), *Pathways towards Legal Migration into the EU: Reappraising Concepts, Trajectories and Policies*, CEPS Paperback, Brussels, pp. 183-209.

³⁹ International Labour Office (ILO) (2014), "Fair Migration: Setting an ILO Agenda", Report of the Director General, International Labour Conference, 103rd Session, Geneva; ILO (2016), "General Survey concerning the migrant workers instruments", Report of the Committee of Experts on the Application of Conventions and Recommendations, International Labour Conference, 105th Session, Geneva, 22 February.

While too often forgotten in past EU policy discussions and legislative activities, some of these legal standards are not just 'aspirational' but rather constitute legally binding obligations that EU member states have committed themselves to internationally. Others carry an interpretative weight, such as at times of assessing the lawfulness of national policies towards third-country nationals. International and regional human rights and labour standards instruments usually apply to monitoring or treaty bodies responsible for the interpretation, review and regular evaluation of states parties' correct implementation.

The United Nations is currently holding high-level discussions on international human rights and labour standards in the area of migration. The Heads of State and Government and High Representatives agreed at the UN Summit of 19 September 2016 the so-called 'New York Declaration',⁴⁰ in which they declared their intention to pay particular attention to the application of minimum labour standards for migrant workers regardless of their status, as well as to recruitment and other migration-related costs.⁴¹ This was followed by the opening of the negotiations of the 'Global Compact for Migration' that in its second draft published in May 2018 calls for the need to facilitate labour mobility at all skill levels and "fair and ethical recruitment and safeguard[ing] conditions that ensure decent work". The Global Compact calls for the promotion and effective implementation of existing international instruments related to international labour mobility, labour rights and decent work.

Despite expectations to the contrary, EU policy on legal and labour migration has developed in a rather dynamic fashion during the past two decades.⁴² Member states' positions in this area have been ambivalent, however. Ministries of Interior have shown much resistance to 'Europeanising' competences in this policy domain, thereby controverting the original call by the European Council in Tampere. However, member states have progressively committed themselves to a Union policy setting that provides for a harmonised set of legal standards, rights and administrative guarantees to which national labour migration policies can no longer be inferior.

The existing EU policy framework on 'legal migration' is composed of a complex, compartmentalised or fragmented body of EU directives that cover the conditions of TCN legal entry and residence, and the rights attached therein. This is particularly so with respect to the current form of the EU legal *acquis* that deal with access to employment and working conditions of third-country nationals.⁴³ Based on the official call by the above-mentioned Tampere Programme, the European Commission proposed a directive which would have covered the conditions of entry/residence and the rights of *all* third-country nationals in the EU.⁴⁴ The proposal did not find consensus among member states' ministries of interior and was withdrawn in 2006.

Since then, the EU has developed a policy approach to legal migration characterised by 'sectorality', which suffers from 'embedded fragmentation'.⁴⁵ The sectoral approach has translated into a legal framework depending on the type of employment/specific labour sector for which TCNs are to be admitted in the EU, as well as to the creation of different EU administrative statuses ascribed to each of them and that present different degrees of working and living conditions as well as rights. There are at present four EU legal acts that cover, respectively, highly qualified workers (EU Blue Card), seasonal workers, intra-corporate transferees, and researchers, trainees and students, volunteers, pupils and au pairs.

⁴⁰ United Nations, General Assembly, Resolution adopted by the General Assembly on 19 September 2016, New York Declaration, A/RES/71/1, 3 October 2016.

⁴¹ Paragraph 57 of the New York Declaration states, "We will consider facilitating opportunities for safe, orderly and regular migration, including, as appropriate, employment creation, labour mobility at all skills levels, circular migration, family reunification and education-related opportunities."

⁴² A. Wiesbrock (2009), *Legal Migration to the European Union – Ten Years After Tampere*, Wolf Legal Publishers, Nijmegen, pp. 545-549.

⁴³ This Research Paper does not cover the external dimensions of EU legal and labour immigration policies, i.e. instruments resulting from international cooperation such as agreements and other non-legally binding tools.

⁴⁴ European Commission, Proposal for a Council Directive on the conditions of entry and residence for the purpose of paid employment and self-employment activities, COM(2001) 386 final, Brussels, 11.7.2001.

⁴⁵ S. Carrera, A. Geddes and E. Guild (2017), *op. cit.*

Since 2014, one of the key policy priorities of European Commission President Jean-Claude Juncker has been “a new policy on legal migration”. In his Political Guidelines published in 2014, Juncker emphasised that such a policy would need to address skill shortages and “attract talent to better cope with the demographic challenges of the European Union”. Juncker emphasised that the Union should “become at least as attractive as the favourite migration destinations such as Australia, Canada and the USA”, and called for a review of the EU Blue Card Directive in light of its unsatisfactory implementation by EU member states.⁴⁶

The emergence in 2015 of the so-called ‘European Refugee Humanitarian Crisis’ shifted the main EU political focus and debate towards the areas of asylum, borders and irregular immigration, and away from the extent to which the forms of EU policy on economic immigration are ‘fit for purpose’ and the facilitation of labour mobility. That notwithstanding, the 2015 European Agenda on Migration announced the Commission’s plan to embark on REFIT (the Commission’s Regulatory Fitness and Performance) initiative⁴⁷ in the form of a so-called ‘Fitness Check’ of the EU legal migration *acquis*, to identify “gaps and inconsistencies” and reflect on ways to simplify and streamline the existing EU framework.⁴⁸ This type of initiative was introduced via the Commission’s Communication on the Smart Regulation in the European Union.⁴⁹

The Fitness Check aims to evaluate the above-mentioned legal migration directives in light of the criteria of relevance, coherence, effectiveness, efficiency and – more generally – EU added value. The notions of effectiveness and efficiency include individual and societal impacts, as well as full compliance with fundamental rights (EU Charter of Fundamental Rights) and international labour standards. The Fitness Check will pay particular attention to improving existing rules “in light of the need to prevent and combat labour exploitation which is common among migrant workers”.⁵⁰ The Commission has also prioritised “the effective enforcement of the relevant EU *acquis* to ensure the protection of the rights of the migrants who are working in the EU, in particular to prevent labour exploitation, irrespective of their legal status.”⁵¹

The Fitness Check was officially launched at the beginning of 2017. The European Commission is still working on the Fitness Check as of this writing (June 2018) and a final product is expected in the second half of 2018.⁵² One of the main reasons behind this delay is the current state of negotiations on the revision of the EU Blue Card Directive as proposed by the Commission in June 2016,⁵³ which is proving to be particularly difficult in the Council.

Since 2004, the European Parliament has been a co-legislator in the policy area of legal and labour migration. The Lisbon Treaty further consolidated that role. The Parliament adopted in 2016 a Resolution on the situation in the Mediterranean that calls for a ‘holistic approach’ on migration in the EU.⁵⁴ The Resolution underlined the need to develop a ‘comprehensive labour migration policy’ in line with Europe 2020 strategic

⁴⁶ J.-C. Juncker (2014), “A New Start for Europe: My Agenda for Jobs, Growth, Fairness and Democratic Change”, Opening Statement in the European Parliament Plenary Session, Strasbourg, 15 July.

⁴⁷ European Commission Staff Working Document (2015), Regulatory Fitness and Performance Programme (REFIT) - State of Play and Outlook - REFIT Scoreboard (SWD(2015) 110 final), annexed to Better Regulation for Better Results - An EU agenda, Communication (COM(2015)215 final). See also European Commission (2015), Better Regulation Guidelines, Chapter on “Evaluations”, p. 50-66, SWD (2017) 350.

⁴⁸ European Commission (2015), A European Agenda on Migration, COM(2015) 240 final, Brussels, 13.5.2015, p. 14.

⁴⁹ European Commission (2014), Smart Regulation in the European Union, COM (2010) 543 final.

⁵⁰ European Commission (2016), Towards a Reform of the Common European Asylum System and Enhancing Legal Avenues to Europe, COM(2016) 197, 6.4.2016, Brussels, p. 18.

⁵¹ Ibid.

⁵² European Commission, DG HOME (2017) Legal Migration Fitness Check: Consultation Strategy, Version as of 01.02.2017 (https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/legal_migration/fitness_check_legal_migration_-_consultation_strategy_1.2.2017_en.pdf).

⁵³ European Commission (2016), Proposal for a Directive on the conditions of entry and residence of third-country nationals for the purposes of highly skilled employment, COM(2016)378 final, Strasbourg, 7.6.2016.

⁵⁴ European Parliament (2016), Resolution of 12 April 2016 on the situation in the Mediterranean and the need for a holistic EU approach to migration (2015/2095(INI)).

goals.⁵⁵ It highlighted that the current EU's legal framework on TCN workers remains fragmented "as it focuses on specific categories of workers, rather than generally all migrant workers".⁵⁶ It concluded that in the long run "the Union will need to establish more general rules governing the entry and residence for third country nationals seeking employment to fill gaps identified in the Union labour market".⁵⁷

The second half of 2019 will see the 20th anniversary of the Tampere Programme. It will also coincide with the taking over of a new Finnish Presidency of the EU in a decisive phase in European integration, characterised by European Parliament elections and inter-institutional renewal at EU levels. It is therefore a critical moment to take stock of the progress made and obstacles encountered in building a common EU migration policy since 1999, and to assess the added value and individual and economic 'costs and benefits' that have emerged from EU policy in the domains of legal and economic immigration.

II. Objectives and scope of the Research Paper

This Research Paper feeds into 'the cost of non-Europe' (CoNE) in the area of migration which is part of a wider CoNE on the Area of Freedom Security and Justice (AFSJ). The Research paper was requested by the European Parliament's Committee on Civil Liberties, Justice and Home Affairs (LIBE Committee). The main rationale of this Research Paper is to critically examine the extent to which EU policy and law have 'added value'.

The notions of 'gaps' and 'barriers' will be understood to mean respectively: 1) Gaps - the areas or situations not covered by EU law, and 2) Barriers - the administrative or practical obstacles faced by individuals while trying to exercise the rights and guarantees provided by the EU's legal migration acquis. The Research Paper investigates the impacts of these gaps and barriers on individuals and society, some of which are then translated into monetised figures.

As with the Commission's Fitness Check, the material scope of analysis focuses on the seven main directives on legal and labour migration outlined in Table 4 below, as well as other relevant and related EU policy documents and their transposition deadlines. Table 2 demonstrates how only four of these seven directives contain provisions that deal with 'first entry' conditions for third-country nationals. Each of these present different deadlines for national transposition. Concerning the geographical scope, it is important to underline that the UK, Ireland and Denmark have not participated in their adoption and are not bound by them.⁵⁸ Only, Ireland opted into the 2005 Researchers Directive.

Table 4. Types of EU legal migration directives

Is this 'first entry' directive?	EU directives (all covered by the Fitness Check)	Transposition deadline
No	Single Permit Directive (2011/98/EU)	25.12.2013
No	Family Reunification Directive (2003/86/EC)	03.10.2005
No ⁵⁹	Long-Term Residents Directive (2003/19/EC)	23.01.2006
Yes	EU Blue Card Directive (2009/05/EC), Commission proposal for revision in June 2016 (COM(2016) 378 final)	19.06.2011

⁵⁵ Ibid., para. 121.

⁵⁶ Ibid., para. 122.

⁵⁷ Ibid., para. 123.

⁵⁸ S. Peers, V. Moreno-Lax, M. Garlick and E. Guild (2012), *EU Immigration and Asylum Law (Text and Commentary): Second Revised Edition, Volume 2: EU Immigration Law*, Leiden: Martinus Nijhoff Publishers.

⁵⁹ In this Research Paper, we consider Family Reunification Directive, not as a first entry directive, as we analyse conditions on which TCNs can reunify with the family member that has been earlier admitted under one of the 'first entry' directives.

Yes	Seasonal Workers Directive (2014/36/EU)	30.09.2016
Yes	Intra-Corporate Transferees Directive (2014/66/EU)	29.11.2016
Yes	Students and Researchers Directive ((EU)2016/801 – recast)	23.05.2018

Source: Authors, 2018.

III. Research questions

The Research Paper assesses the individual and economic impacts that the current worker-by-worker or sectoral approach guiding EU legal and economic migration policy experts in light of international, regional and EU human rights and labour standards on fairness and non-discrimination.⁶⁰ What are the impacts of the current state of affairs in EU action and cooperation on legal migration? Our research places special emphasis on the individual impacts as experienced by the TCNs working in the EU, as well as the economic impacts on receiving societies. It explores this question in light of the following set of four sub-questions:

1) What is the current ‘state of play’ in EU action and cooperation in the area of legal migration? This question aims to identify and map the main EU legislative instruments and policy measures adopted since 1999 in this domain. The particular attention is paid to the labour migration as the key area allowing for the cross-comparison among different legislative and policy initiatives.

2) What are the international, regional and EU standards (benchmarks) in the area of legal migration? What are remaining gaps and barriers in EU legislation and across legislative instruments? This question aims to identify the potential incoherencies between EU legal migration *acquis* and international, regional and EU standards, in particular in the area of labour migration.

3) What impacts do these gaps and barriers have on individuals in terms of protecting their fundamental rights and freedom and what is the economic impact?

a) How are the rights and freedoms of third country nationals legally residing in a Member State impacted by the EU legal migration *acquis* and policy? When answering this question particular attention is placed on a different sets of working conditions for perceived or assigned skill levels as framed by differing third-country national statuses.

b) What are the economic impacts of these gaps and barriers in the EU? When answering this question, we focus on the differences between third-country nationals and EU citizens and the extent to which economic benefits could be generated by closing the gaps.

4) What are the policy options for future EU action and intervention? What are their potential costs and benefits and feasibility? This research question aims identifying and further developing the different policy options, at the EU level and within the LIBE Committee’s competence, for addressing the gaps and barriers in EU action and cooperation in the area of legal migration. This Section pays particular focus on policy options that are consistent and compliant with the EU constitutional duties of fairness and equality prescribed by EU Treaties and the explored standard for review stemming from European and international human rights and labour standards.

Annex 1 provides a detailed overview of the interdisciplinary methodology and full array of data-gathering methods implemented during the research in pursuit of answering the above questions. Research consisted not only of desk research of the key legal and policy sources but also 15 semi-structured interviews with representatives at the European institutions, international organisations and selected member states. This was complemented with an e-questionnaire that was answered by 61 respondents representing civil society,

⁶⁰ The material scope of the paper aims to include neither the residence or employment conditions of refugees and asylum seekers, which fall under the so-called ‘Common European Asylum System’ (CEAS), nor a detailed assessment of xenophobia, racism and discrimination, which was covered by other studies commissioned by the EPRS.

trade unions and employers' organisations across nine EU member states: Belgium, Bulgaria, Germany, France, Lithuania, Poland, Portugal, Spain and the Netherlands.

An additional methodological tool used was the Delphi method, which entailed a closed-door discussion with 13 experts on legal migration who identified main issues/challenges and discussed various policy options for the future of the EU in the area of legal migration (see Annex 1).

As a guiding narrative, the Research Paper places special emphasis on the costs and benefits (impacts) as experienced by TCNs living and working in the EU, as well as those for receiving societies. It addresses the concept of 'cost of non-Europe' beyond whether there is a true common policy. It uses a notion of 'Europe' of which the question of whether current EU policy on legal migration adheres to the EU's own constitutional law and values of the rule of law and fundamental rights is essential. The 'cost of non-Europe' is not limited to secondary law. Thus, the Research Paper also covers broader EU action and cooperation to make sure the values of democracy, the rule of law and fundamental rights which are common to the EU and its Member States are upheld. It explores the extent to which we see 'non-Europe', and the costs that 'non-Europe' generates. The Research Paper moves in this way beyond the current state of play, which has too often tended to be 'state-centric' or focused mainly on 'costs and benefits', as framed by ministries of interior, and not on the main actors affected by EU legislation and (non)action – namely third-country nationals themselves and receiving societies more broadly.

The Research Paper thus elaborates on costs resulting from current gaps and barriers as experienced by TCNs (individual costs) and those receiving Member States (economic costs). The policy options are embedded in the ongoing academic and policy debates over what actions the EU should take in the area of legal migration.⁶¹ The Research Paper reflects the feasibility and EU's added value of these policy options, and shows the main cost and benefit drivers of each, though it does not intend to put a 'price tag' on any of them. More important is framing of the future of 'legal migration' and the EU.

⁶¹ See in particular S. Carrera, E. Guild and K. Eisele (2014), "The next generation of EU Labour Migration Policy: Conclusions and Recommendations", in S. Carrera, E. Guild and K. Eisele (eds), *Rethinking Attractiveness of EU Labour Immigration Policies: Comparative Perspectives on the EU, the US, Canada and Beyond*, Brussels: CEPS; S. Carrera, A. Geddes and E. Guild (2017), "Conclusions and Recommendations: Towards A Fair EU Agenda Facilitating Legal Channels for Labour Mobility", in S. Carrera, A. Geddes, E. Guild and M. Stefan (eds), *Pathways to Legal Migration into the EU: Concepts, Trajectories and Policies*, Brussels: CEPS.

CHAPTER 1: THE STATE OF AFFAIRS OF EU LEGAL MIGRATION POLICY

KEY FINDINGS

- The EU sectoral approach to legal migration leads to unequal treatment among different administrative categories (statuses) of third-country nationals, and between all these workers and EU citizens.
- The current state of EU legal migration policy institutionalises a hierarchy of rights, labour and living conditions that differ according to the extent to which the worker falls within a 'highly qualified/skilled' status and is perceived to be 'more useful' to EU Member States' economies, in comparison to other migrant worker statuses.
- Such presumptions about EU's attractiveness leads to institutionalised forms of differential treatment that on the one hand are deeply embedded in EU policy, but on the other hand – challenges the EU's principles of non-discrimination and fairness.
- The fragmentation that characterises EU policy, and the existence of parallel national schemes and systems, prevents the existence of a *common level playing field* of third-country worker rights and labour conditions in the EU.

1.1. The ambivalent building of a common legal migration policy

The 1999 Amsterdam Treaty constituted a historic step in European cooperation on migration. This Treaty transferred migration policy from an intergovernmental method of cooperation (formerly known as 'Third Pillar' under the Treaty on the European Union) to shared competence between the European Community and the Member States. The 'Europeanisation' of migration policy occurred during a transitory period when all migration policy domains were subject to the co-decision procedure (with the European Parliament as co-legislator) and Qualified Majority Voting (QMV) inside the Council, with the exception of 'legal and economic migration', which was governed by unanimity rule and consultation with the European Parliament until 2004.⁶²

As mentioned in the introduction, the Tampere Programme outlined a roadmap of policy priorities and concrete policy actions and deadlines for their achievement. The Programme covered the period between 1999 and 2004. It identified the need to build a common EU immigration policy that would be *fair* towards TCNs residing legally in the territory of EU Member States. The Programme also enshrined a notion of 'integration' mainly focused on ensuring rights and obligations to TCNs comparable to those of EU citizens and fostering non-discrimination and measures against racism and xenophobia. The European Council identified the need to formulate national legislation on the conditions for admission and residence of TCNs, "based on a shared assessment of the economic and demographic developments within the Union, as well as the situation in the countries of origin."

On these bases, it requested the European Commission to put forward legislative proposals. The response by the European Commission to this call, as advanced in the 2000 Communication on a Community Immigration Policy,⁶³ followed a 'two-tier approach'.

⁶² Council Decision of 22 December 2004; 2004/927/EC; Official Journal L 396, 31.12.04, pp. 0045-0046.

⁶³ European Commission, Communication on a Community Immigration Policy COM(2000) 757, 22.11.2000.

First, a proposal for an 'Open Method of Coordination' (OMC) which would be complementary to the adoption of an ordinary legislative framework.⁶⁴ The OMC would consist of an EU coordination tool led by the Commission and allowing for the exchange of information ('best practices') and the promotion of gradual convergence between Member States' labour migration policies. The Council would produce multi-annual guidelines that would be translated into 'concrete actions' in national action plans. They would be subject to an evaluation method (peer review) through the establishment of EU networks of national officials and 'experts' on an annual basis. The Commission would prepare annual synthesis reports on common 'problems and concerns', and identify areas where 'EU solutions' would be required to deal with the former.⁶⁵

Second, the enactment of EU legislation in the form of the 2001 Proposal for a Directive covering conditions of entry and residence for employment/self-employment of all categories of third-country nationals.⁶⁶ The proposal aimed at laying down common definitions, criteria and procedures regarding the conditions of entry and residence, and a common catalogue of rights, to *all* TCNs holding a common EU residence permit for purposes of both paid employment and self-employed economic activities.⁶⁷

None of the two Commission initiatives was successful in the Council. Representatives of the ministries of interior did not manage to find any consensus on either of these proposals, which inextricably led to the formal withdrawal of the 2001 proposal for a directive. According to the UK House of Lords EU Select Committee, "The measure failed to make progress because of lack of support from the Member States, for whom the right to decide on who should be admitted for employment and in what numbers has always been a politically sensitive issue."⁶⁸

That notwithstanding, rival national interests did not stall the institutional journey of EU labour and legal migration policies.⁶⁹ The Commission launched a public consultation on the way forward with the publication in 2004 of a Green Paper on an EU approach to managing economic migration. The Green Paper addressed the 'added value' of, and the most appropriate form for, EU rules governing the admission and residence of TCNs in the field of employment.⁷⁰ Several respondents to the open consultation procedure expressed concerns about the suggested sectoral step, featuring a 'worker-by-worker approach'. At that time this included the European Parliament, which was of the opinion that "this legislation should define *an overall regulatory framework of reference*" (emphasis added).⁷¹ The European Economic and Social Committee (EESC)

⁶⁴ European Commission, Communication on an Open Method of Coordination for the Community Immigration Policy, COM(2001) 387, Brussels, 11.7.2001.

⁶⁵ For a critical overview and analysis refer to S. Carrera (2008), *In Search of the Perfect Citizen? The Intersection between Integration, Immigration and Nationality in the EU*, Leiden: Martinus Nijhoff Publishers.

⁶⁶ See European Commission, Proposal for a Council Directive on the conditions of entry and residence for the purpose of paid employment and self-employment activities, COM(2001) 386 final, Brussels, 11.7.2001.

⁶⁷ The proposal foresaw that holders of a "residence permit – worker" would enjoy the same treatment in substance as citizens of the Union at least with regard to certain basic rights (working conditions, access to vocational training, recognition of diploma, social security including healthcare, access to goods and services which are available to the public, including housing and trade union rights). See Article 11 of the proposal. The Proposal for Directive stated, "The latter catalogue of rights is aligned with the catalogue of rights proposed in Article 12 of the Commission proposal for a draft Directive on long-term resident third-country nationals but – in line with the principle that that rights of third-country nationals should be incremental with their length of stay – less exhaustive".

⁶⁸ UK House of Lords, EU Select Committee, Economic Migration to the EU, 14th Report 2005-2006 Session, London, p. 31 (<https://publications.parliament.uk/pa/ld200506/ldselect/lddeucom/58/58.pdf>). See also S. Carrera and M. Formisano (2005), "An EU Approach to Labour Migration – What is the Added Value and the Way Ahead?", CEPS Working Document No. 232, CEPS, Brussels, October.

⁶⁹ S. Carrera, A. Geddes and E. Guild (2017), Conclusions and Recommendations: Towards a Fair Agenda Facilitating Legal Channels for Labour Mobility, in S. Carrera, A. Geddes, E. Guild and M. Stefan (eds), *Pathways towards Legal Migration into the EU: Reappraising Concepts, Trajectories and Policies*, CEPS Paperback, Brussels, pp. 176-182.

⁷⁰ European Commission, Green Paper on an EU approach to managing economic migration, COM(2004) 811 final, Brussels, 1.11.2005. See also Carrera and Formisano (2005), op. cit.

⁷¹ European Parliament Resolution on an EU approach to managing economic migration (COM(2004)0811 – 2005/2059(INI)), point 26.

also expressed its concerns about the implementation of a ‘sectoral approach’ (geared towards highly qualified TCNs) as it would be discriminatory in nature.⁷²

Since then the Commission moved towards the implementation of what has been called in the academic literature a ‘partitioning strategy’, i.e. splitting its original ‘horizontal’ approach into several proposals covering different categories of third-country nationals.⁷³ The resulting picture was outlined in the 2005 Policy Plan on Legal Migration,⁷⁴ which laid down the foundations of the current forms of EU’s legal and labour migration policy, which is explained in Section 1.3 below. The Commission presented two packages of proposals. The first one, in 2007 covered highly qualified workers and a single permit for TCNs to reside and work in the EU, providing a common set of rights and the second one in 2010 - seasonal workers, intra-corporate transferees. Such a sectoral approach has been identified by the literature as the official ‘kick-off’ of the emergence of a hierarchical, differentiated and obscure EU legal system on labour migration that accords a higher degree of rights and working conditions to third-country nationals falling under the legal status of ‘highly qualified or skilled’.⁷⁵

1.2. The ‘Lisbonisation’ of EU Legal Migration Policy and the European Parliament’s Role

The entry into force of the Lisbon Treaty in 2009 constituted a fundamental step in European integration on AFSJ. It consolidated the above-mentioned 2004 Green Paper moving EU cooperation on legal migration to the Community method and recognised the European Parliament’s role as ‘co-owner’ of EU migration policy agenda.⁷⁶ The Treaty not only reconfirmed the shared competence between the EU and its Member States in legal migration. It also incorporated in its legal foundations the Tampere Programme’s milestones and principles.

The EU legal migration *acquis* is based on Title V TFEU titled “AFSJ”. Article 67.2 TFEU establishes that the Union shall establish a common immigration policy “which is fair towards third country nationals”. The precise legal basis for EU legal and economic immigration directives can be found in Article 79 TFEU, which reaffirms the long-standing EU commitment to developing a common policy founded on the fair treatment paradigm. Article 79.2 TFEU calls on the EU to adopt measures including conditions of entry and residence, and the definition of the rights of TCNs legally residing in the EU, “including the conditions governing freedom of movement and of residence in other Member States”.

As we will study in Chapter 2 of this Research Paper, the implementation of this provision must be read in light of the EU Charter of Fundamental Rights (EU CFR). The EU CFR enshrines fairness, non-discrimination and equivalence of working conditions as fundamental rights applicable to *every worker* (irrespective of nationality and migration status), as well as international and regional human rights and labour standards.

The Lisbon Treaty included a new Article 79.5 TFEU, which grants EU Member States exclusive competence to determine volumes of admission or quotas for purposes of employment and self-employment. Nevertheless, this same article has left the door open for the EU to legislate all the remaining facets that characterise legal migration policies for economic or labour considerations.⁷⁷ Except in determining ‘volumes of admission’, Article 79 TFEU provides a window for the EU to move forward on the adoption of shared

⁷² Opinion of the European Economic and Social Committee on the Green Paper on an EU approach to managing economic migration (COM(2004) 811 final) (2005/C 286/05), point 2.1.4

⁷³ A. Geddes and A. Niemann (2015), “Introduction: Conceptualising EU policy on labour migration”, *Cambridge Review of International Affairs*, Vol. 28, No. 4, pp. 523–535.

⁷⁴ European Commission, Policy Plan on Legal Migration, COM(2005) 669, Brussels, 21.12.2005. See also Carrera (2007).

⁷⁵ S. Carrera, A. Faure Atger, E. Guild and D. Kostakopoulou (2011), “Labour Immigration Policy in the EU: A Renewed Agenda for Europe 2020”, CEPS Policy Brief No. 240, CEPS, Brussels.

⁷⁶ S. Carrera, N. Hernanz and J. Parkin (2013), “The ‘Lisbonisation’ of the European Parliament: Assessing Progress, Shortcomings and Challenges for Democratic Accountability in the Area of Freedom, Security and Justice”, Study for the European Parliament, DG IPOL, Brussels.

⁷⁷ Carrera, Geddes and Guild (2017), op. cit.

standards dealing with other administrative aspects of labour migration. As Peers et al. (2012) have highlighted, this provision “would be meaningless unless the EU had a competence to regulate such migration in the first place”.⁷⁸

While the literature has underlined the room for manoeuvre left to EU Member States during the transposition and implementation phases of the EU legal migration directives,⁷⁹ the extent to which Member States’ competence on admission remains intact must be read carefully. The set of EU directives presented in Section 1.3 below provide a clear ‘ground floor’ of EU standards and norms, some of which present provisions benefiting from ‘direct effect’, and below which EU Member States cannot venture in their domestic policies. The Court of Justice of the European Union (CJEU) in Luxembourg has helped in clarifying some their provisions in a number of judgments, further fine-tuning and clarifying the actual scope of the EU legal migration directives.

This has been the case for instance with respect to ‘admission conditions’ or the extent to which these directives oblige Member States to grant a ‘right to admission’ after certain criteria are met by the applicant. In Case C-540/03 *European Parliament v Council* the Court held that Member States are required to grant family reunion upon the fulfilment of the conditions laid down in the Family Reunification Directive 2003/86.⁸⁰ Similarly, in Case C-491/13 *Mohamed Ali Ben Alaya v Bundesrepublik Deutschland*, the CJEU stated that the conditions for admission enshrined in Students Directive 2004/114 were exhaustive and therefore did not allow any extra conditionality by Member States.⁸¹

Furthermore, a less well-known – yet equally crucial – legal base in the area of labour migration is Article 153 TFEU, which falls under the Title of “Social Policy”. Article 153.1 TFEU provides that with a view to achieving goals outlined in Article 151 TFEU, namely the promotion of employment, improved living and working conditions and combating social exclusion, the EU “shall support and complement the activities of the Member States in the...(g) conditions of employment for third-country nationals legally residing in Union territory” (emphasis added). Article 153.2 TFEU has served as the foundation of EU directives such as Directive 89/391 on the introduction of measures to encourage improvements in the safety and health of workers at work, or Directive 2008/94 on the protection of employees in the event of insolvency of the employer. Both directives exclude from their material scope any differential treatment based on residence status. The Court of Justice of the European Union (CJEU) in the 2014 *Tümer* Case confirmed that Directive 2008/94 is not limited to EU nationals and that it covers undocumented workers.⁸²

The democratic scrutiny of the enactment of a common EU legal migration policy through the recognition of the role of the European Parliament as co-legislator was not a result of the Lisbon Treaty, but preceded it to 2004. It was only then that EU Member States agreed to apply ‘in full’ the co-decision procedure – currently known as ‘ordinary legislative procedure’ in the Lisbon Treaty – to this policy area. Since then, the European Parliament (both the Civil Liberties, Justice and Home Affairs Committee (LIBE) and the Employment and Social Affairs Committee (EMPL)) has played a fundamental role as co-legislator in this domain.

The European Parliament has consistently called for an overall regulatory framework.⁸³ The Parliament’s kind of contributions have been reflected during the negotiations and the final forms of all the main EU directives covering labour migration. It is noticeable that during the negotiations the positions between the

⁷⁸ S. Peers, V. Moreno-Lax, M. Garlick and E. Guild (2012), *EU Immigration and Asylum Law (Text and Commentary): Second Revised Edition, Volume 2: EU Immigration Law*, Leiden: Martinus Nijhoff Publishers, p. 13.

⁷⁹ H. Verschueren (2016), “Employment and Social Security Rights of Third Country Labour Migrants under EU Law: An Incomplete Patchwork of Legal Protection”, *European Journal of Migration and Law*, Vol. 18, No. 4, pp. 373-408.

⁸⁰ Case C-540/03, *European Parliament v Council*, European Court of Justice judgment of 27.6.2006.

⁸¹ Case C-491/13, *Mohamed Ali Ben Alaya v Bundesrepublik Deutschland*, European Court of Justice judgment of 10.09.2014.

⁸² Case C-311/13, *Tümer*, EU:C:2014:23337; K. Groenendijk (2015), “Equal Treatment of Workers from third countries: The added value of the Single Permit Directive”, ERA Forum, Springer.

⁸³ European Parliament (2016), European Parliament resolution of 12 April 2016 on the situation in the Mediterranean and the need for a holistic EU approach to migration (2015/2095(INI)).

Commission, the Council (Ministries of Interior) representatives and the European Parliament were rather opposing, particularly as regards the equality of treatment provisions. This was the case in relation to the position held by the EMPL Committee during the negotiations of the proposal for a directive on ICTs. The interviews have revealed that the EMPL Committee took a more ‘*employment and social inclusion*’ approach to this discussion, in comparison to LIBE, as the former was particularly, and consistently, concerned about the equality of treatment provisions in these directives. The EMPL Committee emphasised the need to reduce the differentiation of rights and inequality of treatment applicable to different categories of third-country workers, chiefly those for seasonal employment, in comparison to mobile EU citizens, native workers and highly qualified third-country workers.⁸⁴

1.3. The main components of the EU sectoral approach to legal and labour migration

Since 2004, the EU has adopted several sectoral EU directives covering the conditions for admission and residence, and the rights, of third-country nationals in the Union.⁸⁵ The result is what Verschueren has qualified as a ‘patchwork’ of several EU legislative acts and instruments, each applying to different categories of TCNs.⁸⁶ For the purposes of this Research Paper, we focus on the seven EU directives falling under the scope of ‘legal and labour immigration policy’ and Article 79 TFEU.

As Figure 4 below illustrates, all seven directives provide provisions relevant for employment-related activities. However, only the following four EU directives on legal migration provide common rules and standards for the admission and residence of specific categories of third-country nationals: the EU Blue Card Directive (2009/50/EC);⁸⁷ the Intra-Corporate Transferees Directive (2014/66/EU);⁸⁸ the Seasonal Workers Directive (2014/36/EU);⁸⁹ and the Students and Researchers Directive (2016/801).⁹⁰ The Single Permit Directive (2011/98/EU) does not provide for ‘first entry’ admission conditions.⁹¹

Furthermore, the EU Directives on the long-term residence status (2003/109/EC)⁹² and family reunification (2003/86/EC),⁹³ while not qualifying as legal acts covering access for employment-related reasons, provide certain clauses of direct relevance for work-related rights and conditions. The Directive for Family Reunification (2003/86/EC) provides a legal entry for TCN family members. It defines rights of family members and the rules for the sponsors, and – despite its many limitations – enshrines for the first time an EU right to family reunification. The Long-Term Residents Directive (2003/109/EC) allows TCNs who have

⁸⁴ J. Fudge and P. Herzfeld Olsson (2014), “The EU Seasonal Workers Directive: When Immigration Controls Meet Labour Rights”, *European Journal of Migration and Law*, Vol. 16, No. 4, pp. 439-466; see also P. Minderhoud and T. Strik (eds) (2015), *The Single Permit Directive: Central Themes and Problem Issues*, Nijmegen: Wolf Legal Publishers.

⁸⁵ While falling outside the scope of this Research Paper, it is worth signalling that this ‘internal’ policy and legal framework has developed in parallel to third-country cooperation instruments and agreements, often denominated as the external dimensions of EU migration policy. This has added further complexity to the issue via the adoption of a series of EU international agreements, such as Association Agreements, or policy (non-legally binding) tools like the so-called ‘Mobility Partnerships’. See K. Eisele, 2014b.

⁸⁶ Verschueren (2016), op. cit.

⁸⁷ Directive 2009/50/EC on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment, 25 May 2009, OJ L 155, 18.6.2009, pp. 17–29.

⁸⁸ Directive 2014/66/EU on the conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer, 15 May 2014, OJ L 157, 27.5.2014, pp. 1–22.

⁸⁹ Directive 2014/36/EU on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers, 26 February 2014, OJ L 94, 28.3.2014, pp. 375–390.

⁹⁰ Directive (EU) 2016/801 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, 11 May 2016, OJ L 132, 21.5.2016, pp. 21–57.

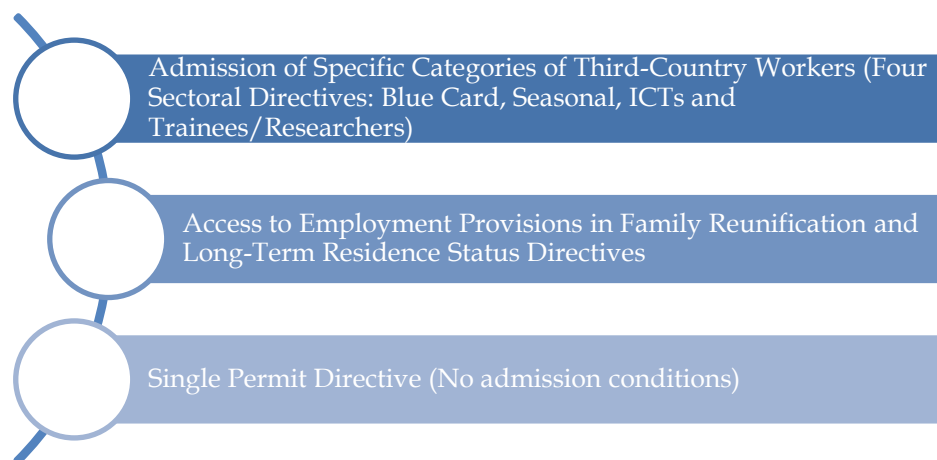
⁹¹ Directive 2011/98/EU on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State, 13 December 2011, OJ L 343, 23.12.2011, pp. 1–9.

⁹² Directive 2003/109/EC concerning the status of third-country nationals who are long-term residents, 25 November 2003, OJ L 16, 23.1.2004, pp. 44–53.

⁹³ Directive 2003/86/EC of 22 September 2003 on the right to family reunification, OJ L 251, 3.10.2003, pp. 12–18

legally and continuously resided in a Member State for five years to obtain “EU long-term resident” status and to enjoy rights equivalent to those of EU citizens.

Figure 4. Typology of EU instruments on employment of third-country nationals and their rights



Source: Authors, 2018.

1.3.1. The EU Blue Card, Intra-Corporate Transferees and Researchers

The EU Blue Card Directive (2009/50/EC) aims to entitle highly qualified migrant workers with rights similar to those of EU citizens and provides the opportunity to obtain EU citizenship, though many gaps remain (see Chapter 2 of this Research Paper for a more detailed overview of this directive). It established a common fast-track and flexible procedure for the admission of those third-country nationals considered to be ‘highly qualified employees’ and their family members.

The academic literature reflects concerns about the disparity of treatment resulting from the system devised in the EU Blue Card Directive. In the name of making the EU ‘more attractive’, the EU Blue Card Directive has been said to institutionalise an unjustified differential treatment between those few TCNs who meet the conditions for being a EU Blue Card Holder and the remaining third-country nationals, resulting in discrimination in labour rights and working conditions.⁹⁴

One of the political priorities of the Juncker Commission was the revision of the EU Blue Card Directive, as it was considered ‘ineffective’ in light of unsatisfactory Member States’ implementation and the very few total number of EU Blue Cards issued. The Commission presented a new legislative proposal in 2016.⁹⁵ Both the Commission and the European Parliament, following the findings of the Commission’s Impact Assessment,⁹⁶ aimed to streamline the directive to increase its EU ‘added value’. The proposal’s main

⁹⁴ See for instance Frank and Spehar (2010); see also E. Guild (2011), “Equivocal Claims? Ambivalent Controls? Labour Migration Regimes in the European Union”, in E. Guild and S. Mantu (eds), *Constructing and Imagining Labour Migration: Perspectives of Control from Five Continents*, Farnham: Ashgate, pp. 207–228; B. Fridriksdottir (2017), *What Happened to Equality? The Construction of the Right to Equal Treatment of Third Country Nationals in European Union Law on Labour Migration*, Leiden: Martinus Nijhoff.

⁹⁵ European Commission (2016), Proposal for Directive, on the conditions of entry and residence of third-country nationals for the purposes of highly skilled employment, COM(2016) 378, Brussels, 7.6.2016.

⁹⁶ European Commission (2016), Communication on the implementation of Directive 2009/50/EC on the conditions of entry and residence of third-country nationals for the purpose of highly qualified employment (“EU Blue Card”), COM(2014) 287 final, Brussels, 22.5.2014; European Parliament (2015), European Parliamentary Research Service, Briefing Implementation Appraisal, The EU Blue Card Directive, December (www.europarl.europa.eu/RegData/etudes/BRIE/2015/558766/EPRS_BRI%282015%29558766_EN.pdf).

objective was to limit the running of parallel national schemes, which was previously identified by the academic literature as one of the main sources of inefficiency of the EU Blue Card Directive.⁹⁷

The new proposal also seeks to increase possibilities for intra-EU mobility and reduce the current admission and residency criteria. Both goals include, among other innovations: lowering salary threshold/levels, reducing options for conducting national labour market tests, shortening periods of notification and reducing administrative fees, and specific provisions for facilitating family member residence permits, access to the labour market and long-term residence status.

At the time of writing the negotiations on the EU Blue Card Directive are ongoing and seem to be frozen on a number of essential aspects,⁹⁸ including one of the revision EU Blue Card key objectives, i.e. the goal of increasing the 'harmonising effect' in key components of the EU Blue Card Scheme through the adoption of 'an EU-wide admission system'. The Commission's initiative would mean that, unlike the current EU Blue Card system, EU Member States would not be allowed to keep their parallel national schemes that target highly skilled and issue national permits. The goal would be to establish a 'truly EU-wide scheme for highly qualified', where Member States would be required to grant only an EU Blue Card and not a national permit. This is proven to be one of the most controversial aspects in the Council, with Member States wanting to keep their national schemes intact.

Two other very important directives: the Intra-Corporate Transferees Directive (2014/66/EU), which covers highly qualified TCNs (and their families) employed outside the EU by international corporations and allows for 'transferring' such workers to an EU Member State branch for a maximum of three years; the Students and Researchers Directive (2016/801), which covers the conditions of entry and residence of TCNs for the purposes of research, studies, training, voluntary service, pupil exchange schemes or educational projects and au pairing. The Students and Researchers Directive was a recast of Directives 2004/114/EC on students and 2005/71/EC on researchers, which were merged together. Researchers are understood to be 'highly qualified workers'. This directive also covers au pairs but is understood as a cultural exchange programme rather than a legal channel for migrant domestic workers.

In 2016, EU Member States issued approximately 56,000 permits (6.5% of all work-related permits) to the category of highly skilled workers that include EU schemes – under Blue Card Directive (1% of all work-related permits), Researchers (1.3% of all work-related permits) and under national schemes for highly skilled (4.2% of all work-related permits) of all work-related permits to highly skilled workers and researchers using this EU scheme.⁹⁹ Most permits were issued by the Netherlands, Germany, Denmark, Sweden and France. While two EU directives – the EU Blue Card Directive and the Students and Researchers Directive – had been specifically developed to attract 'highly skilled migrants' to the EU, Figures 5 and 6 below illustrate that most EU Member States (with the exception of Germany and France) use their own national schemes for highly skilled migrants.

It is important to highlight for the purpose of the Research Paper that the actual total number of third-country nationals benefiting from these national highly skilled schemes is equally low in total numbers when compared to the substantially higher total number of permits issued for other 'skill levels' (see Figure 5). In the written comments drafted by the Commission in response to the final draft of this Research Paper it was added, that: "It is important to recognise here that several EU MS do not distinguish between different skill levels, so the data on national skilled workers is partial".¹⁰⁰ The European Commission's 2016 Impact Assessment accompanying the new EU Blue Card proposal showed how "the very low overall numbers of

⁹⁷ K. Eisele (2013), "Why Come Here If I Can Go There? Assessing the 'Attractiveness' of the EU Blue Card Directive for Highly Qualified Immigrants", CEPS Working Document No. 60, Brussels.

⁹⁸ www.europarl.europa.eu/legislative-train/theme-towards-a-new-policy-on-migration/file-revision-of-the-blue-card-directive.

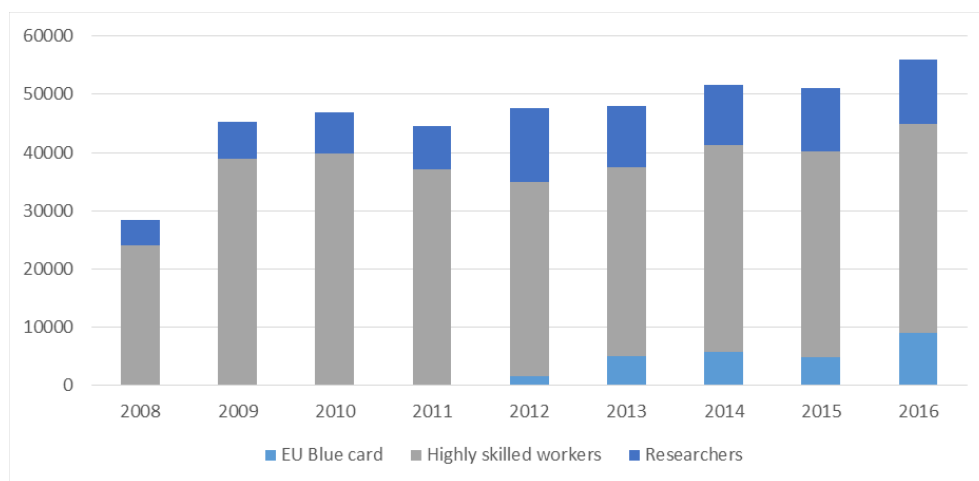
⁹⁹ Eurostat (2018) Eurostat Databasse, migr_resocc Table for 2016. (<https://ec.europa.eu/eurostat/web/asylum-and-managed-migration/data/database>).

¹⁰⁰ European Commission (2018) Comments of DG HOME B1 Unit on this Research Paper, received on 11 of December, 2018, p. 4.

permits issued to highly skilled foreign workers clearly show that neither the national schemes nor the EU Blue Card – and the two combined – are sufficiently effective in attracting highly skilled workers”.¹⁰¹

Member States interviewed for the purpose of this Research Paper argued that national schemes better meet the needs of individual Member States. For instance, in the Netherlands – the largest receiving country for highly skilled migrants in the EU based on the number of issued residence permits – employers have to fulfil only one criterion to hire a highly skilled migrant – the wage threshold, which is lower than the Blue Card’s threshold, without additional requirements, such as a labour market test or skill recognition. Interviews have revealed that in the Netherlands employers willing to employ TCNs need to be registered as ‘Trusted Employers’ and can be checked by the relevant authorities.¹⁰² Similarly, Belgian and Polish authorities claimed they have adequate national schemes for meeting their labour market needs.¹⁰³ Interviews with representatives from Portugal and Belgium revealed that they are more open to having a more harmonised EU scheme, provided that it would not be too burdensome on the applicants and domestic administrations.¹⁰⁴

Figure 5. Issued residence permits for highly skilled workers and researchers



Source: Eurostat, migr_resocc.

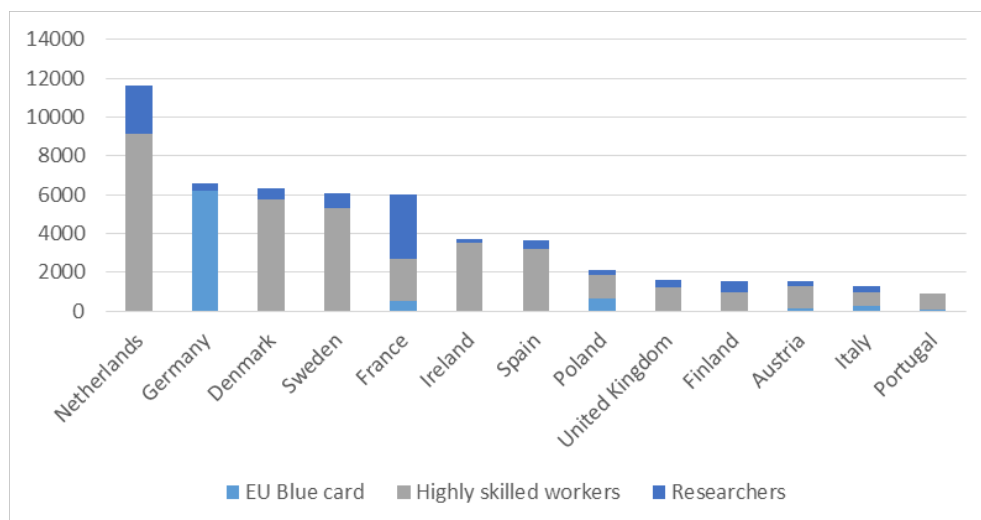
¹⁰¹ Commission Staff Working Document (2016), Impact Assessment accompanying Proposal for Directive, on the conditions of entry and residence of third-country nationals for the purposes of highly skilled employment, COM(2016) 378, Brussels, 7.6.2016, SWD(2016) 193 final, p. 7.

¹⁰² Interview with Dutch Official, 12.03.2018.

¹⁰³ Interview with Belgium Official, 07.02.2018 and Interview with Polish Official, 26.03.2018.

¹⁰⁴ Interview with Belgium Official, 07.02.2018 and Interview with Portuguese Official, 12.02.2018.

Figure 6. Issued residence permits for highly skilled workers and researchers in 2016, by Member State



Source: Eurostat, migr_resocc.

1.3.2. Seasonal Workers

The proposal for the EU Directive on Seasonal Workers initially aimed at “certain sectors, mainly agriculture, building and tourism, where many immigrants work illegally under *precarious conditions*.”¹⁰⁵ In the negotiations, there were invoked certain prerequisites for the sector to be covered by the category of ‘seasonal work’. The sector has to include “well-defined jobs, normally fulfilling a traditional need in the Member State in question”.¹⁰⁶ However, later it was decided to include a following definition:

‘seasonal worker’ means a third-country national who retains his or her principal place of residence in a third country and stays legally and temporarily in the territory of a Member State to carry out an activity dependent on the passing of the seasons, under one or more fixed-term work contracts concluded directly between that third-country national and the employer established in that Member State.¹⁰⁷

Such definitions still provides a margin of appreciation for the EU Member States to decide which are the sectors depending on ‘passing seasons’ and to exclude sectors such as construction and transport do not qualify under the category of ‘seasonal’ work. It was an issue of particular debate during the negotiations of the directive.

The formal adoption of the directive took place over three and half years,¹⁰⁸ which showed “Member States’ hesitance to open their labour markets for low skilled TCNs while recognizing the need for such workers”.¹⁰⁹ According to the interviewees involved in these negotiations, consensus in the Council was eventually reached after the public outcry over Bangladeshi strawberry pickers.¹¹⁰ Seasonal workers from Bangladesh were shot by farm workers in Greece after they had demanded their pay, which was not received in some

¹⁰⁵ Proposal for a Directive of The European Parliament and of the Council on the conditions of entry and residence of third-country nationals for the purposes of seasonal employment, COM(2010) 379 final, Brussels, 13.7.2010.

¹⁰⁶ Ibid.

¹⁰⁷ Directive 2014/36/EU of the European Parliament and of the Council of 26 February 2014 on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers, Article 3 “Definitions”.

¹⁰⁸ Whereas the proposal for this directive on seasonal employment was tabled in July 2010, political agreement was achieved only in October 2013.

¹⁰⁹ C. Rijken (2014), “Preventing exploitation through the seasonal workers directive”, conference paper, UACES 44th Annual Conference, Cork, 1-3 September (www.uaces.org/documents/papers/1401/rijken.pdf).

¹¹⁰ Interview with European Parliament, MEP active on legal migration directives (1), 31.01.2018 and MEP active on legal migration directives (2) 28.02.2018.

cases for more than six months – at least 27 were injured.¹¹¹ This was just one of numerous cases of labour exploitation across the EU, including in countries with generally excellent human rights records, such as Sweden.¹¹²

Looking at the aggregate numbers of issued permits for seasonal work (as classified by Eurostat) can be, however, misleading.¹¹³ For instance, in 2014-16, *over 95%* of all permits appear to have been issued by Poland.¹¹⁴ In an interview, a Polish official clarified that such permits are mainly issued to Ukrainian and Belarusian short-term migrants who fall under a specific national short-term migration scheme based on employer declarations (See Figure 7).¹¹⁵ In the written comments drafted by the Commission in response to the final draft of this Research Paper it was added, also that these numbers does not fall under Seasonal Workers Directive as “the Directive was adopted in 2014, deadline for transposition was September 2016, the first year of collection of statistics of authorisations issued under the Directive was 2017 (they were published mid-2018).”¹¹⁶

In 2016, apart from Poland, only Italy, Sweden, Spain, and France issued more than 1,000 seasonal work permits. Low take-up of the Seasonal Workers Directive by other Member States (only 12 EU countries have ever reported issuing a seasonal permit over 2008-16) relates to the low demand for such a scheme. For example, a Dutch official explained that seasonal work needs at the moment are satisfied by EU citizens who come from Central and Eastern Europe and therefore the Dutch quota for seasonal work is zero.¹¹⁷ A similar situation was reflected in Belgium and Poland, where seasonal needs in the agriculture, tourism and hospitality sectors are low.¹¹⁸ Such needs, however, were felt in Portugal, where tourism and agriculture are important sectors and depend on passing seasons.¹¹⁹ Moreover, Member States can regulate the admission of similar workers under their own national schemes. While parallel national schemes are not allowed under the Seasonal Workers Directive, Member States still resort to national rules in situations beyond the directive’s scope.

¹¹¹ R. Patel, (2013), “Greek farm staff ‘shoot unpaid strawberry pickers’”, *The Telegraph*, 18 April (www.telegraph.co.uk/news/worldnews/europe/greece/10003992/Greek-farm-staff-shoot-unpaid-strawberry-pickers.html).

¹¹² E. Geddie (2013) “The EU must do more to end the exploitation of seasonal workers”, *Equal Times*, 11 December (www.equaltimes.org/the-eu-must-do-more-to-end-the?lang=en#.Ww77eUiFOUk).

¹¹³ As explained by Eurostat “Seasonal Workers data collection under Art 26 Directive 2014/36/EU” only began in 2017 (see Eurostat, Residence permits (migr_res), Reference Metadata in Euro SDMX Metadata Structure (ESMS), http://ec.europa.eu/eurostat/cache/metadata/en/migr_res_esms.htm).

¹¹⁴ The authors highlight that it is not clear why Eurostat classifies these permits (which refer to a specific Polish scheme) under seasonal work, as Poland still has to transpose the Seasonal Workers Directive in 2018.

¹¹⁵ Interview with Polish Official, 26.03.2018.

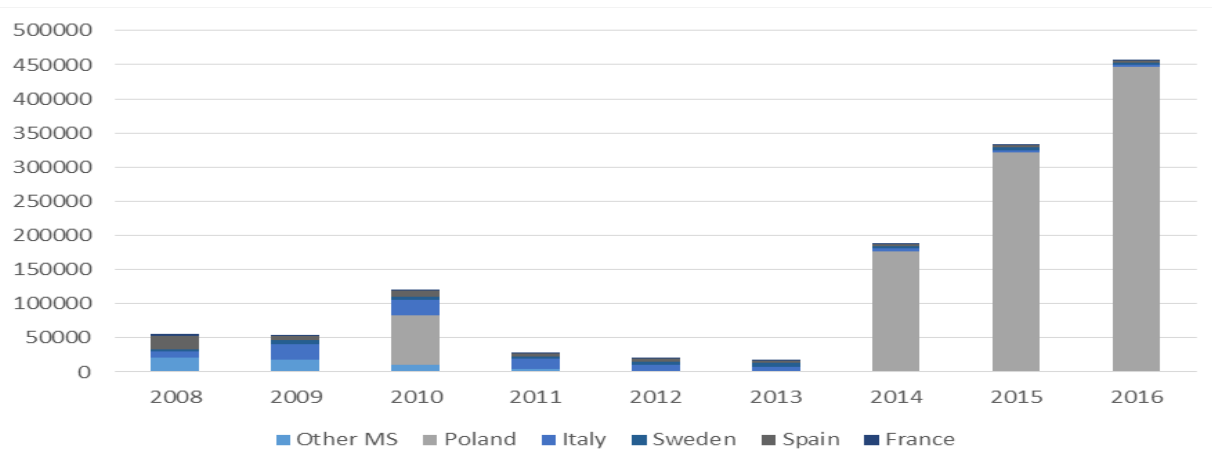
¹¹⁶ European Commission (2018) Comments of DG HOME B1 Unit on this Research Paper, received on 11 of December, 2018, p. 5.

¹¹⁷ Interview with Dutch Official, 12.03.2018.

¹¹⁸ Interview with Belgium Official, 07.02.2018 and interview with Polish Official, 26.03.2018.

¹¹⁹ Interview with Portuguese Official, 12.02.2018.

Figure 7. Issued residence permits for seasonal work



Source: Eurostat, migr_resocc.

1.3.3. Single Permit Directive

The Single Permit Directive (2011/98/EU) establishes common EU rules for application for a single combined residence/employment permit. Most important, it contains equal treatment provisions for all third-country nationals who have this type of permit. It is referred to as a 'framework' or 'horizontal' directive because it covers third-country nationals who are also admitted to a Member State according to national migration law on various national schemes.

In 2016, 22% of all issued permits fell under the Single Permit Directive.¹²⁰ The number of permits varied across the EU (see Figure 8 below). The rather low number (if we expect that majority if not all permits to third country nationals to be issued via this scheme) of single permits could be linked to incorrect transposition and implementation of the directive. The countries that issue the highest percentage of single permits were among the first ones to comply – in Estonia, Latvia, France, Croatia and Sweden, single permits already represented over 80% of all issued permits. Those Member States with low percentages were, as of 2014-15, still receiving infringement notifications. Fifteen Member States were late in complying with the directive: Austria, Belgium, Czech Republic, Croatia, Cyprus, Greece, Finland, Hungary, Italy, Lithuania, Malta, Romania, Spain, Slovenia and the Netherlands.

As of 2015 the last infringement procedures were closed against Greece, Spain, Lithuania, Slovenia and Spain, as they had eventually transposed the Single Permit Directive.¹²¹ As of 2017, Belgium remained the only Member State that failed to communicate the full transposition of the Single Permit Directive and was referred to the European Court of Justice.¹²² Interviews with a Belgian official revealed that issues arose due to the complex institutional set-up and separation of powers between federal, regional and communal levels: the federal level was responsible for residence permits and the regional level for work permits.¹²³ The

¹²⁰ Directive 2011/98/EU of the European Parliament and of the Council of 13 December 2011 on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State.

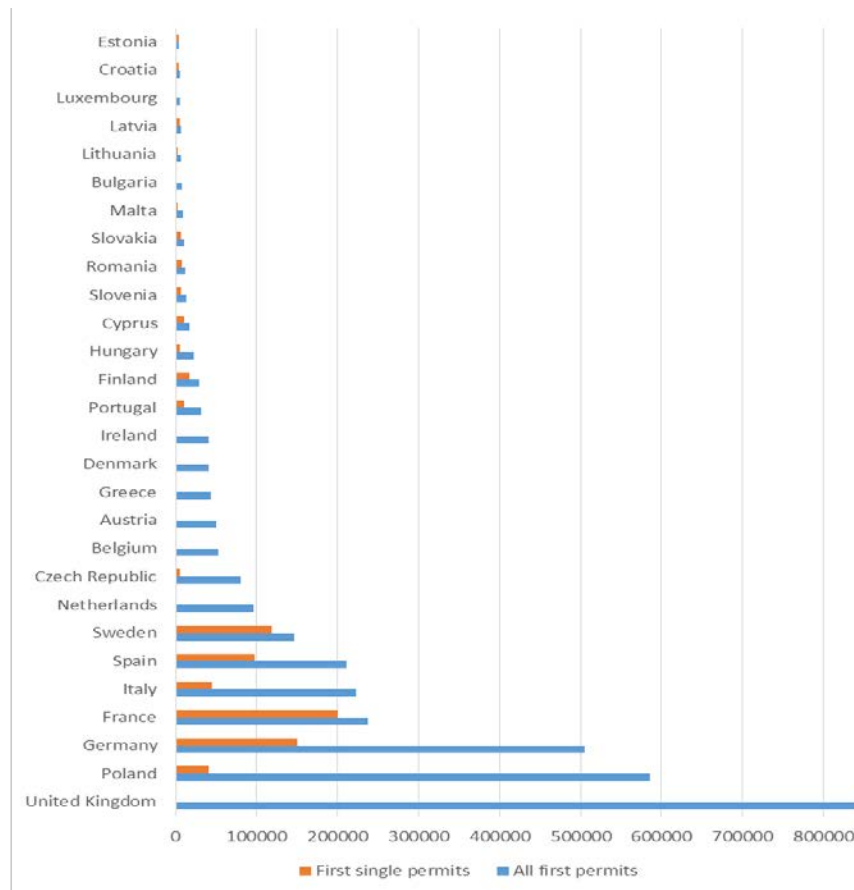
¹²¹ European Commission, Database of Infringement Procedures in the area of Migration and Integration, https://ec.europa.eu/home-affairs/what-is-new/eu-law-and-monitoring/infringements_en?country=All&field_infringement_policy_tid=1628&field_infringement_number_title=/.

¹²² European Commission (2017) Notification of Infringement to Belgium, No. 2014/0230 for failure to communicate national measures in full transposition of Directive 2011/98/EU - Single Permit, 13/07/2017. http://europa.eu/rapid/press-release_IP-17-1953_en.htm.

¹²³ Interview with Belgium Official, 07.02.2018.

infringement procedures led to Belgium's Sixth State Reform, which shifted the responsibilities for issuing single residence permits from the federal to the regional level.¹²⁴

Figure 8. Issued residence permits in 2016, by member state



Source: Eurostat, migr_resfirst

1.3. Codification and the 'Fitness Check' of EU legal migration policy

The idea to adopt an 'EU immigration code' has been put forward by the Commission on several occasions. The first one was in the 2009 Communication on "An area of freedom, security and justice serving the citizen: Wider freedom in a safer environment", which stipulated,

The EU must strive for a uniform level of rights and obligations for legal immigrants comparable with that of European citizens. These rights, consolidated in an immigration code, and common rules to effectively manage family reunification are essential to maximise the positive effects of legal migration for the benefit of all stakeholders and will strengthen the Union's competitiveness.¹²⁵

It reappeared in the Communication on "Delivering an area of freedom, security and justice for Europe's citizens: Action Plan Implementing the Stockholm Programme" of April 2010,¹²⁶ which stated,

Further steps could be taken to codify and streamline the substantive conditions for admission, as well as of the rights of third country nationals. This would be a step towards a 'single area of

¹²⁴ J. Maes (2017).

¹²⁵ European Commission (2009), An area of freedom, security and justice serving the citizen: Wider freedom in a safer environment, COM(2009) 262, Brussels, 10.6.2009.

¹²⁶ European Commission (2010), Delivering an area of freedom, security and justice for Europe's citizens: Action Plan Implementing the Stockholm Programme, COM(2010) 171 final, Brussels, 20.4.2010.

migration', with the aim of facilitating intra-EU mobility of third country nationals, including through mutual recognition of national permits.¹²⁷

Despite these reiterated calls, an EU immigration code has not materialised. Member States' hesitation to codify rules in this area have also by and large predominated. During the last eight years, no further reference to a 'code' has been made in any subsequent Commission policy document. The academic literature has however emphasised and recognised the positive effects that such consolidation and mainstreaming of the EU legal and labour migration *acquis* would entail. A code could provide not only a more ambitious harmonisation than the currently existing rules provide.¹²⁸ It would have the potential to overcome the current sectoral nature of EU policy and seek to put into practice the EU fairness and non-discrimination principle through a more uniform level of rights and working conditions for all third-country nationals in light of international, regional and EU standards.¹²⁹

Instead, the Commission called for the above-mentioned 'Legal Migration Fitness Check', which is still currently in preparation. Still, some preliminary results can be highlighted based on publicly available documents related to the 'Fitness Check',¹³⁰ inputs and summaries of public consultations,¹³¹ as well as non-publicly disclosed information obtained during semi-structured interviews with European Commission and European Parliament representatives.¹³² When examining 'internal coherency' gaps in the EU legal migration *acquis*, the European Commission in its preliminary finding of the Fitness Check has acknowledged that specific equal treatment provisions in each sectoral directive, as well as their specific restrictions, including the length of stay, re-entry, etc. leads to fragmentation and incoherences (see Chapter 3).

The preliminary findings of the Commission's Fitness Check confirm that the existing EU policy and legal setting dealing with the conditions of entry and residence of TCNs, and particularly those instruments covering employment-related aspects, are characterised by fragmentation, differentiation and multi-layered migratory statuses, with national schemes for highly skilled workers often running in parallel with EU Blue Card Scheme. The interviews confirmed that, this differentiation does not seem justified in all cases and sometimes seem to have been rather the result of negotiations with Member States in the Council of the EU.¹³³ The interviewees representing European Parliament and International organisations went a step further, stating that there is a clear indication of the existence of unjustified differential treatment which amounts to unlawful discrimination against third-country nationals.¹³⁴

¹²⁷ Ibid., p. 4.

¹²⁸ S. Peers (2012), "An EU Immigration Code: Towards a Common Immigration Policy", *European Journal of Migration and Law*, Vol. 14, No. 1, pp. 33–61; S. Peers (2014), "An EU Immigration Code: Towards a Common Immigration Policy", in S. Carrera, E. Guild and K. Eisele (eds), *Rethinking the Attractiveness of EU Labour Immigration Policies – Comparative Perspectives on the EU, the US, Canada and Beyond*, CEPS Paperback, CEPS, Brussels, pp. 100–110.

¹²⁹ Kostakopoulou (2017), op. cit.

¹³⁰ European Commission (2015), "Regulatory Fitness and Performance Programme (REFIT) – State of Play and Outlook – REFIT Scoreboard", Commission Staff Working Document, SWD(2015) 110 final, annexed to the Communication on Better Regulation for Better Results – An EU agenda, COM(2015) 215 final, Strasbourg, 19.5.2015; European Commission (2016), "Evaluation Roadmap – REFIT Legal Migration Fitness Check", Working Document. (https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/legal_migration/2016_home_199_fitnesscheck_legal_migration_en.pdf); European Commission (2017), "Fitness Check Legal Migration: Consultation Strategy", Brussels, 01.02.2017 (https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/legal_migration/fitness_check_legal_migration_-_consultation_strategy_1.2.2017_en.pdf).

¹³¹ European Commission (2017), Official website for Public Consultation. 17.09.2017 (https://ec.europa.eu/home-affairs/content/consultation-european-unions-eu-legislation-legal-migration-non-eu-citizens-fitness-check-eu_en); European Commission (2017), Legal Migration Fitness Check, Summary of Replies to the public consultation on legal migration by non-EU citizens (https://ec.europa.eu/home-affairs/sites/homeaffairs/files/e-library/documents/policies/legal-migration/summary_of_replies_en.pdf).

¹³² Interviews with European Commission (1), (2), (3).

¹³³ Interviews with European Commission (1), (2), (3).

¹³⁴ Interview with International Labour Organisation 09.03.2018; Interview with UN Special Procedures/Rapporteur

To conclude, one of the key findings emerging from this Chapter is that the EU sectoral approach to legal migration leads to inequality in the treatment of different administrative categories (statuses) of third-country workers, and between these workers and EU citizens. This leads to a 'differential treatment by design' in EU policy, according to which TCNs are subject to differential levels of labour standards and working conditions depending on whether they qualify and meet all the conditions for holding an EU highly qualified/skilled status. However, it was highlighted in the written comments drafted by the Commission in response to the final draft of this Research Paper that "this is generally not in line with the conclusions of the Fitness Check".¹³⁵

This analysis begs the question as to whether the differential treatment which is left 'by design' in EU legal and labour migration policy is unjustified and is tantamount to unlawful discrimination. This is particularly crucial in cases where discrimination may become 'systematic' or institutional across EU Member States. Chapters 2 and 3 of this Research Paper examine the main benchmarks for conducting this 'legality check', and identify the main challenges and open questions that the current EU framework poses to international and regional human rights and labour standards.

23.02.2018. Interview with European Parliament, MEP active on legal migration directives (1) , 31.01.2018 and MEP active on legal migration directives (2) 28.02.2018.

¹³⁵ European Commission (2018) Comments of DG HOME B1 Unit on this Research Paper, received on 11 of December, 2018, p. 5.

CHAPTER 2: INTERNATIONAL, REGIONAL AND EU STANDARDS FOR ASSESSING INDIVIDUAL COSTS: IMPACTS ON RIGHTS AND LABOUR CONDITIONS OF THIRD-COUNTRY WORKERS

KEY FINDINGS

- Equality of treatment and non-discrimination regarding labour and working conditions among workers, and between foreign and national workers, is a main principle in international, regional and EU human rights and labour standards.
- Despite Member States' varying ratification of international and regional instruments, these are considered sources of standards that can be employed as benchmarks for this study because they are designed to manage labour migration and ensure adequate protection for migrant workers.
- Worker qualification under EU law takes precedence over immigration status at times of upholding the obligation to guarantee fair and just working conditions in the EU legal system.

Although this study covers 'legal migration' encompassing not only third country nationals coming for purposes of employment, but also for studies and family reunification. Nevertheless, the right to work and employment related conditions present us with the context for cross-comparison. Including the right to work for family members and for students that have graduated. Therefore, labour related international, regional and EU standards are further elaborated.

2.1. Key human rights and labour standards of migrant workers

The lawfulness of inequality of treatment among TCNs, and between them and national workers, needs be determined in light of existing international, regional and EU human rights and labour standards.¹³⁶ One of the main principles of these standards is that of equality of treatment and non-discrimination regarding labour and working conditions among workers, and between foreign and national workers. Any limitation or derogation from that principle applied by States must be duly justified and proportionate, necessary and legitimate, both in goals and impacts. There are three major sources of standards that apply to every worker, including TCNs in the EU:

First, *international labour law*: The International Labour Conference of the International Labour Organisation (ILO) adopted a number of Conventions and Recommendations, which outline the minimum international standards in the area of labour rights. These international labour standards apply to TCNs unless they express otherwise.

Second, *international human rights law*: The International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR) and other international Covenants as well as the Universal Human Rights Declaration recognise a set of rights applicable to 'everyone' under the effective jurisdiction of the country, including TCN workers and their family members. This includes the right to work, fair wages and adequate working conditions, and covers migrant workers.¹³⁷

¹³⁶ This Chapter does not cover the well-developed international, regional and EU standards covering the rights of refugees, asylum seekers and beneficiaries of subsidiary protection.

¹³⁷ B. Frioriksdottir (2018), "Rights at Work", in E. Guild, S. Grant and K. Groenendijk (eds), *Human Rights of Migrants in*

Third, *regional human rights law*: This mainly relates to Council of Europe (CoE) standards, chiefly the European Convention of Human Rights and Fundamental Freedoms (ECHR), as interpreted by the European Court of Human Rights, the (Revised) European Social Charter and the various human rights bodies monitoring the application of these instruments by States. This is the case, for instance, of the European Commission against Racism and Xenophobia (ECRI),¹³⁸ whose main task is to combat racism, racial discrimination, xenophobia, anti-Semitism and intolerance from the perspective of the protection of human rights, in the light of the ECHR, its additional protocols and related case law. The ECRI country monitoring mechanism includes amongst its themes national integration policies, including those concerning the labour market, from the perspective of non-discrimination. Other CoE instruments that are used as sources of standards for this Research Paper include the European Convention on Establishment and the European Convention on the Legal Status of Migrant Workers, which concern treatment of migrant workers authorised to work and reside in a CoE Member State and who are nationals of a CoE Member State party of the agreements. The European Convention on Establishment served as the basis for developing EU norms and other CoE standards in this field.¹³⁹

These human rights and international labour law standards are not just ‘aspirational’ in nature, or a question of subjective or personal choice. Member States have obliged themselves willingly to comply with a majority of these standards in their national employment and migration policies. The benchmarks presented in this Chapter also take into account clarifications or interpretations offered by Treaty bodies which, while not having a legally binding nature, constitute authoritative sources of international law for interpreting and assessing the legality of states parties’ domestic policies towards third-country nationals.

As Table 5 shows, the ratification of these international instruments varies among EU Member States, studied in the scope of this Research Paper (see Annex 1 Detailed methodology for the justification of this sample). A case in point is the 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (also known as the Migrant Workers Convention) (ICRMW). None of the EU Member States to date has signed or ratified the International Convention of the Rights of Migrant Workers and their Family Members (see Table 5). However, as correctly pointed out by Guild et al. (2018), this does not mean that States can escape their pre-existing obligations to protect TCNs’ rights in light of other UN legally binding treaties whose scope cover non-nationals and migrant workers, such as the ICESCR,¹⁴⁰ or those laid down in ILO instruments. Furthermore, consistency with international standards is one of the criteria for good governance in migration, and the framework of international human rights and labour standards is the source for most policy measures that are designed to manage labour migration and ensure adequate protection for migrant workers.¹⁴¹ Even countries of destination that are not ready to adopt the international and regional standards are urged to use these minimum norms when they are developing their national labour migration regulations.¹⁴² Therefore, even though not all of these international instruments have been widely ratified, they can still serve as a useful tool for benchmarking.¹⁴³

the 21st Century, London: Routledge Focus, pp. 58-66.

¹³⁸ ECRI is a human rights body of CoE which monitors problems of racism, xenophobia, antisemitism, intolerance and discrimination on grounds such as “race”, national/ethnic origin, colour, citizenship, religion and language (racial discrimination); it prepares reports and issues recommendations to Member States. For more information refer to www.coe.int/t/dghl/monitoring/ecri/default_en.asp.

¹³⁹ For more details see R. Cholewinski (2004), “The Legal Status of Migrants Admitted for Employment. A comparative study of law and practice in selected European States”, Committee of experts on the legal status and rights of immigrants, Council of Europe Publishing, p. 15.

¹⁴⁰ E. Guild, S. Grant and K. Groenendijk (eds) (2018), *Human Rights of Migrants in the 21st Century*, London: Routledge Focus, p. 7.

¹⁴¹ International Labour Organization (2010), “International labour migration. A rights-based approach”, Geneva, International Labour Office, p. 146.

¹⁴² Ibid, p. 137.

¹⁴³ Ibid.

Table 5. Overview of EU Member States' (selected for the purpose of this study) participation

	BE	BG	DE	ES	FR	LT	NL	PL	PT
UN									
ICCPR	R	R	R	R	R	R	R	R	R
ICESRC	R	R	R	R	R	R	R	R	R
ICRMW	N	N	N	N	N	N	N	N	N
ILO									
Convention on Social Equality of Treatment – No. 118	N	N	R ¹⁴⁴	N	R ¹⁴⁵	N	N	N ¹⁴⁶	N
Convention on Equality of Treatment (Accident Compensation) – No. 19	R	R	R	R	R	R	R	R	R
Convention on Maintenance of the Social Security Rights – No. 157	N	N	N	R	N	N	N	N	N
Convention on Migration for Employment (Revised) – No. 97	R	N	R	R ¹⁴⁷	R	N	R	N	R
Convention on Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers – No. 143	N	N	N	N	N	N	N	N	R
Convention on Discrimination (Employment and Occupation) – No. 111	R	R	R	R	R	R	R	R	R
CoE									
European Convention on Social Security	R	N	N	R	S	N	R	N	R
European Agreement on Regulations Governing the Movement of Persons between Member States of the CoE	R	N	R	R	R	N	R	N	R
European Convention on Establishment	R	N	R	N	S	N	R	N	
European Social Charter (Revised) – CET 163	R	R	S	S	R	R	R	S	R
European Convention on the Legal Status of Migrant Workers	S	N	S	R	R	N	R	N	R
4th Protocol ECHR	R	R	R	R	R	R	R	R	R
12th Protocol ECHR	S	N	S	R	N	S	R	N	R

Notes: R (Ratified); S (Signed); N (Not Signed).

Source: Authors, 2018.

In addition, Council of Europe, European Social Charter (Revised), Article 19 on “The right of migrant workers and their families to protection and assistance” is the object of the greatest number of reservations.

¹⁴⁴ Each Member State may accept the obligations of this Convention in respect of any one or more of the branches of social security for which it has in effective operation legislation covering its own nationals within its own territory (Article 2). For more information on the accepted branches by the different Member States, see

www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312263.

¹⁴⁵ Ibid.

¹⁴⁶ The Netherlands ratified the ILO Convention on Social Equality of Treatment (No. 118) in 1964 and denounced it in 2004.

¹⁴⁷ France has excluded the provisions of Annex II.

Ratifying parties had the possibility to accept separate provisions applicable to “legally residing” third-country nationals (see Table 6).

Table 6. Acceptance of clauses of Article 19 of the European Social Charter (Revised)

	BE	BG	DE	ES	FR	LT	NL	PL	PT
Acceptance of Article 19 on “The right of migrant workers and their families to protection and assistance” of the European Social Charter (Revised) clauses ¹⁴⁸	11	0	N	N	12	7	11	N	12

Notes: Member States could choose out of total 12 clauses; N (Not Signed).

Source: Authors, 2018.

2.2. International and regional benchmarks as a framework for assessment

The analysis provided below details the most relevant human rights and international labour law benchmarks, such as equal treatment, work authorisation, entry and re-entry conditions, access to secure residence status, social security coordination, family reunification and recognitions of qualifications. Whereas the equal treatment and non-discrimination benchmark is broader in nature and interlinked with non-discrimination and fairness principles in the EU law (see sub-chapter 2.3. Fairness and non-discrimination at work and the EU Charter of Fundamental Rights), the remaining narrower benchmarks are seen as particularly important for highlighting the gaps and barriers arising due to the sectoral nature of legal migration policies as discussed in Chapter 1. These benchmarks further serve the gaps and barriers analysis in Chapter 3. Benchmarks are summarised in Table 7. See more extensive elaboration in Annex 2: Table 22 and detailed descriptions of each benchmark.

Table 7. Summary table of benchmarks established on the basis of international and regional standards

Area	Benchmarks
Equal treatment	<p>Equality of treatment, irrespective of skills, sector of employment, length of residence, and no less favourable treatment than nationals with regards to:</p> <ul style="list-style-type: none"> • Remuneration and working conditions • membership of trade unions and collective bargaining • social security • employment taxes, dues or contributions • hygiene, safety and medical assistance • recreation and welfare measures • vocational or technical training
Entry and Re-entry conditions	<ul style="list-style-type: none"> • Facilitated entry into the territory for the purpose of temporary visits • Encouraging circular and return migration and reintegration into the country of origin • Granting seasonal workers priority for subsequent admission
Work authorisation	<ul style="list-style-type: none"> • Access to employment in all industries and occupations with max. restriction of 1 or 2 years • Granting seasonal workers the possibilities for subsequent other remunerated activities • Loss or termination of employment should not constitute a sole ground for withdrawal of residence or work permit. • Possibility to find alternative work in case of loss or termination of employment. • Possibility for involuntarily unemployed job seekers to enjoy residence right during the period in which they seek employment.
Residence status	<ul style="list-style-type: none"> • Right to free movement and choice of residence • Facilitation of the prolonged or permanent residence
Social security coordination	<ul style="list-style-type: none"> • Export of benefits • Maintenance of the acquired rights • Totalisation of periods of insurance, employment or residence and of assimilated periods for the purpose of the acquisition, maintenance or recovery of rights and for the calculation of benefits

	<ul style="list-style-type: none"> • Reimbursement of social security contributions
Family reunification	<ul style="list-style-type: none"> • Obligation to facilitate family reunion • Family reunion of seasonal migrants and “special purpose workers”
Recognition of qualifications	<ul style="list-style-type: none"> • Regulations concerning recognition of occupational qualifications, including certificates and diplomas • Recognition and accreditation of migrant workers’ skills and qualifications • Measures to assist migrant workers and their families on the occasion of their final return to their State of origin: <ul style="list-style-type: none"> ○ information about equivalence accorded to occupational qualifications obtained abroad and any tests to be passed to secure their official recognition; ○ equivalence accorded to educational qualifications, so that migrant workers’ children can be admitted to schools without down-grading

Source: Authors, 2018.

2.2.1. Equal treatment and non-discrimination at work as international and regional standards

All the international and regional human rights and labour standards put equality of treatment and non-discrimination with national workers at the heart of the ‘rights at work’ of TCNs (see Annex 4 for an overview of the employed benchmarks). Our starting point is the Universal Declaration of Human Rights (UDHR), which in its Article 23 proclaims that everyone should have the right to work, free choice of employment, just and favourable conditions of work, equal pay for equal work without being discriminated against, and the right to form and join trade unions.

The equality principle also appears in the International Covenant of Civil and Political Rights (ICCPR), which recalls in Article 26 the obligation of equality (and equal protection) before the law and non-discrimination, which is deemed a central component in the international framework of human rights protection, including with respect to human rights at work by any individual.¹⁴⁹

The International Covenant of Economic, Social and Cultural Rights (ICESC), in its Part III, Article 6, enshrines that State parties recognise and will safeguard the right of work (“which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts”). Article 7 ICESC lays down the recognition by states parties of the right of everyone to the enjoyment of just and favourable work conditions.¹⁵⁰ The body responsible for the interpretation and monitoring of ICESC, the Committee on Economic, Social and Cultural Rights, has issued important General Comments clarifying the scope of the ICESC rights.

In General Comment No. 23 (2016) on the right to just and favourable conditions of work,¹⁵¹ the Committee reiterated, “The right of everyone to the enjoyment of just and favourable conditions of work...without

¹⁴⁹ See in this respect the Human Rights Committee (1989), General Comment No. 18, Non-Discrimination, para. 12, which states that “when legislation is adopted by a State party, it must comply with the requirement of article 26 that its content should not be discriminatory. In other words, the application of the principle of non-discrimination contained in article 26 is not limited to those rights which are provided for in the Covenant”.

¹⁵⁰ These include, according to Article 7 ICESC, “(a) Remuneration which provides all workers, as a minimum, with: (i) Fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work; (ii) A decent living for themselves and their families in accordance with the provisions of the present Covenant; (b) Safe and healthy working conditions; (c) Equal opportunity for everyone to be promoted in his employment to an appropriate higher level, subject to no considerations other than those of seniority and competence; (d) Rest, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays”.

¹⁵¹ United Nations Economic and Social Council (2016), Committee on Economic, Social and Cultural Rights, General Comment No. 23 on the right to just and favourable conditions of work (Article 7 of the International Covenant on Economic, Social and Cultural Rights), 27 April. Refer also to General Comment No. 18, adopted on 24 November 2005, Article 6 of the International Covenant on Economic, Social and Cultural Rights, the Right to Work, 6 February 2006, which in paragraph 18 states, “The principle of non-discrimination as set out in article 2.2 of the Covenant and in article 7 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families should apply in relation to employment opportunities for migrant workers and their families.”

distinction of any kind". The General Comment clarifies that the reference to "everyone" highlights the fact that this right applies to all workers in all settings, regardless of whether they are migrant workers and including "domestic workers, self-employed workers, agricultural workers, refugee workers and unpaid workers".¹⁵² It highlighted that the actual importance of this right is yet to be fully realised, with "[d]iscrimination, inequality and a lack of assured rest and leisure conditions plagu[ing] many of the world's workers."¹⁵³ Importantly, with reference to the specific situation of migrant workers, General Comment No. 23 pointed out that violations of the right to just and favourable conditions of work can occur through the adoption of labour migration policies that increase the vulnerability of migrant workers to exploitation. It concluded that migrant workers are:

...vulnerable to exploitation, long working hours, unfair wages and dangerous and unhealthy working environments. Such vulnerability is increased by abusive labour practices that give the employer control over the migrant worker's residence status or that tie migrant workers to a specific employer. If they do not speak the national language(s), they might be less aware of their rights and unable to access grievance mechanisms. Undocumented workers often fear reprisals from employers and eventual expulsion if they seek to complain about working conditions. Laws and policies should ensure that migrant workers enjoy treatment that is no less favourable than that of national workers in relation to remuneration and conditions of work (emphasis added).¹⁵⁴

A specific feature of the UN International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families is that it, in Article 7, excludes 'nationality' among the justified or permissible grounds for differential treatment. In 2013 General Comment No. 2 on the rights of migrant workers,¹⁵⁵ the Committee on Migrant Workers (CMW) reiterated the central role played by the principle of non-discrimination in all international human rights instruments and the UN Charter. It then described a central benchmark for assessing the lawfulness of deferential treatment between nationals and TCNs in rights at work, according to which

...any differential treatment based on nationality or migration status amounts to discrimination unless the reasons for such differentiation are *prescribed by law, pursue a legitimate aim under the Convention, are necessary in the specific circumstances, and proportionate to the legitimate aim pursued* (emphasis added).¹⁵⁶

Equality of treatment constitutes a central guiding paradigm in ILO standards. These are specifically based on two ILO Conventions specifically protecting migrant workers, the Migration for Employment Convention (Revised), 1949 (No. 97)¹⁵⁷ and the Convention concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers, 1975 (No. 143),¹⁵⁸ as well as the accompanying Migration for Employment Recommendation (Revised), 1949 (No. 86)¹⁵⁹ and ILO Recommendation concerning Migrant Workers, 1975 (No. 151).¹⁶⁰ These instruments contain express

¹⁵² Para. 5.

¹⁵³ Para. 3, which continues, "The increasing complexity of work contracts, such as short-term and zero-hour contracts, and non-standard forms of employment, as well as an erosion of national and international labour standards, collective bargaining and working conditions, have resulted in insufficient protection of just and favourable conditions of work."

¹⁵⁴ Pp. 12-13.

¹⁵⁵ UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (2013), General comment No. 2 on the rights of migrant workers in an irregular situation and members of their families, 28 August, para. 18.

¹⁵⁶ The CMW referred here to the Human Rights Committee (1989), general comment No. 18 on non-discrimination, para. 13; and Committee on Economic, Social and Cultural Rights, general comment No. 20 on the right to education, para. 13.

¹⁵⁷ See Article 6 of Convention concerning Migration for Employment (Revised 1949) (Entry into force: 22 January 1952), adopted at the 32nd ILC session (1 July 1949) in Geneva. Ratified by only 10 of 28 Member States.

¹⁵⁸ Article 10 of Convention concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers (Entry into force: 9 December 1978), adopted at the 60th ILC session (24 June 1975) in Geneva. Ratified by only 5 of 28 EU Member States.

¹⁵⁹ Article 17 of Recommendation concerning Migration for Employment, No. 86 (Revised 1949), adopted at the 32nd ILC session (1 July 1949) in Geneva.

¹⁶⁰ Article 2 of Migrant Workers Recommendation, No. 151, adopted at the 60th ILC session (24 June 1975) in Geneva.

provisions on equality of treatment, irrespective of skills, sector of employment, length of residence, and no less favourable treatment than nationals (see Annex 4 for a quick overview of the employed standards as benchmarks). According to these instruments, equality of treatment with respect to migrant workers in a regular situation should be provided regarding the following matters:

- remuneration and working conditions, including hours of work, rest periods, annual holidays with pay, occupational safety and occupational health measures;
- membership of trade unions and enjoyment of the benefits of collective bargaining;
- accommodation;
- social security;
- employment taxes, dues or contributions payable to the person employed;
- hygiene, safety and medical assistance;
- recreation and welfare measures;
- vocational or technical training.

The ILO Discrimination (Employment and Occupation) Convention, 1958 (No. 111) should also be taken into consideration.¹⁶¹ Its purpose is to protect all persons against discrimination in employment and occupation on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, with the possibility of extending its protection to discrimination on the basis of other grounds.¹⁶² According to this Convention, each Member State for which this Convention is in force undertakes to declare and pursue a national policy designed to promote, by methods appropriate to national conditions and practice, equality of opportunity and treatment with respect to employment and occupation, with a view to eliminating any discrimination in respect thereof.¹⁶³ It forms one of the fundamental principles and rights at work, and while it does not expressly prohibit nationality discrimination, it has been used by the ILO Committee of Experts on the Application of Convention and Recommendations to protect migrant workers from related forms of discrimination, such as those on the grounds of sex, race, ethnicity, etc.¹⁶⁴

It is important to underline that the ILO has acknowledged the challenges posed by the current EU sector-by-sector approach to legal and labour migration in light of these international labour standards. The ILO Committee of Experts Report, “Promoting Fair Migration”, to the International Labour Conference in 2016, stated that many States indicated a differentiation in immigration law and practice between highly qualified/skilled workers and those engaged in medium and low-skill work. EU Member States distinguished between “migrant workers falling within the EU Blue Card Directive, allowing high skilled workers to work and live within the EU; and an often limited quota of seasonal workers granted temporary authorization to work in particular sectors”.¹⁶⁵

Similarly, in a previous Technical Note prepared on the Seasonal Migrants Directive, the ILO emphasised, “While it would prefer to see the establishment of a horizontal framework – which would be more in line with the approach taken by relevant International Labour Standards, including the specific instruments protecting migrant workers – nevertheless it welcomes the Commission’s initiatives to simplify administrative admission procedures and reduce the ‘rights’ gaps’ between third-countries nationals and EU

¹⁶¹ Convention concerning Discrimination in Respect of Employment and Occupation (Entry into force: 15 June 1960), adoption at the 42nd ILC session (25 June 1958) in Geneva. Ratified by all EU Member States.

¹⁶² International Labour Conference (2012) General Survey on the fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalization of 2008, Report of the Committee of Experts on the Application of Conventions and Recommendations (Articles 19, 22 and 35 of the Constitution), Report III (Part 1B), International Labour Office, Geneva, p. 307

¹⁶³ Article 2 of Convention concerning Discrimination in Respect of Employment and Occupation.

¹⁶⁴ International Labour Conference (2012), op. cit., pp. 324-326.

¹⁶⁵ International Labour Office (ILO) (2016), General Survey concerning the migrant workers instruments, Report of the Committee of Experts on the Application of Conventions and Recommendations, International Labour Conference, 105th Session, Geneva, 22 February, para. 106; see also International Labour Office (ILO) (2014), “Fair Migration: Setting an ILO Agenda”, Report of the Director General, International Labour Conference, 103rd Session, Geneva.

citizens”.¹⁶⁶ It emphasised the importance of a robust application by the Seasonal Workers Directive of the key principle of equality of treatment regarding working conditions and social security, in light of ILO standards and other regional human rights instruments. The same Technical Note acknowledged that by opting for a sectoral approach, the European Commission had failed to acknowledge and uphold internationally agreed labour standards, and stated,

Unfortunately, the Commission’s impact assessment elaborated as background to the proposed seasonal workers Directive (SEC(2010) 887 of 13 July 2010) *does not include any reference to International Labour Standards*. All EU Member States have ratified the core labour standards conventions and many of the other ILO conventions classified by ILO as up to date. A number of EU Member States have ratified the specific ILO conventions dealing with migrant workers...¹⁶⁷

The principle of non-discrimination is also enshrined in ‘regional human rights standards’ in the context of the CoE. Article 14 ECHR prescribes that the human rights and freedoms provided by the Convention must be delivered in compliance with the principle of non-discrimination, which includes, among other grounds, national or social origin. The 2005 Protocol No. 12 to the ECHR provides for a general prohibition of discrimination on “any right provided by law”, not just rights envisaged in the ECHR. At the time of writing, and as outlined in Table 5 above, the 12th Protocol has been ratified by three EU Member States under analysis in this Research Paper (Spain, Portugal and the Netherlands), and signed by another three (Belgium, Germany and Lithuania). The ECtHR has interpreted in numerous cases the scope of application of Article 14 ECHR, and its relationship with other ECHR rights and freedoms,¹⁶⁸ and it has confirmed that nationality discrimination falls within the scope of Article 14 ECHR.

The ECHR comes along the 1961 European Social Charter (ESC),¹⁶⁹ which guarantees fundamental rights and freedoms in the field of economic and social rights to nationals of CoE Member States as well as foreigners “lawfully residing or working regularly in the territory of a CoE state party”. Through a supervisory mechanism based on a system of collective complaints and national reports, the European Committee of Social Rights (ECSR) seeks to guarantee that ESC standards are correctly implemented and observed by states’ parties of the ESC. The ECSR ascertains whether countries have honoured the undertakings set out in the Charter. Of particular relevance is Article E of the European Social Charter (Revised) (ESC(r)), which prohibits discrimination. According to the ECSR, the “difference in treatment between people in comparable situations constitutes discrimination in breach of the revised Charter if it does not pursue a legitimate aim and is not based on objective and reasonable grounds”.¹⁷⁰

As mentioned in the introduction of this Research Paper, the UN Global Compact on Migration, in its second draft version published in May 2018,¹⁷¹ identifies as one of its objectives the facilitation of “fair and ethical recruitment and safeguard conditions that ensure decent work”. Under this objective, the Global Compact on Migration refers to the priority ascribed by states parties to review existing policies, ensure “fair and

¹⁶⁶ ILO (2010), Proposal for a Directive of the European Parliament and of the Council on the conditions of entry and residence of third-country nationals for the purposes of seasonal employment, COM(2010) 379 ILO Note based on International Labour Standards with reference to relevant regional standards, Geneva (www.ilo.org/wcmsp5/groups/public/---europe/---ro-geneva/---ilo-brussels/documents/genericdocument/wcms_168539.pdf).

¹⁶⁷ Ibid.

¹⁶⁸ For an overview refer to B. Frioriksdottir (2017), *What Happened to Equality? The Construction of the Right to Equal Treatment of Third Country Nationals in European Union Law on Labour Migration*, Leiden: Martinus Nijhoff, in particular Chapter 2, Section 2.3, pp: 69-76.

¹⁶⁹ The ESC has been signed by all 47 Member States of the Council of Europe and ratified by 43 of them. For more information see www.coe.int/en/web/turin-european-social-charter.

¹⁷⁰ See ECSR, *Syndicat national des professions du tourisme v. France*, Complaint No. 6/1999, merits, 10 October 2000, para. 25. In: Y. Ktistakis (2013) *Protecting Migrants under the European Convention of Human Rights and the European Social Charter: A Handbook for Legal Practitioners (2nd Edition)*, Strasbourg: Council of Europe, pp. 69-70. (<https://rm.coe.int/168007ff59>).

¹⁷¹ UN Global Compact on Migration, in its second draft version available at https://refugeesmigrants.un.org/sites/default/files/180528_draft_rev_2_final_1.pdf.

ethical recruitment mechanisms”, and “protect all migrant workers against all forms of exploitation and abuse in order to guarantee decent work and maximize the socioeconomic contributions of migrants in both their countries of origin and destination”.¹⁷² The Global Compact on Migration identifies as central the need to promote by states the signature, ratification, accession and implementation of relevant international instruments related to international labour mobility, labour rights and decent work conditions. It also calls for better ensuring that international human rights and labour law is observed in practice through more effective enforcement and monitoring (via for instance labour inspectors) of these norms.

2.2.2. Work authorisation

The benchmarks related to work authorisation aim to assess whether workers can change their employer with a maximum restriction of two years based on Article 14 (a) ILO Migrant Workers Convention (143) and Article 52 (3a) ICRMW, as well as whether loss or termination of employment constitutes the sole ground for withdrawal of the migrant worker’s authorisation of residence or work permit. In addition, they evaluate the possibility for migrant workers to find alternative work in case of loss or termination of employment. It also includes the possibility for seasonal workers to take up other remunerated activities in cases where they have already been employed on the territory of the Member State for a significant period (see Annex 4 for an overview of the employed standards as benchmarks).¹⁷³

2.2.3. Entry and re-entry conditions

The employed benchmark framework provides for several standards in regards to entry and re-entry conditions. These include whether there is a possibility for facilitated entry for temporary visits¹⁷⁴ and circulation-friendly visa policies for TCNs and policies to encourage circular and return migration¹⁷⁵ (Vankova, 2016). In addition, another standard pertains to the possibility of granting priority to seasonal workers, who have been employed on the territory of a Member State for a significant period, over other workers who seek admission to that State.¹⁷⁶ These benchmarks are summarised in Annex 4, which provides an opportunity for a quick overview.

These benchmarks are in line with the latest (second) draft of the UN Global Compact on Migration.¹⁷⁷ The Compact promotes the development of flexible rights-based and gender-responsive labour mobility schemes for migrants at all skills levels, including temporary, seasonal, circular, and fast-track programmes in areas of labour shortages, in accordance with local labour market needs and skills supply. It recommends doing so by establishing flexible and non-discriminatory visa regimes, such as permanent and temporary work visas, multiple-entry visas, student visas, business visitor visas and visas for investors and entrepreneurs, and by allowing flexible visa status conversions.

2.2.4. Choice of residence and access to secure residence status

Another important benchmark employed by this Research Paper aims to explore whether migrants in regular status have the opportunity to qualify for a prolonged or permanent residence status, which is one of the benchmarks applied to this policy area.¹⁷⁸ This standard is derived from Article 2 of the European Convention on Establishment. In addition, this benchmark considers whether migrants have the right to mobility and choice of residence within the destination country (see Annex 4 for more details).¹⁷⁹

¹⁷² Para. 21.

¹⁷³ Based on Article 59 (2) ICRMW.

¹⁷⁴ Based on Article 1 of the European Convention on Establishment.

¹⁷⁵ Based on ILO Multilateral Framework on Labour Migration, Principle 15, Guideline 15.8.

¹⁷⁶ Based on Article 59 (2) of the ICRMW.

¹⁷⁷ Available at https://refugeesmigrants.un.org/sites/default/files/180528_draft_rev_2_final_1.pdf.

¹⁷⁸ Based on Article 2, European Convention on Establishment.

¹⁷⁹ Based on Article 12 (1) ICCPR, Article 39 ICRMW, Article 2 (1) of the Fourth protocol of ECHR.

2.2.5. Social security coordination

Along with the benchmark on equal treatment covering social security rights described above, the study also uses benchmarks in the field of social security coordination based on, among other things, the European Convention on Social Security, the Convention on Social Equality of Treatment (No. 118) and the Equality of Treatment (Accident Compensation) Convention (No. 19) (see annex X). The ECHR is another important source of standards that must be considered in the field of social security. Despite the fact that it does not stipulate a right to social security per se and it does not contain any social security coordination provisions, the case law of the ECtHR shows that several articles of the ECHR have been used by applicants to challenge national provisions on social security. It demonstrates that the distinction based on nationality in the field of social security must be justified by very robust reasoning.¹⁸⁰

This benchmark aims to assess what kind of benefits can be exported, e.g. in the context of temporary or circular migration, and whether the general principles of social security coordination are covered: maintenance of the acquired rights and rights in course of acquisition under their legislation; totalisation of periods of insurance, employment or residence and of assimilated periods for the purpose of the acquisition, maintenance or recovery of rights and for the calculation of benefits; and equality of treatment (see annex 4).¹⁸¹ In addition, it aims to assess whether reimbursement of social security contributions is possible.¹⁸²

2.2.6. Family reunification

This relates to whether migrant workers, including seasonal workers and other temporary migrants, can reunite with their family members under EU law instruments in the field of legal migration. This benchmark is based on Article 13 (1) of the ILO Migrant Workers Convention (No. 143), which requests contracting States “to take all necessary measures which fall within its competence and collaborate with other Members to facilitate the reunification of the families of all migrant workers legally residing on its territory”. In addition, the ILO Migrant Worker Recommendation No. 151 contains only one prerequisite for family reunification, which is that “the worker has, for his family, appropriate accommodation which meets the standards normally applicable to nationals of the country of employment”.¹⁸³ Moreover, ILO members are called upon to allow the family reunion of seasonal migrants and “special purpose workers” who are legally resident in the country (see annex 4 for a summary of employed benchmarks).¹⁸⁴

Among the Council of Europe instruments, Article 8 of the ECHR guarantees the right to respect for private and family life. Article 8 (2) ECHR, however, provides that “there shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.” The case law of the ECtHR concerning Article 8 and admission of family migrants is relatively scant. In this regard the Court has consistently ruled¹⁸⁵ that in general there is no interference with the right to respect for family life if it is possible for the family to live elsewhere,¹⁸⁶ including

¹⁸⁰ See ECtHR, *Gaygusuz v. Austria*, Judgment of 16 September 1996, Application No. 17371/90, paras 42-50. For a detailed overview, see H. Verschueren (1997), “EC social security co-ordination excluding third-country nationals: still in line with fundamental rights after the Gaygusuz judgment”, *Common Market Law Review*, Vol. 34, pp. 991-1017. For further case law analysis, see also C.H. Slingenberg (2015), “Social security in the case law of the European Court of Human Rights”, in F. Pennings and G. Vonk (eds), *Research Handbook on European Social Security Law*, Cheltenham, UK; Northampton, MA, US: Edward Elgar Publishing, pp. 62-64.

¹⁸¹ For more details, see Z. Vankova, (2016), “EU Circular Migration Policies: Dead or Alive? Developing a Rights-based Benchmark Framework for Policy Assessment”, *Journal of Immigration, Asylum and Nationality Law*, 30(4), pp.332-352.

¹⁸² In line with Article 27 (2) of ICRMW and ILO Migrant Workers Recommendation, 1975 (No. 151), para. 34(1)(c)(ii).

¹⁸³ Migrant Workers Recommendation, 1975 (No. 151), para. 13(2).

¹⁸⁴ ILO (1997), Migrant Worker Recommendation No 151, Annex 1, para. 6.1.

¹⁸⁵ See ECtHR, *Ahmut v the Netherlands*, Judgment of 28 November 1996, Application, No. 21702/93 and ECtHR, *Gül v. Switzerland*, Judgment of 19 February 1996, Application No. 23218/94.

¹⁸⁶ S. Peers (2016), *EU Justice and Home Affairs Law. Volume I: EU Immigration and Asylum Law, Fourth edn.*, Oxford: Oxford

when the case involves children that have been left behind. As the Handbook on European law relating to asylum, borders and immigration acknowledges, the ECtHR's approach in cases involving children left behind "largely depends on the specific circumstances of each particular case".¹⁸⁷ One circumstance in which the Court seems to find that insurmountable obstacles to settling in the country of origin exist, is where the applicant has started a family in the host country and other children have been born and brought up in his/her country of origin.¹⁸⁸

Article 19(6) of the (Revised) European Social Charter and Article 12 (1) of the European Convention on the Legal Status of Migrant Workers (ECMW) provides specific measures on family reunification for lawfully resident migrant workers from other contracting parties.¹⁸⁹ For instance, Article 12 (1) of the ECMW stipulates that the waiting period for family reunification shall not exceed 12 months. According to the European Committee of Social Rights, which examines whether states parties are compliant with the provisions of the European Social Charter (ESC):¹⁹⁰

- a waiting period of more than one year is not compliant with the ESC;¹⁹¹
- family reunification must be possible for children 18- to 21-years-old;¹⁹²
- a requirement for suitable housing should not be so restrictive as to prevent family reunification;¹⁹³
- migrant workers who have a sufficient income to provide for their family members should not be automatically denied the right to family reunification on the basis of the origin of such income, insofar as they are legally entitled to benefits they may receive;¹⁹⁴
- pre-departure or in-country integration requirements for family members that must be satisfied in order to be allowed to enter the country or to be granted a residence permit constitutes a restriction that is likely to deprive the obligation enshrined in Article 19 (6) of its substance and is thus not compliant with the provisions of the ESC.¹⁹⁵

2.2.7. Recognition of qualifications

This benchmark aims to assess the provisions on procedures for recognition of qualifications in the EU legal migration *acquis*. Article 14 (b) of Convention No. 143 provides that States may "after appropriate consultation with the representative organizations of employers and workers, make regulations concerning recognition of occupational qualifications acquired outside its territory, including certificates and diplomas". The same provision is also included in Recommendation No. 151, paragraph 6. Furthermore, Guideline 12.6 to Principle 12¹⁹⁶ of the ILO's Multilateral Framework on Labour Migration states that "promoting the

University Press, p. 333.

¹⁸⁷ European Court of Human Rights and European Union Agency for Fundamental Rights (2014), *Handbook on European law relating to asylum, borders and immigration*, Luxembourg: Publications Office of the European Union, p. 133.

¹⁸⁸ C. Murphy (2013), *Immigration, Integration and the Law. The Intersection of Domestic, EU and International Legal Regimes*, London: Routledge, p. 314.

¹⁸⁹ N. Baruah and R. Cholewinski (2006), *Handbook on Establishing Effective Labour Migration Policies in Countries of Origin and Destination*, OSCE, IOM and ILO, 2006, p.149.

¹⁹⁰ States parties submit annual reports on their implementation of the Charter in law and in practice, on the basis of which the Committee decides whether the countries concerned are in conformity with the Charter. Source: www.coe.int/en/web/turin-european-social-charter/national-reports.

¹⁹¹ European Committee of Social Rights (2006), Conclusions XVIII-1 - Greece - Article 19-6, document number XVIII 1/def/GRC/19/6/EN.

¹⁹² Ibid. and European Committee of Social Rights (2006), Conclusions XVIII-1 - Austria - Article 19-6, document number XVIII-1/def/AUT/19/6/EN.

¹⁹³ European Committee of Social Rights (2011), Conclusions 2011 - Belgium - Article 19-6, document number 2011/def/BEL/19/6/EN.

¹⁹⁴ European Court of Human Rights and European Union Agency for Fundamental Rights (2014), op. cit., p. 134.

¹⁹⁵ Ibid.

¹⁹⁶ Principle 12: An orderly and equitable process of labour migration should be promoted in both origin and destination countries to guide men and women migrant workers through all stages of migration, in particular, planning and preparing for labour migration, transit, arrival and reception, return and reintegration.

recognition and accreditation of migrant workers' skills and qualifications and, where that is not possible, providing a means to have their skills and qualifications recognized" contributes to an orderly and equitable process of labour migration (see Annex 4 for an overview of employed benchmarks).¹⁹⁷

In addition, the ECMW contains a provision concerning the obligation to provide information to migrants returning home. Article 30 states that "to enable migrant workers to know, before they set out on their return journey, the conditions on which they will be able to resettle in their State of origin, this State shall communicate to the receiving State, which shall keep available for those who request it, information regarding in particular: (5th bullet) equivalence accorded to occupational qualifications obtained abroad and any tests to be passed to secure their official recognition".

2.3. Fairness and non-discrimination at work and the EU Charter of Fundamental Rights

Title V TFEU, and EU secondary legislation implementing its provisions, must also be read in light of the EU Charter of Fundamental Rights (EU CFR) to which the Lisbon Treaty conferred the same legally binding value as the Treaties. Some of the rights included in the EU CFR are applicable to 'everyone' irrespective of immigration administrative status. Nevertheless, Article 15.3 stipulates, "Nationals of third countries who are authorised to work in the territories of the Member States are entitled to working conditions equivalent to those of citizens of the Union." Therefore, equivalence is limited to those TCNs who are authorised to work. This would appear to contradict the broader language in Article 31 EU CFR.

Article 15.3 may therefore provide a narrower personal scope of protection limited to 'authorised TCNs'. That notwithstanding, a broader interpretation can be in any case established on the above-mentioned international and regional standards studied in Section 2.2. This is in line with Article 53 EU CFR which stipulates, "Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised by Union law and international law and by international agreements to which the Union, the Community or all the Member States are party".

While the notion of 'equivalence' may be contested and subject to interpretation in relation to its difference from 'equality', Article 31 EU CFR may be more definitive. It may also help us in giving substance to the notion of 'fairness' advanced by the TFEU, particularly in the context of employment or labour relations. Article 31 EU CFR deals with "Fair and Just Working Conditions" and states, "*Every worker* has the right to working conditions which respect his or her health, safety and dignity." It continues, "*Every worker* has the right to limitation of maximum working hours, to daily and weekly rest periods and to an annual period of paid leave."

It is noticeable here that the Charter uses the notion of 'every worker' with no consideration of the immigration or residence status of the person involved. This corresponds with the prevailing approach previously identified in international and regional human rights and labour standards. The qualification of *worker* takes therefore preference over immigration status at times of upholding the obligation to guarantee fair and just working conditions in the EU legal system. In addition, and importantly, Article 45 EU CFR, which deals with free movement and residence, offers the possibility to grant free movement and residence to TCNs who are legally residing in the EU.

This is also consistent with Article 20 EU CFR which stipulates the equality before the law principle to *anyone* (including TCNs) residing in the EU. It is in this context that restrictions to the principle of non-discrimination and equality of treatment between TCNs legally residing in the EU must be duly justified by State authorities. Furthermore, Article 21 EU CFR provides for the general principle of non-discrimination, which includes ethnic or social origin among the prohibited grounds. Article 21.2 EU CFR stipulates that any discrimination

¹⁹⁷ ILO (2006), "Multilateral Framework on Labour Migration: Non-binding principles and guidelines for a rights-based approach to labour migration", ILO, Geneva, p.24 and Article 14 of ILO Convention No. 143.

on grounds of nationality shall be prohibited within the scope of the EU legal system and law “without prejudice of the special provisions of those treaties”. It has been argued in the academic literature that the sharp distinction currently made by the EU between mobile EU citizens and legally residing TCNs may no longer hold true to the same extent.¹⁹⁸ This may be particularly the case in respect of working and residency conditions and intra EU-mobility of TCNs residing and working in the EU.

¹⁹⁸ C. Kilpatrick (2014), “Article 21: Non-Discrimination”, in S. Peers et al. (eds), *The EU Charter of Fundamental Rights: A Commentary*, Oxford: Hart Publishing, pp. 579-604.

CHAPTER 3: GAPS AND BARRIERS IN AND ACROSS THE DIFFERENT EU LEGAL AND POLICY MEASURES

KEY FINDINGS

- The Research Paper identified numerous gaps between the instruments regulating the status of different categories of workers (see summary Table 8).
- Differential treatment as institutionalised by the EU sectoral approach amounts to unlawful discrimination in light of the Research Paper's benchmarks, as it is not always justified.
- There is a clear role for the EU to contribute to promoting and ensuring a common level playing field of international and regional human rights and labour standards protection (non-discrimination among workers) which otherwise could undermine effectiveness of EU secondary law on labour immigration.
- High-skilled workers (Blue Card holders, ICTs and researchers) benefit from the most extensive rights.
- Many barriers are identified which stem from the interplay of transposition of EU law and national procedures/instruments.
- The benchmarks assessment shows that the EU is still some way off developing a fair labour migration policy.

This chapter presents the gaps and barriers identified in the EU legislative instruments related to legal and labour migration. For the purposes of this Research Paper the notion of 'gaps' refers to the incoherencies or differentials between the rights of different categories of TCNs in the existing sectoral and fragmented legal framework (the gaps in the law). This notion also covers relevant issues not covered by EU law and policy. When it comes to 'barriers', this chapter highlights how the practical challenges in exercising rights stemming from the EU sectoral approach and the implementation of the different EU legal migration instruments prevent the EU from meeting the international, regional and EU equal treatment standards employed as benchmarks in the Research Paper.

The chapter focuses on *the gaps and barriers* in and across the four sectoral 'first admission' directives covering:¹⁹⁹ Seasonal Workers, highly qualified workers (EU Blue Card), Intra-corporate Transferees (ICTs) and Students and Researchers. The analysis also draws comparisons with the Single Permit Directive as well as those on the right to family reunification and long-term residence where relevant.²⁰⁰ *Annex 17* provides two practical case studies illustrating the gaps and barriers examined in this Chapter.

¹⁹⁹ The term is borrowed from C. Barnard (2016), *The Substantive Law of the EU: The Four Freedoms*, (Fifth Edition), Oxford:Oxford University Press. Could free movement of persons be confined to free movement of workers in any Brexit deal?, Blog Post, Centre for European Legal Studies (<https://www.cels.law.cam.ac.uk/brexitfree-movement-persons-and-new-legal-order/catherine-barnard-could-free-movement-persons-be>).

²⁰⁰ This chapter builds on Z. Vankova (forthcoming), "EU's approach to Circular Migration in the context of the Eastern Partnership Neighbourhood", in S. Carrera, L. Den Hertog, D. Kostakopoulou and M. Panizzon (eds), *The EU External Policies on Migration, Borders and Asylum. Policy Transfers or Intersecting Policy Universes?*, Leiden: Brill Martinus Nijhoff Publishers.

Table 8. Summary table of gaps and barriers analysed in chapter 3

Benchmark Area	Gaps	Barriers
Equal treatment	Gaps to Equal treatment (G1) <ul style="list-style-type: none"> • Equal treatment to nationals with regard to remuneration, and working conditions • Restrictions and derogations with regard to education and vocational training • Social security restrictions 	Barriers to equal treatment (B1) <ul style="list-style-type: none"> • Lack of implementation and enforcement at the national level • Unfair remuneration and working conditions
Entry and Re-entry conditions (circular migration)	Gaps to entry (G2): by design inherent to the sectoral directives – certain categories are left out; Gaps with regards to different re-entry options (G2): <ul style="list-style-type: none"> • Circular migration restrictions 	Barriers with regards to entry: (B2) <ul style="list-style-type: none"> • Requirement for migrants to apply from outside the EU • Labour market tests • Requirement to provide address Barriers with regards to different re-entry and circular migration options under the Directives (B3): <ul style="list-style-type: none"> • Applying the ‘cooling off’ periods. • Penalising for longer absences
Work authorisation	Gaps concerning change of employer (G3): <ul style="list-style-type: none"> • Changes of employer are limited or subject to prior authorisation. • ICTD permit holders are bound to their employer. Gaps concerning consequence of unemployment (G4): <ul style="list-style-type: none"> • Unemployment leads to permit withdrawal, unless BC holder; • Lack of possibility to seek alternative work, unless BC holder. 	Barriers concerning change of employer (B4): <ul style="list-style-type: none"> • Fear of loss of employment and dependency from employer. • Different enforcement capacity of the labour inspectorates at the national level. Barriers concerning consequence of unemployment (B5): <ul style="list-style-type: none"> • Different provision of rights at national level due to the lack of explicit provisions in this regard.
Residence status and mobility with the EU/Member State	Gaps concerning mobility and choice of residence (G5): <ul style="list-style-type: none"> • SWD does not provide sufficient guarantees to address employer-organised accommodation. Gaps concerning residence status (G6): <ul style="list-style-type: none"> • ICTs (ICTD) and seasonal workers (SWD), as well as other TCNs residing on temporary and formally limited permits excluded from access to LTR. Gaps concerning intra- EU mobility (G7): <ul style="list-style-type: none"> • ICTD and SRD allow for temporary mobility, whereas LTRD, ICTD, BCD, SRD allow long-term mobility. 	<p>Legal gaps in many cases are leading to practical obstacles, therefore the barriers are not further discussed in this area.</p>

Social security coordination	Gaps concerning social security coordination (G8): <ul style="list-style-type: none"> Provisions on export of benefits differ between the Directives and there are no provisions in that regard in the LTRD and FRD. The Directives do not contain other social security coordination principles such as aggregation of periods of insurance, employment and residence. 	Barriers concerning social security coordination (B6): <ul style="list-style-type: none"> Coordination of social security at the national level is subject to conclusion of bilateral agreements between MS and third countries, which provide for the actual entitlements. Their number varies from MS to MS.
Family reunification	Gaps concerning family reunification (G9): <ul style="list-style-type: none"> No right: seasonal workers, students, temporary workers with permits for less than one year Rules for FR: for workers with residence permit valid for one year or more and for LTR in the first MS Privileged rules: Blue Card Holders, researchers and ICT Free admission: family members of LTR TCN admitted in first MS free to move with the LTR TCN to the second MS. 	Barriers concerning family reunification (B7): <ul style="list-style-type: none"> Narrow definition of ‘family members’ and wide discretion to Member States Long waiting periods Prior integration requirements Restrictions for family members to work
Recognition of qualifications	Gaps concerning recognition of qualifications (G10): <ul style="list-style-type: none"> Equal treatment only once authorisation has been obtained, but not before Limited recognition of qualifications vs. skills 	Barriers (B8): <ul style="list-style-type: none"> Long waiting periods, in particular for regulated professions

Source: Authors, 2018.

The analysis of gaps left by existing EU legal migration *acquis* is further substantiated by the empirical research findings. We employ the data gathered through the e-questionnaire, interviews and Delphi method discussion conducted for the purposes of this Research Paper (see Annex 1 for a detailed methodological note). The analysis also makes use of data in implementation reports carried out by the European Commission. The chapter concludes with an assessment using the benchmarks developed in Chapter 2, and provides two case studies of how the trajectories of third-country nationals (TCNs) accepted under the Seasonal Work Directive would differ from those under the Blue Card scheme, thus showing how such gaps and barriers have implications for individual rights at work.

3.1. Key gaps and barriers

Gaps

The EU sectoral approach on legal migration studied in Chapter 1 entails the use of decisive features such as skills qualifications, salary thresholds or types of sectors on which EU legal statuses are assigned, granting differential treatment and rights. Such an approach has institutionalised the differences among third-country worker statuses and leads to a fragmentation of rights and working conditions across categories of TCNs: ‘more rights and labour standards’ for those obtaining the EU Blue Card, ICT or researcher permits; and ‘less rights and labour standards’ for those holding the EU Seasonal Worker’s Permit. The variances of rights at work have become even more evident during the phases of national implementation, where there have been different national interpretations of the exact scope of the EU rights granted by these directives.

Barriers

In the transposition and implementation, there are further divergences as to the extent to which Member States actually make use of and apply these EU directives. The fragmentation that is already present in the 'law in the books' is thus further exacerbated in the 'law in action'. Moreover, the actual transposition by Member States of several directives is very recent or still awaited. The flexibility granted to Member States in the transposition and implementation means that there is a considerable element of 'non-Europe' in this field, producing individual and economic costs. It leaves the individual in a weak position, as the EU and its Member States have competing interests in employing TCNs.²⁰¹ It became even more apparent in the current negotiations over the revision of the Blue Card, where different Member States' interests stand in the way of an approach based on fairness, and therefore hinders TCN rights.

3.1.1. Gaps and barriers with regards to equal treatment

Gaps to equal treatment (G 1)

The fairness and quasi-equality of treatment paradigm appears in the main body of the various EU legal migration directives.²⁰² A majority of these directives include among their goals and legal provisions the "equality of treatment of third country nationals in respect to Member States' nationals". This 'equality' is however subject to a set of differentiated restrictions or conditions which have been linked to particular categories of TCN workers, and the length of regular stay or residence ascribed to the former.

From all the EU legal migration directives only the Family Reunification Directive does not include any provisions on equality of treatment. However, TCNs with such status who are allowed to work, benefit from the broader scope of the Single Permit Directive. Another gap in this field concerns the ICTs who are guaranteed equal treatment with regards to the terms and conditions of employment with posted workers under Directive 96/71/EC.²⁰³

All 'first admission' directives except the ICT provide for equal treatment with nationals concerning working conditions including pay and dismissal, as well as health and safety requirements at the workplace.²⁰⁴ The Seasonal Workers Directive, as well as one of the recitals of the preamble of the Single Permit Directive,²⁰⁵ clarifies that the term "working conditions" in addition also covers at least working hours/time and leave/holidays. As already indicated above, the ICTs are entitled to equal treatment with posted workers (which are EU or TCN nationals working temporarily in another Member State),²⁰⁶ except with regard to remuneration where equal treatment with nationals is one of the admission criteria.²⁰⁷

Migrants covered by the different legal instruments are entitled to equal treatment with regards to freedom of association and affiliation, except for family migrants under the Family Reunification Directive. However, if they have the right to work, they still benefit from the equal treatment provisions of the Single Permit Directive. The Seasonal Workers Directive contains an equal treatment provision, which explicitly covers the right to strike and take industrial actions.

²⁰¹ Carrera, S., Faure Atger, A., Guild, E. & Kostakopoulou, D. (2011), "Labour Immigration Policy in the EU: A Renewed Agenda for Europe 2020", *CEPS Policy Brief*, No. 240, April 2011.

²⁰² The term "EU legal migration directives" is used when referring to the first admissions directives, the Single Permit Directive, the Family Reunification Directive and the Long-Term Residence Directive.

²⁰³ See Article 3 of Directive 96/71/EC.

²⁰⁴ Article 14 (1) (a) BCD; Article 12 (1) (a) SPD; Article 22 (1) SRD; Article 23 (1) (a) SWD. Long-term residents also enjoy equal treatment in this area under Article 11 (1) (a).

²⁰⁵ See recital 22 of the Preamble of SPD.

²⁰⁶ Article 18 (1) ICTD.

²⁰⁷ Article 5 (4) (b) ICTD.

The ICTs Directive does not provide for equal treatment with regards to education and vocational training. The rest of the ‘first admissions’ directives contain optional restrictions to equal treatment that Member States may apply regarding “study and maintenance grants and loans or other grants and loans”.²⁰⁸ In addition, the Seasonal Workers Directive and the Single Permit Directive allow possible derogations to equal treatment concerning education and vocational training, which is directly linked to the specific employment activity.²⁰⁹

Finally, the Single Permit Directive provides for additional optional restrictions to equal treatment that Member States can make use of by limiting their application to those TCNs who are in employment or who have been employed and who are registered as unemployed; excluding TCNs who have been admitted to their territory as students under Directive 2004/114/EC; and laying down specific prerequisites including language proficiency and the payment of tuition fees, in accordance with national law, with respect to access to university and post-secondary education.²¹⁰

In contrast, long-term residents enjoy equal treatment with nationals in this field, including study grants in accordance with national law. Member States, however, may restrict this to cases where the registered or usual place of residence of the long-term resident, or that of family members, lies within the territory of the Member State concerned.²¹¹ Family members under the Family Reunification Directive have the same access to education and vocational training as the sponsor.²¹²

All ‘first admissions’ directives contain equal treatment clauses in regards to branches of social security, as defined in Article 3 of Regulation (EC) No 883/2004.²¹³ Except for the Blue Card Directive, however, all other ‘first admissions’ directives allow Member States to restrict equal treatment in the field of social security, mostly with regards to family benefits.²¹⁴ Finally, the Long-term Residence Directive could provide for less protection than workers covered by the Single Permit Directive, because Article 11 (4) allows Member States to limit equal treatment with regards to social assistance and social protection to core benefits.²¹⁵

The directives also legislate different provisions in respect of the export of benefits. Blue Card holders are entitled to portability of statutory old age pensions, “at the rate applied by virtue of the law of the debtor Member State(s) when moving to a third country.”²¹⁶ According to this provision, Member States are required to pay pensions to former Blue Card holders when they move to a third country, even when there is no bilateral social security agreement between the respective two countries.²¹⁷ However, due to the fact that this is an equal treatment clause, the only requirement is that the Member State provides for this type of social security export for its own nationals. Furthermore, Blue Card holders can benefit also from Article 12 (4) of the Single Permit Directive, which additionally allows for a wider export of invalidity and death pensions.²¹⁸

The rest of the categories of migrants covered by the ICTs Directive,²¹⁹ the Students and Researchers Directive²²⁰ and the Single Permit Directive²²¹ are entitled to export of old-age, invalidity and death statutory

²⁰⁸ Article 14 (2) BCD; Article 23 (2)(ii) SWD; Article 12 (2) (iii) SPD; Article 22 (1) (a) SRD. Only the BCD gives an indication as to what the “other grants and loans” are for, namely secondary and higher education and vocational training.

²⁰⁹ Article 23 (2)(ii) SWD; Article 12 (2) (iv) SPD.

²¹⁰ Article 12 (2) (a) SPD.

²¹¹ Article 11 (2) LTRD.

²¹² Article 14 (1).

²¹³ Article 23 (1) (d) SWD; Article 14 (1) (e) BCD; Article 18 (2) (c) ICTD; Article 12 (1) (e) SPD; Article 22 (1) SRD.

²¹⁴ Article 18 (3) ICTD; Article 22 (2) (b) and (c) SRD; Article 23 (2) (i) SWD. Article 12 (2) (b) SPD. Concerning the latter, see also C-449/16 - Martinez Silva, ECLI:EU:C:2017:485.

²¹⁵ H. Verschuere (2016), “Employment and Social Security Rights of Third-Country Labour Migrants under EU Law: An Incomplete Patchwork of Legal Protection”, *European Journal of Migration and Law*, No. 18, pp. 375-408

²¹⁶ Article 14 (1) (f) BCD.

²¹⁷ Verschuere (2016), op. cit.

²¹⁸ Ibid.

²¹⁹ Article 18 (2) (d) ICTD.

²²⁰ Article 22 (1) SRD.

²²¹ Article 12 (4) SPD.

pensions under the same conditions and rates as for nationals of the Member State when they move abroad. The wording of the last paragraph of Article 23 (1) of the Seasonal Workers Directive, however, contains an entitlement for seasonal workers or the survivors of such workers residing in a third country to statutory pensions only.

According to Verschueren, seasonal workers cannot benefit from invalidity and death pensions because neither the Seasonal Workers Directive nor the Single Permit Directive, which excludes seasonal workers from its scope, provide for any entitlement in this regard for these migrant workers.²²² Whether these workers could benefit from such pensions will depend on the implementation of the directive in national law, since in some cases statutory pensions could also cover invalidity and survivors' benefits. In contrast, the Long-term Residence Directive does not contain any provisions on export of benefits.

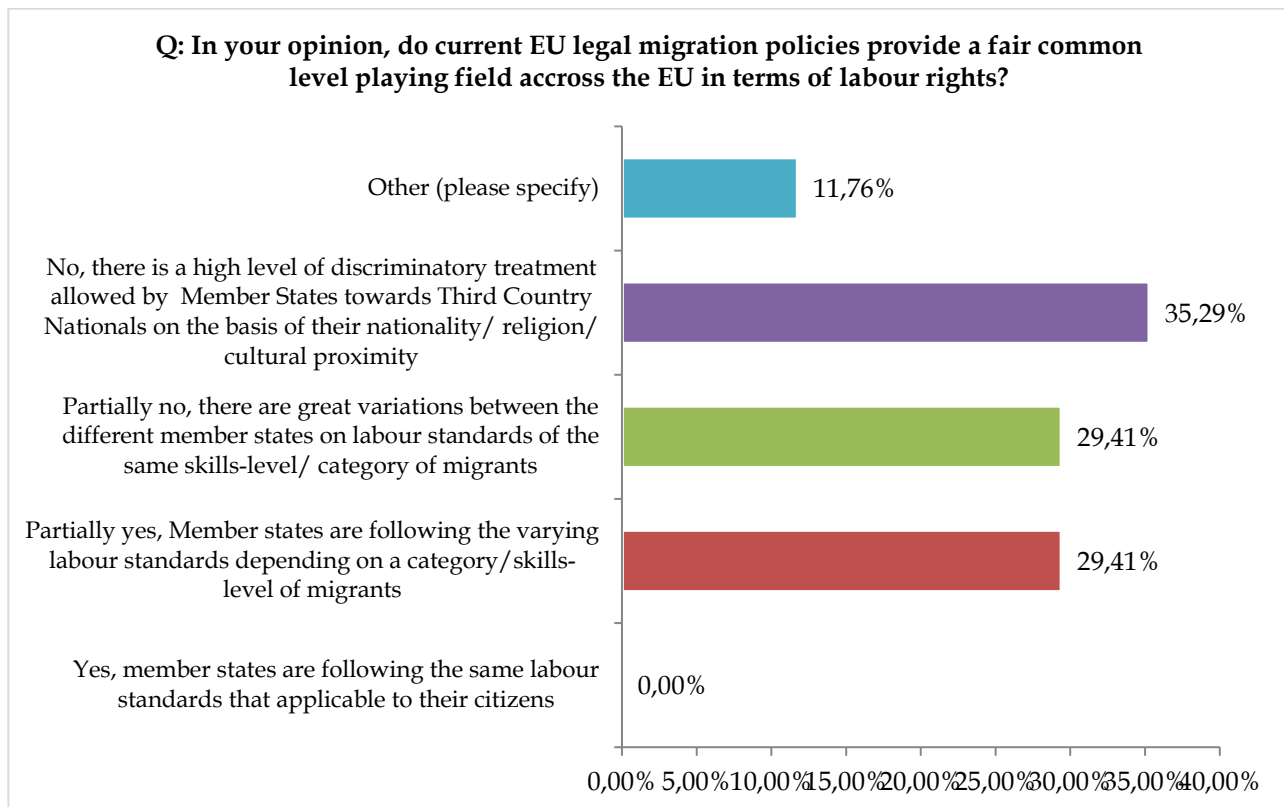
The Single Permit Directive, the Seasonal Workers Directive, the Students and Researchers Directive, the Blue Card Directive and the Intra-corporate Transferees Directive all provide for equal treatment with nationals in relation to the "recognition of diplomas, certificates and other professional qualifications in accordance with the relevant national procedures".²²³ The equal treatment provisions in these directives mean that the different categories of migrants can benefit from the existing national procedures.

E-questionnaire respondents, representing trade unions and employers' organisations, were asked about their perception of whether EU legislation in the area of legal migration has enhanced 'equal treatment' (see Figure 9 below). None of them responded positively in light of the inequality treatment among different categories and across different Member States (Yes – 0 respondents). Views among survey respondents were divided however as to whether the EU has managed to approximate the statuses across the EU along the different perceived levels of skills (five respondents), that great differences still remain across the EU (five respondents) or that actually discriminatory practices (on prohibited grounds) are reflected or inherent in national immigration rules and practices (six respondents).

²²² Verschueren (2016), *op. cit.*

²²³ Article 23 (1)(h) of the SWD, Article 12 (1) (d) of the SRD, Article 14 (1) (d) of the BCD, Article 18 (2) (b) of the ICTD, Article 12 (1) (d) of the SPD.

Figure 9. EU legal migration aquis contribution in creating fair common level playing field as perceived by social partners



Source: E-questionnaire, February–April 2018.

A respondent representing a workers' organisation/trade union in Belgium clarified that the EU directives aimed at highly qualified migrant workers (EU Blue Card and ICTs Directives) provide "high potentials and the equal treatment issues and protection of labour rights are better than for instance those provided for in the Seasonal Workers Directive."²²⁴ The same respondent pointed out that 'laws on the books' and 'laws in the reality' may be different based on experiences with the EU Posted Workers Directive. This instrument concerns mobile EU citizens and thus is beyond the scope of the current assessment, but it demonstrates that the EU currently allows that, through "the possibility of posting, lower and mid-skilled workers are less well treated than national workers."²²⁵

The Delphi method discussion implemented in this Research Paper brought to light important findings regarding the EU value added in ensuring equal treatment and upholding international human rights and labour standards of all TCNs. This was seen to be an essential cornerstone for creating a fair common level playing field across the EU in compliance with EU standards and Treaty principles.

The Delphi method participants mentioned that equal and fair treatment is essential not only in order to ensure better internal coherency in the current EU legal migration *aquis* (Figure 10 and Table 9), but also in order to ensure external consistency with international and EU human rights principles and labour standards. This 'internal-external consistency' was identified to be of central importance in terms of the EU's legitimacy, image and role in negotiating the UN Global Compacts on Migration.²²⁶ According to the Delphi method participants, the EU's external and internal legal migration policies need to be well-aligned so as to have

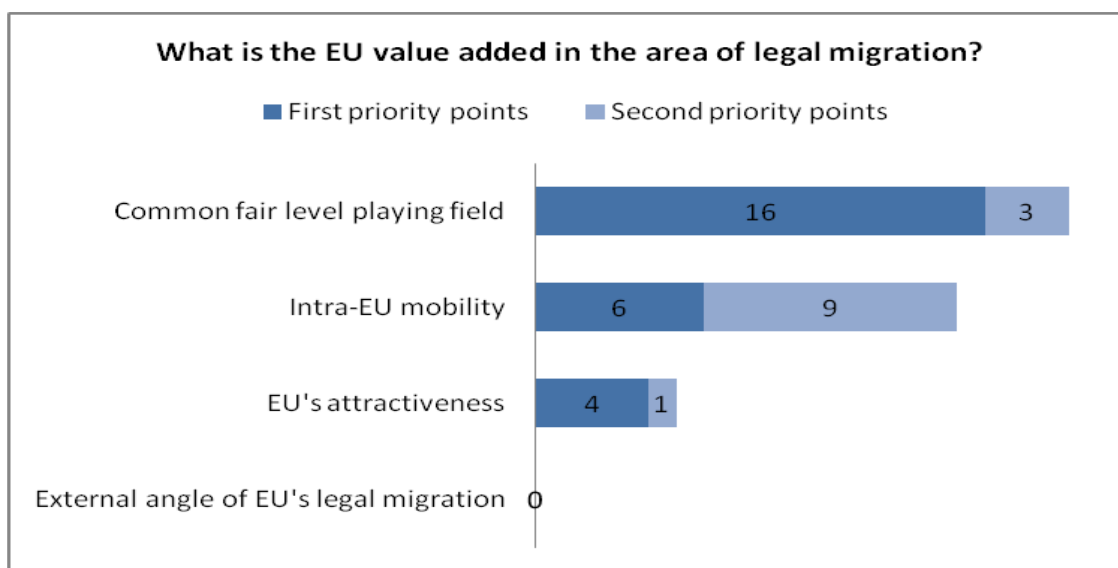
²²⁴ A respondent, representing a workers' organisation/trade union in Belgium, e-questionnaire, February-April 2018.

²²⁵ A respondent, representing a workers' organisation/trade union in Belgium, e-questionnaire, February-April 2018.

²²⁶ Delphi method discussion on 9 March 2018, Brussels.

credibility ‘at home’ – among and ‘outside’ Member States – and in the international arena.²²⁷ Similarly, it was seen that internal and external coherence, and upholding non-discrimination standards on rights at work, adds to the EU’s global attractiveness.

Figure 10. Delphi method voting on the greatest EU value added in the area of legal migration



Source: Authors, 2018, based on the Delphi method discussion on 9 March 2018, Brussels.

Table 9. Delphi method discussion on equal treatment

Pros	Cons	Conditions
<ul style="list-style-type: none"> Adds to equality & upholds rights of all people (including nationals & TCNs) Strengthens EU role in standard-setting Provides grounds for approximation Tackles unfair business practices 	<ul style="list-style-type: none"> High expectations Difference of the law in the books and the law in practice Problems with poor minimum standards 	<ul style="list-style-type: none"> Should be understood as both process and goal Should not remain bureaucratic tricks Should extend to all areas of life

Source: Authors, 2018, based on the Delphi method discussion on 9 March 2018, Brussels.

3.1.2. Gaps in terms of EU competence in the area of employment

One of the gaps mentioned in the Delphi discussion was the lack of EU competence in the area of labour issues. This however stands at odds with the current state of play of EU competence in migration and social inclusion, which is highlighted in Chapter 1 of this Research Paper. A Bulgarian trade union member responding to the survey said,

“The problem is that European migration policy is being dealt with outside European labour policy. But they are interconnected. If the EU fails to provide decent working conditions and wages in all Member States, this will inevitably affect the migrants from third countries.”²²⁸

²²⁷ Delphi method discussion on 9 March 2018, Brussels.

²²⁸ A respondent, representing a workers’ organisation/trade union in Bulgaria, e-questionnaire, February-April 2018.

The EU Employer Sanctions Directive (2009/52/EC) establishes minimum standards across the EU on sanctions and measures against employers of irregularly-staying TCNs. In particular, Article 6 of the Employers Sanctions Directive (2009/52/EC) obliges employers to pay back the wages for undocumented migrants. Nevertheless, our research shows that due to the lack of prospects for regularising status, many abusive employers are not duly reported as Directive 2009/52/EC does not protect the residence status of the victim, nor does it allow finding a new employment, so as to enable the agency of the TCNs.

Four European Parliament interviewees were convinced about the need to treat the discourse about and policy approach to legal migration as an issue of employment rather than of 'home affairs'.²²⁹ They also referred to the Resolution on the situation in the Mediterranean and the need for a holistic EU approach to migration.²³⁰ At the moment legal migration is treated as an issue of 'security', where a 'ministries of interior' (prevention and policing) approach has too often prevailed over one focused on 'labour and social affairs' and fair and non-discriminatory working conditions.²³¹ Two European Parliament interviewees demonstrated that this dynamic is also seen in the European Parliament. The issues on legal migration have been only marginally covered by the EP EMPL Committee, which is still responsible for the Equal Treatment issues (Article 79.2.b TFEU), and instead have fallen mainly under the mandate of the LIBE Committee, which is mainly responsible for negotiations on entry and residency conditions (Article 79.2.a TFEU).²³² Similar dynamics can be expected to happen at national levels. However, as one interviewee highlighted, sometimes ministries of interior have been more open to EU proposals than ministries of social affairs and labour, which see themselves as "protecting labour market from social dumping".²³³

3.1.3. Gaps in terms of EU non-discrimination legislation and policies

A recent study published by the EU Agency on Fundamental Rights (FRA) highlights that in light of greater perceived discrimination and hate crime incidents by TCNs in the EU, there is an important gap to be filled in the EU legislation which at the moment allows discrimination on the basis of nationality.²³⁴ The FRA study emphasises that

"while migrants are protected from discrimination on the basis of ethnic or racial origin, in 16 Member States they are not protected against discrimination on the basis of their nationality or migrant, refugee or foreigner status. Given that fundamental rights and equality are the basis of the EU and among the shared values common to the Member States (Article 2 of the Treaty on European Union (TEU) and Article 21 of the Charter), this may function as an obstacle to the enjoyment of equality and fundamental rights."²³⁵

The Delphi discussion participants confirmed the need for the EU to devise more targeted measures that tackle specific forms of discrimination arising due to EU migratory status and the lack of effective options to uphold and enforce rights and working conditions attached to each of them.²³⁶ Currently available legislative tools are the Racial Equality Directive (2000/43/EC), extending to all areas of life, and the Employment Equality Directive (2000/78/EC), extending to all grounds of discrimination, including nationality and migration status. There are also two separate documents covering the issues on gender discrimination, such as the Access to Goods and Services Directive (2004/113/EC), addressing direct and indirect discrimination based on gender, and Council Directive 79/7/EEC on the progressive implementation of the principle of

²²⁹ Interviews with European Parliament (1), (2), (3), (4).

²³⁰ European Parliament (2016), Resolution of 12 April 2016 on the situation in the Mediterranean and the need for a holistic EU approach to migration (2015/2095(INI)).

²³¹ Interviews with European Parliament (1), (2), (3).

²³² Interviews with European Parliament (1), (2).

²³³ Interview with Polish official.

²³⁴ FRA (2017), "Together in the EU: Promoting the participation of migrants and their descendants", Study, Vienna, March (<http://fra.europa.eu/en/publication/2017/migrant-participation>).

²³⁵ Ibid.

²³⁶ Delphi method discussion on 9 March 2018, Brussels.

equal treatment for men and women in matters of social security. **Error! Reference source not found.** showcases the gaps left by EU directives, in particular when it comes to discrimination on the grounds of nationality (as discussed in Chapter 2).

Table 10. Grounds for discrimination and affected policy areas, with EU directives that address them

	Education	Social protection	Employment	Access to goods and services
Gender		79/7/EEC	2006/54/EC	2004/113/EC
Race	2000/43/EC	2000/43/EC	2000/43/EC	2000/43/EC
Religion			2000/78/EC	
Disability			2000/78/EC	
Age			2000/78/EC	
Sexual orientation			2000/78/EC	
Nationality				

Source: Based on EPRS (2017), “At Glance: EU measures against discrimination”, Brussels, April ([www.europarl.europa.eu/RegData/etudes/ATAG/2017/603887/EPRS_ATAG\(2017\)603887_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/ATAG/2017/603887/EPRS_ATAG(2017)603887_EN.pdf)).

There is a lack of possibilities for addressing multiple and intersectional forms of discrimination within the context of employment and other life areas as illustrated in **Error! Reference source not found.** above. The EU’s added value in this respect has been confirmed by another EPRS study in the area of equality, which also called for filling not only legislative but enforcement gaps.²³⁷ This Research Paper finds that the absence of the Horizontal Equal Treatment Directive, proposed by the Commission and pending within the Council since 2008, adds to gaps and barriers in the EU’s law to address intersectional forms of discrimination. Also, as nationality is not included among the grounds in the Race Directive, this leads to a protection gap for TCNs, further fragmenting their rights across the EU.²³⁸

As mentioned in Chapter 2 on EU principles of ‘fairness’ and ‘equivalence’, certain differential treatment of EU Member State nationals and TCNs can be justified as proportional and necessary for the pursued aims. Nevertheless, it is important to bring into account discriminatory impacts of such provisions. As Brouwer and De Vries (2015) highlight, absence of grounds of nationality in the Racial Equality Directive as well as in Article 18 of TFEU should not be a ‘carte blanche’ to discriminate against TCNs:

“[I]t is time to (re)interpret Article 18 TFEU so as to apply also to TCNs [third-country nationals] ...to allow TCNs to rely on this provision where they are treated differently on account of their nationality in any area falling within the scope of the EU treaties.”²³⁹

The current Research Paper indicates that the very institutionalised and systemic nature of differential treatment of TCNs, depending on the first entry directive according to which they are admitted, has implications for their bargaining power, possibility to defend labour rights and fundamental rights in the receiving society.

3.1.4. Gaps in terms of accessing justice

²³⁷ Fachathaler et al. (2018).

²³⁸ FRA (2017), op. cit.

²³⁹ E. Brouwer and K. de Vries (2015), “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 M. van den Brink, S. Burri and J. Goldschmidt (eds), *Equality and Human Rights: Nothing but Trouble?*, Utrecht: Netherlands Institute of Human Rights (SIM), pp. 123–146. In FRA (2017) Second European Union Minorities and Discrimination Survey, main results.

The literature has underlined how having effective recourse to the justice system constitutes a particularly crucial element for ensuring the protection of one's fundamental and labour rights.²⁴⁰ The 2016 FRA MIDIS II survey indicated that overall reporting of discrimination cases had decreased since FRA MIDIS I, which took place in 2008. The FRA study highlights that "EU-MIDIS I revealed that only a small proportion of respondents (18 %) reported incidents of discrimination they had experienced in the 12 months preceding that survey. EU-MIDIS II results show that the situation has not improved. To the contrary: only 12 % of respondents who felt discriminated against reported the most recent incident."²⁴¹

Nevertheless, in the context of third-country workers, particularly undocumented migrant workers, the role of rights and 'the justice system' are often seen as 'a last resort', as it may lead to termination of employment and subsequent expulsion from the country. In addition, it may also be a costly option, where only those with sufficient resources could benefit and invest in access to justice.²⁴² However, the EU's Victims of Crime Directive (2012/29/EU) constitutes a positive example of addressing this 'justice gap'. This directive establishes minimum standards on the rights, support and protection of victims of crime, including hate crime. A more effective operationalisation of the Victims of Crime Directive (2012/29/EU) and providing possibilities for civil society to provide first legal information and cooperate with legal aid services could facilitate improved access to justice for TCNs falling under the scope of EU legal migration directives.

The EU Returns Directive (2008/115/EC) was mentioned by a Delphi method discussant representing academia as transforming a directive of 'shame' into a directive of 'rights', highlighting in particular the right to access justice.²⁴³ Article 13.4 of the Returns Directive obliges Member States to provide legal aid free of charge in such cases.²⁴⁴ Several Delphi method discussants from civil society referred to the possibility that the threat of undocumented migrant workers being returned is often used by employers to intimidate and discourage their employees from seeking justice.²⁴⁵ However, as illustrated in our subsequent analysis, the threat is also present for those whose residence status is firmly tied to an employment contract, and thus the termination of employment would result in losing the right to reside in the EU, such as those under Seasonal Work Permit.

Barriers to equal treatment (B1)

The Delphi method discussion identified the lack of equal treatment among TCNs and their potential exploitation in the labour markets as a key challenge to the EU's internal and external credibility, and that concrete efforts should be employed to address such gaps. It should be stressed, however, that this is more an issue of lacking implementation and enforcement at the national level in Member States, and thus a barrier rather than a gap in EU law because all relevant legal migration directives and the Charter (see Articles 15 (3), 30 and 31) grant equal treatment to nationals with regard to remuneration and to most of them concerning other working conditions.

3.1.2. Gaps and barriers with regards to entry re-entry and circular migration

Gaps to entry, re-entry circular migration (G2)

Circular migration has been defined by the European Commission as "a form of migration that is managed in a way allowing some degree of legal mobility back and forth between two countries"²⁴⁶. Of the 'first

²⁴⁰ FRA (2017) Second European Union Minorities and Discrimination Survey, main results.

²⁴¹ Ibid, p. 15.

²⁴² Ibid.

²⁴³ Delphi method discussion, 9 March 2018, Brussels.

²⁴⁴ Article 13, para. 4, states, "Member States shall ensure that the necessary legal assistance and/or representation is granted on request free of charge in accordance with relevant national legislation or rules regarding legal aid, and may provide that such free legal assistance and/or representation is subject to conditions as set out in Article 15(3) to (6) of Directive 2005/85/EC."

²⁴⁵ Delphi method discussion, 9 March 2018, Brussels.

²⁴⁶ European Commission (2007), Communication from the Commission to the European Parliament, the Council, the

admissions' directives, the Blue Card Directive sets the highest standard regarding the possibility for rights-based circular migration as opposed to time-bound temporary migration schemes resembling a guest-worker model. This means that the Blue Card Directive allows for facilitated re-entry conditions after absences from the territory of the host Member State. In addition, it means that Blue Card holders have the flexibility to "move back and forth" between their country of origin and the host Member State and at the same time keep adding residence periods that would qualify towards permanent residence.²⁴⁷

With regards to seasonal workers, the EU's approach is to provide for short-term stays coupled with re-entry conditions. Since the transposition of the directive was due by 30 September 2016, there is still no comprehensive information for assessing what kind of measures have been put in place in national law and whether they contribute to circulation-friendly policies.

ICTs can be given an option to re-enter after the end of the maximum duration of the last transfer, but Member States have a margin of appreciation to impose a gap period of up to six months (the so-called 'cooling off period') between the end of the last three-year transfer and a new transfer application, which can decrease the motivation of migrants to re-enter.²⁴⁸ Therefore, whether this directive could be used to facilitate re-entry is in the hands of Member States.²⁴⁹ Because of the possibility of applying a cooling off period, interviewed representatives of an IT company in Bulgaria shared that this instrument is not attractive to them and thus they had transferred their employees to Blue Card or national permits.

The Students and Researchers Directive does not stipulate any explicit facilitated re-entry conditions, which means that researchers need to reapply according to the general admission procedure²⁵⁰ and potentially make use of the visa facilitation instruments and visa-free regimes, if applicable. This is considered a wide gap, since these professionals are a very mobile group.²⁵¹

The Long-Term Residence Directive provides possibilities for circular migration and re-entry of settled TCNs after a certain period of time. In cases when holders of an EU long-term residence permit want to go back to their countries of origin for longer than 12 months, they are able to do that and keep their permits only if the host Member State allows for longer periods of absence.²⁵² Furthermore, in some Member States, the periods of absence are not unconditional.²⁵³ Here again, Blue Card holders can benefit from more favourable provisions and more rights. By way of derogation from Article 9 (1) (c) of the Long-Term Residence Directive, Member States are required to extend the period of absence from the territory of the EU, which is permitted for an EU long-term residence status holder, to 24 consecutive months for Blue Card holders.²⁵⁴ Empirical

European Economic and Social Committee and the Committee of the Regions on circular migration and mobility partnerships between the European Union and third countries, COM/2007/0248 final, Brussels, 16.5.2007, p. 8.

²⁴⁷ See Article 16 (3) stating that for the purpose of calculating the five-year period of legal and continuous residence in the EU required for the EU long-term residence status, periods of absence from the territory of the EU shall not interrupt this period if they are shorter than 12 consecutive months and do not exceed in total 18 months within the required five-year period.

²⁴⁸ Article 12 (2) ICTD.

²⁴⁹ According to an interim overview of the implementation of the directive presented by the European Commission during a seminar at Radboud University on 10 November 2017, Member States seem to make use of this provision.

²⁵⁰ Articles 7 and 8 SRD.

²⁵¹ See for instance A. Fernandez-Zubieta, A. Geuna and C. Lawson (2015), "What do We Know of the Mobility of Research Scientists and of its Impact on Scientific Production", LEI&BRICK Working Paper 08/2015, pp. 3-9; see also Weert (2013), "Support for Continued Data Collection and Analysis Concerning Mobility Patterns and Career Paths of Researchers", European Commission, DG RTD, Brussels, pp. 16-18.

²⁵² Article 9 (1) (c) LTRD.

²⁵³ D. Vanheule, Mortelmans, A., Maes, M., & Foblets, M.-C. (2011), *Temporary and Circular Migration in Belgium: empirical evidence, current policy practice and future options in EU Member States*, Belgian National Contact Point, Brussels.

²⁵⁴ Article 16 (4) BCD.

data shows that the limited period of absence seriously hinders geographical mobility and circular migration because of the potential risk of loss of status.²⁵⁵

Barriers to entry (B2)

The access to the EU labour market for TCNs coming to the EU is “subject to a wide diversity of conditions, requirements, and restrictions”.²⁵⁶ How easy or difficult it is to gain access to the EU labour market depends again on the profile and ‘legal status’ of the TCNs irrespective of their actual skills and qualifications, which in turn is a direct result of the sectoral approach to labour migration developed at the EU level.

There are myriad obligatory conditions for admission related to a work contract or binding job offer, sufficient resources, sickness insurance, as well as optional requirements. Even the Blue Card holders that the EU wishes to attract face fairly restrictive admission conditions.²⁵⁷ For instance, most Member States use the option of Article 5(2) of the Blue Card Directive and require the applicant to provide an address in the Member State, which according to the data gathered on the basis of focus groups with Blue Card holders in Bulgaria is an additional barrier and can add to the burdensome entry application procedure when migrants are applying from outside the EU.²⁵⁸

Currently, the Blue Card, Students and Researchers and ICTs directives contain wide discretion for the use of ‘threat to public policy, public security or public health’.²⁵⁹ Moreover, the European Commission proposed narrowing the possibilities of using blanket application of refusal on the grounds of ‘threat to public policy, public security or public health’ and to use it only for non-renewal and withdrawal in a proportionate manner and when linked with the “specific circumstances of the case and respect [for] the principle of proportionality”.²⁶⁰

The uneven use of the Blue Card Directive is striking, with Germany responsible for the large majority of issued Blue Cards.²⁶¹ The Blue Card Impact Assessment concluded that such a situation is a result of different economic needs but also of the existence of “the national parallel schemes for attracting highly qualified TCN[s] that compete with the EU Blue Card and with each other.”²⁶² The European Parliament saw it as “an incentive for Member States to invest and utilise the EU Blue Card.”²⁶³ In any case, the numbers of first

²⁵⁵ Z. Vankova (2017), “Implementing the EU's Circular Migration Approach: Legal and Migrant Perspectives on Entry and Re-Entry Conditions in Bulgaria and Poland”, Robert Schuman Centre for Advanced Studies, Research Paper No. RSCAS 2017/34, European University Institute, Fiesole.

²⁵⁶ Carrera, S., Guild, E., & Eisele, K. (2014) (eds.), *Rethinking the Attractiveness of EU Labour Immigration Policies – Comparative Perspectives on the EU, the US, Canada and beyond*, CEPS Paperback, Brussels.

²⁵⁷ European Commission (2016), Impact Assessment Accompanying the document Proposal for a Directive of the European Parliament and the Council on the conditions of entry and residence of third-country nationals for the purposes of highly skilled employment and repealing Directive 2009/50/EC Strasbourg, SWD(2016) 193 final, PART 1/6, 7.6.2016, pp. 4, 6-8.

²⁵⁸ European Commission (2014), Communication on the implementation of Directive 2009/50/EC on the conditions of entry and residence of third-country nationals for the purpose of highly qualified employment, COM(2014) 287 final, Brussels, 22.5.2014; Vankova (2017).

²⁵⁹ See for instance Article 5 (1) (f) BCD, Article 7 (6) SRD, Article 5 (8) ICTD. On the wide discretion given to the Member States in the public security aspect, see C-544/15 *Fahimian*, ECLI:EU:C:2017:255. On “public order”, see C-240/17 – E, ECLI:EU:C:2018:8.

²⁶⁰ Article 7, para. 4. of European Commission (2016), Proposal for a Directive of the European Parliament and of the Council on the conditions of entry and residence of third-country nationals for the purposes of highly skilled employment, COM/2016/0378 final - 2016/0176 (COD), Strasbourg, 7.6.2016.

²⁶¹ Eurostat data shows that in 2015, Germany issued 14,620 of the 17,106 overall Blue Cards issued by the Member States.

²⁶² European Commission (2016), op. cit., p. 24.

²⁶³ European Parliament (2017), Explanatory Remarks on the proposal for a directive of the European Parliament and of the Council on the conditions of entry and residence of third-country nationals for the purposes of highly skilled employment (COM(2016)0378 – C8-0213/2016 – 2016/0176(COD)), 28 June.

residence permits issued by Member States for reasons of employment far outnumber those of the Blue Card, showing its limited overall application thus far.²⁶⁴

In addition, the existence of parallel EU and national highly skilled/qualified schemes creates an overly complex landscape of rules, statuses and procedures. Member States have wide margin of appreciation - due to ample of the 'may' clauses in current BCD there are "not only 25 national schemes but also 25 very different EU Blue Card approaches adding diversity to the migration policies addressing the highly skilled".²⁶⁵ As mentioned in Chapter 1 of this Research Paper, so far Member States have opposed abolishing national schemes in the negotiations in the Council.²⁶⁶

Regarding all 'first admissions' migration directives, Member States retain the power to determine the volumes of admission, as set out in Article 79 (5) TFEU.²⁶⁷ This means that they are free to set quotas of admission and reject applications when these quotas are reached. This, however, does not apply to admitted family members under the Family Reunification Directive. Furthermore, Member States can impose a labour market test requirement, which could also serve as a basis for rejecting the application.²⁶⁸ Most Member States have imposed such a test even on Blue Card holders,²⁶⁹ who are migrant workers considered to be in demand and "desired". Nevertheless, for the Blue Card admissions, an Impact Assessment study concluded that refusal rates on labour market tests appeared to be low.²⁷⁰ With regard to admitted family members under the Family Reunification Directive, the labour market test is possible only during the first year.²⁷¹ It can also serve as a barrier to accessing a second Member State under the Long-Term Residence Directive.²⁷² The OECD has highlighted that labour market tests vary across Member States, thereby creating a context characterised by a lack of clarity and simplicity.²⁷³ According to its report, there is scope for the EU to clarify the nature of labour market tests and ensure equal consideration of all EU/EAA nationals and residing TCNs with full access to the labour market.²⁷⁴

Barriers to re-entry as part of circular migration (B3)

Even though the Blue Card Directive provides opportunities for rights-based circular migration, Member States have discretion to restrict in their national law the periods of absences from their territories to specific cases only, which is considered a barrier.²⁷⁵ Furthermore, the failure of the Blue Card Directive to support the EU in its competition for global talent and attract highly qualified/skilled TCNs, as well as empirical legal research on the implementation of the Directive, shows that even though this instrument provides for flexibility of the migration trajectory and rights-based circular migration, it has not been used widely due to the restrictive admission conditions and differing implementation at national level.²⁷⁶

²⁶⁴ Eurostat data shows that in 2015, Member States issued 707,598 first residence permits for employment purposes. This of course includes not only high-skilled workers.

²⁶⁵ European Commission (2016), op. cit.

²⁶⁶ For the state of play in the negotiations, see European Parliament (2017), European Parliamentary Research Service, Briefing EU Legislation in Progress, Revision of the Blue Card Directive ([www.europarl.europa.eu/RegData/etudes/BRIE/2017/603942/EPRS_BRI\(2017\)603942_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2017/603942/EPRS_BRI(2017)603942_EN.pdf)).

²⁶⁷ The term "first admissions directives" is borrowed from Barnard (2016) and in this text refers to the Seasonal Workers Directive, Blue Card Directive, the Intra-corporate Transferees Directive and the Students and Researchers Directive.

²⁶⁸ See Article 8 (3) SWD and Article 8 (2) BCD. Member States cannot apply a labour market test to intra-corporate transferees, unless required by an Act of Accession. See Recital 21 of ICTD Preamble.

²⁶⁹ European Commission (2014).

²⁷⁰ European Commission (2016), op. cit., Annex 7 Analysis Related to Variations of the Admission Conditions of the EU Blue Card, p. 196.

²⁷¹ Article 14 (2) FRD.

²⁷² Article 14 (3) LTRD.

²⁷³ OECD (2016), Recruiting Immigrant Workers: Europe, OECD Publishing, Paris, 2016

²⁷⁴ Ibid., pp. 133, 137.

²⁷⁵ Article 16 (5) BCD.

²⁷⁶ European Commission (2014), Communication on the implementation of Directive 2009/50/EC on the conditions of entry and residence of third-country nationals for the purpose of highly qualified employment ("EU Blue Card"),

Delphi discussion participants indicated that it is important to have ‘circular migration’ as an option, not as an obligation, through minimising bureaucratic hurdles for entry and exit. As Graeme Hugo highlights, ‘circular migration’ is not a panacea itself. In order to be a ‘triple-win’ – for migrants and sending and receiving countries – it should be managed well, for instance by reducing individual mobility costs by enabling dual citizenship and portability of social benefits and minimising the disruption of family life.²⁷⁷ Similarly, Solé et al. (2016) concludes that circular migration should be seen not as simple movement back and forth but as within the additional layers of policies on “return management, xenophobic attitudes, welfare system stability, limitations of nation-states and so on”.²⁷⁸

3.1.3. Gaps and barriers concerning work authorisation

Work authorisation is an important policy area to consider with regards to TCNs in the EU. Very often their initial work permits bind them to a specific employer, sector and region for a period of time, during which they cannot change them. This can pose two types of problems for migrants. In case of job loss, TCNs may be inclined to either overstay in the receiving country or leave for their home country earlier than their work permits allow. In addition, the impossibility of changing their employment can increase their risk of exploitation and abuse.²⁷⁹

Gaps concerning change of employer (G3) and barriers (B4)

The EU Blue Card Directive and the Seasonal Workers Directive explicitly provide for changing employers.²⁸⁰ For seasonal workers, Member States must allow once to change employer, but retain discretion on how many further changes to allow within the authorised period.²⁸¹ Within the first two years changes of employer for EU Blue Card holders are subject to prior authorisation of the competent authorities of the Member State of residence, in accordance with national procedures.²⁸² There is a difference in treatment in this regard concerning the ICTs Directive and the Students and Researchers Directive. The possibility to change employers is only implicitly provided for researchers²⁸³ and ICTs are bound to their employer during the whole period of their transfer.²⁸⁴ In contrast, long-term residents are entitled to free access to employment and the right to switch employers in line with Article 11 (1) (a).

Gaps concerning consequences of unemployment (G4) and barriers (B5)

Of the ‘first admission’ directives, only the Blue Card Directive explicitly stipulates, in Article 13 (1), that unemployment does not automatically lead to the withdrawal of the permit, unless the period of unemployment exceeds three consecutive months and occurs more than once during the validity of the

COM(2014) 287 final, Brussels, 22.5.2014; European Parliament (2015), European Parliamentary Research Service, Briefing Implementation Appraisal, The EU Blue Card Directive, December (www.europarl.europa.eu/RegData/etudes/BRIE/2015/558766/EPRS_BRI%282015%29558766_EN.pdf); European Commission (2016); European Parliament (2016), European Parliamentary Research Service, Briefing Initial Appraisal of a European Commission Impact Assessment, The New EU Blue Card Directive, September (www.europarl.europa.eu/RegData/etudes/BRIE/2016/587338/EPRS_BRI%282016%29587338_EN.pdf); Vankova (2017).

²⁷⁷ G. Hugo (2013), “What we know about circular migration and enhanced mobility”, *Migration Policy Institute*, 7, pp. 1-10.

²⁷⁸ C. Solé, S. Parella, T.S. Martí and S. Nita (2016), “Concluding Remarks”, in C. Solé, S. Parella, T. Martí and S. Nita (eds), *Impact of Circular Migration on Human, Political and Civil Rights, United Nations University Series on Regionalism*, vol. 12, Dordrecht: Springer, Cham.

²⁷⁹ See N. Baruah and R. Cholewinski (2006), “Handbook on Establishing Effective Labour Migration Policies in Countries of Origin and Destination”, Organization for Security and Co-operation in Europe, International Organization for Migration and the International Labour Office, p. 115.

²⁸⁰ Article 15 (3) SWD; Article 12 (2) BCD.

²⁸¹ See Article 15 (4) SWD.

²⁸² Article 12 (2) BCD.

²⁸³ See Article 21 (5) SRD.

²⁸⁴ See Article 17 ICTD.

permit. In the case of seasonal workers, taking into consideration the possibility to change employers within the authorised period, this should implicitly mean that the sole fact of unemployment could not lead to withdrawal if the worker secures another job with another employer within a reasonable time.²⁸⁵ Not allowing for a reasonable period to look for another job would take away the *effet utile* of Article 15(3) of the Blue Card Directive and thus be incompatible with the EU law principle of effectiveness. The length of the reasonable time, according to the Court, has to be defined in national law. In the case of ICTs, unemployment would lead to the withdrawal of the permit,²⁸⁶ while the Students and Researchers Directive does not legislate in this regard. However, this means that only the Blue Card Directive explicitly provides for the possibility to find alternative work in case of loss of employment and this is considered a gap with regards to the rest of the sectoral ‘first admissions’ directives.

3.1.4. Gaps and barriers concerning choice of residence and access to secure residence status and intra-EU mobility

Gaps in choice of residence (G 5)

All ‘first admissions’ directives allow for mobility within the Member States and choice of residence. Technically, only seasonal workers could be limited to a certain extent concerning their choice of residence in cases when it is arranged by the employer.²⁸⁷ Even though the directive contains safeguards ensuring that the accommodation provided by the employer guarantees an adequate standard of living and meets the general health and safety standards of the respective Member State, it does not address employer-organised accommodation, which could lead to abuse and dependency and is considered a gap.²⁸⁸

The Long-Term Residence Directive provides for the general rules on the access to this status. TCNs who have resided “legally and continuously” within the host Member State’s territory for five years immediately prior to the submission of the relevant application have the right to long-term residence status.²⁸⁹ Periods of absence from the host Member State which are shorter than six consecutive months and do not exceed 10 months in total within the five-year period are not considered an interruption and should be taken into account for its calculation.²⁹⁰ Prior residence “solely on temporary grounds” or where the residence permit had been “formally limited” is not calculated into the five-year period.²⁹¹

Gaps in secure residence status (G 6)

A wide gap between different categories of migrants arises from the Long-Term Residence Directive’s exclusion from its scope of TCNs who reside on such “temporary” or “formally limited permits”,²⁹² such as ICTs, seasonal workers and students. Nevertheless, the CJEU ruled in *Justitie v. Singh* C-502/10 that Member States must not automatically exclude persons on such temporary permits from EU long-term residence, since any resident with at least five years’ legal residence is a *de facto* permanent resident deserving equal rights and opportunities under the law.²⁹³

²⁸⁵ On the basis of Article 15 (3) SWD. The “reasonable time” criterion was introduced by the CJEU in its judgment in *Tetik, C-171/95 Tetik v. Land Berlin*, ECLI:EU:C:1997:31. It concerned Turkish workers with a right to continue to work under Article 6 (1) of the EEC-Turkey Association Council Decision 1/80, but on the basis of comparison with the rights of EU workers. See paras 27, 30-32, 42 and 48.

²⁸⁶ Article 8 (5) (a) in connection with Article 14 ICTD.

²⁸⁷ See Article 20 SWD.

²⁸⁸ See Article 5 (1)(c) and Article 6 (1) (c) in connection with Article 20 SWD. See also A. Wiesbrock, Jöst, T., & Desmond, A. (2016), “Seasonal Workers Directive 2014/36/EU”, in: Hailbronner, K. & Thym, D. (Eds.), *EU Immigration and Asylum Law. A Commentary* (Second Edition ed.): C. H. Beck /Hart/ Nomos.

²⁸⁹ Recital 6 and Article 4 (1) LTRD.

²⁹⁰ Article 4 (3) LTRD.

²⁹¹ Article 4 (2) in connection with Article 3 (2) (e) LTRD.

²⁹² According to the Court ruling in C-502/10 *Singh*, ECLI:EU:C:2012:636, these are two distinct autonomous exceptions, which need to be interpreted through the prism of the integration objective of the directive.

²⁹³ T. Huddleston (2016), “Time for Europe to get migrant integration right”, Issue paper published by the Council of Europe Commissioner for Human Rights, Council of Europe, May.

Therefore, the only option for these two categories of migrants is to change to another national or EU permit that would allow them to accumulate residence periods for long-term residence status. On the other hand, EU Blue Card holders have facilitated access to permanent residence²⁹⁴ and the Revision Directive might give them even greater access to this EU permit.²⁹⁵ Access to long-term residence for researchers is implicitly provided in the Students and Researchers Directive²⁹⁶, which can be considered another gap, between SRD and BCD.

In addition, language courses, as an integration condition for long-term residence, have to be proportionate and accessible for TCNs.²⁹⁷ As CJEU clarified in *P and S v. Commissie Sociale Zekerheid Breda* C-579/13, the costs of the language course and accessibility of study materials cannot constitute an undue obstacle; for example, denying free courses to migrants and imposing fines for non-attendance is seen to contravene EU law. In the earlier case *Commission v. Netherlands* C-508/10, the CJEU clarified that course cost should not be disproportionately higher than the ordinary fees for renewing personal documents, such as an identification card or passport.²⁹⁸

Gaps in intra-EU mobility (G7)

Most of the legal migration directives incorporate certain versions reflecting Article 45 EU CFR in respect of intra-EU mobility of legally residing TCNs. Two types of intra-EU mobility are provided, presenting different policy objectives where the notion of ‘temporariness’ is relevant. Firstly, the goal of the Blue Card Directive and the Long-Term Residence Directive is for the person to move to a second Member State, find a job and settle there. Therefore, these two directives contain a residence requirement in the first Member State: 18 months of residence for Blue Card holders²⁹⁹ and for long-term residents,³⁰⁰ after they have obtained the status, which means after five years. Secondly, the objective of intra-EU mobility in other directives, such as the Intra-Corporate Transferees Directive or the Students and Researchers Directive, aims to facilitate a temporary movement to a second Member State and thus these directives do not require a prior residence.

Depending on the specific directive, intra-EU mobility also appears under the guises of short-term or long-term mobility, which often depends on the exact length of residence that is foreseen in the second Member State. With regards to researchers, the Intra-Corporate Transferees Directive³⁰¹ and Students and Researchers Directive³⁰² provide for both types of mobility. The Long-Term Residence Directive and Blue Card Directive envisage only long-term mobility.

Here also, depending on the category of TCN and TCN worker the procedural and substantive requirements applicable to the exercise of intra-EU mobility, and the criteria applicable to their family members, vary substantially. With regards to family members, long-term residents,³⁰³ Blue Card holders,³⁰⁴ ICTs exercising long-term mobility³⁰⁵ and researchers³⁰⁶ are entitled to bring their family members when moving to a second Member State. However, from these four categories only the family members of long-term residents are required to have already resided with the sponsor in the first Member State in order to be able to move to a second Member State.

²⁹⁴ See Article 16 (2) and (3) BCD.

²⁹⁵ Article 17 (2) BCD Recast Proposal.

²⁹⁶ D. Thym (2016), “Long Term Residents Directive 2003/109/EC”, in: Hailbronner, K. & Thym, D. (Eds.), *EU Immigration and Asylum Law. A Commentary* (Second Edition); C. H. Beck /Hart/ Nomos.

²⁹⁷ Huddleston (2016), op. cit.

²⁹⁸ Ibid.

²⁹⁹ Article 18 (1) BCD.

³⁰⁰ Article 14 (1) LTRD.

³⁰¹ See Articles 21 and 22 ICTD respectively.

³⁰² See Articles 28 and 29 SRD respectively.

³⁰³ Article 16 (1) LTRD.

³⁰⁴ Article 19 BCD.

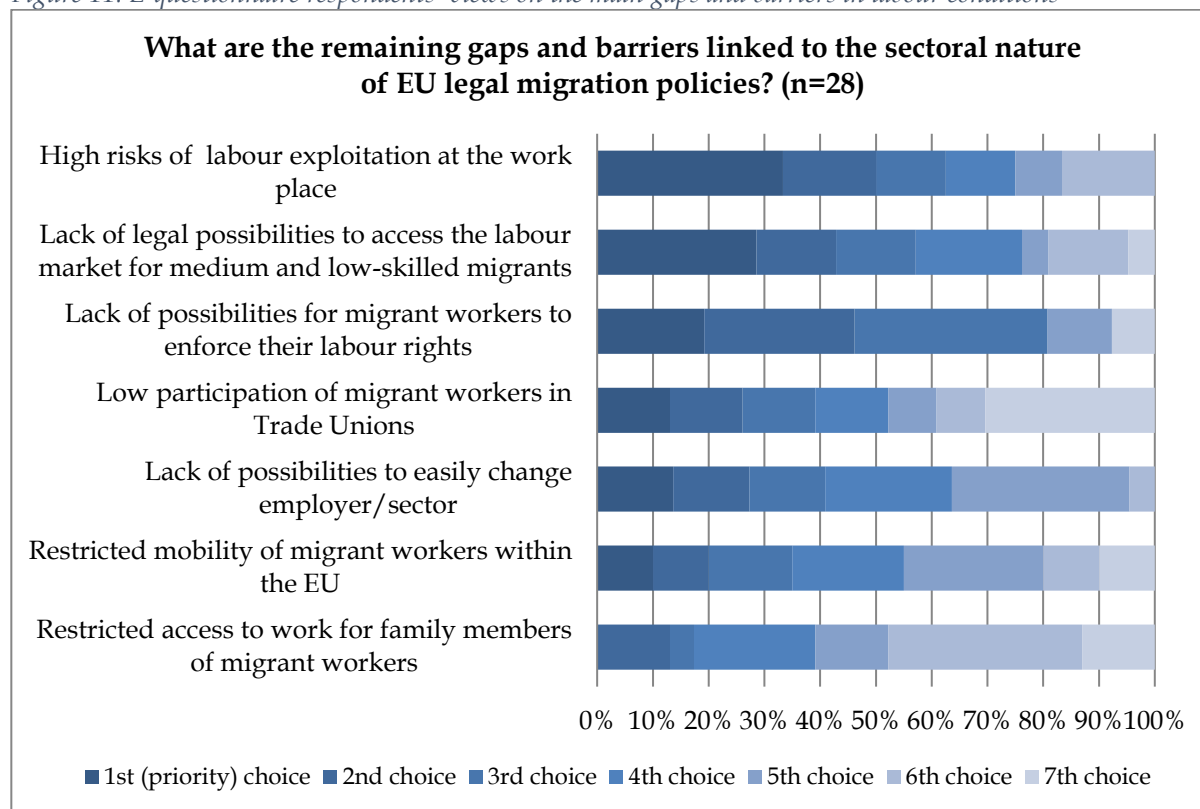
³⁰⁵ Article 19 (4) ICTD.

³⁰⁶ Article 30 SRD.

Intra-EU mobility is foreseen for Blue Card holders, who can accrue years of residence within different Member States with a view to obtaining long-term residence in the EU. The European Commission, in revising the Blue Card to enhance intra-EU mobility, proposed lowering the number of years required to obtain long-term residence status from five to three. Automatic recognition of Blue Cards issued by other Member States and having a single scheme for highly qualified TCNs were also proposals for enhancing intra-EU mobility.³⁰⁷ For example, European Parliament representatives and the European Commission official mentioned during interviews that gaps left by current legislation hinders intra-EU mobility, and particularly, the mobility of seasonal workers.³⁰⁸ The Blue Card Revision proposal contains the possibility of allowing to ‘upgrade’ from ‘seasonal’ to ‘Blue Card’ status. Interviewee from the Council of the EU has highlighted that even though such clause would apply to a small number of people, it was received negatively within the Council.³⁰⁹

Interviewees representing international organisations highlighted that barriers to intra-EU mobility also stem from the lack of uniformity of international human rights and labour standards across the Union.³¹⁰ The latter was also confirmed by e-questionnaire respondents. One-third of them chose labour exploitation and general lack of legal access to the EU’s labour market as the most important gaps and barriers to address. Restricted intra-EU mobility and restricted possibilities for family members to work in the EU were seen at the lower end of the priority list (see Figure 11 below).

Figure 11. E-questionnaire respondents’ views on the main gaps and barriers in labour conditions



Source: E-questionnaire, February-April 2018.

Barriers to intra-EU mobility seem to result not only from different sectoral directives. These barriers are also attitudinal and social. For example, e-questionnaire respondents reiterated that the lack of legal entry access

³⁰⁷ Interview with European Parliament (1)(2)(3).

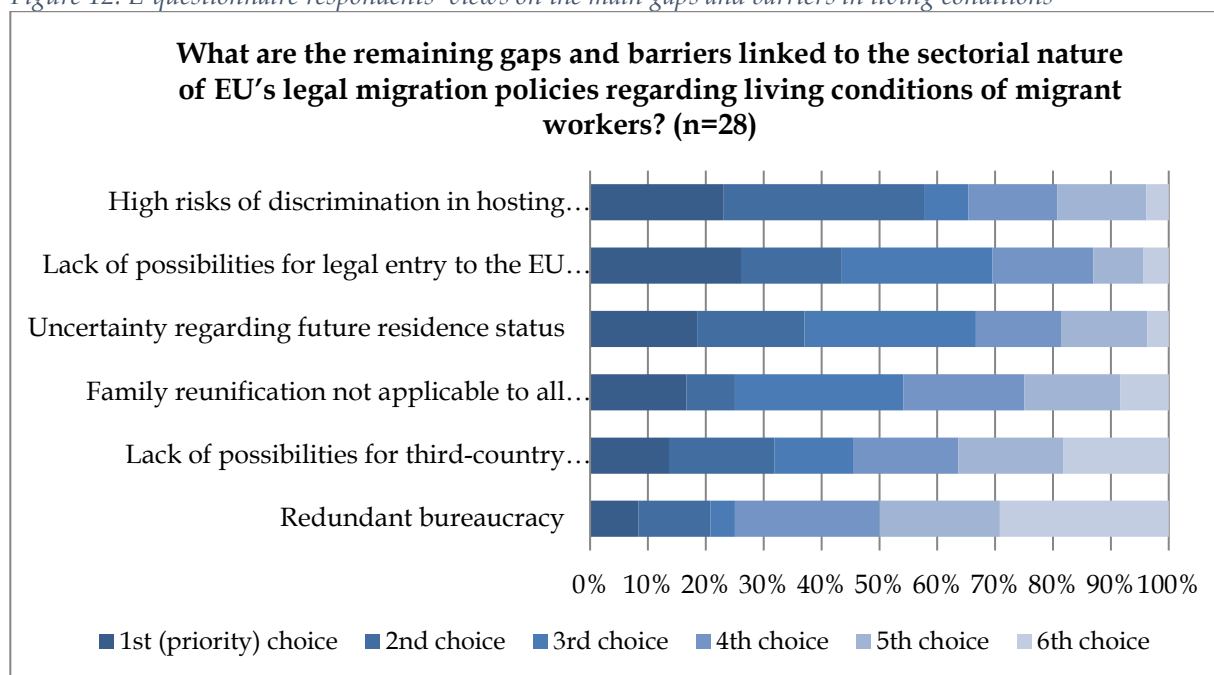
³⁰⁸ Interview with European Commission (2); European Parliament (1)(2)(3).

³⁰⁹ Interview with Council of the EU.

³¹⁰ Interview with International Organisations (1) (2).

and high perceived risks of discrimination hinder living conditions (see Figure 12). Such attitudinal barriers add barriers not only to intra-EU mobility but also to the EU's perceived (un)attractiveness.

Figure 12. E-questionnaire respondents' views on the main gaps and barriers in living conditions



Source: E-questionnaire, February-April 2018.

Interviews with national officials confirmed that in reality there are still major bureaucratic barriers, as TCNs need to reapply for residence permits and fulfil other migration control procedures when moving to another Member State.³¹¹ Interviewees representing EU institutions noted that Member States are not very keen to recognise EU Blue Cards and single residence permits issued by another Member State.³¹² Delphi method discussants suggested that certain conditions for enhancing trust among different actors are needed – they mentioned transparency of the procedures and information sharing as the key condition for mutual trust to enhance legal migration policies.³¹³

3.1.5. Gaps and barriers concerning social security coordination

Gaps (G8)

Legal migration directives are relevant to TCNs' social security rights but are not instruments that coordinate social security systems, thus the existence of social security coordination agreements between Member States and third countries. One can understand the actual entitlements for TCNs in practice only by examining these agreements in detail.³¹⁴

Barriers (B6)

The Delphi method discussion added that there is lack of clarity and coordination among Member States on social protection issues, particularly in relation to portability of rights and family benefits.³¹⁵ Interviews conducted with European Parliament representatives provided concrete examples of the difficulties and

³¹¹ Interview with Belgium, Polish and Dutch officials.

³¹² European Parliament (1), European Commission (3) and Council of the EU, interviewees.

³¹³ Delphi method discussion, 9 March 2018, Brussels.

³¹⁴ See for instance, B. Spigel (2010), "Analysis of Member States' Bilateral Agreements on Social Security with Third Countries", European Commission, Employment, Social Affairs & Equal Opportunities, December.

³¹⁵ Delphi method discussion, 9 March 2018, Brussels.

persistent inequalities and barriers for TCNs to enjoy social security contributions, including at which rate of currency they should be paid.³¹⁶

3.1.6. Gaps and barriers concerning the right to family reunification

Gaps (G9)

The Family Reunification Directive goes further than the universal human rights instruments and the case law of the ECtHR, and stipulates a right to entry and residence for nuclear family members.³¹⁷ However, it reserves this right only for migrants who, according to the Member States, have prospects of settling on the basis of permanent residence. Therefore, a wide gap exists because the directive excludes temporary and seasonal migrants, whose permits are for a specific purpose, with limited validity of less than one year and no possibility of renewal.³¹⁸

How easy or hard it is to reunite with the family depends very much on the category in which the migrant fits and in which Member State he or she wants to reunite with the rest of the family. Blue Card holders, ICTs and researchers are definitely categories that have the most-facilitated access on the basis of derogations to the Family Reunification Directive.³¹⁹ They are exempted from requirements such as having reasonable prospects of obtaining the right to permanent residence, the waiting period requirement and the labour market test for admitted family members.

Barriers (B7)

The Family Reunification Directive permits a number of derogations, which can be seen as barriers to family reunification. Article 4 (5) of the Directive allows Member States to require the sponsor and his/her spouse to be of a minimum age, which is typically 21, before the spouse is able to join him/her. This requirement may only be used to ensure better integration and to prevent forced marriages in Member States.³²⁰ The Commission's Report on the directive's implementation showed that most Member States make use of this optional provision.³²¹ Moreover, several Member States apply the age threshold.³²² The directive provides a narrow definition of the family members and their rights. COFACE Families Europe, in their response to the Commission's 'Fitness Check', observes that EU rules ignore the diversity of family composition, thus "EU rules are made for a single type of family and the right to family life for those persons living in different family forms can be unachievable under the current legislation."³²³

For example, children and most often female spouses become dependent on their sponsors' status, for example to get long-term residence in the EU. The European Parliament has acknowledged this issue in the context of asylum, as "the integration process and rights of women and girls are undermined when their legal status is dependent upon their spouse".³²⁴ Similar challenges are present for TCN spouses using family reunification avenues, where 'dependency' by design affects women more than men.³²⁵ As a result migrant

³¹⁶ Interview with European Parliament representative (1), Brussels.

³¹⁷ S. Peers, E. Guild, D. Arcarazo, K. Groenendijk, & V. M. Lax (2012), *EU Immigration and Asylum Law (Text and Commentary): Second Revised Edition, Volume 2: EU Immigration Law*: Martinus Nijhoff Publishers.

³¹⁸ Article 3 (1) FRD.

³¹⁹ Article 15 BCD; Article 26 SRD; Article 19 ICTD.

³²⁰ European Commission (2014a), p. 7, emphasis added.

³²¹ European Commission (2008), p. 5.

³²² There are two possible derogations which also apply to children. See Article 4 (1) (d), third paragraph, of the FDR and Article 4 (6) of the FRD. For more details, S. Peers et al. (2012).

³²³ COFACE Families Europe (2017) COFACE Families Europe response to the public consultation on EU's legislation on the legal migration of non-EU citizens (Fitness Check on EU legal migration legislation). Brussels, 18 September 2017, URL.

³²⁴ European Parliament resolution of 8 March 2016 on the situation of women refugees and asylum seekers in the EU (2015/2325(INI)), para. H.

³²⁵ M. Morokvasic (2008), "Femmes et genre dans l'étude des migrations: un regard rétrospectif", in J. Falquet, A. Rabaud,

women are more likely to suffer from the lack of access to their rights, including sexual and reproductive rights, and to experience heightened risks of various types of exploitation, including by the spouse.³²⁶

As civil society evidence indicates, this makes migrant women and girls more vulnerable, especially in domestic violence situations, as they often risk losing residence status.³²⁷ In addition, income inequality adds to this dynamic: “In the case of sex, for example, discrimination resulting in lower pay not only leads to lower income, but also higher economic dependence on the spouse/partner, placing the individual at increased risk of intimate partner violence.”³²⁸ In addition, some Member States impose limitations on family members to access the labour market. Other Member States impose pre-departure ‘integration tests’ that can be costly or impractical for many persons willing to reunite with their family members.³²⁹

Applications for family reunification must be submitted and examined when family members reside outside the territory of the Member State in which the sponsor resides.³³⁰ Nevertheless, “in appropriate circumstances” Member States can derogate from this rule and also accept applications that have been submitted when the family members are already in the territory of the Member State concerned.³³¹ Member States have discretion to determine in which situations they will allow for these types of applications. Peers et al. (2012) comment that this provision could be interpreted to mean that Member States are not required to always permit in-country applications, yet they are free to set higher standards for family reunification, which do not necessarily need to be compatible with the provisions of the Family Reunification Directive.³³²

In addition, before authorising the entry of family members, Member States have the discretion to impose additional requirements.³³³ These requirements concern public policy, public security or public health,³³⁴ “normal” accommodation,³³⁵ sickness insurance,³³⁶ “stable and regular resources”³³⁷ and integration requirements,³³⁸ as well as a waiting period.³³⁹ Integration requirements can be applied to family members of Blue Card holders, ICTs and researchers only after they have entered the Member State. These additional

J. Friedman and F. Scrinzi (eds), *Femmes, genre, migrations et mondialisation: un état des problématiques*, Paris: CEDREF, Université Paris Diderot-Paris, p. 7.

³²⁶ L. Hocter, A. Lamačková and K. Thomasen (2017), “Women’s sexual and reproductive health and rights in Europe”, Issue paper by the Council of Europe Commissioner for Human Rights, Council of Europe, December.

³²⁷ ENAR (2010), “Gender and Migration”, Factsheet 42, February.

³²⁸ T. Fachathaler, M. Fernandes, A. Markowska, N. Meurens, L. Rossi & J. Van Caeneghem, (2018), Study for the European Parliament, “The Cost of Non-Europe in the area of Equality and the Fight against Racism and Xenophobia”, by Milieu Ltd for the European Parliamentary Research Service, Brussels, 2018.

³²⁹ For more details on these additional requirements see, K. Groenendijk (2011), “Pre-departure Integration Strategies in the European Union: Integration or Immigration Policy?”, *European Journal of Migration and Law*, Vol. 13, No. 1. See also T. Strik (2013), “Integration tests: helping or hindering integration?”, Committee on Migration, Refugees and Displaced Persons, Doc. 1336, 4 December.

³³⁰ Article 5 (3) of the FRD.

³³¹ Article 5 (3), second paragraph, of the FRD.

³³² Peers et al. (2012), p. 258.

³³³ For more details, see European Commission (2014), Communication on Guidance for application of Directive 2003/86/EC on the right to family reunification, COM (2014) 210 final, Brussels, 3 April.

³³⁴ Article 6 of the FRD.

³³⁵ Article 7 (1) (a) of the FRD.

³³⁶ Article 7 (1) (b) of the FRD.

³³⁷ Article 7 (1) (c) of the FRD. On that article, see Case C-558/14 *Khachab*, ECLI:EU:C:2016:285.

³³⁸ Article 7 (2) of the FRD. For more information, see S. Carrera (2016), “Civic Integration Exams in EU Immigration Law. What Integration is Not in European Law”, in H. Verschueren (ed), *Residence, Employment and Social Rights of Mobile Persons. On How EU Law Defines Where They Belong*, Antwerp, Cambridge: Intersentia; K. Groenendijk (2012), “Integration of immigrants in the EU: The old or the new way?”, in Y. Pascouau and T. Strik (eds), *Which integration policies for migrants? Interaction between the EU and its member states*, Nijmegen: Wolf Legal Publishers; Y. Pascouau (2011), “Mandatory Integration Provisions in EC and EU Member States”, in S. Bonjour, A. Rea and D. Jacobs (eds), *The Others in Europe*, Brussels: Université de Bruxelles.

³³⁹ Article 8 of the FRD.

requirements can cause serious delay to family reunification and disrupt family life. To prevent it, the European Commission, in its Guidance for the application of Directive 2003/86/EC on the right to family reunification, encourages Member States to keep waiting periods “as short as strictly necessary”.³⁴⁰

Despite the discretion awarded to Member States when implementing obligatory integration requirements, their national interpretation and implementation are subject to EU rule of law and fundamental rights scrutiny.³⁴¹ According to the CJEU case law, such measures should aim to facilitate and promote family reunification and not unlawfully pursue migration control goals that aim to filter and limit family reunification.³⁴² These types of mandatory policies need to allow for individualised case-by-case assessment in view of specific circumstances, such as “age, illiteracy, level of education, economic situation or health”,³⁴³ and must comply with the Charter.³⁴⁴ Restrictions must be interpreted narrowly and should not make the exercise of the rights guaranteed by EU migration law too difficult to exercise in practice. Such mandatory civic integration policies should be proportional and the proportionality test criteria should cover their accessibility, design and organisation.³⁴⁵ The principle of proportionality requires the conditions of application of such a requirement to not exceed what is necessary to achieve those aims.

3.1.7. Gaps and barriers concerning recognition of qualifications

Gap (G 10)

Despite the existence of EU instruments in the field of recognition of qualifications, research shows that the recognition systems continue to differ depending on which country is in charge of the recognition procedure.³⁴⁶ Furthermore, equal treatment under the directives applies only when the migrants have already received their authorisation to enter.

Barrier (B8)

A specific type of administrative barrier is experienced by migrants working in regulated professions. As a result, in some Member States, they were forced to undertake ‘medium to low qualified’ jobs in order to support themselves during the long and cumbersome process of recognition of qualification, very often requiring the passing of exams and language tests.³⁴⁷ Therefore, risks of de-qualification, at least during an initial period, are higher among this category of persons. Therefore, the European Parliament called for “the *speedy* validation and recognition of documents attesting the relevant higher *education* qualifications and *higher professional skills to be verified*” (emphasis original).³⁴⁸

3.2. Assessment against the benchmarks

The presented analysis of the gaps and barriers across the legal migration instruments shows that they raise issues of differential or unequal treatment ‘by design’ on the basis of the worker-by-worker and sectoral approach and differential treatment of EU Blue Card holders, who are granted better and ‘fairer’ working

³⁴⁰ European Commission (2014), Communication on Guidance for application of Directive 2003/86/EC on the right to family reunification, COM (2014) 210 final, Brussels, 3 April, p. 17.

³⁴¹ Carrera (2016), op. cit., p. 150.

³⁴² Case C-578/08 *Chakroun*, ECLI:EU:C:2010:117, para. 43. Case C-153/14 *K and A*, ECLI:EU:C:2015:453, para. 57.

³⁴³ Case C-153/14 *K and A*, ECLI:EU:C:2015:453, para. 58.

³⁴⁴ See Case C-153/14 *K and A*, ECLI:EU:C:2015:453, para. 53. This is also in line with Article 17 of the Family Reunification Directive.

³⁴⁵ Case C-153/14 *K and A*, ECLI:EU:C:2015:453, paras 56-58 and paras 69 and 71 on the fees. Case C-579/13 *P and S*, ECLI:EU:C:2015:369, para. 49. See also para. 54 on the amount of a fine penalising failure to comply.

³⁴⁶ Z. Vankova (2018), “Circular migration from the Eastern partnership countries to the EU – the rights of migrant workers in Bulgaria and Poland”, PhD dissertation, Maastricht University, funded under the FP7-PEOPLE-2013-ITN call of the Marie Curie Actions – Initial Training Networks funding scheme (Project number – 608417).

³⁴⁷ Ibid.

³⁴⁸ European Parliament (2017), Explanatory Remarks of the on the proposal for a directive of the European Parliament and of the Council on the conditions of entry and residence of third-country nationals for the purposes of highly skilled employment (COM(2016)0378 – C8-0213/2016 – 2016/0176(COD)), 28 June.

and living conditions than ICTs, researchers and seasonal workers. Despite the fact that EU directives contain specific equal treatment provisions, Member States are still allowed to apply restrictions to certain categories of TCNs which are lower for EU Blue Card holders. Therefore, the benchmark for equality of treatment demonstrates that first admission directives allow for differentiated treatment of the different categories of migrant workers under EU law on the basis of skills, sector of employment and length of residence, and between citizens and TCNs. This differentiation appears unjustified in all cases and leads to discrimination because it seems to be driven by factors such as economic interests of the Member States during the negotiations of these instruments (Annex 3: Table 23 for an overview).

The assessment of the benchmarks in the area of work authorisation shows that only the Blue Card Directive and the Seasonal Workers Directive explicitly provide for change of employer, subject to specific limitations. In reality, seasonal workers have more limitations on changing their employers than Blue Card Holders (see Annex 3, Gaps 3 (G3)). This possibility is implicitly provided for researchers. ICTs, however, are tied to their employer. Even if one argues that ICTs are a special case of temporary posted workers and different treatment is justified, the added value of EU law in the field of legal migration could be in providing a more consistent approach to the implementation of this labour standard concerning the possibility of changing employers.

Furthermore, the analysed instruments do not explicitly legislate for change of occupation, which is a direct result of the EU's sectoral approach to labour migration. This means that depending on the transposition into national law, only the Blue Card Directive could fulfil the benchmark in the area of work authorisation pertaining to free access to employment in all industries and occupations with a maximum restriction of two years. This also means that seasonal workers cannot look for alternative employment other than seasonal work as defined by the respective Member States, as the majority of Member States require leaving the country in order to change 'the legal migration purpose'. Allowing for such a possibility without being obliged to leave the country is another benchmark in this policy area (see Annex 4). However, Member States can provide more favourable provisions to TCNs who come as seasonal workers on the basis of bilateral agreements (Article 4 of the Seasonal Workers Directive).³⁴⁹ The application of bilateral agreements in the field of labour migration is in line with International Labour Standards.³⁵⁰ Moreover, only the Blue Card Directive explicitly provides that unemployment does not automatically lead to permit withdrawal (unless said employment is for more than three months), making it the only legal instrument fulfilling this benchmark in the field of work authorisation (see Annex 3, Gaps 4 (G4)).

Facilitation of circular and return migration policies is another benchmark employed by this Research Paper. The analysis shows that Blue Card holders are the only category which can benefit from extensive circular migration-friendly policy options that allow for absences from the territory of the Member State while accumulating residence periods for access to long-term residence (see Barrier 3 (B3) in Annex 3). Furthermore, circular migration cannot commence without a visa application (unless migrants are exempt on the basis of their nationality) and depends on entry conditions. The Research Paper demonstrated that there are numerous barriers in this area related to application procedures, labour market tests and other requirements.

The Research Paper also assessed whether migrants have a right to free movement and choice of residence within the Member State where one is lawfully resident. The assessment of this benchmark showed that all first admissions directives provide for mobility and choice of residence. The Seasonal Workers Directive, however, falls short of providing sufficient guarantees to address employer-organised accommodation (see Gap 5 (G5) in Annex 3). Furthermore, of the first admissions directives, the Blue Card Directive and the

³⁴⁹ There is still no available data on the application of the directive in different Member States and the use of bilateral agreements by different Member States.

³⁵⁰ ILO (2010), Proposal for a Directive of the European Parliament and of the Council on the conditions of entry and residence of third-country nationals for the purposes of seasonal employment, COM(2010) 379, ILO Note based on International Labour Standards with reference to relevant regional standards, p. 6 (www.ilo.org/wcmsp5/groups/public/---europe/---ro-geneva/---ilo-brussels/documents/genericdocument/wcms_168539.pdf).

Students and Researchers Directive (even though implicitly), are the only two instruments that fulfil the benchmark for the facilitation of prolonged or permanent residence (see Gaps 6 (G6) in Annex 3). In addition, The Research Paper identified different regimes of intra-EU mobility provided for the different categories of migrants (see Gaps 7 (G7) in Annex 3).

Comparing the requirements for different categories of migrant workers, it becomes evident that there are currently four different regimes for family reunification (see Gaps 9 (G9) in Annex 3) and facilitation of these policies also depends very much on the skill level of the migrant. All highly qualified/skilled categories (Blue Card holders, ICTs and researchers), depending on their contracts, could enter and stay on temporary permits, which means that the temporary stay is not the leading factor when allowing for this right. Despite the fact that seasonal work concerns a temporary stay, these workers are the only migrant worker category excluded from the scope of the Family Reunification Directive and the right to family reunion, along with other temporary permit holders under national law. This is not in line with ILO standards. Therefore, the benchmark on obligations to facilitate family reunion can be considered only partially fulfilled. In addition, the Family Reunification Directive allows Member States to impose additional requirements, which can delay family reunification and disrupt family life. The CJEU has on several occasions underlined the need for Member States to apply the directives consistently with fundamental rights norms.³⁵¹

The assessment of the benchmarks in the field of social security coordination and recognition of qualifications (see Annex 3 and Annex 4) shows that the current EU legal migration *acquis* does not remedy barriers in the field of recognition of qualifications and social security coordination related to the developed national instruments in the Member States. These barriers, however, concern all categories of workers. The Research Paper demonstrates that the first admissions directives are relevant to the social security rights of TCNs but are not instruments that coordinate social security systems (see Gaps 8 (G8) in Annex 3). For instance, these directives do not contain any provisions on aggregation of periods of insurance, employment and residence. For migrant workers this could mean that even in cases where they have fulfilled such periods in their home country, they might not be able to bring these into account in order to obtain the right to social security benefits that, according to the national legislation of the host Member State, depend on having fulfilled such waiting periods.³⁵² Furthermore, none of the legal migration instruments provide for the reimbursement of social security contributions, which is another benchmark in this policy area. This Research Paper finds that the EU Single Permit Directive does not sufficiently address the gaps and barriers introduced by the 'first entry' directives. For example, the first admissions directives also fall short of fulfilling the benchmarks in the field of recognition of qualifications (see annex 4), and gaps and barriers persist especially when it comes to regulated professions (see Annex 3, Gaps 10 (G10) and Barrier 8 (B8)). The presented analysis and benchmarks assessment shows that the conclusion drawn in 2011 by Peers is still valid: "the EU is still some way off developing a fair and comprehensive policy on legal immigration".³⁵³ There is a clear role for the EU to contribute to promoting and ensuring a common level playing field of international and regional human rights and labour standards protection (non-discrimination among workers); otherwise, effectiveness of EU secondary law on legal migration could be undermined.

³⁵¹ See for example on the Family Reunification Directive: CJEU, Grand Chamber, Case C-540/03, *European Parliament v. Council*, ECR 2006 I-5809, 27.06.2006.

³⁵² See also H. Verschuere (forthcoming), "Employment and Social Security Rights of Third-Country Nationals under EU Labour Migration Directives", *European Journal of Social Security*.

³⁵³ Peers (2011), p. 499.

CHAPTER 4. GAPS AND BARRIERS AND THEIR IMPACTS ON INDIVIDUALS

KEY FINDINGS

- EU Member States that have a higher percentage of third-country nationals (TCNs) seem to be more positive towards immigration from third countries for employment. On the contrary, those EU Member States that are less exposed to the migration, though their nationals are more likely to use intra-EU mobility, remain most restrictive towards immigration from third countries.
- The trend of very low numbers of EU Blue Cards issued to nationals of Sub-Saharan African countries and the Least Developed Countries (LDCs). As of 2016 only 2.2% of all granted Blue Card declarations were issued to nationals of Sub-Saharan African countries. There has been assessments of the 'brain drain' phenomenon that EU legal migration channels could potentially cause in the Least Developed Countries. However not so much attention has been paid to the impacts of possible direct, indirect and institutional forms of discrimination and other obstacles when persons from LDCs or Sub-Saharan African countries are trying to access EU and Member States' legal migration channels.
- This chapter further demonstrates how gaps and barriers in equal treatment increase the likelihood of discrimination in employment and society. The self-reported experiences of discrimination show that one-third of North Africans and one-fourth of Roma and sub-Saharan Africans continue to experience discrimination against their ethnic or migration background. For a majority of them, discrimination is a recurring experience in various parts of life, though particularly in the area of employment.
- Gaps and barriers regarding the secure residence status and the impossibility of changing employer, obstacles to establishing protection or being protected by trade unions, are likely to increase labour exploitation as bargaining power diminishes. The case study of migrant domestic workers illustrates the very precarious situation of persons who are not covered by any of the sectoral directives.

Negative public attitudes toward migration in general and TCNs in particular, discrimination in employment and labour exploitation are relevant to the cost of non-Europe in migration as they are both - barriers and individual impacts. In our analysis, negative public attitudes, discrimination and labour exploitation result from current gaps and barriers identified in Chapter 3. This Chapter builds on qualitative and quantitative evidence to use in econometric analysis (Chapter 5) and *status quo* assessment (Chapter 6).

4.1. Public attitudes to third-country nationals

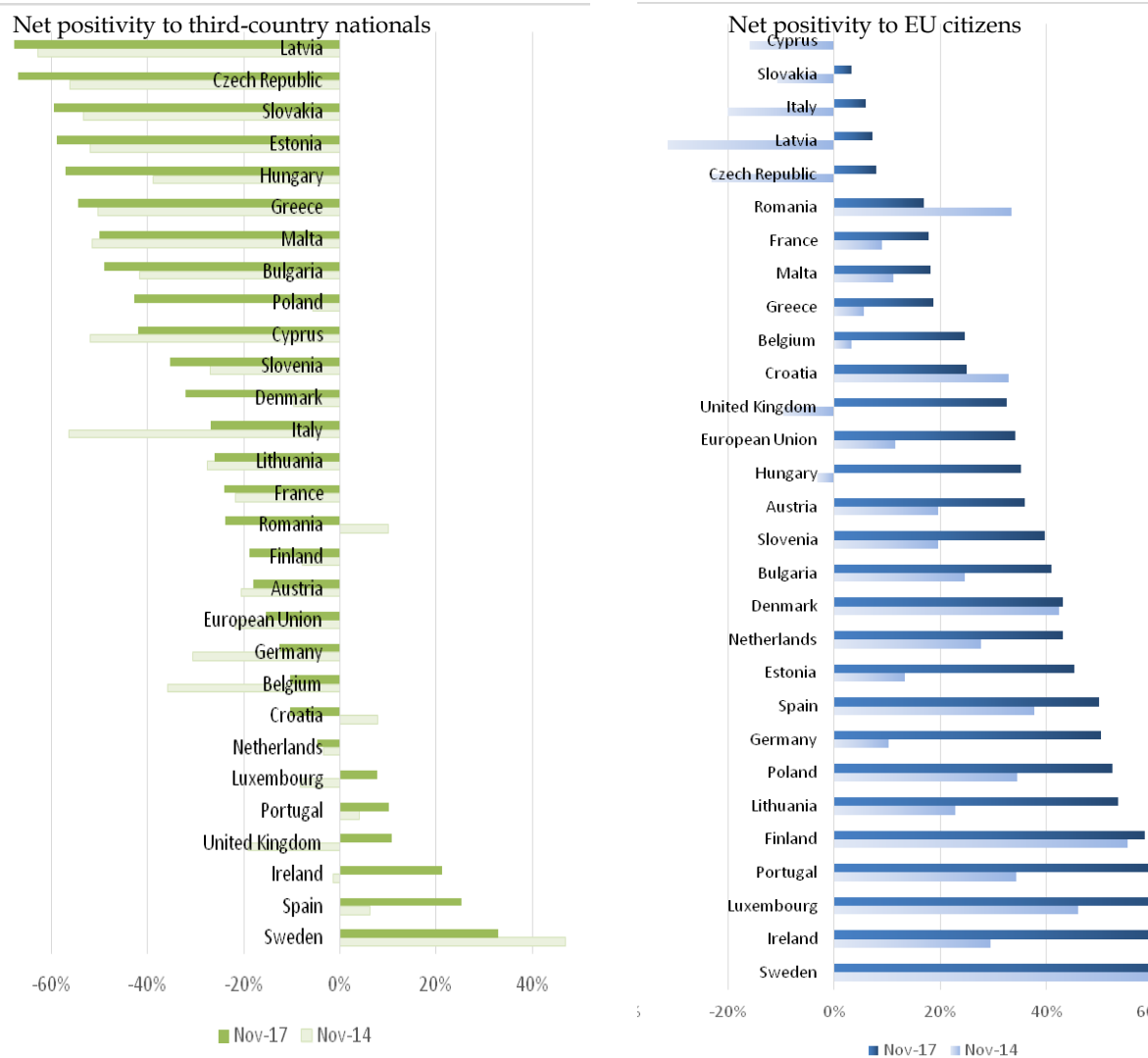
Though the current research focuses only on the migration of TCNs to the EU, public attitudes cannot be understood without taking into consideration the intra-EU mobility of EU citizens. This was reflected in interviews with Dutch and Belgian officials.³⁵⁴ Europeans are highly positive toward mobility of EU citizens. Even in those EU Member States whose electorates responded with net negative attitudes to immigration by

³⁵⁴ Interview with Dutch official, 12 March 2018; Interview with Belgium Official, 7 February 2018.

EU nationals in 2014 (Cyprus, Slovakia, Italy, Latvia and Czech Republic), by November 2017, every single EU Member State responded with an overall positive reaction to immigration by EU nationals (see Figure 13, in blue). Every Member State also showed an increase in positivity during the period from 2014 to 2017 except for Romania and Croatia, where positivity towards intra-EU mobility decreased, possibly due pending full membership in the Schengen area (see Figure 13, in blue).

Conversely, Europeans report that immigration of TCNs evokes a far more negative response. In Figure 13, in green, we see that by November 2017 only six of the EU's 28 electorates reported a positive feeling towards immigration by non-EU nationals – Sweden, Spain, Ireland, the UK, Portugal and Luxembourg therefore remained exceptions from the rule. From 2014 to 2017 Europeans did not increase their favourability towards immigration of TCNs in the same way that they did to intra-EU mobility by EU citizens. Moreover, in 16 of the 28 Member States (or 57%) has become more negative. Having said that, the European Union average, when weighting by Member State population, has become more positive (as larger Member States are more in favour), although still more than 15% of the population feels negativity toward TCN immigration.

Figure 13. Comparison of net positivity towards immigration of third-country nationals and EU citizens



Notes: Q1. "Please tell me whether 'Immigration of people from outside of the EU' (green) and 'inside EU' (blue) evokes a positive or negative feeling for you". Per cent responding "very positive" and "fairly positive" minus percent responding "fairly negative" and "very negative".

Source: Eurobarometer, November 2014, November 2017.

Nevertheless, the above-mentioned 2017 Eurostat findings may have changed in the meantime as negative attitudes towards mobile EU nationals seems to have played a large part in the Brexit campaign and in French and Dutch elections. The use of traditional and social media in the latter campaigns seems to have challenged positive views towards mobility of EU citizens and migration in general. A recent study has shown that 10 weeks prior to the Brexit vote 99 front-page leads on immigration appeared in the main newspapers (78 of which – 79% -- were published in Leave-supporting outlets).³⁵⁵ Therefore, it is likely that net positivity, for example in the UK, declined.

A small migrant population (Annex 4: Figure 26) as well as negative net migration (Annex 4 : Figure 27) can be also associated and correlated with the most negative attitudes towards migration. Exceptions here are Portugal, Spain and Ireland, which are rather positive on migration – these countries have a long, well-articulated and internalised emigration history. On the contrary, Member States in Central and Eastern Europe, before joining EU, had little exposure to global migration, with the exception of migration within the Soviet Union and satellite countries. Some academics, such as Ivan Kratsev, suggest the following interesting explanation for the emergence of the Visegrad block, which opposes EU level reforms in the area of migration and asylum: fears in this region are not based on actual experiences of migration but rather on the rise of nationalism and exploited fears of the one-nation state disappearing.³⁵⁶

We can see to what extent Europeans see various criteria as relevant when deciding which TCNs should be accepted and which should be excluded. The pattern is fairly clear: around 80% of Europeans see commitment to the national way of life as important (between 6 and 10 on the 0-10 scale) (see Annex 4: Figure 28). Similarly, around 75% see the ability to speak the local language as important, while around 70% see having relevant work skills and high education qualifications as important, respectively. By contrast, less than 25% see coming from a Christian background as important and less than 15% see being white as important. Other academics such as Taras and Green suggest that post-2004 accession Member States whose nationals just recently became mobile may themselves act as ‘gate keepers’, insisting on stricter individual or categorical criteria (being white, Christian, etc.) for TCNs to come to their country.³⁵⁷

In Figure 14 we see the results to the question, “When should immigrants obtain rights to social benefits and services?” in 14 countries that were surveyed in 2008 and 2016 by the European Social Survey. The countries are placed in descending order according to the proportion in 2008 of those who responded either that immigrants should only receive social benefits once they become citizens or that they never should, i.e. the proportion of the population who believe that labour market participation should not endow EU citizens and TCNs with equal rights. Slovenia and the Czech Republic were the only countries in which a majority (in both cases very slim) of citizens gave one of these two responses in both 2008 and 2016 (though in Slovenia strict views were declining, whereas in the Czech Republic especially the “Never” answers increased). In both years, a majority of citizens of Finland, the UK, Norway, Germany, Belgium, Sweden, France, Ireland and Switzerland responded that labour market participation for at least a year was sufficient to receive social benefits. This was also the case in Estonia in 2016 and the Netherlands in 2008.

In terms of change over the eight years, in 11 of the 14 countries, the proportion of respondents increased who said that labour market participation or less was sufficient to receive social benefits. The only exceptions were the Czech Republic, the Netherlands and Poland. Overall, a political trend exists, with Central Eastern European countries more likely to be desirous of restrictions on social benefits, though the trend is not absolute (see the Netherlands and Finland). This is also reflected in the current negotiations on the Revision

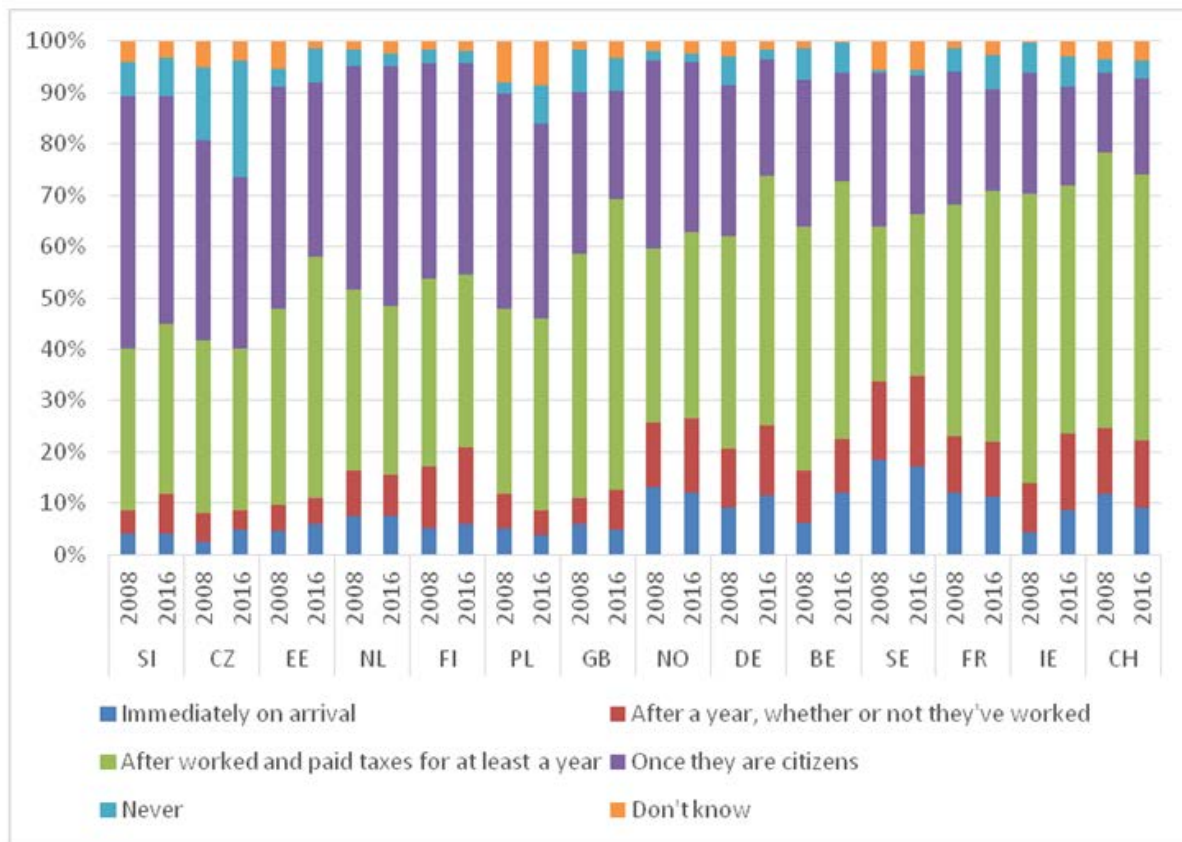
³⁵⁵ M. Moore and G. Ramsay (2017), “UK media coverage of the 2016 EU Referendum campaign”, Kings College, Centre for the Study of Media, Communication and Power, May, p. 23 (www.kcl.ac.uk/sspp/policy-institute/CMCP/UK-media-coverage-of-the-2016-EU-Referendum-campaign.pdf).

³⁵⁶ Kratsev (2017).

³⁵⁷ R. Taras (2012), *Islamophobia and Xenophobia in Europe*, Edinburgh: Edinburgh University Press, pp. 89-90. E.T. Green (2007), “Guarding the gates of Europe: A typological analysis of immigration attitudes across 21 countries”, *International Journal of Psychology*, 14 November (<https://doi.org/10.1080/00207590600852454>).

of the Blue Card, where Visegrad countries are keeping a more restrictive approach. Again, it is important to highlight that in terms of single permits for TCNs (with the exception of Poland), these are countries that do not receive many TCNs and, as showed above, their net migration is negative. The Dutch and Finnish examples are interesting, as these countries experience more intra-EU mobility of EU citizens than of TCNs who fill vacancies. Thus full rights upon receiving citizenship of a Member State may signal a cautious stance on intra-EU mobility of EU citizens.

Figure 14. “When should immigrants obtain rights to social benefits/services?”



Source: European Social Survey, 2008, 2016.

Negative public attitudes to migration of TCNs may be an indirect outcome of the EU's complex and fragmented legal migration system. The lack of clarity in rules and statuses became easy targets for manipulation in the media, for example on social protection schemes – Who benefits under what conditions?³⁵⁸ Overall, positivity of mobility among EU citizens could on the other hand be attributed to the EU Citizens Rights or Free Movement Directive (2004/58/EC), in which the rights of EU citizens and their family members are clearly laid out. The CJEU has not been hesitant to add clarity and interpret provisions as to broaden the rights of EU citizens in light of EU values and general principles. For example, in *Coman* (Case C-673/16), the CJEU upheld the right of family reunification with same-sex spouses, by interpreting “spouse” in gender-neutral terms. See also Annex 4: Figure 27 for the attitudes of European citizens over the impacts of immigration.

4.2. Experiences of discrimination in employment

Discrimination on pre-existent biases can be translated in the interpersonal forms of discrimination (for example at work place) or take a more systemic shapes (selectivity rationales embedded and reinforced in policy making).

³⁵⁸ Moore and Ramsay (2017), op. cit.

The EU legal migration avenues seem to be most limited towards certain regions, such as sub-Saharan Africa or the Least Developed Countries (LDCs). due to the absence of bi-lateral or multilateral agreements, . The European Parliament LIBE and EMPL Committees joint report has highlighted that:

“According to the Communication of the Commission on the Implementation of Directive 2009/50/EC in 2014, only 2,1% of the beneficiaries of the EU Blue Card during the first phase of the implementation in 2012 came from Sub-Saharan Africa. This may indicate implicit racial bias applied preventing certain types of workers to access to some more favourable statuses and therefore enjoying equal treatment with other workers or other family members. The lack of diversity among the EU Blue Card holders may reflect national policies and practices which can perpetuate forms of direct, indirect or institutional discrimination towards new candidates.”³⁵⁹

Recent Eurostat statistics of Blue Card decisions granted by citizenship confirms a trend of extremely low numbers of Blue Card holders from this region. During 2016 there were only 455 decisions to grant Blue Card to citizens of sub-Saharan Africa³⁶⁰ out of total 20.979 decisions to grant Blue Card. This amounts to only 2.2% of all granted decisions in 2016.³⁶¹

The Commission’s Impact Assessment also acknowledged the very low numbers of Blue Card applicants coming from LDCs, as “[i]n 2013, 188 out of 12 963 Blue Cards (1,45 %) were granted to citizens of LDCs.”³⁶² However, the Commission’s Impact Assessment focused on the ‘brain drain’ impact that the EU Blue Card Directive could have on LDCs. The Commission highlighted higher risks of negative ‘brain drain’ impacts on LDCs, providing the following reasoning:

Even though it is hard to estimate the real benefits or damages of 'brain drain' it can be assumed that small LDCs close to powerful economic regions are more likely to suffer from 'brain drain' than larger countries. This type of emigration may put the state’s economy at risk, and more directly, may affect the education system as well as the healthcare and engineering sector.³⁶³

Therefore, the Commission’s Impact Assessment showed the strikingly low numbers of Blue Card applicants from LDCs that “the potential negative impacts of brain drain are likely limited for these countries”³⁶⁴, not problematising further why these numbers are so low, and how it affects the potential for development. In the field of development, remittances are generally seen as one of the relevant sources of income for populations in developing countries and providing some of positive potentials, if managed properly. For example, the UN Conference on Trade and Development (UNCTAD) highlights that:

The evidence suggests that remittances contribute to poverty reduction and improved health care

³⁵⁹ European Parliament (2017) Report on the proposal for a directive of the European Parliament and of the Council on the conditions of entry and residence of third-country nationals for the purposes of highly skilled employment (COM(2016)0378 – C8-0213/2016 – 2016/0176(COD)), Rapporteurs: Claude Moraes (Committee on Civil Liberties, Justice and Home Affairs) Jean Lambert, (Committee on Employment and Social Affairs), 28 June, Brussels.

³⁶⁰ ‘Sub-Saharan Africa’ counted as 46 African countries, excluding Algeria, Egypt, Libya, Morocco, Somalia, Sudan and Tunisia and Western Sahara.

³⁶¹ Eurostat (2018) Table EU Blue Cards by type of decision, occupation and citizenship [migr_resbc1], last update: 30-10-2018. (<https://ec.europa.eu/eurostat/web/asylum-and-managed-migration/data/database>).

³⁶² Commission Staff Working Document (2016), Part 6 of the Impact Assessment accompanying Proposal for Directive, on the conditions of entry and residence of third-country nationals for the purposes of highly skilled employment, COM(2016) 378, Brussels, 7.6.2016, SWD(2016) 193 final, p. 31.

³⁶³ Ibid.

³⁶⁴ Ibid.

and education, and constitute a significant source of external financing whose availability, if managed through appropriate policies, could prove particularly valuable for capital-scarce LDCs.³⁶⁵

To counter these negative effects, UNCTAD proposes a new international support mechanism aimed at enabling highly skilled members of LDC diasporas to contribute to specialized knowledge transfer and to channel investment to their home countries. While six EU Member States (BE, CY, DE, EL, LU and MT) have opted in for the right to refuse an application for an EU Blue Card in order to ensure ethical recruitment with the purpose of avoiding "brain drain" as provided by the BCD Art. 8(4), however so far none of the EU Member States into agreements with Third Countries as provided by BCD Art. 3 (3) regarding ethical recruitment.³⁶⁶ The Commission's Impact Assessment has not problematised this gap either.

While 'brain drain' is an important phenomenon to be considered in designing EU legal migration acquis, it is highly questionable whether low numbers of people were the result of ethical recruitment policies. The very low numbers for TCN from LDCs or Sub-Saharan African countries could be result of barriers and obstacles, such as those related to non-recognition of diplomas and qualifications (as discussed in Chapter 3 of this Research Paper) and also the higher likelihood of direct, indirect or institutional discrimination in accessing such schemes. Inability to access legal, safe and orderly channels relates to the 'brain waste' phenomenon – for example, the costs as lost remittances due to qualified nationals working underqualified or undeclared work, falling into irregularity and becoming victims of human trafficking.

Another systemic form of discrimination could be identified in difference of treatment of EU nationals vis-à-vis third country nationals. All EU nationals have a right to equal treatment/non-discrimination with regard to employment in Member States, while only certain types of TCN migrant workers are protected and only at certain stages in the employment life cycle. The discriminatory outcomes resulting from this picture need to be taken into account to establish the link. For example, the overrepresentation of TCN among overqualified workers, in comparison with the EU nationals, signals that there is a discriminatory outcome, that can not always be justified by lack of language skills or other objective criterias.

The differential treatment of TCN in the EU legal migration acquis may be exacerbated by discriminatory attitudes, which may place additional barriers in ensuring 'equal treatment'. Negative bias towards persons of different ethnic origin, nationality, religion, skin colour are likely to translate to the discrimination in the workplace. Some national studies also link workplace discrimination to the economic crisis; however, this effect appears to have diminished compared with previous economic crises. The risk of discrimination is higher for migrant workers than EU nationals, in particular, in the sectors that are more vulnerable to lay off during recession periods. The literature also frequently highlights that low-skilled migrant workers are particularly vulnerable to workplace discrimination.³⁶⁷ At the same time, such workplaces, like seasonal work have lower labour rights protection standards.

Another facet of discrimination identified in this Research Paper in the area of legal migration relates more generally to extensive qualitative evidence illustrating discrimination in employment and the workplace of third-country workers, in comparison to national workers. The fact that TCNs are more exposed to discriminatory practices in the labour market was also pointed out in the e-questionnaire results (see Figure 15) and during the Delphi method discussion. FRA Director Michael O'Flaherty highlighted that

³⁶⁵ UNCTAD (2012) The Least Developed Countries Report 2012: Harnessing Remittances and Diaspora Knowledge to Build Productive Capacities, UNCTAD/LDC/2012, UN Publications.

³⁶⁶ Commission Staff Working Document (2016), Part 6 of the Impact Assessment accompanying Proposal for Directive, on the conditions of entry and residence of third-country nationals for the purposes of highly skilled employment, COM(2016) 378, Brussels, 7.6.2016, SWD(2016) 193 final, p. 30.

³⁶⁷ European Parliament (2014).

“immigrants, descendants of immigrants, and minority ethnic groups continue to face widespread discrimination across the EU and in all areas of life – most often when seeking employment.”³⁶⁸

The situation of respondents with North African background and respondents with sub-Saharan African background continues to indicate the highest levels of discrimination based on ethnic or immigrant background. This is the case both in the five years before the survey (at 45% and 39%, respectively) and in the 12 months before the survey (at 31% and 24%, respectively). Those of sub-Saharan African background mostly experience discrimination based on their physical appearance, while immigrants and descendants of immigrants from North Africa and Turkey more often face discrimination based on their names.”³⁶⁹

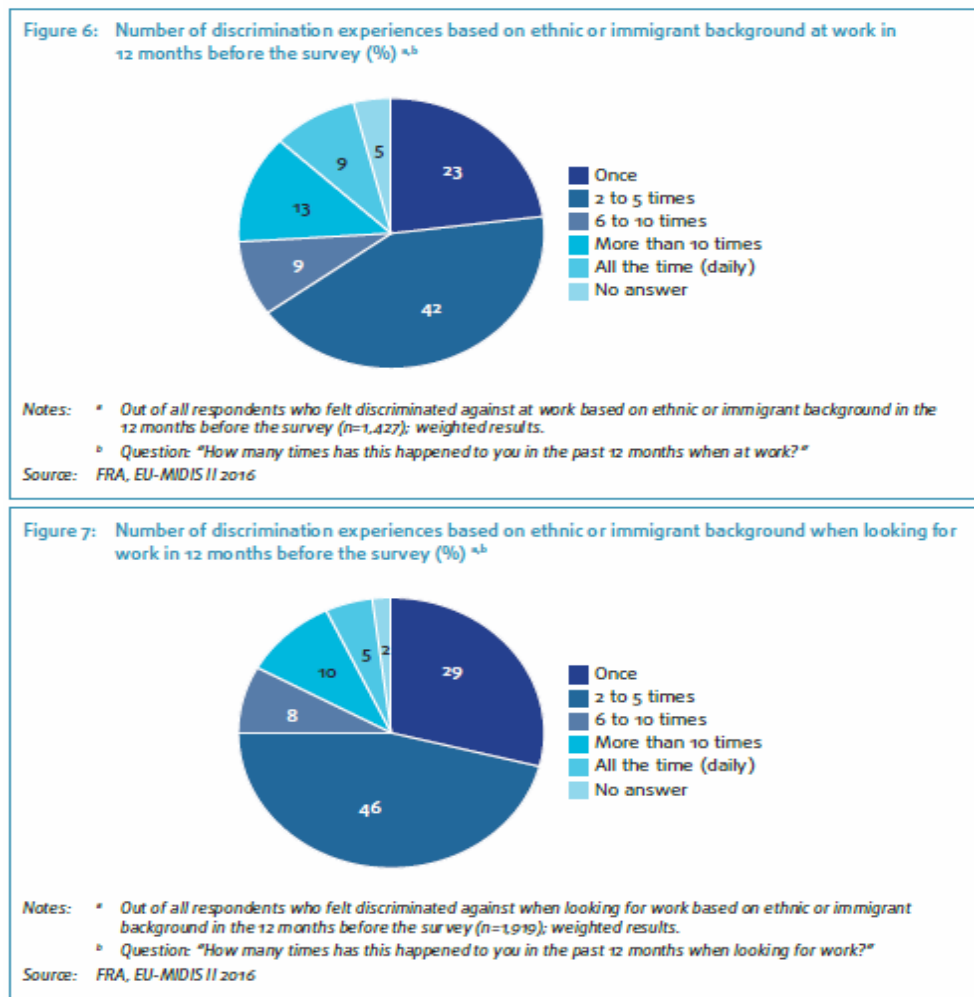
In addition, EU-MIDIS II as well as EU MIDIS I respondents describe discrimination as a recurring experience in various fields of life, though particularly in the area of employment. FRA MIDIS II survey main findings indicate that respondents of ethnic and/or immigrant background regularly feel discriminated against at work and when looking for work (Figure 15). FRA highlights: “Of the respondents who indicated having felt discriminated against because of their ethnic and/or immigrant background at work, 9% said they experienced it on a daily basis. Meanwhile, 13% said they felt discriminated against more than 10 times in the 12 months preceding the survey.”³⁷⁰

³⁶⁸ FRA (2017), Second European Union Minorities and Discrimination Survey, Main results, p. 3.

³⁶⁹ Ibid., p. 13.

³⁷⁰ Ibid., p. 33.

Figure 15. FRA MIDIS II findings in the area of discrimination in employment



Source : FRA, EU-MIDIS II, 2016.

4.3. Experiences of labour exploitation

The structural gaps in power relationships between employers and employees, nationals and migrants, in the absence of effective oversight and monitoring, still result in severe cases of exploitation and other types of abuse, including sexual assaults and rapes of migrant seasonal workers.³⁷¹ The structural gaps were identified by Amnesty International to define labour policies as abusive when the policies by design give the employer control over the migrant worker's residence status and/or when they tie migrant workers to a specific employer.³⁷² For example, in Italy, "The non-payment of wages or arbitrary wage deductions, which are common instances, are often justified by the employer as payments for his/her 'cooperation' in the process to obtain documents."³⁷³

³⁷¹ Info Migrants (2018), "Female seasonal workers exploited and raped in Spain" translated from ANSA, 28 May (www.infomigrants.net/en/post/9502/female-seasonal-workers-exploited-and-raped-in-spain).

³⁷² Amnesty International (2014), "Abusive labour migration policies", submission to the UN Committee on Migrant workers' day of general discussion on workplace exploitation and workplace protection, 7 April (www.ohchr.org/Documents/HRBodies/CMW/Discussions/2014/AI_DGD2014.pdf).

³⁷³ Ibid., p. 10.

Interviews for this research confirmed that empowerment of migrant workers, such as by ensuring equal treatment, was seen of paramount importance when negotiating the Seasonal Workers Directive, although the European Parliament managed to enshrine it only after public reactions to the mistreatment of migrant workers in the agricultural sector.³⁷⁴ The Explanatory Memorandum of the Commission indicates that Seasonal Workers Directive promises some protection for migrant workers, such as labour-related rights and access to a “high level of healthcare”.³⁷⁵ Nevertheless, the willingness to properly transpose and implement it at national level was controversial:

The directive has not sufficiently addressed the specifics of seasonal workers and the role of temporary work agencies and disregards difficulties to inform seasonal workers on their rights. Additionally, it lacks clear obligations to actually monitor the implementation and secure effective implementation. Similar to the comments in the second evaluation of the sanctions directive it includes the risk of having a formal implementation of a directive without the intended effect.³⁷⁶

Nevertheless, those not falling into any categories for first admissions directives and also falling outside national legal migration categories remain not covered by Single Permit Directive, such as those in precarious medium- and low-skilled jobs such as construction and transport, and particularly in the domestic work sector, are even more at risk of labour exploitation due to the absence of safeguards. For example, the global survey conducted by the ILO³⁷⁷ shows that TCNs are often over-represented in so-called ‘non-standard jobs’, *irrespective of their actual qualifications and skills*, including domestic work, other parts of the service industry and construction. Those sectors may experience ‘social dumping’, particularly in wages, and increased labour market segmentation, with low-skilled and low-paid jobs becoming the exclusive domain of migrants.

According to ILO estimates, in 2013 globally, migrant domestic workers accounted for 7.7% of all employed international migrants, and 17.2% of all domestic workers were international migrants.³⁷⁸ These sectors may experience social dumping, particularly in wages, and increased labour market segmentation, with low-skilled and low-paid jobs becoming the exclusive domain of migrants.³⁷⁹ Migrant men are disproportionately represented in temporary and temporary agency work in construction. Migrant women are over-represented in part-time, temporary and temporary agency work in domestic care, hotel and restaurant services, and in the cleaning sector. The ILO states that migrant workers experience great pressure to find work quickly in order to repay migration costs, and incur high costs while waiting for suitable standard job. They are also ready to work under less favourable conditions than native-born workers and accept non-standard jobs. Migrant women are prevalent in non-standard jobs in the domestic work sector, where the risks of labour exploitation and sexual abuse are higher (see Annex 8: Box 3. Case study: Third-country nationals in domestic work sector and Box 4. Case study: Discrimination of immigrants in the labour market).

³⁷⁴ Interviews with European Parliament, 21 February 2018 and 31 January 2018.

³⁷⁵ Proposal for a Directive of the European Parliament and of the Council on the conditions of entry and residence of third-country nationals for the purposes of seasonal employment, COM(2010) 379 final, Brussels, 13.7.2010, p. 5.

³⁷⁶ C. Rijken (2014), “Preventing exploitation through the seasonal workers directive”, conference paper, UACES 44th Annual Conference, Cork, 1-3 September (www.uaces.org/documents/papers/1401/rijken.pdf).

³⁷⁷ ILO (2017), “Addressing governance challenges in a changing labour migration landscape”, Report IV, Non-Standard Employment Around The World, Understanding Challenging, Shaping Prospects, ILO, Geneva,

³⁷⁸ ILO (2015), Global Estimates on Migrant Workers: Results and Methodology, ILO, Geneva. (http://www.ilo.org/global/topics/labour-migration/publications/WCMS_436343/lang-en/index.htm).

³⁷⁹ ILO (2014), “Skills mismatch in Europe: Statistics brief”, Geneva, p. 12.; G. Lemaître (2014), “The demography of occupational change and skill use among immigrants and the native-born”, in OECD (ed.), *Matching Economic Migration with Labour Market Needs*, Paris: OECD.

CHAPTER 5: GAPS AND BARRIERS: ECONOMIC IMPACTS AT INDIVIDUAL AND SOCIETAL LEVEL

KEY FINDINGS

- Legal gaps and barriers (restricted access to the labour market, restrictions on job mobility, re-entry and circular migration, insecure residence status) can indeed explain some differences in economic outcomes between third-country nationals (TCNs) and mobile EU citizens with similar observable characteristics.
- Restricted access to the labour market limits employment opportunities of TCNs in the EU. Even though the labour market restrictions usually apply in the first year(s) since arrival to the EU, they can leave a longer-term scarring effect and lower later labour market attachment.
- A combination of legal gaps and barriers increases the likelihood for TCNs to work part-time and results in lower incidence of having a permanent contract. Moreover, for TCN men, legal gaps and barriers can explain part of the wage gap (vis-à-vis mobile EU citizens with similar characteristics).
- TCNs consider barriers to recognition of qualifications the main obstacle to getting a job matching their skills. These barriers are more formidable for TCNs than for mobile EU citizens.
- Barriers to intra-EU mobility indeed make TCNs less mobile compared to EU nationals. This might have negative implications for adjustment to changes in economic conditions, knowledge flows within the EU, and for EU attractiveness to skilled immigrants.

This chapter examines the economic costs of the gaps and barriers in the EU legal and labour migration policies and their effects on inequalities in working conditions and socio-economic outcomes between TCNs and EU nationals. The economic analysis is structured in three steps: First, we compare outcomes of TCNs residing in the EU to those of EU nationals. Among EU nationals we distinguish between a) the nationals of their country of residence and b) 'mobile EU nationals' – EU nationals who currently reside in another Member State. We focus on employment, job characteristics, health, well-being, and intra-EU mobility (sub-chapter 5.1.). Second, we evaluate to what extent legal gaps and barriers related to the status of a 'third-country national worker' can explain the documented differences in outcomes between TCNs and EU nationals (sub-chapter 5.2.). This evaluation draws on the original econometric analysis. As a third step (sub-chapter 5.3.), we use the results of the analysis to translate the impact of gaps and barriers into qualitative estimates of impacts at the individual level (from a TCNs' perspective) and societal level (Member States' perspective). They are subsequently quantified in Chapter 6.

5.1 Differences in outcomes between third-country nationals and EU nationals

The starting point of the analysis is to investigate differences in various outcomes between TCNs and EU nationals. Differences in employment rates, wages, work and life conditions between TCNs and *comparable* EU nationals may point to the fact that the former, due to their administrative status, face legal gaps and barriers resulting in both individual and economic costs. We specifically compare outcomes of TCNs not only with those of the native population, but also with outcomes of mobile EU nationals (EU nationals having

exercised their right to move and residing in another Member State). This allows us to filter out possible effects of gaps and barriers related to a ‘foreign national’ status in general.

The objective of this descriptive exercise is to complement the legal analysis of gaps and barriers stemming from the current EU approach to legal migration policies (see Chapter 3) with quantitative analysis. We employ two representative and harmonised data sets: Eurostat Labour Force Survey - Ad-hoc Modules on Migration in 2008 and 2014 (EU LFS) and the European Social Survey (ESS). Both data sets cover respondents across the EU and contain individual-level data on a rich set of socio-economic indicators. More information about data sets, methodology of the econometric analysis, and corresponding regression tables can be found in the Annex 5.

5.1.1. Approach to descriptive analysis

In the analysis to follow, we focus on individuals of prime working age (20-55) who live in one of the Member States in the year of a survey.³⁸⁰ We always compare outcomes between TCNs and EU nationals while controlling for age, attained education, country of residence and survey year. In this way, we calculate *conditional differences* in outcomes, i.e. by comparing individuals with similar observable characteristics.

In addition to nationality, we also always distinguish by gender. A number of studies have emphasised that in particular women TCNs struggle to integrate in labour markets in many EU Member States.³⁸¹ Therefore, it is important to understand to what extent legal gaps and barriers related to the ‘third-country national’ status can explain such poorer performance of women. A plausible explanation is that women are more likely than men to enter the EU for family reunification reasons: among TCNs, 55% of women are family migrants compared to 27% of men.³⁸² Based on the analysis in Chapters 3 and 4 above, which highlighted the challenges faced by family migrants in the EU, it is then likely that economic effects of legal gaps and practical barriers are particularly strong for women TCNs.

Figure 16 - Figure 18 and Annex 5: Table 28 - Annex 5: Table 31 in Annex 5 of this Research Paper report the calculated conditional differences between TCNs, mobile EU citizens and the native population in units of the analysed outcome. For example, employment rate is measured as a share of employed individuals (in percent of the population group). Hence, the bars in figures will show by how many percentage points employment rates among TCNs and mobile EU citizens differ from those of the native population with the same observable characteristics. Statistically significant results are in boldface.³⁸³ For simplicity of exposition, we refer to point estimates, standard errors are provided in corresponding tables in the Annex 5.

5.1.2. Differences in work-related outcomes

Figure 16 illustrates conditional differences in work-related outcomes: employment rate, monthly pay, and job characteristics. Even when controlling for gender, age, and education, foreign nationals (both from third countries and EU mobile nationals) differ from the native population across almost all considered work-related outcomes. Moreover, there are statistically significant differences in outcomes between TCNs and mobile EU citizens.

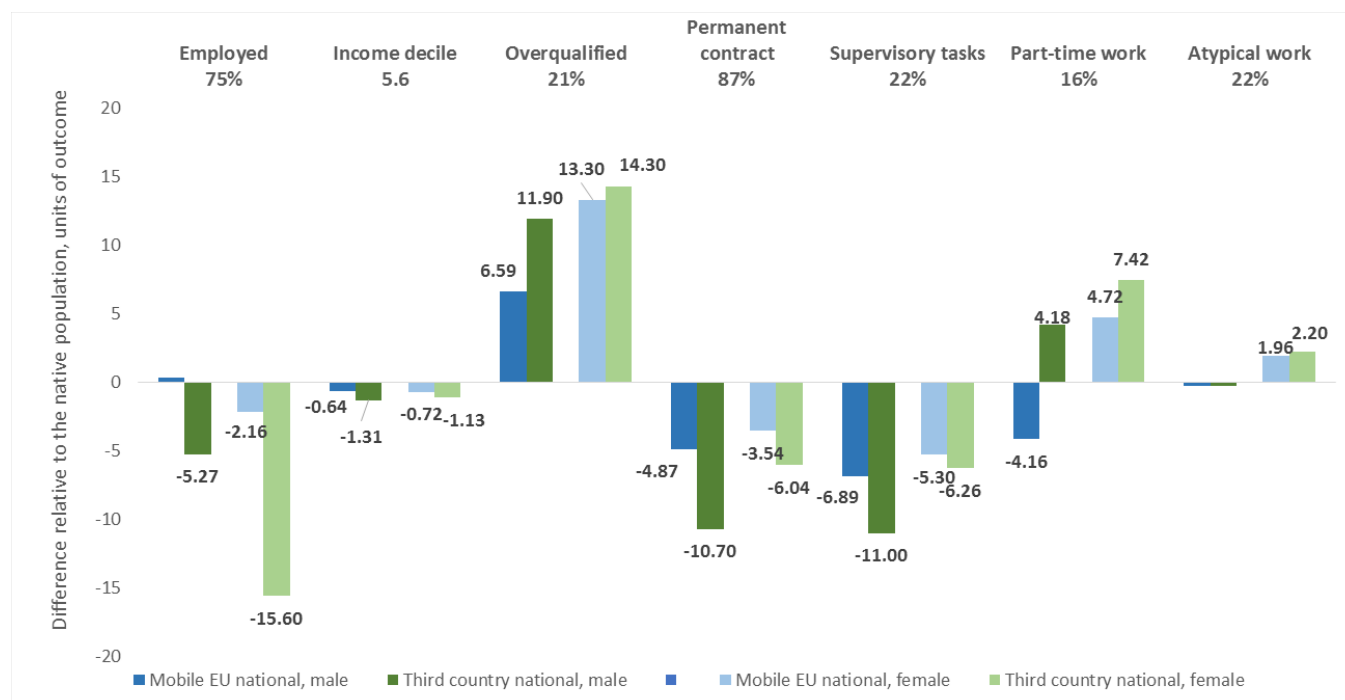
³⁸⁰ We limit the sample to the individuals in the prime working age in order to focus on gaps and barriers experienced by working individuals. The results for older individuals (over 55) are likely to be confounded by, among other things, different pension schedules between TCNs and other individuals.

³⁸¹ See, for instance, Barslund et al. (2017), MEDAM (2017), Tanay et al. (2016).

³⁸² EU LFS Ad-hoc Module on Migration (2014).

³⁸³ Statistically significant results are different from zero with at least 90% confidence.

Figure 16 Conditional differences in work-related outcomes between third-country nationals and mobile EU nationals (nationals, referred to as 'native population' in the text, is a reference group)



Source: Authors own calculations, 2018 using EU LFS, 2008 and 2014 waves.

Note: Statistically significant results are in boldface. The sample includes respondents aged 20-55 living in an EU Member State in the years of survey. Numbers below column titles show the average of an outcome for the native population (nationals of their country of residence). All reported differences are conditional on gender, age group, education, country of residence and interview year. Data on overqualification and monthly pay are available only for 2014. Corresponding table: Annex 5: Table 28.

For men, the employment rates of TCNs are 5 percentage points lower compared to those of the native population and of mobile EU citizens. Conditional on being employed, men TCNs are also more likely to be overqualified for their job and to work part-time and less likely to have a permanent job and exert supervisory responsibilities. Reported wage income of men TCNs is lower by about 1 decile (roughly equivalent to €2,000 per year) when compared to the native population of the same age and education and by about 0.7 decile when compared to mobile EU nationals.³⁸⁴

At the same time, we do not detect any significant differences for men TCNs in reported atypical work. Annex 5: Table 29 shows whether the results are driven by sorting of men TCNs to different industries and occupations. Were this the case, once we control for industry and occupation, the differences in outcomes would disappear. Yet the results show that such sorting only partially explains the wage gap and the differences in contract duration or supervisory responsibilities between men TCNs and EU nationals.

For women, the largest difference relates to employment rates: women TCNs are 16 percentage points less likely to be employed than native women and 13.5 percentage points less likely to be employed than mobile EU women. Conditional on employment, there are still substantial differences relative to the native women in terms of wage income, overqualification, contract duration, supervisory responsibilities, and part-time and atypical work. However, the differences between women TCNs and mobile EU women are less stark in terms of both statistical significance and magnitudes. This could be explained by the fact that harsher barriers at

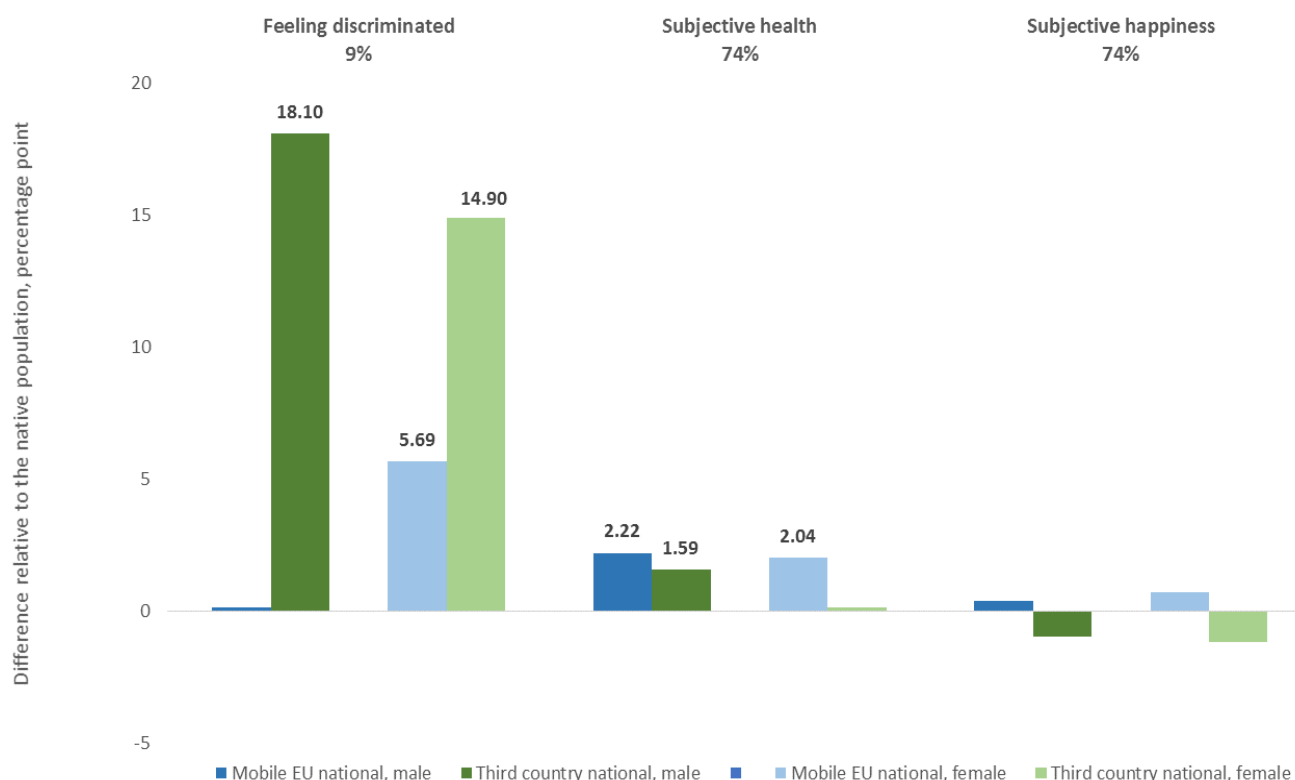
³⁸⁴ The EU LFS reports monthly (take-home) pay from the main job in deciles. To proxy monetary equivalents, we made use of the EU-SweLC data (ilc_di01 dataset, Eurostat) on income distribution and computed the difference between the 5th and 4th income percentiles in the EU.

the entry to the labour market make it unfeasible (or less worthwhile) for women TCNs to pursue a job of low quality. The presence of barriers at entry also leads to more concentration of women TCNs (relative to men TCNs) in specific occupations. Annex 5: Table 29 shows that if we control for occupation and industry of work, differences between women TCNs and mobile EU women disappear.

5.1.3. Differences in life quality

We further use the ESS data to investigate whether TCNs are different from EU nationals in terms of ‘life quality’. Figure 17 presents the results; as in the previous analysis, we control for gender, age, education, country of residence and year of the survey.

Figure 17. Conditional differences in life quality between third-country nationals and mobile EU citizens (nationals, referred to as ‘native population’ in the text, is a reference group)



Source: Authors own calculations, 2018 using ESS, 2002-2016 waves.

Note: Statistically significant results are in boldface. The sample includes respondents aged 20-55 living in an EU Member State in the years of survey. Numbers below column titles show the average of an outcome for the native population (nationals of their country of residence). All reported differences are conditional on gender, age group, education, country of residence and interview year. In the data, we cannot directly observe nationality of respondents, but know if an individual is a national of the country of residence. If an individual is not national of his/her country of residence, we proxy his/her nationality by the country of birth. Corresponding table: Annex 5: Table 30.

The results give a somewhat mixed picture. For instance, TCNs report lower health³⁸⁵ and lower happiness than mobile EU nationals, however, these differences are very small in magnitude and not statistically significant. There are, however, striking differences between TCNs and EU nationals in terms of self-reported experiences of discrimination. Men TCNs are 18 percentage points more likely to feel discriminated than both

³⁸⁵ On average, foreign nationals report slightly better health than the native population. This reflects, however, positive selection for migration: migrants tend to be in general healthier than non-migrants.

the native population and mobile EU nationals. Women TCNs are almost 15 percentage points more likely to report discrimination than native women (9 percentage points more likely if compared to similar mobile EU women). Moreover, the difference in perceived discrimination does not significantly decrease when the sample is limited to employed individuals. While perceived discrimination is a self-reported indicator, such great differences, particularly among workers and potential workers, are alarming. For instance, the recent FRA MIDIS II study highlighted recurrent experiences of discrimination where? of whom? (See Chapter 4). In addition, the tolerance to unequal treatment of employees and a lack of sensitivity to discrimination observed in Chapter 4 indicate the complex social configuration of this phenomenon, which often takes the form of indirect and intersectional discrimination.³⁸⁶

The potential economic impact of discrimination was thoroughly analysed in the comprehensive European Parliament (EPRS) Study on the Cost of Non-Europe in the area of Equality and the Fight against Racism and Xenophobia.³⁸⁷ Annex 17 summarizes the available evidence on discrimination of immigrants in the labour market (see Box 4 in Annex 8 of this Research Paper). While the presented evidence relates more generally to discrimination against immigrants (who can be defined either by country of birth, ethnic background or nationality), the policy implications are important for defining EU legal migration policies toward TCNs. Specially, wage discrimination against vulnerable groups can be influenced by institutional factors such as or instance collective wage bargaining could diminish wage discrimination against immigrants, while higher accessibility to trade unions and professional organisations for immigrants may improve awareness of their rights.

5.1.4. Differences in intra-EU mobility

Lastly, we investigate to what extent TCNs are different from the EU nationals in terms of their intra-EU mobility.³⁸⁸ While EU nationals enjoy free labour mobility within the EU, TCNs face a number of legal barriers, which increase their intra-EU mobility costs. For the purpose of this analysis, we define intra-EU mobility as including situations when an EU national a) lived in a different EU Member State one year before the survey; b) currently resides and works in two different EU Member States.

As Figure 18 shows, TCNs indeed have lower intra-EU mobility rates compared to EU nationals with the same observable characteristics (age, gender, education and industry of work). These results might appear at odds with the work of Jauer et al., who find that TCNs and nationals of new EU Member States were more likely to be mobile during the 2008-09 crisis than the native population (nationals) of Eurozone countries.³⁸⁹ Although the results of Jauer et al. study are not directly comparable with Figure 18,³⁹⁰ they are important as they show that mobility does represent an important adjustment mechanism to economic shocks in the EU, including for TCNs.

³⁸⁶ FRA (2017).

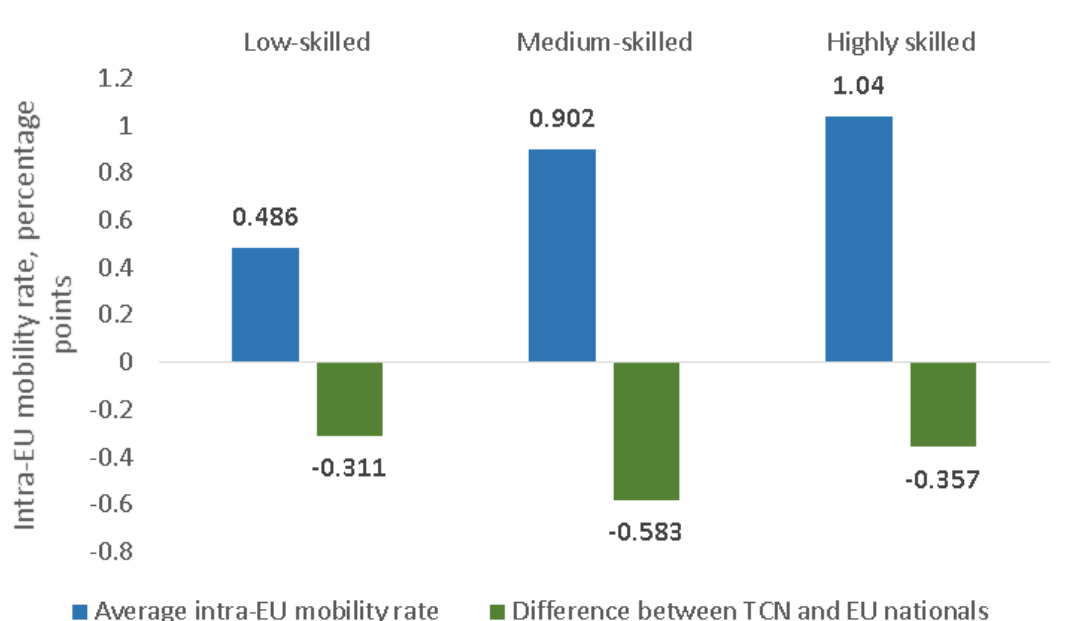
³⁸⁷ Fachthaler et al. (2018).

³⁸⁸ In contrast to previous analysis, we do not distinguish here between the native population and mobile EU nationals.

³⁸⁹ Jauer et al. (2018).

³⁹⁰ First, Jauer et al. (2018) define mobility solely as a change of country of residence, whereas we use a broader definition that defines individuals as mobile if they change a country of residence (only 27% of cases in our data) or work in a different Member State. Second, Jauer et al. (2018) can only observe aggregated net migration flows, whereas we can account for individual characteristics such as age, gender, education and industry of work, which are important determinants of mobility. Third, Jauer et al. (2018) focus on mobility during the crisis period when TCNs are often more likely to lose jobs than the native population and, hence, have lower opportunity costs of moving to another country.

Figure 18. Annual intra-EU mobility rates and conditional differences in intra-EU mobility between third-country nationals and EU nationals



Source: Authors own calculations, 2018, using EU LFS, 2008 and 2014 waves.

Note: Statistically significant results are in boldface. The sample includes respondents aged 20-55 living in an EU Member State in the years of survey. Annual intra-EU mobility rate represents the likelihood that a given individual either resided in another EU Member State one year before the survey or currently works in an EU Member State different the reported country of residence. All reported differences are conditional on gender, age group, education, industry of work, countries of residence (current and one year ago) interacted with time effects. Corresponding table: Annex 5: Table 31.

While differences between TCNs and EU nationals are present for individuals of all skill groups, mobility of low- and medium-skilled individuals appears to be particularly constrained (relative to the average mobility rate within these skill groups). Hypothetically, were the gaps fully eliminated, it would mean additional 11,000 low-skilled, 15,000 medium-skilled and 8,000 highly skilled TCNs exercising intra-EU mobility in a given year.³⁹¹

The above results highlight that, relative to EU nationals, TCNs, on average, perform worse in the labour market, hold jobs of lower quality, report higher discrimination and are less mobile within the EU. The observed differences can be driven by multiple reasons. On the one hand, differences can arise due to still unobserved productivity factors: language skills, quality of obtained education, and country-specific work and social experience. Missing country-specific human capital can contribute to the concentration of TCNs in lower job positions and less well-paid occupations. On the other hand, TCNs experience legal gaps and barriers, linked to their administrative status, which often restrict the employment opportunities and bargaining power.

For instance, lower employment rates of TCNs can be associated with restricted access to the labour market, which appears to be particularly harsh on women TCNs. Lower quality of jobs (i.e. lower wage income, higher incidence of overqualification, shorter contract duration and fewer supervisory responsibilities) can be the consequence of insecure residence status, lower job and geographic mobility, and consequently lower

³⁹¹ These numbers are obtained by multiplying the total number of TCNs in each skill group by their respective mobility gap. Data source on the population of TCNs: lfsa_pganws (Eurostat, 2018). Data source on education attainment of TCNs: edat_lfs_9911 (Eurostat, 2018). We consider active population in the age between 25 and 55. Total number of TCNs as of 2016: 8.5 million. Educational attainment: 42.8%, low-skilled; 30.6%, medium-skilled; 26.6%, highly skilled.

bargaining power of TCNs. The presence of these gaps and barriers might also discourage TCNs from improving their human capital and ‘trap’ them in low-income jobs. The next section of this chapter aims at establishing causal links between legal gaps and barriers and outcomes of TCNs in the EU.

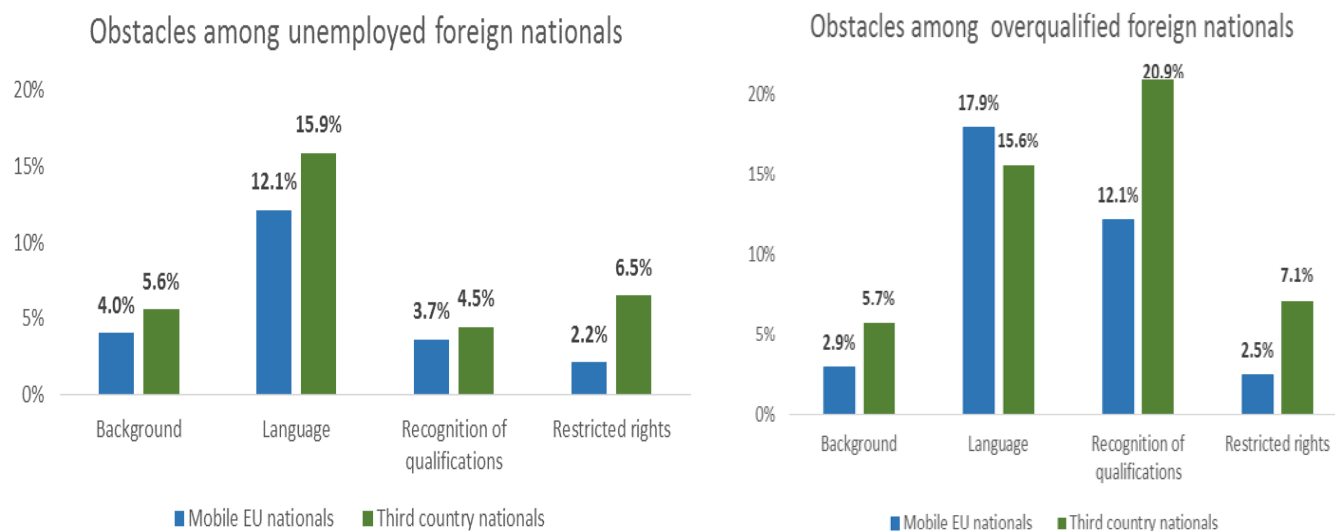
5.2. The impact of legal gaps and barriers associated with ‘third-country national’ status

This section consists of two parts. First, we use the EU LFS Ad-hoc Modules on Migration that explicitly asked respondents about obstacles they face in EU labour markets. We then estimate to what extent these self-reported obstacles are associated with work-related outcomes among TCNs. Second, we aim at establishing the causal impact of extending rights for TCNs (to those of EU nationals). To that end, we exploit the quasi-experimental setting (further explained below) created after the EU enlargements in 2004 and 2007. While this section does not evaluate the impact of *all* gaps and barriers analysed in Chapters 3 and 4, it speaks to the implications of several important ones: a) restricted access to the labour market; b) insecure residence status and limitations on re-entry and circular mobility; c) low mobility between employers; d) difficulties in recognition of foreign qualifications and diplomas; e) limitations to intra-EU mobility.

5.2.1. The impact of self-reported gaps and barriers on work-related outcomes of third-country nationals

Regarding two work-related outcomes, employment and overqualification, the EU LFS Migration Module (2014 wave) provides evidence on self-reported obstacles. Following the legal analysis of gaps and barriers in previous chapters, we are in particular interested to see how TCNs perceive the role of ‘restricted rights’ and ‘recognition of qualifications’. In Figure 19, we compare responses of TCNs with those of mobile EU nationals to check whether indeed the perceived barriers are higher for the former.

Figure 19. Obstacles among overqualified and unemployed third-country nationals and mobile EU nationals in the EU labour markets



Source: Authors own calculations, 2018, using EU LFS, 2014 wave.

Note: Respondents are asked to identify the main obstacle to getting a job corresponding to their qualifications or to getting a job at all. The sample includes respondents aged 20-55 living in an EU Member State in the years of survey.

TCNs are indeed more likely than mobile EU citizens to name ‘restricted rights’ as the main reason for being unemployed or overqualified for their job: 6.5% vs. 2.2% and 7.1% vs. 2.5% respectively. While ‘recognition of qualifications’ is not largely perceived as the main reason for unemployment, this barrier represents an important obstacle for TCNs to getting a job that matches their skills: 21% of overqualified TCNs name it as the main reason for being overqualified. To compare, ‘recognition of qualifications’ appears to be the major

barrier for only 12% of mobile EU nationals.³⁹² These results suggest that TCNs effectively face more barriers when trying to have their qualifications recognised in the EU. It requires, however, more research to investigate the roots of the barrier: first, difficulties with the recognition of qualifications in the EU for TCNs might result from the bureaucratic procedures and conditions for entry and residency inherent to specific national or EU migration status or a lack of information about the process; second, they may be due to imperfect transferability of human capital.

In addition, the EU LFS Ad-hoc Module on Migration (2008 wave) asked respondents '[w]hether [their] current legal access to the labour market is restricted'. We then link answers to this question to current work-related outcomes of TCNs.³⁹³ To reduce omitted variable bias, i.e. bias due to unobserved factors that influence both work-related outcomes and reported legal restrictions, we use a rich set of controls. In essence, we compare two TCNs of the same gender, age group, education, and who are coming for the same migration reason from the same origin and living in the same destination for the same number of years, but one has a restricted legal access to the labour market whereas the other does not report any legal restrictions.

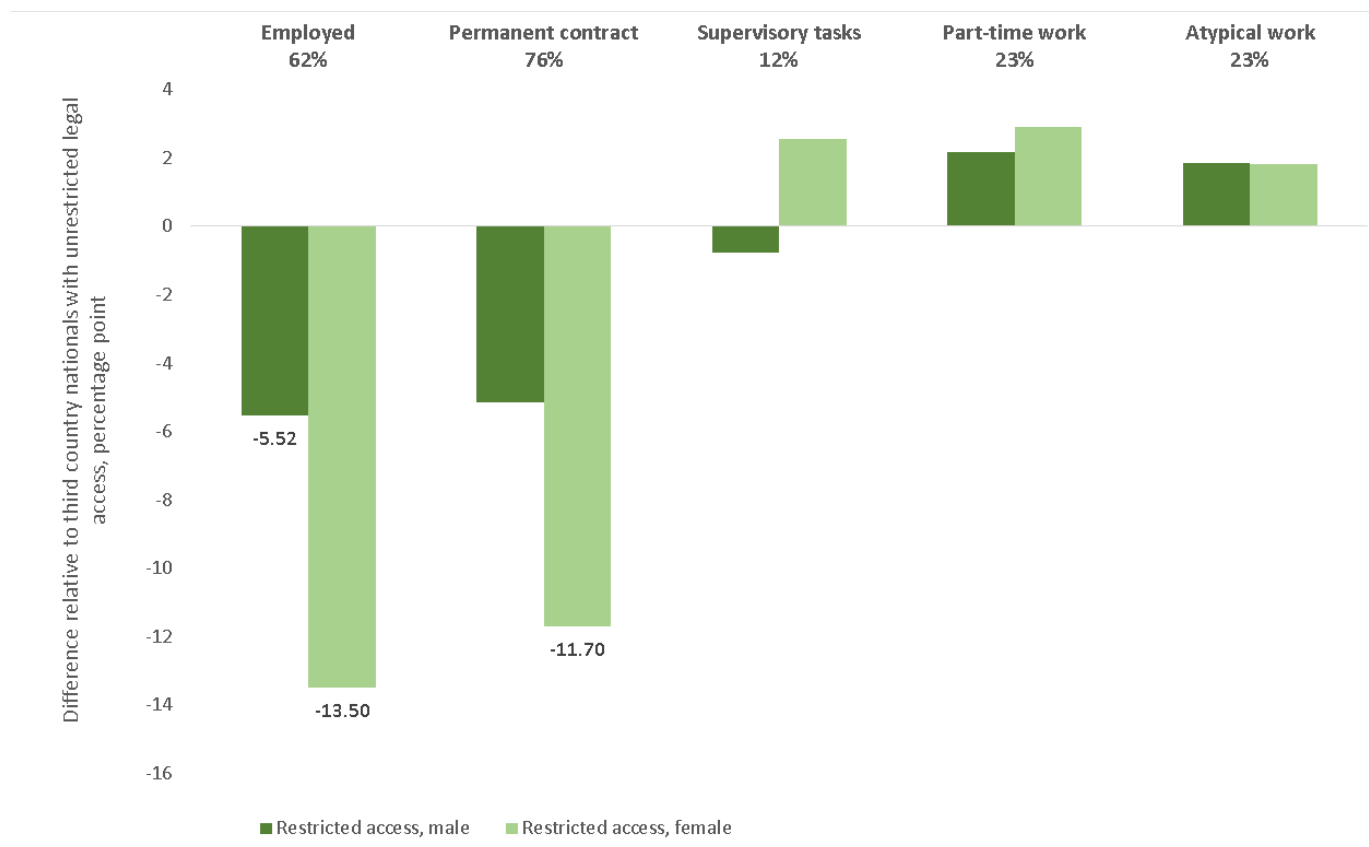
As Figure 20 shows, legal restrictions have important consequences, in particular, for women TCNs: those facing restrictions are 13.5 percentage points less likely to be employed and 11.7 percentage points less likely to have a permanent contract relative to women TCNs with the same observable characteristics but with unrestricted access. The likelihoods of part-time and atypical work also increase; however, they are not precisely estimated. The effect on the incidence of supervisory tasks can seem counter-intuitive, however, first, it is not statistically significant, and, second, it can also relate to the change in the composition of employed women TCNs: while additional restrictions may be decisive for lower-skilled women to not take a job, they are not likely to discourage higher-skilled women from pursuing well-paid jobs.

Results for men TCNs have an intuitive direction: legal restrictions on access to the labour market are associated with a 5.5 percentage point lower employment rate. Restrictions are also associated with a lower chance of having a permanent contract and with higher likelihoods of part-time and atypical work. Except for the effect on employment rate, the results, however, are imprecisely estimated. Such low precision is a combination of two factors: first, it is to be expected that restrictions on access to the labour market will be strongest at the employment stage; second, the measurement error of other work-related outcomes is larger than that of employment.

³⁹² The difference still remains statistically significant when we condition responses on gender, age and education of respondents.

³⁹³ The answer is counted as "Yes" if immigrants report that their access is a) restricted to employment for specific employers/sectors/occupations, b) restricted to self-employment, c) not allowing self-employment, d) falls under any combination of a, b and c.

Figure 20. The role of self-reported legal restrictions for work-related outcomes of third-country nationals in the EU



Source: Authors own calculations, 2018, using EU LFS, 2008 wave.

Note: Statistically significant results are in boldface. The sample includes TCNs aged 20-55 living in an EU Member State in the years of survey. Numbers below column titles show the average of an outcome for TCNs in the sample. All reported differences are conditional on gender, age group, education, migration reason, destination* origin, destination* arrival year, origin* arrival year and interview year. Corresponding table: Annex 5: Table 32.

Although we can account for observable individual characteristics of TCNs as well as for the destination and origin time-specific effects, the results of this analysis can still suffer from the omitted variable bias and can be thus interpreted as an upper bound of the true effect's magnitude.³⁹⁴

5.2.2 The causal impact of legal gaps and barriers for third-country nationals: the 'EU experiment'

We further aim at establishing the causal impact of gaps and barriers for TCNs by exploiting the EU enlargement 'natural experiment'. After the EU enlargements in 2004 and 2007, nationals of new EU Member States (NMS)³⁹⁵ who resided in old EU Member States experienced a change of status from a 'third-country national' to an 'EU national'. Effectively, this extended their rights concerning legal access to the labour market, job mobility, security of residence, circular migration, and intra-EU mobility.

Yet this change in legal status (i.e. extension of rights) for NMS nationals, did not happen simultaneously in all EU Member States. Throughout 2004-14, NMS nationals faced different transitional provisions depending

³⁹⁴ For instance, in the EU LFS we observe only an aggregated origin region of TCNs and not individual countries. The differences in both work-related outcomes and restrictions faced can be specific to countries of origin (especially if certain countries from the same origin region have closer ties – both in terms of language proximity and bilateral migration agreements – than others).

³⁹⁵ NMS8, accession in 2004: Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia and Slovenia (Malta and Cyprus were exempt from transitional provision). NMS2, accession in 2007: Bulgaria and Romania.

on their country of residence. For example, the UK lifted all restrictions for NMS8 nationals already in 2004, while for NMS2 nationals the restrictions were in place until 2014. Italy kept restrictions until 2006 for NMS8 nationals and until 2012 for NMS2 nationals. Germany kept restrictions until 2011 for NMS8 nationals and until 2014 for NMS2 nationals.³⁹⁶ As a result, in some Member States, NMS nationals already enjoyed the same rights as other EU nationals, while in other Member States, they still faced the same restrictions as other TCNs. We can thus compare how granting more rights, i.e. extending to EU nationals' rights, affects work-related outcomes.

We conduct the analysis using EU LFS and ESS data, and thus the results illustrate an average EU case.³⁹⁷ We consider the same outcomes as presented in the descriptive analysis. We limit the sample to TCNs and NMS nationals who arrived between 1995 and 2004 to ensure that transitional provisions did not influence decisions to migrate. To better understand the variation, which we exploit for this analysis, consider two immigrants from Poland, two from Bulgaria and two from Serbia arriving in the UK or Italy in 2003. All immigrants are of the same gender, age group and education level (see Table 11).

Table 11. Illustrative example: time variation in the application of transitional provisions across EU destinations and NMS origins. Reference points: immigrants arrive in 2003; outcomes measured in 2014

Extended rights:	The UK 2004 for NMS8 2014 for NMS2	Italy 2006 for NMS8 2012 for NMS2
Poland	10 years since acquiring EU national rights	8 years since acquiring EU national rights
Bulgaria	0 years since acquiring EU national rights	2 years since acquiring EU national rights
Serbia	0 years since acquiring EU national rights	0 years since acquiring EU national rights

Source: Authors, 2018.

Note: This is an illustration using the UK and Italy as two examples. The actual analysis is conducted using data from most EU Member States (see Annex 5.2).

As of 2014, all of them had resided in their destinations for 11 years, however, during this period, they faced different regulations. As of 2014, a Polish immigrant in the UK had held EU national rights for 10 years, while a Polish immigrant in Italy for eight years. A Bulgarian immigrant in Italy had held EU national rights for only two years; a Bulgarian immigrant in the UK for none. Such a setting allows us to control for origin- and destination time-specific effects. The results can be also informative about longer-term effects: they show how an individual's outcome will change with one additional year of having full EU national rights.³⁹⁸

³⁹⁶ Freedom of movement of workers in the EU

https://en.wikipedia.org/wiki/Freedom_of_movement_for_workers_in_the_European_Union.

³⁹⁷ Ruhs and Wadsworth (2017) use a similar setting and analyse the impact of the removal of restrictions in the UK for Romanian and Bulgarian nationals in 2014. They find that acquiring unrestricted work authorisation negatively affected NMS8 immigrants' likelihood to work as self-employed, but at the same time the authors do not find any discernible effects on other labour market outcomes or on the receipt of welfare benefits.

³⁹⁸ Under the assumption that the effect is linear in the years since receiving EU national rights.

Figure 21. The role of extending rights (to EU national rights) for work-related outcomes of third-country nationals



Source: Authors own calculations, 2018, using EU LFS, 2008 and 2014 wave.

Note: Statistically significant results are in boldface. The sample includes foreign nationals aged 20-55 living in an EU Member State and who had arrived between 1995 and 2004. The sample is limited to the nationals of new EU Member States and third-country nationals residing in one of 'old' EU Member States (AT, BE, DE, ES, FI, FR, GR, IT, LU, PT, SE, UK) at the moment of the survey. All regressions control for gender, age group (five-year intervals), education, years since EU entry of the origin (otherwise zero), origin* arrival year (origin-specific time effects in the EU), destination* arrival year (destination-specific time effects), and interview year. Standard errors are clustered on 'country-of-residence and year' level. Data on monthly pay and overqualification is available only in 2014 wave. Corresponding table: Annex 5. Table 33.

Figure 21 illustrates the results of the analysis. In general, the statistically significant results are in line with the earlier findings on self-reported legal restrictions (Figure 20). The employment rate of women TCNs increases, on average, by almost 2 percentage points with every year since obtaining EU national rights. They are also less likely to work only part-time. For men TCNs, several job characteristics improve: on average, with every year since obtaining EU national rights they receive higher monthly pay and are more likely to have a permanent contract and to work full-time. Annex 5: Table 34 shows the estimated results for the sample of family migrants (who are often more constrained by legal obstacles in accessing labour markets than TCNs coming to the EU for work). Consistent with this, we observe a stronger effect of extending rights on work-related outcomes of family migrants from third countries. The employment rate increases by 1.8 percentage points for men and by 4.4 percentage points for women; similarly, probabilities to have a permanent contract and to work full-time increase.

We repeat the analysis with the ESS data to estimate the effect of extending rights on life quality indicators: perceived discrimination, subjective happiness and health. Moreover, with this data set we can cross-check the result on employment (see Annex 5: Table 35). While the effect of extending rights is qualitatively confirmed for employment, econometric modelling does not detect any effects on subjective happiness or health of immigrants. First, as Figure 17 illustrated, there are no detectable differences in reported subjective happiness and health between TCNs and EU nationals. This could be explained as for example, TCN tend to be younger than national population. Second, the noise in measuring these subjective outcomes attenuates possible effects. Likewise, the econometric exercise does not capture effects of extending rights on perceived discrimination. As Chapter 4 and Box 4. Case study: Discrimination of immigrants in the labour market demonstrates discrimination is possible on multiple and intersectional grounds and needs to be studied in qualitative terms. Nevertheless, recent European Parliament study shows that when categories are lacking

legal entry channels there can be grave revelations on the access to health services and increased mortality rates by 1.3-1.8%.³⁹⁹

5.2.3. The impact of legal gaps and barriers on intra-EU mobility

As Figure 18 showed, TCNs are indeed less mobile than EU nationals with similar observable characteristics. Chapter 3 highlighted certain barriers to intra-EU mobility: among others, the need to obtain new residence and work authorisations, a lack of status recognition and the restriction on accumulating years of residence for long-term residence status. There is evidence shown that many TCNs indeed delay their intra-EU mobility until they obtain long-term residence in one of the Member States (in most cases, this requires five years of residence). Poeschel uses a similar quasi-experimental setting of the EU enlargement and shows that once legal constraints are removed (to the benchmark of full intra-EU mobility for EU nationals), intra-EU mobility of non-EU nationals increases by 0.2-0.6 percentage points, which is a significant contribution given that an average gap in mobility rates between TCNs and EU nationals is estimated at 0.4 percentage points (see Figure 18. Annual intra-EU mobility rates and conditional differences in intra-EU mobility between third-country nationals and EU nationals).⁴⁰⁰

5.3. Qualitative estimates of costs at the individual level and societal level

This section synthesises results of the legal analysis conducted in Chapters 3 and 4 with the empirical findings in the previous two sections to qualify the impact of gaps and barriers in the area of legal migration. Following the econometric analysis, we focus on assessing the impact of gaps and barriers explicitly related to employment and work conditions of TCNs in the EU: access to the labour market, job mobility, re-entry and circular migration, secure residence status, recognition of qualifications and intra-EU mobility (see Table 12). For this exercise, we draw on the findings presented in the previous section, where we estimated the impact of self-reported restrictions on accessing the labour market and the impact of extending rights of TCNs to those of EU nationals (see Table 13).

Table 12. Gaps and barriers directly related to employment and work conditions of third-country nationals in the EU

Gaps and barriers	Direct consequences	Direct individual impacts	Societal impacts
Work Authorisation - Restricted access to the labour market ('Entry' - G2&B2) - Limitations -change employers (G3; B4); also as a consequences of unemployment (G4; B5)	Limited employment opportunities Lower job mobility → lower adjustment Lower bargaining power → lower wages	Unemployment Overqualification Lower job quality Lower earnings	GDP loss Budget burden
Limitations on re-entry and circular migration (G2&B2; B3)	Lower geographic mobility → lower adjustment to shocks Fear of unemployment → lower bargaining	Overqualification Lower job quality Lower earnings	GDP loss due to overqualification

³⁹⁹ van Ballegooij, V., C. Navarra, V. Moreno-Lax, M. Fernandes (2018) Humanitarian Visas European Added Value Assessment accompanying the European Parliament's legislative owninitiative report (Rapporteur: Juan Fernando Lopez Aguilar), July 2018, Brussels. (<http://www.europarl.europa.eu/cmsdata/150782/eprs-study-humanitarian-visas.pdf>)

⁴⁰⁰ Poeschel (2016).

	power, acceptance of low-quality jobs		
Insecure residence status (G5&G6)	Uncertain time horizon in the destination country → underinvestment in country-specific skills	Poorer long-term integration outcomes (employment, earnings, social integration)	GDP loss Budget burden Negative attitudes toward immigrants
Recognition of qualifications (G10 & B8)	Employers experience difficulties in recognition of foreign qualifications Difficulty to find a matching job	Unemployment Overqualification Lower earnings	GDP loss due to unemployment and overqualification
Barriers to intra-EU mobility (G7)	Lower intra-EU mobility of non-EU immigrants Lower adjustment to economic shocks	Unemployment Foregone earnings (due to lost job opportunities)	GDP loss due to unemployment Productivity loss due to lower knowledge spillovers Lower attractiveness of the EU to foreign workers

Source: Authors, 2018.

Table 13. Econometric analysis: summary of findings, individual impact

Outcome	Documented differences between TCNs and mobile EU nationals (conditional on observable characteristics) ⁴⁰¹	Impact of self-reported gaps and barriers – restricted access to the labour market and barriers to recognition of qualifications – on outcomes of TNCs ⁴⁰²	Impact of extending rights: from TCN status to EU national status (for every year since obtaining EU national rights) ⁴⁰³
Employment rate	Men: -5.2 pp Women: -13.5 pp	Men: - 5.5 pp Women: -10.6 pp	Men: - Women: +1.9 pp
Monthly pay (decile)	Men: -0.7 decile Women: -0.4 decile	Men: u/a Women: u/a	Men: +0.1 decile Women:
Overqualification	Men: +5.5 pp Women: -	Men and women: 21% of overqualified TCNs name recognition as the main obstacle (12% among foreign nationals from the EU)	Men: - Women: -
Permanent contract	Men: -5.2 pp Women: -2.5 pp	Men: - Women: -12 pp	Men: +1.4 pp Women: -
Supervisory tasks	Men: -4.1 pp Women: -	Men: - Women: -	Men: - Women: -
Part-time work	Men: + 8.3 pp Women: +2.7 pp	Men: - Women: -	Men: - 2.3 pp Women: -1.5 pp
Atypical work	Men: - Women: -	Men: - Women: -	Men: - Women: -
Perceived discrimination	Men: +18.1 pp Women: +9.3 pp	Men: n/a Women: n/a	Men: - Women: -
Subjective health	Men: - Women: -	Men: n/a Women: n/a	Men: - Women: -
Subjective well-being	Men: - Women: -	Men: n/a Women: n/a	Men: - Women: -
Intra-EU mobility, annual rate	On average: -0.4 pp; low- and medium-skilled non-EU nationals are more constrained.		+0.2-0.6 pp (Poeschel, 2016)

Source: Authors own calculations, 2018 based on the results of the econometric analysis; pp: percentage point.

⁴⁰¹ Summarises results of the analysis presented in Figure 14, Figure 15, Figure 16.

⁴⁰² Summarises results of the analysis presented in Figure 17 and Figure 18

⁴⁰³ Summarises results of the analysis presented in Section 5.2.2 The causal impact of legal gaps and barriers for third-country nationals: the ‘EU experiment’ and Section 5.2.3. The impact of legal gaps and barriers on intra-EU mobility

As Table 13 illustrates, legal gaps and barriers have some real implications for TCNs in the EU. For women TCNs, legal restrictions appear to strongly influence their employment rates. This relates to the fact that about 55% of women TCNs come to the EU for family reasons; especially during the first years after arrival, they still might face legal restrictions on accessing the labour market. This increases their likelihood to stay unemployed or to take jobs, which badly match their skills. Legal restrictions in the first years of immigration may in their turn lead to negative long-term implications: long-term unemployment due to scarring effects and eventual dependency on the spouse. Low employment rates among women TCNs further exacerbate gender gaps in activity rates and wages.⁴⁰⁴

For men TCNs, statistically significant effects of legal restrictions are mainly detected on the intensive margin: monthly pay and quality of jobs. Legal restrictions reduce available employment options for TCNs and thus lead to lower bargaining power and hence lower wages. Unsecure residence status is often associated with employers' unwillingness to offer permanent contracts and lowers incentives to invest in firm-specific skills by both sides. In line with this, our econometric analysis shows that removing legal restrictions leads to a higher incidence of having a permanent contract and increase in wages.

Employers experience challenges in recognition of qualifications. As Chapter 3 has highlighted, recognition of foreign qualifications remains an important barrier, namely the difficulties and lengthy procedures in particular for the regulated professions. In addition, some of the native employers may also mistrust foreign qualifications, which can lead to discrimination of TCNs at the hiring stage or to wage discrimination of foreign employees. The discrimination (though not necessarily on the grounds of migration status, but also on ethnicity, race, religion, etc.) can partly explain wage and overqualification outcomes. Our findings show that TCNs who are overqualified in their jobs are almost 9 percentage points more likely than mobile EU nationals to name recognition of qualifications as the main reason for this. It is a more structural challenge as MS in the Council of the EU (and not employers) are unwilling to put in place systems to make it easier to recognise foreign qualifications as this clause was debated in the case of Blue Card.⁴⁰⁵

Our analysis shows that TCNs are less mobile relative to similar EU nationals. This results in individual costs due to foregone job possibilities in other EU Member States and societal costs due to lower adjustment to economic shocks, poorer skill matching and lower knowledge flows. For instance, lower intra-EU mobility is likely to lower attractiveness of the EU as a destination for highly/qualified skilled.⁴⁰⁶ If this is indeed the case, it will impose a cost of lost opportunities. Several studies found a positive effect of migration on innovation though patenting in destination countries. Kerr & Lincoln use random visa allocations to find causal effects of migration on innovation and growth in the United States.⁴⁰⁷ They find that admission of highly skilled immigrants leads to an increase in science and engineering employment through contributions from the immigrants themselves.

Hunt & Lioselle reach a similar conclusion; they measured how skilled immigrants increase innovation in the US.⁴⁰⁸ Using state panel data from 1940-2000, they find that a one percentage point increase in immigrant college graduates' population share increases patent per capita by 9-18%. Another channel that may exert a positive productivity effect but is harder to measure may arise from the "place of birth" variety among workers. This may generate a greater variety of ideas and increase the variety of goods and services supplied

⁴⁰⁴ Fachthaler et al. (2018).

⁴⁰⁵ Interview with the Council of the EU, General Secretariat, 16.02.2018.

⁴⁰⁶ Delphi method discussion, 9 March, 2018, Brussels.

⁴⁰⁷ Kerr and Lincoln (2010).

⁴⁰⁸ Hunt and Lioselle (2010).

locally⁴⁰⁹ or enhance productivity.⁴¹⁰ Bosetti et al., Parrotta et al., Ozgen et al. and Niebuhr find that cultural diversity is one of the main channels to generate new ideas and innovation in Europe.⁴¹¹

Moreover, lower intra-EU mobility of TCNs also decreases their ability to contribute to knowledge flows within the EU. Kaiser et al. and Braunerhjelm et al. conduct firm-level analysis in Denmark and Sweden and show that hiring new knowledge workers increases a firm's patenting activity.⁴¹² Interestingly, the former employers of these workers also increase patenting, which can be explained by reverse knowledge flows. While some Member States may be concerned about inner-EU competition for talented immigrants, Fackler, Giesing & Laurentsyeve show that free labour mobility of skilled workers within the EU in fact can positively affect innovation in both their destination and source countries.⁴¹³ While mobile skilled workers are no longer inventing in their previous country of residence, they could contribute to cross-border knowledge and technology diffusion and thus help their previous countries of residence to catch up to the technology frontier. See Annex 9 for a brief description of other potential socio-economic impacts.

⁴⁰⁹ Di Giovanni, Levchenko and Ortega (2015).

⁴¹⁰ Ottaviano and Peri (2006); Ortega and Peri (2014); Trax, Brunow and Suedekum (2012).

⁴¹¹ Bosetti et al. (2015); Parrotta et al. (2014); Ozgen et al. (2014); Niebuhr (2010).

⁴¹² Kaiser et al. (2015); Braunerhjelm et al. (2015).

⁴¹³ Fackler, Giesing and Laurentsyeve (2017).

CHAPTER 6. MONETISING THE IMPACTS OF THE STATUS QUO

KEY FINDINGS

- In this Research Paper we quantified and monetized the impacts for several gaps and barriers for TCNs as compared with the native population.
- The analysis focused on two key impacts – employment and income – and assessed the implications for earnings of individual migrants (individual impact) as well as tax revenue (economic impact).
- The greatest impacts were seen for barriers to family reunification, which was mainly due to the limited employment opportunities for spouses of third-country workers.
- The estimated loss to individuals and society due to the poor recognition of qualifications was also relatively large.

This Chapter synthesises the results of the individual and economic gaps and barriers provided between Chapters 3 and 5 and monetises the impacts of the forms in the area of legal and labour migration.

First, following the econometric analysis, we focus on assessing the impact of gaps and barriers explicitly related to employment and work conditions of TCNs in relation to: work authorisation, job mobility, re-entry and circular migration, secure residence status, recognition of qualifications, intra-EU mobility, family reunification, social security and discrimination. For this exercise, we draw on the findings presented in the previous chapter, where we estimated the impact of restricted access to labour market and the impact of extending rights of TCNs to those of EU nationals. We narrow the assessment to the area of employment due to the availability of comparable datasets and possibility to produce rigorous quantification.

The gaps and barriers are closely interlinked and share similar impact pathways. For example, four of the five gaps and barriers are related to legal restrictions to employment for TCNs, although some groups may be more affected than others, in particular vulnerable groups such as TCN women, many of whom are family migrants. We focused our assessment on two key impacts: employment and wage level. These two impacts are translated into monetary figures of lost annual earnings (individual impact) and lost tax revenue (economic impact). The impacts on employment and wage level were obtained from the econometric analysis presented in sub-chapter 5.1.

The translation involved economic modelling drawing on additional data from Eurostat such as average wages in the EU per decile (to correspond with the wage decile estimated in sub-chapter 5.1.) and the average tax rate per income level (to estimate tax revenue). Additional steps to support the modelling were also taken. This has included, for example, a linear extrapolation of income between deciles.⁴¹⁴ The econometric estimates are based on 2014 data. The key parameters are summarised in Annex 6 with the key parameters

⁴¹⁴ Eurostat provides an average wage per decile. For example an income of €10,635 corresponds with the second decile of income in the EU in 2016 and an income of €12,563 corresponds with the third decile of income. A linear extrapolation between deciles was made in order to obtain values for income between deciles.

to assess impacts of gaps in employment and wages. We mainly used 2016 data for the translation of impacts into monetary figures.

Table 14 below presents a summary of the estimated annualised monetised economic and individual impacts resulting from the gaps and barriers, which are described in greater detail in the remainder of this chapter. The estimates of lost annual income and tax revenue refer to the population of TCN workers residing legally in the EU. It is also worth noting that while our analysis focused on these two impacts – employment and wages – other impacts are possible but were difficult to quantify and monetise for the purposes of this Research Paper. Such impacts included health and GDP. With regards to GDP, a complex modelling effort would be needed to assess macro-level changes in labour force supply and demand.⁴¹⁵

Table 14: Summary of monetised impacts

Gap/barrier	Main Impact		Estimates*	
	Employment	Income	Lost annual income for TCN workers in the EU, net (individual impact)	Lost annual tax revenue in the EU (economic impact)
Intra-EU labour mobility (G7)	✓		€31.2 million	EUR €8.5 million
Recognition of qualification (G10; B7)	✓		€3.2-5.3 billion	€1.4-2.3 billion
Re-entry and circular migration (G2; B3)	✓		No estimate made	
Secure residence (G5 & G6)	✓		Est 100,000 people affected; no estimate made	
Entry (G2&B2) and Work authorisation (change of employers G3&B4; unemployment G4&B5)		✓	€1.1-2.3 billion	€445-891 million
Family reunification (G9&B7)	✓		€6.9-8.7 billion	€2.6-3.2 billion
Social security (G8&B6)		✓	Est. 100,000 people affected; no estimate made	
Equal treatment (G1; B1)	✓	✓	€21 billion	€8 billion

Note: *Author's calculations unless otherwise noted.

Source: Authors, 2018.

⁴¹⁵ Some studies have investigated this issue. For example, one study investigated the potential economic impact of reductions in migration due to Brexit. The study found that a decrease in net migration of 91,000 could result in a reduction in GDP estimated between 0.63% and 1.19%. Per capita GDP would fall by an estimated 0.22% to 0.78% (Portes and Forte, 2017).

6.1. Employment status

In terms of employment, TCNs fare poorly compared with nationals whereas an ‘employment gap’ is not evident for mobile EU citizens (see Table 15 below). The employment gap magnitude of these differences may be explained in part by differences between these groups such as differences in educational attainment. However, our econometric analysis in Chapter 5 finds that the gap remains after controlling for other factors and that it is greater for females.

Table 15: Employment rate by migrant status

	Male	Female
Native born	77.1%	66.5%
Mobile EU national	79.8%	66.4%
Third country national	71.5%	52.0%

Source: Descriptive statistics from LFS analysis - Ad-hoc Module on Migration, 2014.

Several legal gaps and barriers stemming from the current EU sectoral and fragmented approach on legal and labour migration investigated in Chapter 3 of this Research Paper may directly contribute to the evident difference in employment rate between TCNs and national workers. Specifically, legal restrictions on intra-EU mobility may lead to a lower mobility rate and consequently, the exclusion of employment opportunities in other EU Member States. Restrictions on intra-EU mobility may thus lead to a lower probability of employment, especially for low- and medium-skilled individuals. Our earlier analysis found that legal restrictions are less evident for Blue Card holders. A lower probability of employment may translate into lower earnings as well as lost tax revenue.

We estimated the cost associated with this gap by considering two scenarios. *Scenario 1* was the status quo where low and medium-skilled TCNs exhibit lower labour mobility than national workers. *Scenario 2* considered a hypothetical situation where this population exhibited the same level of intra-EU labour mobility as EU citizens. The findings from our econometric analysis suggest that in Scenario 2, an additional estimated 11,000 low-skilled and 15,000 medium-skilled TCNs would exercise intra-EU mobility in a given year.⁴¹⁶ One study found that labour mobility in the EU was associated with an increased 9% likelihood of being employed.⁴¹⁷ This study focused on refugees, and we assume a similar increased likelihood may be evident for TCNs in general. We assume that these newly employed individuals would earn the average EU-level wage by their skill category as well as gender, as estimated in Section 5.1. Based on this information we estimate gross earnings to increase by €31.3 million. The estimated tax revenue would be €8.5 million, leaving €31.2 million in net earnings.⁴¹⁸

The impact pathways for restrictions on re-entry and circular migration are expected to be similar to legal restrictions on intra-EU mobility, particularly in terms of bargaining power with respect to employment conditions. TCNs may not be able to access the same level of unpaid or paid leave as national workers, and this is especially a concern for low-skilled TCNs. No quantitative estimate could be constructed due to the limited availability of economic studies on this issue.

⁴¹⁶ These numbers are obtained by multiplying the total number of non-EU nationals in each skill group by their respective mobility gap. Data source on the population of non-EU national: *lfsa_pganws* (Eurostat, 2016). Data source on education attainment of non-EU nationals: *edat_lfs_9911* (Eurostat, 2016). I consider active population to be aged 25 to 54. Total number of non-EU nationals as of 2016: 8.5 million. Educational attainment: 42.8%, low-skilled; 30.6%, medium-skilled; 26.6%, highly skilled.

⁴¹⁷ Tanay et al. (2016), pp. 109-47.

⁴¹⁸ This estimation uses a tax rate of 27%, which is the rate for single adults without children with an income that is 80% of the average wage. This wage level is comparable to the income level of low- and medium-skilled TCNs.

Poor recognition of qualifications may also present barriers to seeking and securing employment. We assume that this is primarily an issue for a high-skilled foreign born population and that it can be proxied by estimates from discrimination testing studies. As described in Box 1 in Annex 8, a number of such studies have been conducted by sending two CVs that are identical except for the name of the applicant. For example, one study noted that call-backs were 50% lower for individuals with a foreign name.⁴¹⁹ The study ascribed the discrimination to the grounds of ascribed race/ethnicity and not necessarily on actual migration status or nationality. Nonetheless, we consider this type of discrimination a proxy for poor recognition of qualifications, which is also a form of discrimination. More specifically, we assume that about 30-50% of the unexplained gap between highly-skilled TCNs and highly skilled national workers can be explained by poor recognition of qualifications.⁴²⁰ With this assumption and findings from the econometric analysis, we estimate the lost earnings and tax revenue associated with poor recognition of qualifications among highly skilled TCNs. In total, we estimate a loss of €3.2-5.3 billion in net annual income and €1.4-2.3 billion in tax revenue.

The lack of secure residence has implications for obtaining of permanent residence and consequently social and labour market integration. Over the medium to long term, this gap may result in less likelihood of employment and poorer integration. Lastly, barriers to family reunification may have a multitude of adverse impacts, one being an adverse impact on the employment opportunities for spouses. As noted earlier in this Research Paper, about 60% of non-EU women come to the EU for family reasons. Barriers to their employment may reduce the likelihood of social integration and also increase the risk of poor mental health. These barriers may help to explain in part the sizeable gap in the likelihood of employment between TCN women and native women: 6% for the low-skilled category, 15% for medium-skilled and 28% for high-skilled.

To estimate the impact of this gap, we considered a scenario where the gender gap in employment among TCNs approximates 80-100% of the gender gap in employment among the native population. At present, the gender gap in employment is much starker for the TCN population. We assume that up to 20% of this additional gap may be due to other barriers to employment such as language proficiency. We then assumed that the additional TCN women employed earn the average wage of TCN women of the same skill level. Overall, we estimate a loss in net earnings of €6.9-8.7 billion and a loss in tax revenue of €2.6-3.2 billion.

6.2. Wages

Our analysis of the LFS uncovered substantial wage-level differences between national workers and TCN workers (see Table 16). Some of these differences may be explained by differences between the two groups such as age, but the gap remains after controlling for a large number of variables. The remaining gap may be driven in part by the legal gaps and barriers identified in this Research Paper. It is also important to highlight that the wage gap is known to decrease over time as migrants integrate more fully into society and the labour market.⁴²¹

The econometric analysis highlights a number of factors that may contribute to lower wages among third-country workers relative to national workers. These factors include the lower likelihood of supervisory tasks, greater prevalence of part-time work and less likelihood of a permanent contract. Our investigation found that lower wages is a key impact for several of the gaps and barriers.

⁴¹⁹ Carlsson and Rooth (2006).

⁴²⁰ This range is in line with estimates from the FRA MIDIS II of discrimination in the area of employment. Findings from the survey note that skin colour or physical appearance was noted by 50% of respondents when looking for work and that first or last names were understood to be a factor in discrimination for 36% of respondents. For more information, see FRA (2017). Sub-Saharan Africans and Muslims are among the most discriminated groups.

⁴²¹ OECD (2018). International Migration Outlook. OECD Publishing, Paris
Available at: http://dx.doi.org/10.1787/migr_outlook-2018-en.

Table 16: Wage gap (unadjusted) by migrant status, gender and skill level

	Low-skill		Medium-skill		High-skill	
	Male	Female	Male	Female	Male	Female
National Workers	5.21	3.16	5.93	4.12	7.54	6.17
Mobile EU citizens	4.50	2.58	5.11	3.22	7.25	5.49
TCNs	3.80	2.48	4.38	2.75	6.49	4.88

Source: Authors.

Gaps concerning work authorisation imply that foreign workers have lower bargaining power with their employers and an increased risk of exploitation including lower wages. This is especially a concern for low- and medium-skilled TCNs. With regards to high-skilled TCNs, the EU Blue Card Directive allows for the possibility to find alternative work in the case that employment is lost. To assess the potential impact on wages, we reviewed studies investigating the impact of naturalisation on wages.⁴²² With naturalisation, work permits and authorisations are not needed. One study that conducted an econometric analysis of microdata from Germany found a wage premium of about 2% with naturalisation. We apply this parameter estimate to our econometric analysis findings from the LFS (see Section 5.1). The overall adjusted gap in wage decile between TCNs and nationals is about 0.4-0.6 for low-skilled workers and 0.9 for medium-skilled workers. We translated these deciles into wage levels, and considered a hypothetical scenario where the wage level was 1-2% higher for these low and medium-skilled TCNs. Our analysis resulted in an estimate of €1.1-2.3 billion in lost earnings (net) and €445-891 million in lost tax revenue.

The Impact Assessment of the revised Blue Card Directive provides insights into the economic impact of the gaps and barriers with respect to the work authorisation of highly skilled TCN workers.⁴²³ The study assesses the net benefits of several policy option packages. These policy option packages consider alternatives regarding the admission conditions of highly skilled TCNs, their rights and the relationship with the Blue Card scheme and national schemes. The net benefits are defined as the economic gains due to additional wages and revenue for higher education net of factors such as labour mobility, remittances and the administrative burden on the Member States. The assessment finds that several options would generate a positive impact. One of the the policy option packages (POP 2(a)) was estimated to have an impact of EUR 1.4 to EUR 6.2 billion while another (Pop 2(c)) was estimated to have a net impact of EUR 1 to 6.9 billion⁴²⁴.

Barriers in social security coordination including discrimination may lead to lower earnings and a greater risk of poverty in later life. Seasonal workers, who are already a vulnerable group, would be most affected. The impacts of these barriers may accumulate with the number of years spent engaging in seasonal work. No quantitative estimate of these impacts could be made due to the lack of available evidence on this issue.

⁴²² Two examples of such studies: Bevelander and Veenman (2006); Steinhardt (2008).

⁴²³ European Commission (2016) Commission Staff Working Document Impact Assessment, Proposal for a Directive of the European Parliament and the Council on the conditions of entry and residence of third-country nationals for the purposes of highly skilled employment and repealing Directive 2009/50/EC.

⁴²⁴ EPRS (2016) The New EU Blue Card Directive. Initial Appraisal of a European Commission Impact Assessment Briefing. As explained: Pop 2(a) would make the Blue Card scheme more widely accessible among highly skilled workers. Pop 2(c) would introduce two tiers into the Blue Card system, each targeting a different skill level. One tier would be more selective and would convey greater rights.

Lastly, we considered the cost associated with the lack of equal treatment overall. This analysis considered the gap in employment between TCNs and natives as well as the lower wages among TCNs and natives. The gaps were translated to lost employment, lost income and tax revenue and aggregated across all skill groups. This gap overlaps with several other more specific gaps and barriers previously discussed in chapter 3, for example recognition of qualifications is a specific issue within unequal treatment. It is the largest cost estimate generated and provides an upper bound of the potential loss associated with the gap of unequal treatment.

CHAPTER 7. POLICY OPTIONS: KEY DRIVERS OF COSTS AND BENEFITS

KEY FINDINGS

There are *four main policy options proposed* for the future EU's *acquis* in the area of legal immigration:

- First, aim at better enforcement and practical delivery of common EU rules and rights foreseen in currently existing EU sectoral d There are four main policy options proposed for the future EU's *acquis* in the area of legal immigration:
- First, aim at better enforcement and practical delivery of common EU rules and rights foreseen in currently existing EU sectoral directives;
- Second, gradually expand within the sectoral approach and add new categories of third-country workers in EU law;
- Third, develop a non-binding code in the area of legal migration, facilitating a 'one-stop shop' of all existing EU rules and instruments on legal and labour immigration;
- Fourth, adopt a Binding Immigration Code on conditions and rights for all third-country workers in the EU, which, similar to the area of free movement of EU citizens, would bring together all secondary legal instruments into one sole legal act. The assessment on the basis of Chapters 3-6 confirms that the fourth option would be the most efficient policy, closing most of the gaps and barriers resulting from the current sectoral nature of the EU legal migration *acquis*.
- Options 4 has the greatest potential benefits due to their strong orientation towards equal treatment overall. The costs associated with unequal treatment between TCNs and natives are substantial. In addition, this option would add more legal certainty and labour security among all TCNs.
- Options 1, 2 and 3 tackle all the gaps and barriers to some extent – they may be less preferred to Options 4 on the basis of benefits alone, but may be less costly and more feasible.
- There are a number of accompanying measures, which could be additionally explored, such as broadening the social dialogue (engaging more formally social partners and civil society in informing and evaluating EU policies and their domestic implementation) and the potential role of the EU's Common Labour Authority.

This chapter explores different available policy options and their potential in closing the gaps and barriers identified in Chapter 3 and 4. Chapters 5 and 6 identified some of the economic estimates and monetised the

impacts related to gaps and barriers in the current legal migration *acquis*, which emerge mainly due to its fragmentation and the sectoral (worker-by-worker) approach.

According to the main results in Chapters 3-5, Chapter 6 revealed a number of costs of the current *status quo* which require policy and legislative reforms. As studied in this Research Paper first admissions directives differentiate among TCNs on the basis of their assigned skills and qualifications in specific EU statuses, which often do not match their actual real skills and are subject to other entry and residence administrative conditions and limitations. As illustrated in the econometric analysis in Chapter 5, there is a need to devise policy options that could reduce the impacts of the gaps and barriers, namely: the impact of restricted access to the labour market, the joint impact of other gaps and barriers (insecure residence status, low mobility between employers, barriers to circular migration, etc.), the impact of barriers to the recognition of qualifications – here can mention both overqualification of TCNs and address statistical discrimination, the impact of barriers to intra-EU mobility and EU equal treatment. Yet, for example, while an improved system of recognition of qualifications could improve the situation, there is a need to streamline and simplify existing EU legal migration law, so as to provide better possibilities for upward social mobility and economic participation.

Whereas the EU Blue Card Directive offers the most extensive set of rights, this is not the case for seasonal workers. For example, the EU Blue Card includes a regulated form of intra-EU mobility (after 18 months), the accumulation of periods of time spent in different Member States to reach the five-year period for long-term residence purposes, the possibility to bring family members, and equal treatment as concerns, e.g. social security, although with some exceptions. The recently proposed revision of the EU Blue Card Directive aims to further broaden the rights of the highly qualified and streamline them across the EU by abolishing parallel national schemes and permits. The Commission's Impact Assessment has thoroughly demonstrated the remaining gaps in the current system, as well as the benefits and costs of a revised EU Blue Card system.

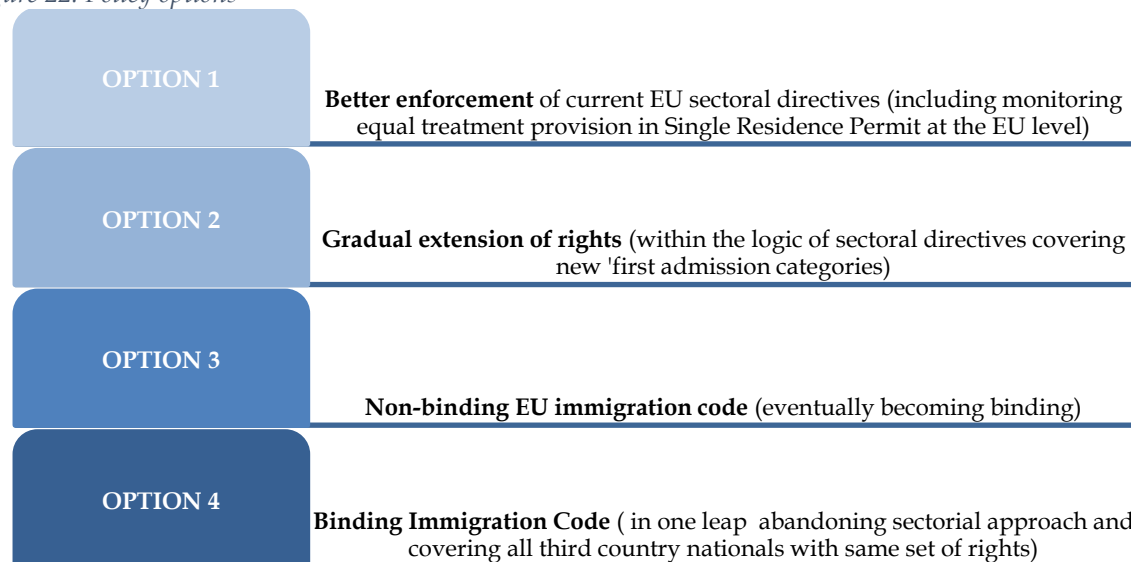
Up until today TCNs granted the status of 'seasonal workers' (irrespective of their actual skills) have been subject to enforced circularity with very few basic labour rights that often are not properly checked, enforced and monitored in practice. In some Member States, seasonal workers are made more vulnerable because of legal provisions: employers are placed in a position of power over the residence status of their TCN employees, as discussed in Chapter 4. The dependencies and discrepancies inherent to current EU legislation institutionalise a form of discrimination by design on the basis of which the category 'third-country national' was assigned to a specific individual as a holder of a Blue Card or as an ICT or researcher on the one hand or as a holder of a Seasonal Worker Permit in the EU on the other. In addition, a rather costly gap remains if TCNs do not qualify for either of the statuses foreseen in the sectoral directives and therefore fall outside any EU standards of protection.

This chapter identifies and substantiates each policy option in light of previous and current academic and policy debates (sub-chapter 7.1). The assessment of the different policy options elaborates on how they could reduce the identified impacts of gaps and barriers resulting from a status quo situation (sub-chapter 7.2). The chapter also puts forward a set of recommendations for EU policy-makers, mainly for the European Commission and the European Parliament as well as Member States (7.3). We call for a long-term vision of the future of the EU's legal migration *acquis*, which at its core will better uphold international, regional and EU human rights and labour standards and fully implement fair and non-discriminatory treatment among third-country workers, and between them and national workers, regarding rights at work, including intra-EU mobility.

7.1. Description of policy options

Past and current academic and policy debates have already advanced and covered several policy options in the area of EU legal and labour migration policy.⁴²⁵ We take these as our starting point and reflect on which ones would more efficiently address the gaps and barriers, as well as the individual and economic costs assessed in this Research Paper. On the basis of the above discussed academic debate four policy options can be considered for the next generation of EU legal migration *acquis* (see Figure 22).

Figure 22. Policy options



Source: Authors own compilation, 2018.

7.1.1. Academic and policy debate

As Chapter 1 highlighted, the European Parliament reiterated the need for a general framework directive.⁴²⁶ In the meantime, the European Commission is undertaking a legal Fitness Check, so as to identify the main gaps and barriers in EU legislation and to propose various ways forward, including better implementation and the possibility to expand EU sectoral directives to other sectors, though not necessarily calling for an entirely new or renewed approach to legal migration.

This Research Paper confirms the findings of previous literature according to which EU policy on legal and labour migration is characterised by fragmentation and discrimination which results primarily from the EU sectoral approach.⁴²⁷ Kostakopoulou has reflected on the need to codify the current EU legal *acquis* as it was

⁴²⁵ See in particular S. Carrera, E. Guild and K. Eisele (2014), "The next generation of EU Labour Migration Policy: Conclusions and Recommendations", in S. Carrera, E. Guild and K. Eisele (eds), *Rethinking Attractiveness of EU Labour Immigration Policies: Comparative Perspectives on the EU, the US, Canada and Beyond*, Brussels: CEPS. S. Carrera, A. Geddes and E. Guild (2017), "Conclusions and Recommendations: Towards A Fair EU Agenda Facilitating Legal Channels for Labour Mobility", in S. Carrera, A. Geddes, E. Guild and M. Stefan (eds), *Pathways to Legal Migration into the EU: Concepts, Trajectories and Policies*, Brussels: CEPS.

⁴²⁶ European Parliament (2016), Resolution of 12 April 2016 on the situation in the Mediterranean and the need for a holistic EU approach to migration (2015/2095(INI)).

⁴²⁷ Eisele, K. (2014), *The External Dimension of the EU's Migration Policy: Different Legal Positions of Third Country Nationals in the EU, A Comparative Perspective*, Leiden: Martinus Nijhoff Publishers; Fudge, J. and P. Herzfeld Olsson (2014), "The EU Seasonal Workers Directive: When Immigration Controls Meet Labour Rights", *European Journal of Migration and Law*, Vol. 16, No. 4, pp. 439–66.; Geddes, A. (2015), "Temporary and Circular Migration in the Construction of European Migration Governance", *Cambridge Review of International Affairs*, Vol. 28, No. 4, 571–88; Geddes, A. and A. Niemann (2015), "Introduction: Conceptualising EU policy on labour migration", *Cambridge Review of International Affairs*, Vol. 28, No. 4, pp. 523–35; Guild, E. (2011), "Equivocal Claims? Ambivalent Controls? Labour Migration Regimes in the European

subsequently envisaged in the Commission's Action Plan implementing the Stockholm Programme.⁴²⁸ The Commission at that point foresaw drafting a code that would provide "a uniform level of rights and obligations for legal immigrants", which is now scattered across different sectoral directives (**Option 4** below).⁴²⁹

Peers has also supported (and is already writing) an EU immigration code,⁴³⁰ which could eventually become binding as part of the EU's legal *acquis* (**Option 3**). Groenendijk has instead argued for the gradual expansion of sectors and rights attached and to not open up current EU legal standards so as to avoid lowering them (**Option 2**).⁴³¹ Whereas all of the above-mentioned approaches include better implementation, the most modest approach reflects the current position of some Member States, which are refraining from new legislative initiatives in this area as well as from substantial revisions and even re-casts of the current sectoral directives (**Option 1**).

The four policy options presented below are interrelated can be read as strategies for future EU policy intervention with different levels of ambition and speed as to how to streamline or to reach maximum harmonization the current EU legal migration *acquis* (see Figure 22): solely by better implementing current directives (Option 1); by gradually extending the covered rights and sectors (Option 2); by starting with a non-binding immigration code that lays out migrant workers' rights (Option 3); by adopting a Binding Immigration Code which would put the EU on track with the 1999 Tampere Programme and provide a longer-term vision for the next generation of the EU legal migration *acquis* (Option 4).

All four policy options are assessed in relation to equal treatment, intra-EU mobility and EU attractiveness. The 'benefits' are understood not only as eliminating the gaps and barriers identified in this Research Paper, but also as creating 'EU added value' in more normative terms, such as in upholding EU Treaty and legal standards and contributing to internal and external consistency in EU action on economic immigration.

7.1.2. Approach on assessment of different policy options

The benefits and costs of different policy options are discussed in light of how they address the gaps and barriers identified in Chapter 3 and how they remedy individual and economic impacts studied in Chapters 3 through 6 (see Table 17 and Table 18). The assessment does not perform a fully-fledged economic cost-benefit analysis due to the following considerations:

First of all, Options 1 and 4 essentially present different long-term visions - should the EU slow down with new legislative reforms and try to implement current directives (Option 1)? Or should the EU abandon the current sectoral approach altogether and create a Binding Immigration Code to simplify and harmonise the rules for all TCNs (Option 4)? Options 2 - Gradual extension of categories and 3 - Non-binding Immigration Code for 10 - 20 years would take steps towards the goal of moving towards a Binding Immigration Code (while Option 4 would make it in one leap). They present different strategies to move away from the status quo and the impacts of gaps and barriers. Therefore, we rather draw our attention to potential *qualitative and*

Union", in E. Guild and S. Mantu (eds), *Constructing and Imagining Labour Migration: Perspectives of Control from Five Continents*, Farnham: Ashgate, pp. 207-28; Peers, S., V. Moreno-Lax, M. Garlick and E. Guild (2012), *EU Immigration and Asylum Law (Text and Commentary): Second Revised Edition*, Volume 2: EU Immigration Law, Leiden: Martinus Nijhoff Publishers; Wiesbrock, A. (2009), *Legal Migration to the European Union - Ten Years after Tampere*, Nijmegen: Wolf Legal Publishers.

⁴²⁸ European Commission (2010), Delivering an area of freedom, security and justice for Europe's citizens: Action Plan Implementing the Stockholm Programme, COM(2010) 171 final, Brussels, 20.4.2010.

⁴²⁹ Ibid.

⁴³⁰ Peers (2014) and Peers, S. (2012), "An EU Immigration Code: Towards a Common Immigration Policy", *European Journal of Migration and Law*, Vol. 14, No. 1, pp. 33-61.

⁴³¹ Groenendijk (2014).

quantitative benefits, such as EU added value, intra-EU mobility, increased attractiveness; key drivers of costs to implement such measures, and the feasibility of implementing each of these options. We provide some rough quantitative estimates of these policy options in addressing the key gaps and barriers identified in Table 18: Summary of estimated annual benefits of policy options at aggregate EU level Figure 23, but we refrain from summing them up, as some gaps and barriers are overlapping and interrelated. For example, 'equal treatment' entails better recognition of qualifications, broadened family reunification, more secure residence status and could lead to increased intra-EU mobility.

Secondly, the costs would depend on the timeframe, and while the more long-term measures (Options 2 and 3) would take up more resources. While, Option 1 and Option 4 could be felt in a short run. For example, Option 4 requires the establishment and implementation of common EU norms and standards for the entry, residence and rights/labour conditions of all TCNs, which are equivalent to those of Member States' own nationals. Such a quantitative assessment would depend a great deal on the current design in each Member State, which is beyond the scope of this Research Paper, as the main focus of our analysis was instead on gaps and barriers left by current EU legislation and (in)action in this area.

Thirdly, it is not entirely clear what these options would entail. Even for Option 1, 'better enforcement', it could be practical only if we limit ourselves to the area of sectoral directives. However, the EU's action in this domain presents intrinsic synergies with other policy domains, such as better enforcement of non-discrimination and equal treatment directives, the social pillar, system for recognition of qualifications, ensuring fundamental rights and rule of law, which are seen as related additional measures.

Finally, as a more meaningful assessment than coming up with a one price tag per option we propose to estimate key benefits (see Table 18 and Figure 21) and identify cost drivers in qualitative terms (in the text below). As for the assessment of the overall preferred policy options - we highlight the feasibility and areas of potential overspill where the EU is acting together with Member States (Table 20). The qualitative assessment could be a starting point for an *ex ante* impact assessment for the preferred policy option.

7.2. Key benefits and drivers of costs of different policy options

This Section identifies through a qualitative approach how well different policy options relate to the gaps and barriers assessed and quantified in Chapter 6. We propose Table 15 below as a summary of these interrelations and potential positive impacts on different policy areas. Option 4 emerges with the greatest potential benefits due to their strong orientation towards equal treatment and family reunification overall. As highlighted in Table 12 of Chapter 6, the costs associated with unequal treatment between TCNs and nationals are substantial with lost income estimated to be over € 21 billion and family reunification over €6.9-8.7 billion. As highlighted in

Table 17, Options 1, 2 and 3 also tackle the gaps and barriers to some extent – they may be less preferred to Options 3 and 4 on the basis of benefits alone, but may be less costly and more feasible. Thus, in order to have a more complete picture it is important to investigate these factors as well, which are reviewed below.

Table 17. Overview of policy options' potential benefits in addressing key gaps and barriers

Gaps and barriers	Option 1:	Option 2:	Option 3:	Option 4:
	Better enforcement	Gradual extension	Non-binding code	Binding Immigration Code
Intra-EU labour mobility (G7)	+	++	++	+++
Recognition of qualification (G10; B7)	++	+	+	++
Re-entry and circular migration (G2; B3)	+	+	+	++
Secure residence (G5 & G6)	+	++	++	++
Entry (G2&B2) and Work authorisation (change of employers G3&B4; unemployment G4&B5)	++	++	+	+++
Family reunification (G9&B7)	+	++	++	+++
Social security (G8&B6)	++	+	+	++
Equal treatment (G1; B1)*	+	++	++	+++

Notes: Level of positive impact over identified areas: +++ high; ++ moderate; + low. *Equal treatment overlaps with other gaps and barriers. *Source:* Authors own compilation, 2018.

The table above is based on interviews, e-questionnaires and Delphi method discussion. All of these methods indicated a higher correlation of the sectoral approach with intra-EU labour mobility, equal treatment, secure residence and family reunification. It should be noted that none of the policy options proposed above are capable of fully addressing the 'recognition of qualification' and 'social security' challenges (as it would require a separate European system for recognition of qualifications and social security coordination, which would fall outside 'better enforcement' option). Table 16 below provides a summary of the estimated benefits of each of the four Policy Options. This is complemented with Figure 23, which visualises the estimated economic benefits for each of these Policy Options.

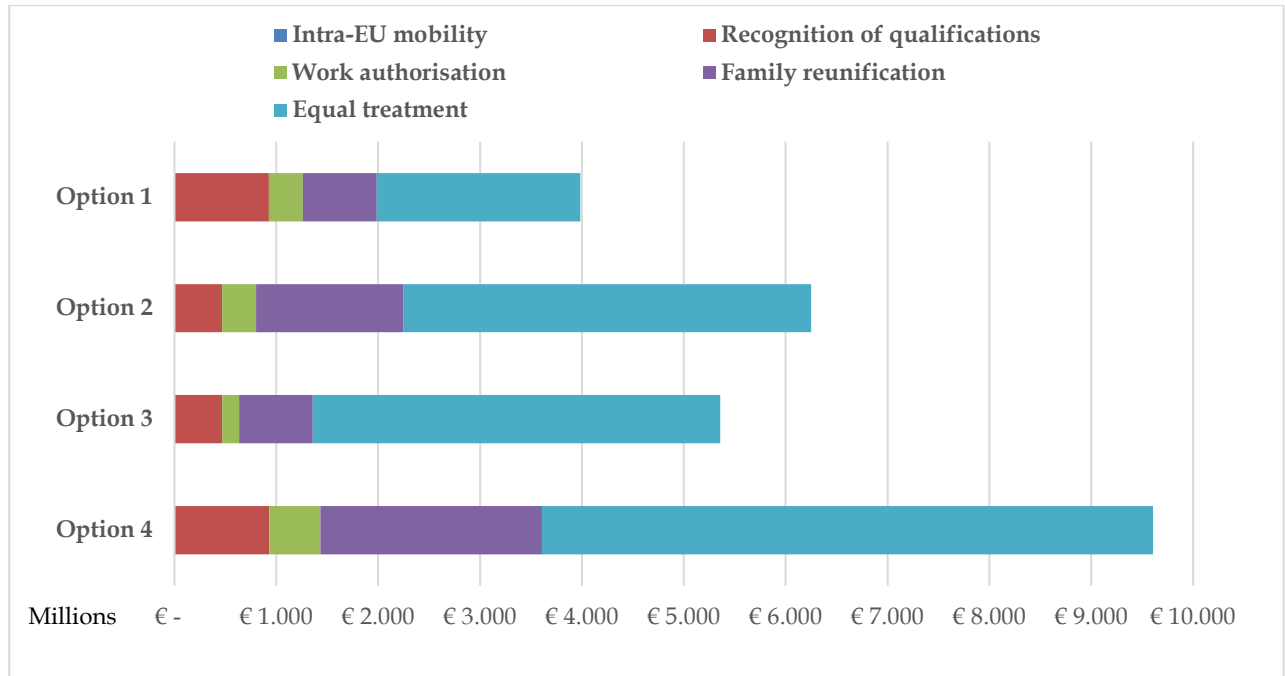
Table 18: Summary of estimated annual benefits of policy options at aggregate EU level

	OPTION 1: Better enforcement	OPTION 2: Gradual Extension	OPTION 3: Non-binding Immigration Code	OPTION 4: Binding Immigration Code
Intra-EU labour mobility (G7)	€7.8 million individual benefits and €2.125 million economic benefits	€15.6 million individual benefits and €4.25 million economic benefits	€15.6 million individual benefits and €4.25 million economic benefits	€23.4 million individual benefits and €6.375 million economic benefits
Recognition of qualification (G10; B7)	€1.6 - 2.65 billion individual benefits and €0.7 - 1.15 billion economic benefits	€0.8 - 1.325 billion individual benefits and €0.35 - 0.575 billion economic benefits	€0.8 - 1.325 billion individual benefits and €0.35 - 0.575 billion economic benefits	€1.6 - 2.65 billion individual benefits and €0.7 - 1.15 billion economic benefits
Entry (G2&B2) and Work authorisation (G3&B4; G4&B5)	€0.55 - 1.15 billion individual benefits and €222.5 - 445.5 million economic benefits	€0.55 - 1.15 billion individual benefits and €222.5 - 445.5 million economic benefits	€0.275 - 0.575 billion individual benefits and €111.25 - 222.75 million economic benefits	€0.825 - 1.725 billion individual benefits and €333.75 - 668.25 million economic benefits
Family reunification (G9&B7)	€1.725 - 2.175 billion individual benefits and €0.65 - 0.8 billion economic benefits	€3.45 - 4.35 billion individual benefits and €1.3 - 1.6 billion economic benefits	€1.725 - 2.175 billion individual benefits and €0.65 - 0.8 billion economic benefits	€5.175 - 6.525 billion individual benefits and €1.95 - 2.4 billion economic benefits
Equal treatment (G1; B1)*	€5.25 billion individual benefits and €2 billion economic benefits	€10.5 billion individual benefits and €4 billion economic benefits	€10.5 billion individual benefits and €4 billion economic benefits	€15.75 billion individual benefits and €6 billion economic benefits

Note: * Equal treatment is overlapping with other gaps and barriers, and therefore we refrain from summing up the different benefits per option. It is based on author's own calculations taking into account Table 14: Summary of monetised impacts and Table 17. Overview of policy options' potential benefits in addressing key gaps and barriers, when 'low impact' is assigned to be 25%; 'moderate' - 50% and 'high' - 75%. These are all estimations. These benefits may not be realised immediately, but may take several years. The figures have been annualised.

Source: Authors, 2018.

Figure 23. Estimated economic benefits annually at aggregate EU level (EUR millions)



Note: Similarly, to Table 16, 'equal treatment' overlaps with some of the other categories. Intra-EU mobility benefits are so low in comparison to the other areas that they do not show up in the Figure 22. These are Option 1 (€2); Option 2 (€4); Option 3 (€4) and Option 4 (€6).

Source: Authors, 2018.

Table 19. Qualitative assessment of key costs per policy option

Cost drivers: Options:	Legislative change at the EU level	EU level structures to be created	Costs drivers at EU and national level	Estimated Years for Reaching Maximum Harmonisation	Level of Costs
OPTION 1: Better enforcement	No	Yes, coordination system to monitor enforcement of 4 sectorial directives/ staffing/ databases	<ul style="list-style-type: none"> • Additional administrative staff • Staff training • New databases • Additional funding for integration/language training of third country nationals 	More than 30 years	Medium
OPTION 2: Gradual Extension	Yes, 3 – 5 new directives covering new categories + 2 - 3 recasts of current directives	No, but Commission is overseeing the transposition and implementation	<ul style="list-style-type: none"> • New legislation costs • Transposition costs • Additional administrative staff • Additional staff training on legislation and updates 	20-30 years	High
OPTION 3: Non- binding Immigration Code	Not in the beginning/ after 10-20 years 1 directive/ or change of Treaty of the EU	No, Commission oversees implementation of 1 directive + EU labour authority is involved	<ul style="list-style-type: none"> • Costs for awareness raising, training • Communication campaign • Additional funding possibilities for Member States 	10 – 20 years	Medium
OPTION 4: Binding Immigration Code	Yes, 1 directive	No, Commission oversees implementation of 1 directive + EU labour authority is involved	<ul style="list-style-type: none"> • New EU and national legislation costs • Transposition costs • Additional staff re-training 	5 -10 years	Low

Source: Authors, 2018.

OPTION 1. Better enforcement

Key benefits:

A first option focuses on ensuring better enforcement of current EU sectoral directives, including enhancing non-discrimination and/or labour rights provisions in the current Single Permit Directive and monitoring their compliance at the EU level. It would essentially not close all the gaps but would address some of the practical barriers, such as lengthy procedures and administrative difficulties. As Table 17. Overview of policy options' potential benefits in addressing key gaps and barriers indicates, the better enforcement policy option could moderately contribute to recognition of qualification, work authorisation and social security coordination, namely by better coordinating between the different systems and reducing lengthy waiting periods and bureaucracy. Better enforcement of rules would however have low positive impact on re-entry, circular migration and secure residence, as rules are stringent for different categories of workers, such as seasonal workers. If currently on-going integration measures would be better implemented, it could also improve employment rates and working conditions of third country nationals. The impacts of persons not covered by 'first entry' directives and thus falling undocumented is not monetised, but could even further reduce perceived benefits of this policy option.

Similarly, while certain equal treatment provisions are foreseen for all the Single Residence Permit holders, the current legal migration system is based on unequal treatment among different categories of workers according the 'first entry' directives. Improving non-discrimination litigation avenues would be beneficial to those who currently lack access to justice. Nevertheless, major issues, such as parallel national schemes in the Blue Card, would remain unaddressed, as essentially Member States would continue to have the wide margin of appreciation on what is their interpretation of the directives – which may include the options they accept, such as which family members, under what conditions, would reunify with Blue Card holders, and which rights would be applicable to seasonal workers.

Key costs:

Improving the efficiency and effectiveness of the current patchwork legal migration system would entail high costs. The main drivers could be increased staff costs and training, and the development of necessary EU level coordination systems. Interviews revealed that in some cases there is an issue of understaffing of relevant services – from consulates abroad to employment agencies at the local level. Another issue and challenge is the lack of knowledge about relevant European law, in particular, Single Residence Permit provisions or their national interpretation. This would entail training and devoting some of the current staff for the EU coordination schemes, better coordination between national and regional/local levels, and better coordination between ministries of interior and ministries of social affairs and employment. Better enforcement would also mean that people who would fall into irregularity due to current stringent provisions (or their national interpretations) would be more quickly identified and deported, which would entail additional resources among national and EU border agencies for return operations and voluntary repatriation schemes. The additional funding for integration measures (such as language and vocational training) as well as additional systems to improve recognition of qualifications could be devised.

Feasibility:

The interviews and Delphi method discussion showed that while this option seems the most realistic, it is not likely to address identified gaps and barriers. The negative political climate and Member States' ministries of interior positions on economic immigration have resulted in stalled negotiations revision of the

EU Blue Card, which was seen by the European Commission, the European Parliament and the General Secretariat as the least controversial policy issue in the EU agenda.⁴³²

In this context of reluctance to undertake any initiatives in the area of legal migration, Delphi method discussants chose Option 1 as most feasible or 'politically realistic'. The gaps and barriers analysis in Chapter 3 shows that in the long run the Commission will need to streamline existing *acquis* so as to better ensure the enforcement of EU standards and rights foreseen in the current EU directives and provide less margin of discretion during the phases of domestic implementation by EU Member States.

OPTION 2. Gradual extension of rights and working conditions

Key benefits:

A second option implies a gradual extension of labour standards and rights at work within the logic of sectoral directives to other categories of TCNs who are not covered by the current directives, i.e. migrant domestic workers or transport workers, etc. It would not close the gap but would avoid lowering the standards, as it was feared by some academics. It potentially could resolve the issues in relation to the entry conditions and employment rights for those who are not currently covered by sectoral directives, such as migrant domestic workers and long-distance drivers, persons' working in the beauty, service industry, self-employed persons, talents in atypical industries who often risk being exploited and losing their residence rights, or accumulating their years to obtain Long Term Residence permit.

Gradual extension of rights to new categories of workers would not have high impacts on any of the gaps. Nevertheless, as Table 17. Overview of policy options' potential benefits in addressing key gaps and barriers demonstrates, it could have moderate impacts on secure residence and work authorisation, particularly on the categories that are not yet covered by any sectoral directives. Potentially, the gradual extension of rights of the newly added categories, as well as those under the Seasonal Workers Directive and the Students and Researchers Directive could lead to raising the rights thresholds to those equivalent of the Blue Card. In that case this option would contribute towards more intra-EU mobility, equal treatment and secure residence. This option would have only minor positive impacts on recognition of qualification, re-entry and circular migration as well as social security, as these areas would require a separate approach. In addition, newly added categories cover atypical jobs, therefore it could raise more questions for the potential recognition of qualifications from third countries and/ or social security schemes coordination with third countries (for accumulating pension benefits for example).

Key costs:

The key cost drivers would originate from adding new categories of workers and extending different rights by type of worker. Thus, in a short and medium term, adding new categories and revising old directives to extend rights are highly likely to increase administrative burden – more staff would be needed at both EU and national. This would entail the costs of new EU legislation (3 – 5 directives) and transposition costs for Member States, as there would be additional recasts of current directives as to harmonize them. This could also lead to high costs for training and guidance to the EU and national authorities trying to catch up and keep updated with complex and fast paced developments. In a short and medium term, it would also extend fragmentation and will contribute to continuous bureaucratic hurdles among national and European authorities. Nevertheless, in the long run (30 - 20 years) this approach could lead towards a harmonised approach in the area of legal migration, where the rights of different categories of third country nationals would be approximated.

⁴³² Interviews with European Parliament (2), (3), European Commission (2), (3), Council of the EU.

Feasibility:

While academic debate finds this option more 'realistic', Delphi method discussion pointed out the feasibility challenges in the revision of the EU Blue Card Directive. It is an example of what a gradual extension of rights could look like in practice – a lot of negotiations at EU level. The main goal of the BCD revision has been to set up an EU-wide regime for the admission of highly qualified TCNs. Nevertheless, Member States are reluctant to drop their own national schemes for highly skilled third-country workers. The interviewees and Delphi method discussants indicated the great political sensitivity of talking about any kind of migration in the context of the so-called 'European refugee humanitarian crisis'. Therefore, we conclude that the feasibility of this approach would be moderate. National administrations also expressed the fatigue of new and updated legislation.

OPTION 3. Non-binding immigration code**Key benefits:**

A third option entails the elaboration and adoption of a non-binding EU immigration code, in the beginning as an aspirational standard, which over the time, for example with the change of Treaty of the EU/ or by passing a separate directive could become binding. It could follow the example of the EUs Charter of Fundamental Rights, that was non-binding to begin with. It would aim at providing a one-stop shop that brings together all existing EU legal instruments and regulations covering legal and labour migration, and in the long run it would pave the way towards closing the gap between sectoral directives. Table 17. Overview of policy options' potential benefits in addressing key gaps and barriers shows the potential to address different gaps would be by and large moderate due to the non-binding nature. Nevertheless, it could be expected that EU level guidance or the immigration code could be a highly influential tool articulating Member States' commitment to equal treatment. It would moderately extend the right to family reunification and intra-EU mobility. The non-binding immigration code could potentially spark reflection about social security coordination, recognition of qualifications, the need to create a better system for re-entry and circular migration based on choice, not necessity. However, as links are not strong, this might exert only very negligible positive impact. Similarly, while in the long run it could exert a highly positive impact on the harmonisation of work authorisation and secure residence rights, the non-binding nature of the code in a short and medium term minimises these effects.

Key costs:

In the short run the impacts of the current gaps and barriers potentially would continue. Therefore, impacts would be similar to those of the better implementation scenario, Option 1. Nevertheless, if eventually the code would become binding in 10 – 20 years (unlike Option 4 – in 2 - 5 years), it would entail some moderate costs for transposition and implementation, as Directive would only acknowledge what Member State's has agreed to do. Nevertheless, in the long run, we conclude that the costs would be moderate or low to implement this option, as one code would need to be developed and voluntarily agreed to by Member States. Implementation costs could be on the side of the EU – awareness raising, training and communication about the new non-binding immigration code. It could also entail some funding possibilities for Member States willing to implement the needed reforms at the national level.

Feasibility:

This strategy essentially aims to reduce resistance by Member States' ministries of interior and to apply the voluntary and incentives-based approach over 10 – 20 years' period, and proposes a way like Fundamental Rights Charter was developed – as non-binding document summarising EU standards. The charter eventually became binding with Lisbon Treaty. As mentioned above, experiences with the Blue Card revision indicate that there is very little political willingness among the majority of Member States to undertake new legislative initiatives in the area of legal migration. This option would avoid being another

‘legal initiative’. Nevertheless, the Member States’ respondents and Delphi method discussants highlighted that a pro-migrant worker approach is likely to ‘backfire’ on their national constituencies. Thus, even for the more moderate approach, to start with a non-binding code could be met with resistance by some Member States, as, for example, happened with the Global Compact on Migration. Finally, it is likely that a non-binding code may be quickly ‘buried’ by new initiatives and strategies if political priorities shift towards more restrictive migration policies.

OPTION 4. Binding Immigration Code: streamlining and codifying

Key benefits:

The fourth option is the elaboration of a Binding Immigration Code that would imply abandoning the sectoral approach logic and adopting the directive for all TCNs regardless of their skills status. This option would aim to close the gaps and barriers between different sectoral directives, in particular those related to equal treatment, intra-EU mobility, family reunification (see Table 17).

A positive spillover effect would be simplification and streamlining of entry/residence and employment conditions for TCNs. Such a code would integrate all the existing instruments and eliminate their inconsistencies and unjustified variations, and provide an opportunity for clarity, simplification and raised rights standards.⁴³³ Therefore we conclude on the basis of interviews, e-questionnaires and Delphi method discussion that Option 4 would have a high positive impact on work authorisation, family reunification, equal treatment and intra-EU mobility. This is based on the argument that administrative authorities would be able to apply the same set of rights nationally and across the EU, therefore the speed of issuing work authorisation would increase. It would also increase the possibilities to accelerate intra-EU mobility. Employers and labour inspectorates would need to follow equal treatment clauses applicable to national employees, thus reducing exceptions from the rule. Finally, the right to family reunification in such a code should be recognised by everyone, thus reducing the likelihood of family members resorting to migrant smugglers or overstaying their visas and otherwise falling into irregularity.

In addition, various stakeholders have called for restarting the legal migration ‘Fitness Check’ in order to facilitate more clarity, legal certainty and simplicity, as well as to ensure uniformity of rights and working conditions irrespective of the level of ‘skills’ or ‘qualifications’ attributed to or as framed in specific EU third-country worker status.⁴³⁴ The impact of ‘recognition of skills’ or ‘qualifications’ would essentially remain in the employers’ own interest, as is currently the case, for example, in the Netherlands; and the perverse incentive for employers to profit from faking persons’ qualifications would be likely reduced, as there would be more possibilities within different levels of qualifications under the same or similar conditions.

The impact on re-entry conditions and circular migration as well as on secure residence and social security would be moderately positive. Streamlining and codifying per se would not create a circular migration system, regularisation programme or social coordination system. Nevertheless, this could make possible different initiatives in this area, since admission and employment criteria would be simplified. For example, the social security coordination systems could also be simplified by following precedent and applying the same conditions as for the national workers and students.

⁴³³ Kostakopoulou, D. (2017), “EU Legal Migration Templates and Cognitive Ruptures: Ways Forward in the Research and Policy-Making” in S. Carrera, A. Geddes, E. Guild and M. Stefan (eds), *Pathways to Legal Migration into the EU: Concepts, Trajectories and Policies*, Brussels: CEPS, p. 181.

⁴³⁴ European Commission (2017), Legal Migration Fitness Check, Summary of Replies to the public consultation on legal migration by non-EU citizens (https://ec.europa.eu/home-affairs/sites/homeaffairs/files/e-library/documents/policies/legal-migration/summary_of_replies_en.pdf).

Another important byproduct or condition is changing the narrative about legal migration, as labour migration and the mobility of students and families should be seen not as an issue primarily of security but employment, education and social affairs. While EU has limited competences to intervene in these areas, the EU Citizens Directive has shown that harmonising rules in the area of admission is entirely possible without intervening in these fields and applying the principles of fairness and near equality (as discussed in Chapter 2).

In addition, they are likely to reduce pressure regarding anti-migrant smuggling activities – people of all skill levels from destination countries would have access to cheaper, legal and safe pathways to Europe, and would be less likely to embark on dangerous journeys. The attention of law enforcement and labour inspectorates could rather be shifted to investigating other more violent crimes, human trafficking, slavery and servitude, and labour inspectorates could focus on labour exploitation of both nationals and migrants.

Key costs:

Such overall reform would entail elaborating a directive at the EU level and transposing it at national levels across the EU. While the directive would streamline the patchwork of directives into one, it would not create new provisions but rather would apply the fairness and near equality principles. In other words, third-country workers would be ensured the same or similar rights as those of nationals across the EU. At national level, implementation would require transposing the directive, mainstreaming migrant workers and their family members and students into respective national laws and procedures. This option would also require retraining personnel in immigration, employment and education agencies. The costs could be similar to those of the Single Residence Permit or EU Citizens Directive.

While transposition and re-training costs are a one-off, it should be less costly than Option 2 on gradual extension – Option 4 entails having only one legislation clearly stating the EU standards created, and could actually lead to reduction of administrative staff, provide possibilities for automation of the process. EU's labour authority could assist Commission in monitor the labour-related issues across the EU. In the short to medium term streamlined procedures for all TCNs would reduce the administrative burden and current costs in the agencies responsible for visas, residence and work permits. Therefore, we conclude that there would be moderate costs endured.

Feasibility:

The possible legal basis could be Article 79 TFEU, that provides a possibility for the EU institutions to adopt of shared standards dealing with other administrative aspects of labour migration, besides the volumes of admission. As Peers et al. have highlighted, this provision “would be meaningless unless the EU had a competence to regulate such migration in the first place”.⁴³⁵ Another avenue could be, Article 151 TFEU is a central legal basis for the promotion of employment, improved living and working conditions and combating social exclusion in the EU, irrespective of migration status. It does not talk about ‘migrants’, but about ‘workers’.

Interviews with the European Parliament and European Commission showed the existence of a general preference for this policy option. For example, the European Parliament's resolution calling for the holistic approach clearly reiterates the commitment of creating one scheme for all categories of workers.⁴³⁶ Yet, after the experience with the General Framework Directive in 2001, the European Commission remained cautious of putting such a proposal on the agenda.

Thus, although a Binding Immigration Code would be the most desirable policy option, in the current political context some policy actors interviewed and majority of Delphi discussion participants considered

⁴³⁵ S. Peers, V. Moreno-Lax, M. Garlick and E. Guild (2012), *EU Immigration and Asylum Law (Text and Commentary): Second Revised Edition, Volume 2: EU Immigration Law*, Leiden: Martinus Nijhoff Publishers, p. 13.

⁴³⁶ European Parliament (2016), Resolution of 12 April 2016 on the situation in the Mediterranean and the need for a holistic EU approach to migration (2015/2095(INI)).

it “politically unfeasible”.⁴³⁷ However, the EU has several past successful experiences in bringing together ‘sectoral’ and fragmented EU rules into one sole legal directive, e.g. the EU Citizens Directive, or even in the form of a code, e.g. the Schengen Borders Code.

Great benefit and moderate costs aside, the low feasibility of this option is thus the main challenge (see Table 20). Two representatives of the European Parliament interviewed for this Research Paper highlighted that given that even negotiations over revisions of the EU Blue Card Directive have been frozen at the Council, the situation may worsen for TCNs and the need increase to add more variations.⁴³⁸ Therefore, in their view, the current ‘political climate’ does not appear conducive to revising the sectoral EU directives and can lead only to achieving minor improvements. In addition, Member States continue to oppose the idea of a Binding Immigration Code and, as mentioned above, some have openly opposed the idea of any new legislation in the Commission’s Fitness Check consultations.

Table 20. Summary of policy options assessment

	Key benefits	Key Costs	Feasibility
Option 1	Low	Moderate	High
Option 2	Moderate	High	Moderate
Option 3	Moderate	Moderate	Moderate
Option 4	High	Low	Low

Source: Authors, 2018.

Negative public attitudes towards migration from third countries were named by Delphi discussants, interviewees and e-questionnaire respondents as a key challenge. Chapter 4 indicates that EU actions are not only responding to but also shaping public opinion. Delphi method discussants highlighted that at the national level political campaigns are shaped by exploiting various anti-immigrant biases without any solid counter-narrative at the EU level. They see a greater role for EU level institutions and policies in addressing racist political agendas and enforcing the EU’s rule of law, democracy and fundamental rights values. Therefore, institutions should attempt to re-frame the overall narrative in the area of legal migration in the one that is evidence- based and fundamental rights compliant. Meaning also, stricter sanctioning of hate speech and xenophobic remarks, to begin with, EU’s own institutions, agencies, parties affiliated with European Political Families.

7.3. Preferred policy option: Binding Immigration Code

Different policy options were put forward and verified in terms of feasibility and desirability by the Delphi method discussion among key experts and stakeholders as well as among online survey respondents who represent social partners and civil society. The results of the e-questionnaire indicate that respondents were divided over which of these policy options should be preferred at EU level. Streamlining and codifying the EU’s legal migration *acquis* was seen as the main preference among 26% of respondents (see Annex 7, Figure 1).

Delphi method discussants were divided into two camps on the most preferred policy options for legal migration policy in the EU. More than a half felt very strong about changing the sectoral approach with a Binding Immigration Code and saw added value in broadening social dialogue as a complementary measure (see Annex 7, Figure 2).

Nevertheless, it emerged from the discussion that a Binding Immigration Code would essentially be the way to close gaps and barriers to equal treatment, particularly among different categories of TCNs. Finally, it would add to the EU’s attractiveness, because if equal treatment and non-discrimination are in place, Delphi

⁴³⁷ Interviews with European Parliament (2), European Commission (3), Council of the EU.

⁴³⁸ Interviews with European Parliament (1), (2).

method discussants said they would see intra-EU mobility and increased EU's attractiveness as a result or outcome.⁴³⁹

7.4. Recommendations

1. Put a Binding Immigration Code back on the EU's agenda

This Research Paper has highlighted the high EU added value and preference among the different stakeholders (with the exception of some Member States) for a Binding Immigration Code covering all TCNs regardless of their perceived skills and qualifications. Such a directive would need to be based on equal treatment and fairness principles among different categories of TCNs, and between these workers and EU citizens. The European Parliament and Commission should undergo the full *ex ante* impact assessment on the basis of the concrete proposal or its variants. Such an assessment would need to take into account short-term and long-term costs and benefits.

2. Embed the rights of third-country nationals in a rule of law mechanism

In all four options proposes, EU's legal migration system would rely on national administrations, their justice systems and may entail some additional databases as to exchange information with a view to speed-up intra-EU mobility, therefore rule of law and related non-discrimination standards would need to be constantly monitored by independent Rule of Law mechanism.

Differential treatment of TCNs is one of the results of the sectoral approach. It is by design institutionalised and therefore it is hard for individuals to challenge whether it is necessary, proportional and justified. Differential treatment of TCNs is not in line with international and regional human rights and labour standards benchmarks. There is currently a gap between EU legal and labour migration law and these legally binding and interpretative standards. Their correct implementation should be further scrutinised and monitored at the EU level, as they also affect the very effectiveness of EU legal migration law on the ground.

Findings of international and regional monitoring bodies, if unaddressed and repeated or escalated, could constitute challenges to the rule of law more generally and become systematic in nature. The current discussion to establish an EU rule of law mechanism should also include institutional discrimination in the area of labour migration as one of its thematic components as proposed by the Parliament's Legislative Own-Initiative calling for an EU mechanism on Democracy, the Rule of Law and Fundamental Rights accompanied by a European Added Value Assessment.⁴⁴⁰ Member States' representatives engaging in hate speech or promoting negative attitudes about TCNs should be disciplined, by cutting funding to offending Member States for their failure to apply the rule of law or uphold fundamental rights and democratic principles.

3. Strengthening access to justice for all third-country nationals despite their migration status

Social partners, civil society and international organisations consulted in this Research Paper were cautious in case labour inspectors were transformed into immigration control (police) officers.⁴⁴¹ The idea of a 'firewall' was mentioned as a potential solution by some interviewees and during workshop and Delphi method discussions organised in the scope of this Research Paper. The firewall has been broadly defined as "a separation between immigration enforcement activities and public service provision".⁴⁴² The firewall in

⁴³⁹ Delphi method discussion, 09.03.2018, Brussels.

⁴⁴⁰ Bárd, P, S Carrera, E Guild, D Kochenov (2016) An EU Mechanism on Democracy, the Rule of Law and Fundamental Rights, Study for the European Parliament.

⁴⁴¹ Ibid.

⁴⁴² Crépeau and Hastie (2015).

particular aims to cover those provisions that preserve the basic rights applicable to ‘everyone’ in the jurisdiction of the country, regardless of migration status. Such rights include prohibitions of torture, slavery and servitude, discrimination, and the rights to health, education, fair labour conditions and remuneration (including for undeclared work), and legal redress – under both international and European regional standards.

The firewalls were also proposed in the UN Global Compact for Migration, and could actually enhance confidence that those who come forward to labour inspectorates before situations descend into severe labour exploitation will not be penalised. Firewalling could secure effective access by individuals, irrespective of their migratory status, to justice in labour, civil or criminal matters.⁴⁴³ In addition to this, the best preventive measures against labour exploitation and discrimination is for third-country nationals to have effective access to the options and information regarding how to defend one’s rights.⁴⁴⁴

Improving access to justice and enforcement of existing standards could also be facilitated by investing in a permanent network of legal practitioners and judges specialised in legal and labour migration law, which would permanently and regularly monitor and identify key challenges in domestic practical implementation of EU regulations, as well as their compatibility with international, regional and EU standards.

4. Injecting a social policy and labour standards approach

Our research and the results of the Delphi method acknowledged the weak or less ambitious EU non-binding policies in the area of social policy, such as the EU Pillar for Social Rights.⁴⁴⁵ A general lack of ambition was noted in thinking of the future of the EU’s social dimension, given the EU is not meeting requirements of the Fundamental Rights Charter or international labour rights standards.⁴⁴⁶ As demonstrated in this Research Paper, EU social policy already includes third-country nationals and even undocumented migrants within its scope of application.

European Parliament interviewees were unanimous about the need to change the discourse about legal migration in the EU as a policy issue where a ‘ministries of interior’ (management and policing) approach has too often prevailed over an ‘labour and social affairs’ approach.⁴⁴⁷ Two European Parliament interviewees reflected that issues on legal migration have been only marginally covered by the European Parliament EMPL Committee, which is still responsible for equal treatment issues, and instead have fallen mainly under the mandate of the LIBE Committee, which is mainly responsible for negotiations on entry and residency conditions.⁴⁴⁸ Similar dynamics can be expected to occur at national levels. Therefore, legal migration should be discussed with the EMPL Committee as well as with national ministries of social affairs and labour.

5. Strengthening the EU’s role in monitoring labour rights

⁴⁴³ Ibid.

⁴⁴⁴ Ibid.

⁴⁴⁵ Ibid.

⁴⁴⁶ European Commission (2017), Reflection paper on social dimension of Europe, Brussels, 26 April (https://ec.europa.eu/commission/publications/reflection-paper-social-dimension-europe_en). The most ambitious option for Europe suggests the following (emphasis added): “While the centre of gravity for action in the social field should and would remain with national and local authorities, the EU *would explore* ways to further support Member State action, making full use of all instruments in its toolbox. Legislation would not only set *minimum standards* but, *in selected areas, could fully harmonise citizens’ rights across the EU*, with the aim of focusing on social convergence in social outcomes.”

⁴⁴⁷ Interviews with European Parliament (1), (2), (3).

⁴⁴⁸ Interviews with European Parliament (1), (2).

The new Commissions' proposal for the European Labour Authority, in the context of the EU's Pillar of Social Rights, is intriguing and could be better explored in relation to the labour rights of TCNs working in the EU.⁴⁴⁹ Although, the European Labour Authority is limited to cross-border situations, discussants suggested that looking in the future its competences could be expanded. Some of participants saw the EU's added value in the coordination of social protection schemes, whereas others saw it in the coordination of enforcement, for example of labour inspections.⁴⁵⁰ Respondents to the e-questionnaire highlighted that there is a need for "[s]trengthening the EU's competence in monitoring fair and decent employment conditions for all workers", not only TCNs.⁴⁵¹ Thus the EU could play a role in better streamlining a single *EU labour standards policy*. Such Authority thus could oversee the equal treatment provisions as enshrined in Single Residence Permit to begin with and to measure gaps and barriers between the actual rights and those enshrined in the international and regional human rights and labour rights bodies.

6. Broadening social dialogue on labour migration at EU level

Social dialogue, including dialogue between civil society, trade unions and employers' organisations, should be more formalised and developed at EU levels. A broadened social dialogue could contribute to better enforcement of current EU legal migration *acquis* and its various directives, as well as to a practitioners-based (on the ground) assessment of evolving gaps and barriers at domestic levels. A broadened social dialogue through national counterparts could also better address questions related to labour rights and non-discrimination against TCNs. An EU-level broadened social dialogue could play a role especially by providing training and information about labour standards and fundamental rights in employment, and ensuring better linkages with ILO processes and standards. Such independent supervision of labour and living standards could be linked with and feed into the Rule of Law monitoring of EU institutions and Member States.

⁴⁴⁹ European Commission (2018).

⁴⁵⁰ Delphi method discussion, 09.03.2018, Brussels.

⁴⁵¹ A respondent representing Bulgarian trade unions/workers' organisations, e-questionnaire, February-April 2018.

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ANNEX 1. DETAILED METHODOLOGY

Data collection methods

The doctrinal and comparative legal analyses entailed desk research of the main legal and policy instruments at international, regional and EU levels. These included: all relevant EU directives on legal migration and related handbooks, guidelines for their interpretation and Impact Assessments; EU primary law sources (the Treaties and the EU Charter of Fundamental Rights); regional human rights standards (especially the European Convention on Human Rights and Revised European Social Charter); relevant case law of the Court of Justice of the EU (CJEU) and of the European Court of Human Rights (ECtHR), and applicable international human rights and labour standards.

The latest desk research also included an account of all relevant academic publications and scholarly literature, as well as relevant studies and reports, reflecting and assessing the current state of EU policy and legal developments in the area of legal and labour migration.

Desk research was complemented with 14 semi-structured interviews with experts who play a particularly important role in the policy area of legal migration at EU and national levels. Such expert information facilitated a better understanding of the main issues and challenges that characterise the EU policy approach and the most recent EU policy developments surrounding the EU Fitness Check and the revision of the EU Blue Card Directive.

Out of 14 interviews, three were conducted with officials working for the European Commission, four for the European Parliament (MEPs and policy advisers who were involved in framing relevant legal migration directives), and one for the Council of the EU, and two with international organisations such as the ILO and the UN. In addition, interviews were conducted with four national officials⁴⁵² selected from the nine Member States covered by the Research Paper, all of whom were invited to reflect on how the added value, ‘costs’ and ‘benefits’ of the EU’s legal migration are perceived and assessed at national level (see, Annex 1: Table 21. Anonymised list of interviewees).

A key method was an e-questionnaire. A total of 61 respondents answered it.⁴⁵³ The e-questionnaire was disseminated in cooperation with Social Platform, the Platform International for Undocumented Migrants (PICUM), the European Trade Unions Confederation (ETUC) and Business Europe through their national members in selected Member States. Inputs were gathered from national social organisations as well as trade unions and employers’ organisations, working at the national level (see Annex1: Figure 22). The survey focused on the experiences in a selection of nine Member States, in particular: Belgium, Bulgaria, Germany, France, Lithuania, Poland, Portugal, Spain and the Netherlands (see Annex 1: Figure 23).

These Member States were selected on the basis of geographical balance, different legal and migration policy traditions, different accession periods to the EU, importance of social history (whether immigration or emigration country), as well as their attitudes and negotiating positions towards ‘more EU’ in ‘legal and labour migration’.

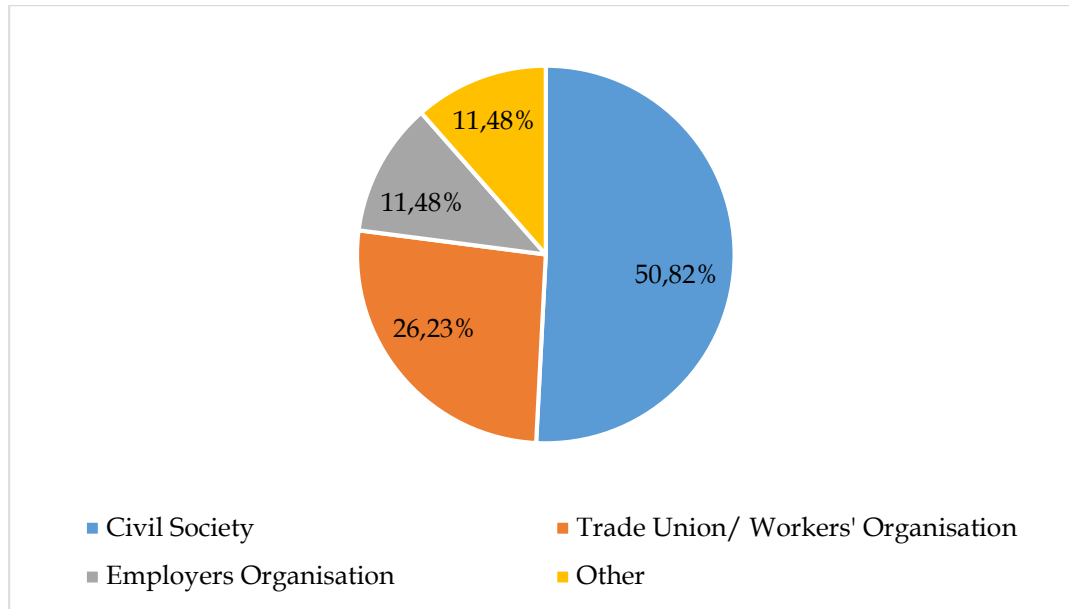
In addition, the Research Paper includes findings from a number of stakeholders working at the EU level (five respondents) as well as the Czech Republic (three respondents), the UK (two respondents), Slovakia (one respondent) and Italy (one respondent). The questionnaire posed a number of multiple choice and open questions about how they view the current ‘sectoral approach’ that characterises the EU’s legal migration

⁴⁵² Two additional interviews were planned after receiving the EPRS feedback following the validation meeting. Due to the Easter holidays interviews were delayed until after the final draft deadline, one with the European Parliament (10.04.2018) and one with a relevant Member State (09.04.2018).

⁴⁵³ The authors in the Technical Offer committed to reaching a target of 50 responses.

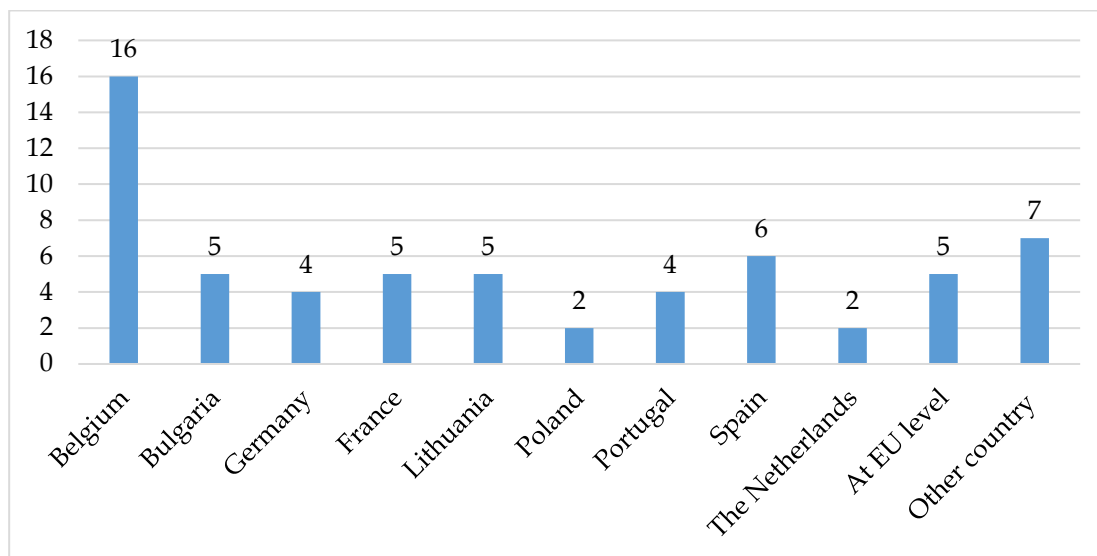
acquis, what gaps and barriers they identify, what evidence they have of the actual transposition and implementation at the national level, and what options they propose for future law and policy-making. The questionnaire was available from February to April 2018.

Annex1: Figure 24. Percentage of respondents by type of affiliation (N=61)



Source: E-questionnaire, February–April 2018.

Annex 1: Figure 25. Number of respondents by country of affiliation (N=61)



Source: E-questionnaire, February–April 2018.

While the overall results of the e-questionnaire may not be representative, the expert knowledge gathered from practitioners representing social partners and civil society actors specialised in this field is highly valuable at times of informing and providing first-hand (bottom-up) knowledge and experiences in these

rather specialised policy domains. Their insights and experiences gathered on the ground are shared across the various chapters comprising the Research Paper, especially Chapter 3 on gaps and barriers as well Chapter 4 on barriers and impacts.

The above data-gathering methods were complemented with a Delphi method (closed-door) discussion held at CEPS in Brussels on 9 March 2018. A select group of 13 experts participated in the Delphi method discussion. The selection of experts was limited to stakeholders already engaged in this project, thus covering the two out of three advisory board members of this research project, four leading researchers/academics, seven key stakeholders – four of whom represented civil society – two trade unions and one employers' organisation. In addition, interim findings were discussed with the national trade unions that are taking part in ETUC's Permanent Committee on Mobility on 18 of April, 2018.⁴⁵⁴

The Delphi method consisted of a number of 'rounds' in which participants expressed their thoughts and opinions, with the objective of identifying common priorities, objectives and concerns about the costs of non-Europe on legal migration.⁴⁵⁵ It included three interactive discussion sessions and 'vote-casting' rounds to give feedback on the preliminary findings and preferred policy options outlined in Chapter 7 of this Research Paper (see below, attached programme of the Delphi discussion).

Data analysis methods

The Research Paper started with in-depth doctrinal legal research taking into account the existing EU legal and policy framework and main legal acts and policy documents on legal and labour migration. Special focus targeted the current state of affairs and 'what we already know' about the current forms of existing EU instruments and their inter-relationships. The analysis deployed comparative legal research methods aimed at identifying in a structured manner the main divergences and convergences between the various EU legal instruments covering different categories/EU statuses of third-country nationals.

On these bases, the Research Paper provides a comparative account of the different sets of rights and working conditions offered by the different EU directives in the area of legal and labour migration.

Quantitative analysis of public perceptions follows the methodology used by the Observatory of Public Attitudes to Migration (OPAM) of the Migration Policy Centre (MPC) at the European University Institute (EUI). The Research Paper uses existing data sets, namely the European Social Survey and the Eurobarometer, FRA MIDIS II to evidence negative public attitudes towards third-country nationals (TCNs), discrimination and labour exploitation, linked to the third-country worker migration status. The qualitative data gave us indications about the broader societal and individual barriers and impacts, though they were not further quantified (Chapter 4).

Econometric analysis of available data sets was used to establish the causal economic consequences of legal and practical constraints for TCNs legally residing in a Member State. The hypotheses were used to test the results of the legal analysis and the identified major gaps (See detailed explanation in Annex 5). The analysis targeted topics of intra-EU mobility and restrictions and rights. The main data set used in this Research Paper comprises micro-data from the EU Labour Force Survey, including two survey waves of the *ad hoc* modules on migration (2008 and 2014) and the European Social Survey. Econometric analysis was then further complemented with quantitative and qualitative assessment of the impacts resulting from the status quo – individual and societal costs of gaps and barriers (Chapter 6).

⁴⁵⁴ ETUC (2018), Meeting of ETUC Permanent Committee on Mobility, Migration and Inclusion, 18 April, Brussels.

The Policy Options are embedded in the academic and policy perspective and identify the main cost-benefit drivers but refrains from the full quantitative analysis (Chapter 7). The policy options put forward are those compliant with the relevant EU and international legal provisions and standards/benchmarks, in particular with international labour standards on equal and fair treatment, and the EU Treaties (including the EU Charter of Fundamental Rights).

Annex 1: Table 21. Anonymised list of interviewees

No.	Institution	Date	Remarks
EU Institutions			
1.	European Parliament, MEP active on legal migration directives (1)	31.01.2018	Face-to-Face/completed
2.	European Parliament, MEP active on legal migration directives (2)	28.02.2018	Face-to-Face/completed
3.	European Parliament, Policy adviser active on legal migration (1)	07.03.2018	Face-to-Face/completed
4.	European Parliament, Policy adviser active on legal migration (2)	10.04.2018	Face-to-Face/completed
5.	European Commission, DG HOME (1)	29.01.2018	Call/completed
6.	European Commission, DG HOME (2)	06.02.2018	Face-to-Face/completed
7.	European Commission, DG HOME (3)	20.02.2018	Face-to-Face/completed
8.	Council of the EU, General Secretariat	16.02.2018	Face-to-Face/completed
International Organisations			
9.	International Labour Organisation	09.03.2018	Face-to-Face/completed
10.	UN Special Procedures/Rapporteur (1)	23.02.2018	Face-to-Face/completed
National Governments/Stakeholders			
11.	Belgium Official	07.02.2018	Face-to-Face/completed
12.	Polish Official	26.03.2018	Face-to-Face/completed
13.	Portuguese Official	12.02.2018	Face-to-Face/completed
14.	Dutch Official	12.03.2018	Call/completed

Notes: * One interview The additional interview with the National Governments official was arranged and confirmed, after the validation meeting at the EPRS, but eventually it was cancelled. It must be stressed that officials of all nine selected member states were also repeatedly invited to contribute to the interviews, but some of them used their right not to participate as it was voluntary exercise. In any case, in the Technical Offer, the authors have committed to conduct 10 – 15 interviews.

Source: Authors, 2018.

ANNEX 2. BENCHMARKS ESTABLISHED ON THE BASIS OF INTERNATIONAL AND REGIONAL STANDARDS

Annex 2: Table 22. Benchmarks established on the basis of International and Regional Standards

Policy Area	International Standards	Benchmarks
Entry conditions	No general international law provisions. Admission is national prerogative of states.	-
Re-entry	European Convention on Establishment, Art. 1	Facilitate the entry into the territory of the contracting parties for the purpose of temporary visits.
	ILO Multilateral Framework on Labour Migration, Principle 15, Guideline 15.8	Adopting policies to encourage circular and return migration and reintegration into the country of origin, including by promoting temporary labour migration schemes and circulation-friendly visa policies.
	ICRMW, Art. 59 (2)	The State of employment shall, subject to paragraph 1 of the present article, consider granting seasonal workers who have been employed in its territory for a significant period of time the possibility of taking up other remunerated activities and giving them priority over other workers who seek admission to that State, subject to applicable bilateral and multilateral agreements.

<p>Equal treatment</p>	<p>ICCPR, Art. 26</p> <p>ICESC, Art. 7</p> <p>ILO Convention No 97, Art.6 ILO Convention No 143, Art. 10 Migration for Employment Recommendation (Revised) No 86, Art. 17 Recommendation concerning Migrant Workers No 151, Art. 2</p> <p>ILO Convention No. 111, Art. 2</p>	<p>Equality (and equal protection) before law and non-discrimination</p> <p>Right to the enjoyment of just and favourable conditions of work</p> <p>Equality of treatment, irrespective of skills, sector of employment and status, and no less favourable treatment than nationals with regards to:</p> <ul style="list-style-type: none"> • Remuneration and working conditions, including hours of work, rest periods, annual holidays with pay, occupational safety and occupational health measures; • membership of trade unions and enjoyment of the benefits of collective bargaining; • accommodation; • social security; hygiene, safety and medical assistance; • recreation and welfare measures; • vocational or technical training <p>Each Member undertakes to declare and pursue a national policy designed to promote, by methods appropriate to national conditions and practice, equality of opportunity and treatment in respect of employment and occupation, with a view to eliminating any discrimination in respect thereof.</p>
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Work permit	<p>ECMW, Article 8(2)</p> <p>ILO Migrant Workers Convention (143), Art. 14 (a)</p> <p>ICRMW, Art. 52 (3a)</p> <p>ICRMW, Art. 59 (2)</p>	<p>Access to employment in all industries and occupations with max. restriction of 1 or 2 years (with some limitations provided in the law).</p> <p>Contracting states shall consider granting seasonal workers who have already been employed in their territory for a significant period of time the possibility of taking up other remunerated activities</p>
	<p>ILO Convention No. 143, Art. 8 (1)</p> <p>ICRMW, Art. 49 (2)</p> <p>ILO Convention No. 143, Art. 8 (2)</p> <p>ICRMW, Art. 49 (3); Art. 51</p>	<p>Loss or termination of employment should not constitute a sole ground for withdrawal of migrant worker's authorization of residence or work permit</p> <p>Possibility to find alternative work in case of loss or termination of employment</p>
Residence status	<p>ICCPR, Art. 12 (1), ICRMW, Art. 39, ECHR, Art. 2 (1) of the Fourth Protocol</p> <p>European Convention on Establishment, Art. 2</p>	<p>Right to free movement and choice of residence within the country, where one is lawfully resident</p> <p>Contracting parties shall facilitate the prolonged or permanent residence of nationals of the other parties in its territory.</p>

Social security, pension and healthcare benefits	<p>ILO Convention on Social Equality of Treatment Convention (No. 118), Art. 5</p> <p>ILO Equality of Treatment (Accident Compensation) Convention (No. 19), Art. 1</p>	<p>Possibility to export: Old-age pensions and benefits</p> <p>Invalidity benefits, death grants</p> <p>Benefits in respect of accidents at work and occupational diseases, survivors' benefits</p>
	<p>Maintenance of the Social Security Rights Convention (No. 157), Art.2</p> <p>Maintenance of Social Security Rights Recommendation (No. 167)</p> <p>ILO Convention on Social Equality of Treatment, Art. 7 (2)</p> <p>Migration for Employment Convention (No. 97), Art. 6 (b)</p> <p>European Code of Social Security, Art. 73</p>	<p>Maintenance of the acquired rights and rights in course of acquisition under their legislation.</p>

	<p>ILO Convention on Social Equality of Treatment, Art. 7 (2)</p> <p>ILO Convention No. 143, Art. 9(1)</p> <p>ICRMW, Art. 27 (2)</p>	<p>Totalisation of periods of insurance, employment or residence and of assimilated periods for the purpose of the acquisition, maintenance or recovery of rights and for the calculation of benefits.</p> <p>Reimbursement of social security contributions</p>
Entry and re-entry of family members	<p>CRC, Art. 10(1)</p> <p>ICRMW, Art. 44 (2)</p> <p>ILO Convention No. 143, Art. 13(1)</p> <p>ILO Migrant Worker Recommendation No. 151</p> <p>(Revised) European Social Charter, 1996, Art.19 (6)</p> <p>ILO (1997) Guidelines on Special Protective Measures for Migrant Workers in Time-bound Activities</p>	<p>Obligation to facilitate family reunion</p> <p>Family reunion of seasonal migrants and “special purpose workers” who are legally resident in the country</p>

Recognition of qualifications	<p>ILO Convention No. 143, Art. 14 (b) ILO Recommendation No. 151, Paragraph 6</p> <p>ILO Multilateral Framework on Labour Migration. Non-binding principles and guidelines for a rights- based approach to labour migration, 2006, Guideline 12.6</p> <p>European Convention on the Legal Status of Migrant Workers, Art. 30</p>	<p>Members may after appropriate consultation with the representatives organizations of employers and workers, make regulations concerning recognition of occupational qualifications acquired outside its territory, including certificates and diplomas</p> <p>Recognition and accreditation of migrant workers' skills and qualifications and, where that is not possible, providing a means to have their skills and qualifications recognized</p> <p>Measures to assist migrant workers and their families on the occasion of their final return to their State of origin - information about equivalence accorded to occupational qualifications obtained abroad and any tests to be passed to secure their official recognition; equivalence accorded to educational qualifications, so that migrant workers' children can be admitted to schools without down-grading.</p>
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Source: Authors, 2018 on the basis of Zvezda Vankova, PhD study "Circular migration from the Eastern partnership countries to the EU – the rights of migrant workers in Bulgaria and Poland" implemented as part of the TRANSMIC project.

ANNEX 3. GAPS AND BARRIERS AGAINST THE BENCHMARKS

Annex 3: Table 23: Gaps and barriers assessment against the international and regional benchmarks

Area	Aspirational standards/benchmarks based on international instruments presented in Chapter 2	Gaps and barriers
Equal treatment	<p>Equality of treatment, irrespective of skills, sector of employment, length of residence, and no less favourable treatment than nationals with regards to:</p> <ul style="list-style-type: none"> • Remuneration and working conditions, including hygiene, safety; • membership of trade unions and enjoyment of the benefits of collective bargaining; • social security and medical assistance; • vocational or technical training. 	<p>Gaps (G1)</p> <p>All first admission directives grant equal treatment to nationals with regards to remuneration, and working conditions except for the ICT.</p> <p>First Admission Directives allow for possible restrictions and derogations with regards to education and vocational training (no equal treatment with regards to ICTs).</p> <p>All Directives but the FRD provide equal treatment clauses to social security but allow for restrictions (except the BCD).</p> <p>Barriers to equal treatment (B1)</p> <p>Lack of implementation and enforcement at the national level in the Member States of equal treatment provisions with regard to remuneration and working conditions.</p>

<p>Entry and Re-entry conditions (circular migration)</p>	<p>Facilitation of circular and return migration policies.</p> <p>Granting previously employed seasonal workers the possibility of taking up other remunerated activities and giving them priority over other workers who seek admission to that State (subject to applicable bilateral and multilateral agreements).</p>	<p>Barriers with regards to entry: (B2)</p> <p>All Directives allow MS to pose requirement for migrants to apply from outside the EU (except LTRD).</p> <p>Few allow for in-country application (“may” clauses in the FRD; BCD and SRD only when TCNs have residence permit or long-term visa; SPD – in accordance with national law).</p> <p>ICTD and SWD – no in-country applications.</p> <p>Optional labour market tests envisaged in the SWD, BCD, SRD- for workers, mobile LTR.</p> <p>Requirement to provide address envisaged in LTRD, BCD, SRD, ICTD.</p> <p>Wide margin for member states to use ‘public policy or security clauses’</p> <p>Barriers with regards to different re-entry options under the Directives (B3):</p> <ul style="list-style-type: none"> • BCD provides for the highest rights-based circular migration standard (allows absences, mobility and accumulation of residence periods for LTR). • SWD provides for short-term stays coupled with re-entry conditions for bona fide workers. • ICTD – options for re-entry and cooling off periods.
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		<ul style="list-style-type: none"> • SRD – no explicit re-entry options but a highly mobile group. • LTRD – absences for up to 12 months (24 in the BCD). <p>Gaps with regards to different re-entry options (G2):</p> <p>Absence from the MS for the BC holders could be restricted to specific cases only.</p> <p>Circular migration for seasonal workers and ICTs depends on MS</p>
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<p>Work authorisation</p>	<p>Access to employment in all industries and occupations with maximum restriction of 1 or 2 years (with some limitations provided in the law).</p> <p>Loss or termination of employment should not constitute a sole ground for withdrawal of migrant worker's authorization of residence or work permit.</p> <p>Possibility to find alternative work in case of loss or termination of employment (also for seasonal workers who have already been employed for a significant period of time)</p>	<p>Gaps concerning change of employer (G3):</p> <p>Only the BCD and the SWD allow explicitly for change of employer (the LTRD, for instance, provides for free access).</p> <p>Changes are limited in the SWD.</p> <p>Changes of employer in the BCD are subject to prior authorisation.</p> <p>ICTD permit holders are bound to their employer.</p> <p>Barriers concerning change of employer (B3):</p> <p>Fear of loss of employment and dependency from employer.</p> <p>Different enforcement capacity of the labour inspectorates at the national level.</p> <p>Gaps concerning consequence of unemployment (G4):</p> <p>Only the BCD explicitly provides that unemployment does not automatically lead to permit withdrawal (unless for more than 3 months).</p> <p>Only the BCD explicitly provides for possibility to seek alternative work in case of loss of work.</p> <p>Barriers concerning consequence of unemployment (B5):</p> <p>Different provision of rights at national level due to the lack of explicit provisions in this regard.</p>
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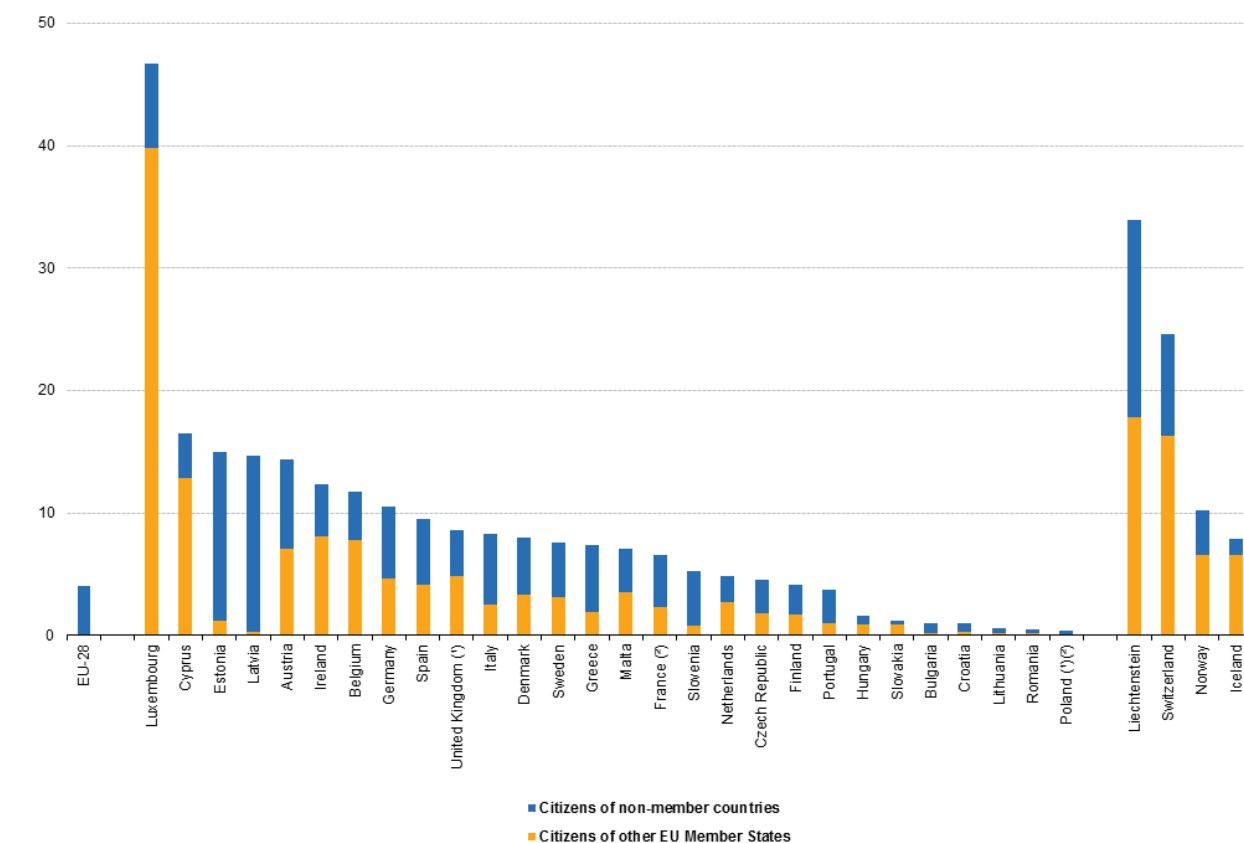
Residence status and mobility with the EU/Member State	<p>Right to free movement and choice of residence within the country, where one is lawfully resident.</p> <p>Facilitation of the prolonged or permanent residence.</p>	<p>Gaps concerning mobility and choice of residence (G5):</p> <p>All first admission directives provide for mobility and choice of residence but SWD does not provide sufficient guarantees to address employer-organised accommodation.</p> <p>Gaps concerning residence status (G6):</p> <p>ICTs (ICTD) and seasonal workers (SWD), as well as other TCNs residing on temporary and formally limited permits excluded from access to LTR.</p> <p>BCD provides facilitated access to LTR.</p> <p>SRD only implicitly provides for access to the LTR permit.</p> <p>Gaps concerning intra- EU mobility (G7):</p> <p>Different regimes:</p> <p>ICTD and SRD allow for temporary mobility.</p> <p>LTRD, ICTD, BCD, SRD allow long-term mobility.</p>
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Social security coordination	<p>Export of benefits.</p> <p>Maintenance of the acquired rights and rights in course of acquisition under their legislation.</p> <p>Totalisation (aggregation) of periods of insurance, employment or residence and of assimilated periods for the purpose of the acquisition, maintenance or recovery of rights and for the calculation of benefits.</p> <p>Reimbursement of social security contributions.</p>	<p>Gaps concerning social security coordination (G8):</p> <p>Provisions on export of benefits differ between the Directives and there are no provisions in that regard in the LTRD and FRD.</p> <p>The Directives do not contain other social security coordination principles such as aggregation of periods of insurance, employment and residence.</p> <p>Barriers concerning social security coordination (B6):</p> <p>Coordination of social security at the national level is subject to conclusion of bilateral agreements between MS and third countries, which provide for the actual entitlements. Their number varies from MS to MS.</p>
Family reunification	<p>Facilitation of family reunification, including for seasonal workers</p>	<p>Gaps concerning family reunification (G9):</p> <p>Four different regimes for family reunification:</p> <ol style="list-style-type: none"> 1) No right: seasonal workers, students, temporary workers with permits for less than one year 2) Rules for FR: for workers with residence permit valid for one year or more and for LTR in the first MS 3) Privileged rules: Blue Card Holders, researchers and ICT (e.g. no waiting period and labour market test for admitted family members) 4) Free admission: family members of LTR TCN admitted in first MS free to move with the LTR TCN to the second MS. <p>Barriers concerning family reunification (B7):</p> <p>Right to family reunion is foreseen for TCN with their spouses and minor children. For the rest of the family members, MS</p>

		<p>have discretion, though volumes of admission are not applicable in this case</p> <p>Waiting periods, integration requirements, etc. imposed on national level can disrupt or hinder family life.</p> <p>Negative impact on long term integration for both family members and the TCN workers.</p>
Recognition of qualifications	<p>Recognition and accreditation of migrant workers' skills and qualifications</p> <p>Where that is not possible, providing a means to have their skills and qualifications recognized</p>	<p>Gaps concerning recognition of qualifications (G10):</p> <p>Equal treatment in all Directives applies only once authorisation has been obtained, but not before</p> <p>Barriers (B8):</p> <p>In particular for regulated professions it takes longer to recognise diplomas and qualifications.</p> <p>This leads to de-qualification, and highly-qualified persons working in perceived 'low skilled' jobs, i.e. as a seasonal workers while awaiting the recognition.</p>

ANNEX 4. PUBLIC ATTITUDES TOWARDS MIGRATION AND MOBILITY IN THE EU

Annex 4: Figure 26. Share of non-nationals in the resident population, 1 January 2016 (%)



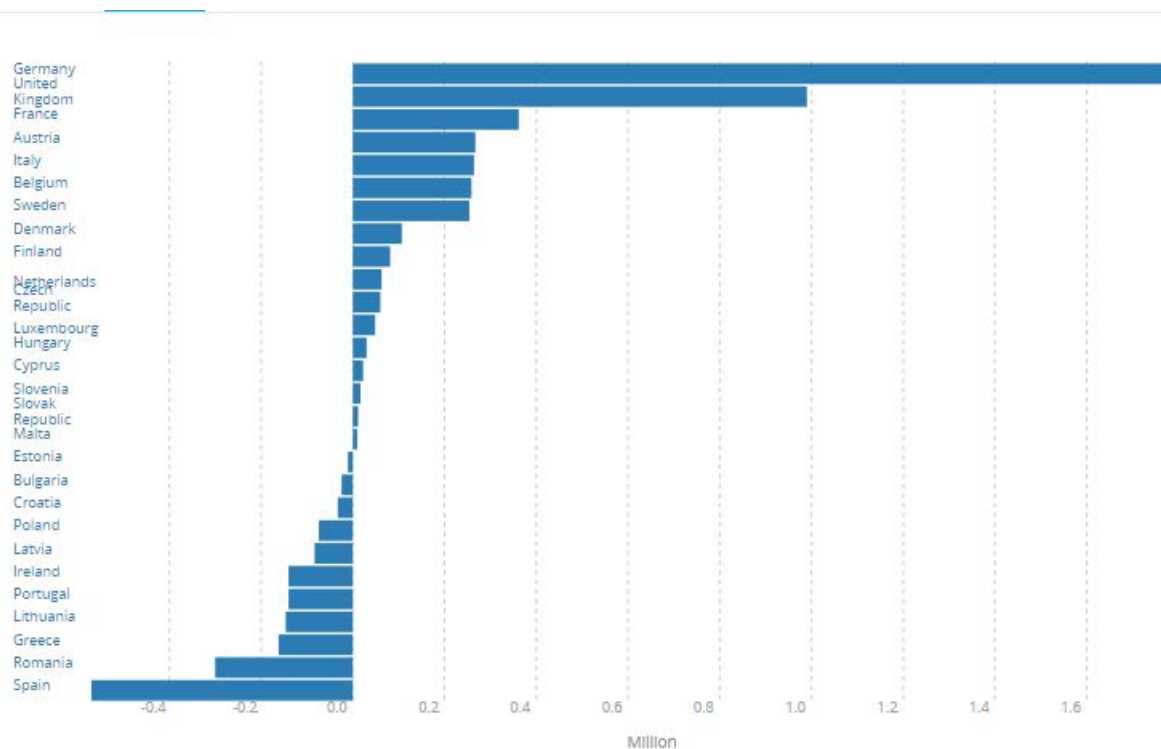
(*) Estimate.

(*) Provisional.

Source: Eurostat (online data code: migr_pop1ctz)

Source: Eurostat, migr_pop1ctz

Annex 4 : Figure 27. Total Net Migration in the EU Member States in 2012

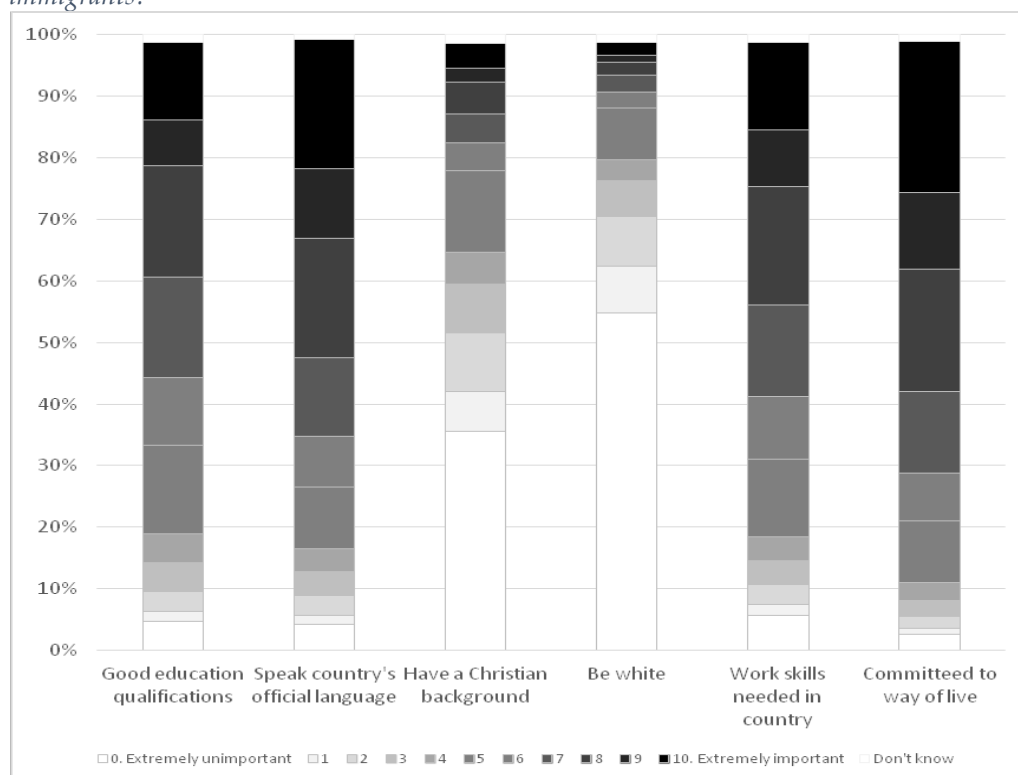


Source: United Nations Population Division, World Population Prospects, World Bank, 2012. [URL](#).

As regards to Figure 17, Eurostat 2015 results confirmed that the trends remain largely unchanged, with exception of Cyprus dropping towards a negative net migration:

“A total of 17 of the EU Member States reported more immigration than emigration in 2015, but in Bulgaria, Ireland, Greece, Spain, Croatia, Cyprus, Poland, Portugal, Romania, Latvia and Lithuania, the number of emigrants outnumbered the number of immigrants”

Annex 4: Figure 28. 'To what extent are the following important qualifications for accepting or excluding immigrants?'



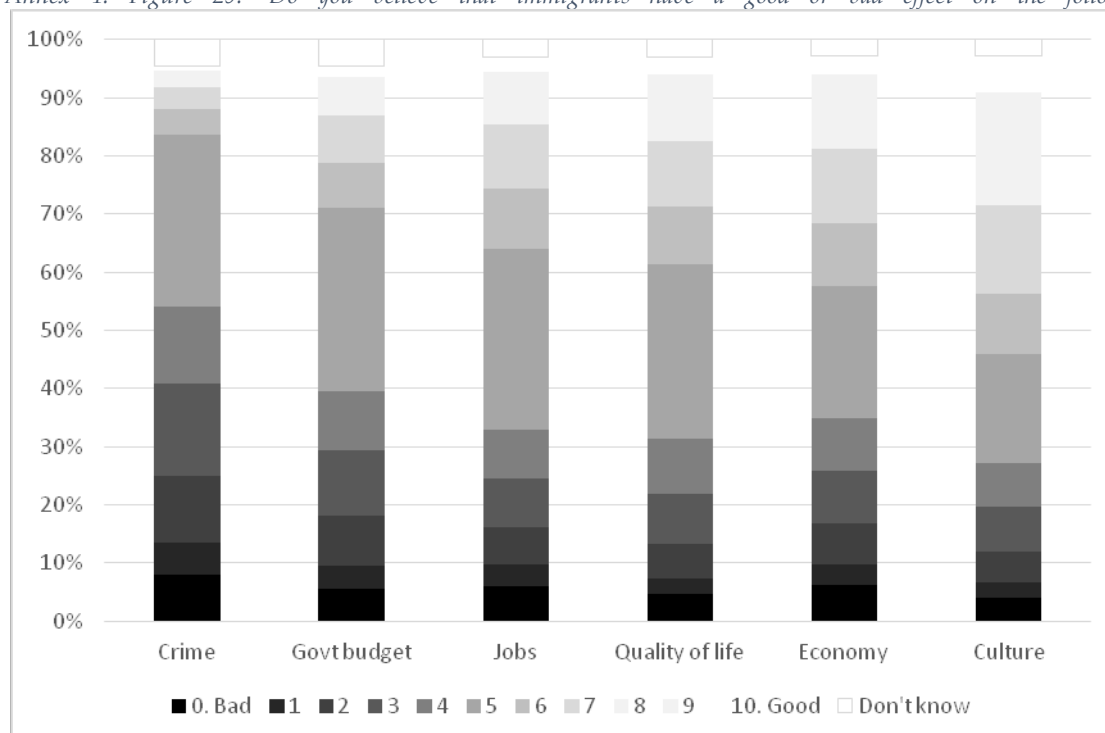
Source: European Social Survey, 2014

What do Europeans see as the effects of immigration?

We now move on to the question of what Europeans see as the effects of immigration. This is applicable to the cost of non-Europe in migration insofar as citizens are unlikely to support a migration policy regime that is not able to address (if founded) or rebut with evidence their more pronounced fears. As we can see in Figure 19, when asked to place the effect of immigration on each area of public life—the national economy, culture, quality of life, jobs, government budget and crime—Europeans distinguish between them.

Crime is the only facet in which a majority of Europeans perceive the effect of immigration as being negative—around 54% place the effect between 0 and 4 on the 0-10 spectrum. Conversely, the effect of immigration on culture is the only area in which a majority of Europeans see the effect of immigration as positive—around 54% placing its effect between 6 and 10 on the 0-10 spectrum. Europeans are more ambiguous on the other effects—with the economy perceived as being most positively affected and the government's budget seen as most negatively, with the effects on jobs for native workers and quality of life being in the middle.

Annex 4: Figure 29. 'Do you believe that immigrants have a good or bad effect on the following issues?'



Source: European Social Survey, 2014.

On the one hand, it supports the notion that individuals are most concerned about the effect of immigration on their safety and on the sustainability of rapid demographic transformation on government budgets and, on the other, we know that Europeans most concerned by immigration are those who value security most highly in their day to day lives. Nevertheless, the power of media re-shape such opinions should not be underestimated - in a forerun of Brexit debate - Leave campaign has successfully stirred fears about the EU citizens and TCNs from pre-accession countries like Turkey or Albania on their negative impacts ,on Britain's schools, jobs, houses, healthcare, crime and culture.

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The very dangerous assumptions about the 'criminal migrants' need to be further questioned and challenged as these are more often outcomes of irresponsible reporting about crimes when foreign nationalities are highlighted, than actual phenomenon of 'criminal migrants'.⁴⁵⁷ In fact, migrants are more likely to be victims of violent racist and xenophobic crimes inspired by such toxic rethorics. For example, after Brexit, in London alone - 'there were more than 2,300 recorded race-hate offences in London, compared with 1,400 in the 38 days before the vote'.⁴⁵⁸

⁴⁵⁶ M. Moore and G.Ramsay (2017) UK media coverage of the 2016 EU Referendum campaign, Kings College, Centre for the Study of Media, Communication and Power, May 2017, p. 23. (<https://www.kcl.ac.uk/sspp/policy-institute/CMCP/UK-media-coverage-of-the-2016-EU-Referendum-campaign.pdf>)

⁴⁵⁷ Moore, K. (2015) Immigration coverage and populist cultural work in the 2015 General Election campaign: Early reflections from leading UK academics. In D. Jackson & E. Thorsen (Eds), UK election analysis 2015: Media, voters and the campaign. Bournemouth: Political Studies Association and Centre for the Study of Journalism, Culture and the Community, Bournemouth University.

⁴⁵⁸ The Guardian (2016) 'Horrible spike' in hate crime linked to Brexit vote, Met police say "article by M. Weaver (<https://www.theguardian.com/society/2016/sep/28/hate-crime-horrible-spike-brexit-vote-metropolitan-police>).

ANNEX 5. ECONOMIC ANALYSIS

5.1. Data sets

European Labour Force Survey, Ad-hoc Migration Modules, waves 2008 and 2014

For the analysis of work-related outcomes (employment status, monthly pay, duration of a contract, etc.), we use data from the European Labour Force Survey (EU LFS), which is a large household survey harmonised across Member States, three countries of the European Free Trade Association (Iceland, Switzerland and Norway) and two candidate countries (Turkey and FYR of Macedonia). The survey focuses on labour participation of people aged 15 and over, covering all industries and occupations, as well as on persons outside the labour force. In 2016, the survey's sample size across the EU amounted to about 1.5 million respondents.

Specifically for this project, we focus on the data collected in the Member States for the Ad-hoc Migration Modules (EU LFS 2008 and 2014 waves).⁴⁵⁹ The migration modules cover sufficiently large samples of TCNs residing in the EU and allow us to conduct a representative econometric analysis of migrants' economic integration (as proxied by their work-related outcomes). Annex 5: Table 24 summarises the availability of data by participating country and survey wave.

Annex 5: Table 24. Representation of countries by survey year, EU LFS Ad-hoc Modules on Migration

Wave	Participating countries	Number of available observations
2008	AT BE BG CY CZ DE DK EE ES FR GR HU IE IT LT LU LV NL PL PT RO SE SI SK UK	745,169
2014	AT BE BG CY CZ EE ES FI FR GR HR HU IT LT LU LV MT PL PT RO SE SI SK UK	447,395

Source: Authors, 2018 using EU LFS data.

Note: Number of available observations with non-missing data for nationality, gender, age and education.

To account for sampling issues and ensure representativeness, we weigh all the observations by the sampling weight (coeff) available in the data files and recommended by the data providers.⁴⁶⁰

The migration modules contain specific questions relevant for the analysis of migrants' experiences – country of nationality/birth, years since migration, migration reason and obstacles in the labour market – as well as standard socio-economic data collected in all waves of the EU LFS: age, education, employment status, occupation, job characteristics, etc. Annex 5: Table 25 presents the summary of main variables from the EU LFS used in the analysis. For variables that measure the outcomes, we also report the number of available observations.

Annex 5: Table 25. Summary of outcomes and key variables, EU LFS Ad-hoc Modules on Migration

Variable	Definition and derivation	Number of available observations
<i>Outcomes:</i>		
Employed	Variable label: ilostat Question in the survey: ILO working status of the respondent Coding of the variable: 1 - 'Employed'; 0 - 'Unemployed/Inactive/Military service'.	1,192,564
Income decile	Variable label: incdecil	185,043

⁴⁵⁹ We use anonymised micro data provided by Eurostat. The responsibility for all conclusions drawn from the data lies entirely with the authors.

⁴⁶⁰ Eurostat (2018).

(monthly pay)	Question in the survey: Monthly (take home) pay from main job (deciles) of the respondent Coding of the variable: numbers in decile (from 1 to 10).	(available only for 2014)
Overqualification	Variable label: overqual Question in the survey: Is the respondent overqualified for the current job? Coding of the variable: 1 - 'Yes'; 0 - 'No'.	312,162 (available only for 2014, conditional on being employed)
Permanent contract	Variable label: temp Question in the survey: The respondent's permanency of the job Coding of the variable: 1 - 'Person has a permanent job or work contract of unlimited duration'; 0 - 'Person has temporary job/work contract of limited duration'.	744,533 (conditional on being employed)
Supervisory tasks	Variable label: supervisor Question in the survey: Supervisory responsibilities at the job of the respondent Coding of the variable: 1 - 'Yes'; 0 - 'No'.	734,953 (conditional on being employed)
Part-time work	Variable label: ftpt Question in the survey: Full-time/Part-time distinction of the respondent Coding of the variable: 1 - 'Part-time'; 0 - 'Full-time'.	883,646 (conditional on being employed)
Atypical work	Variable labels: shiftwk, evenwk, nightwk, satwk, sunwk Question in the survey: Shift work, evening work, night work, Saturday work, Sunday work Coding of the variables: each variable is coded as 1 - 'Yes'; 0 - 'No'. Then we derive a combined indicator 'atypical work' as an average of the five variables.	841,766 (conditional on being employed)
Hours worked	Variable labels: hwusual Question in the survey: Number of hours per week usually worked in the main job Coding of the variable: actual number of hours worked (1-100)	744,209 (conditional on being employed)
<i>Explanatory variables:</i>		
Foreign national	Variable label: national Question in the survey: Nationality of the respondent Coding of the variable: 'National' - if a citizen of the reporting country; 'Foreign, EU' - if a citizen of another EU Member State, 'Foreign, TCN' - if a citizen of a country outside the EU.	
Origin region	Variable label: national Question in the survey: Nationality of the respondent Coding of the variable: country of nationality in the EU LFS is not directly reported; countries are grouped as follows: 000 - National/Native of own Country, 001 - EU15, 002 - NMS10 (10 new Member States of 2004), 003 - NMS3 (3 new Member States of 2007 and 2013), 006 - EFTA, 007 - Other Europe, 009 - North Africa, 010 - Other Africa, 011 - Near and Middle East, 012 - East Asia, 013 - South and South East Asia, 016 - North America, 017 - Central America (and Caribbean), 018 - South America, 019 - Australia and Oceania	
Age group	Variable label: age Question in the survey: Age of the respondent, calculated Coding of the variable: in five-year intervals (20-24, 25-29, 30-34, 35-39, 40-44, 45-49, 50-55)	
Gender	Variable label: sex Question in the survey: Gender of the respondent Coding of the variable: 1 - 'Female'; 0 - 'Male'.	

Education	Variable label: hatlev Question in the survey: Highest educational attainment level of the respondent Coding of the variable: 1 - 'Low' - no schooling, primary or middle school (ISCED 0-2); 2 - 'Middle' - completed high school or vocational degree (ISCED 3-4); 3 - 'High' - tertiary degree (ISCED 5-6).	
Reason for migration	Variable label: ahm2014_migreass, ahm2008_migreass Question in the survey: Reason for migration Coding of the variable (categories corresponding to migration reasons): 1 - 'Employment', 2 - 'Family reasons', 3 - 'Study', 4 - 'International protection or asylum'	2008: 44,668 2014: 30,713
Restriction	Variable label: ahm2008_restracc Question in the survey: Is current legal access to the labour market restricted? Coding of the variable: The answer is coded as 1 if individuals report that their access is a) restricted to employment for specific employers/sectors/occupations, b) restricted to self-employment, c) not allowing self-employment, d) falls under any combination of a, b and c. Otherwise, the variable is set to zero.	Available in 2008 only TCNs: 25,025 observations
Main obstacle in the labour market	Variable label: ahm2014_jobobst1 Question in the survey: What is the main obstacle to getting a job corresponding to the person's qualifications or to getting a job at all? Coding of the variable (categories corresponding to the reported obstacles): 1 - 'Language' (Lack of language skills in host-country language(s)), 2 - 'Recognition of qualifications' (Lack of recognition of qualifications obtained abroad), 3 - 'Restricted rights' (Restricted right to work because of citizenship or residence permission), 4 - 'Background' (Origin, religion or social background).	Available in 2014 only TCNs: 30,429 observations

Source: Authors, 2018

European Social Survey, waves 2002-16

To measure life quality indicators – subjective health, subjective happiness and perceived discrimination – we use data from the European Social Survey (ESS). The biannual survey has been conducted since 2002 across Europe with newly selected cross-sectional samples. The survey aims to monitor social structures and social developments in Europe: respondents are asked about their life conditions, social behaviour, beliefs, attitudes, and judgements of key aspects in their societies. Along thematic variables, the survey also collects key socio-economic indicators, such as age, education, family structure, economic participation, country of origin, etc. These data are representative of the European population and are considered highly reliable. The data have been widely used by researchers in economics and social sciences.⁴⁶¹

For this project we use all available waves of the survey conducted between 2002 and 2016. We restrict the sample to individuals aged 20 to 55 (to focus on working individuals) and residing in one of the following countries: Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, Sweden and the United Kingdom. We decided to limit the sample to these countries because most of them are well represented across all rounds of the survey. Annex 5: Table 26 summarises the availability of data by participating country and survey wave.

⁴⁶¹ See, for instance, www.europeansocialsurvey.org/bibliography/complete.html for the list of publications using the European Social Survey data.

Annex 5: Table 26. Representation of countries by survey year, European Social Survey

Wave	Participating countries	Number of available observations
2002	IE GB FI BE DK IT DE PT AT ES LU GR NL FR SE	17,380
2004	ES LU FR GB BE GR AT SE PT NL DK FI DE IE	16,384
2006	DE AT PT FI SE BE DK NL GB IE ES FR	14,252
2008	IE BE FR SE GR PT NL ES DK GB DE FI	14,442
2010	SE DE BE FI GB IE GR ES NL PT DK FR	14,123
2012	DK DE ES FR SE FI PT IE BE NL GB IT	13,417
2014	FR SE NL AT DE DK IE ES PT GB FI BE	12,831
2016	DE FI SE BE NL FR IE GB AT	10,018

Source: Authors, 2018 using European Social Survey data.

Note: Number of available observations with non-missing data for nationality, gender, age and education.

To account for sampling issues and ensure representativeness, we weigh all the observations by the combination of two sampling weights (the post-stratification weights and the population size weights) available in the data files and recommended by the data providers.⁴⁶²

Annex 5: Table 27 presents the summary of main variables from the European Social Survey used in the analysis. For variables that we use to measure the outcomes, we also report the number of available observations.

Annex 5: Table 27. Summary of outcomes and explanatory variables, European Social Survey

Variable	Definition and derivation	Number of available observations
<i>Outcomes:</i>		
Discrimination	Variable label: dscrgpr Question in the survey: Would you describe yourself as being a member of a group that is discriminated against in this country? Coding of the variable: 1 - 'Yes'; 0 - 'No'; 'Don't know' - missing.	112,287
Health	Variable label: health Question in the survey: What is your subjective general health? Coding of the variable: on the scale from 1 to 5, where 1 - 'Very good'; 5 - 'Very bad'. We recode it to be between 0 and 1, where 1 - 'Very bad' and 0 - 'Very good'.	112,231
Happiness	Variable label: happy Question in the survey: How happy are you? Coding of the variable: on the scale from 0 to 10, where 10 - 'Extremely happy'; 0 - 'Extremely unhappy'. We normalise the values to be between 0 and 1.	112,062
Employed	Variable label: mnactic Question in the survey: What is your main activity in the last seven days? Coding of the variable: 1 - 'Paid work' (employed); 0 - 'Education, Unemployed, Disabled, Military/civil service, Retired, Other'.	111,923
<i>Explanatory variables:</i>		
Foreign national	Variable labels: ctzcntr and cntbrtha Questions in the survey: Are you a citizen of this country? What is your country of birth? Coding of the variable: 'National' - if a citizen of the reporting country; 'Foreign, EU' - if not a citizen and born in EU-28, 'Foreign,	

⁴⁶² European Social Survey (2014).

	TCN' – if not a citizen and born outside the EU. ⁴⁶³	
Age group	Variable label: agea Question in the survey: Age of respondent, calculated Coding of the variable: in five-year intervals (20-24, 25-29, 30-34, 35-39, 40-44, 45-49, 50-55)	
Gender	Variable label: gndr Question in the survey: What is your gender? Coding of the variable: 1 – 'Female'; 0 – 'Male'.	
Education	Variable label: edulvlb Question in the survey: What is the highest level of education you have successfully completed? Coding of the variable: 1 – 'Low' – no schooling, primary or middle school (ISCED 0-2); 2 – 'Middle' – completed high school or vocational degree (ISCED 3-4); 3 – 'High' – tertiary degree (ISCED 5-6).	

Source: Authors, 2018

5.2. Empirical specifications

Estimating conditional differences in work-related outcomes and life quality between third-country nationals and EU nationals

The purpose of this descriptive analysis is to document differences in work-related and life quality outcomes between comparable third-country nationals (TCNs) and the EU nationals. We use data from both the EU LFS Ad-hoc Modules on Migration and the European Social Survey. In the analysis, we distinguish by nationality: the native population (nationals of the reporting country), mobile EU citizens, and TCNs. We also distinguish by gender to know whether there are significant differences between women and men. Equation 1 presents the empirical specification.

$$Y_i = MaleForeignEU_i + FemaleForeignEU_i + MaleTCN_i + FemaleTCN_i + Female_i + Age_i + Education_i + \tau_t + \nu_c + \epsilon_i \quad (1)$$

Where:

Y_i – is the outcome variable of a respondent i (see Annex 5: Table 25 and Annex 5: Table 27 for the definitions).

$MaleForeignEU_i$, $FemaleForeignEU_i$, $MaleTCN_i$, $FemaleTCN_i$ – are the main explanatory variables of interest. These are interaction variables of the gender and nationality. For example, $MaleForeignEU_i$ is equal '1' for men, who are nationals of another Member State. $FemaleForeignEU_i$ is equal '1' for women, who are nationals of another Member State. $MaleTCN_i$ and $FemaleTCN_i$ are corresponding variables for men and women, who are TCNs. $MaleForeignEU_i$, $FemaleForeignEU_i$, $MaleTCN_i$, $FemaleTCN_i$ show by how much outcomes of *foreigners from within the EU/TCNs* differ from those of the native men/women. These differences are measured in the units of the outcome. For example, in Annex 5: Table 28, column (1) reports differences in employment rates. The coefficient for *Male Foreign EU* equals 0.00317, meaning that there is no statistically significant difference in the probability of being employed between the native men and EU mobile citizen - men. The coefficient for *Male TCN* equals -0.0527,** meaning that the probability of being employed for male TCNs is 5.3 percentage points lower than that for native men.

$Female_i$ is a dummy equal to 1 for women respondents and 0 for men respondents.

Age_i is an indicator for the age group of a respondent.

$Education_i$ is an indicator for the attained education level of a respondent.

τ_t - year of the survey fixed effects.

ν_c - reporting country fixed effects.

⁴⁶³ The direct information on country of citizenship is of lower quality (many missing observations) than is that for the country of birth.

ϵ_i - error term.

Hence, $MaleForeignEU_i$, $FemaleForeignEU_i$, $MaleTCN_i$, $FemaleTCN_i$ measure differences in outcomes between mobile EU citizens, TCNs, and the native population of the same gender, age and education level, residing in the same reporting country and answering the survey in the same year.

In an additional specification, we add two more controls: industry fixed effects (industries are defined according to NACE classification, 1 digit level) and occupation fixed effects (ISCO classification, 1 digit level). In this case, we measure differences between respondents not only of the same age, gender and education, but also who work in the same industry and occupation.

For estimations we use linear probability models (OLS), the observations are weighted by sampling weights provided in the data. Robust standard errors account for possible heteroscedasticity. We cluster standard errors at the level of the reporting country and year of the survey as it is likely that standard errors are correlated among respondents residing in the same country and answering the survey in the same year.

Corresponding tables with the results: Annex 5: Table 28 Annex 5: Table 30. Corresponding figures in the text: **Error! Reference source not found.** and **Error! Reference source not found.**

Estimating differences in intra-EU mobility between third-country nationals and EU nationals

The purpose of this analysis is to evaluate differences in intra-EU mobility rates between TCNs and EU nationals. Here, we distinguish by nationality: TCNs vs. EU nationals (both the native population and mobile EU citizens). We also distinguish by education level, as low-, medium- and highly skilled TCNs may face mobility constraints of varying extents. Equation 2 presents the empirical specification.

$$Y_i = TCN_i + Female_i + Age_i + Education_i + \gamma_j + \nu_c \tau_t + \mu_c \tau_{t-1} + \epsilon_i \quad (2)$$

Where:

Y_i – is the indicator for intra-EU mobility, which takes the value of 1 if a respondent resided in another Member State one year before the survey or if a respondent resides and works in different Member States.

TCN_i – is the main explanatory variable of interest. It takes the value of 1 for TCNs and is equal to zero otherwise. The coefficient TCN_i shows by how much the likelihood of intra-EU mobility in a given year among TCNs differs from that among EU nationals. For example, in Annex 5: Table 31, column (1) reports differences in intra-EU mobility rates for the full sample of respondents. The coefficient for TCN equals - 0.00428, *** meaning that TCNs are 0.428 percentage points less likely to be mobile within the EU relative to an EU national of the same gender, age, education, industry of work, current and previous countries of origin.

$Female_i$ is a dummy equal to 1 for women respondents and 0 for men respondents.

Age_i is an indicator for the age group of a respondent.

$Education_i$ is an indicator for the attained education level of a respondent.

γ_j - industry fixed effects.

$\nu_c \tau_t$ - reporting country time-specific fixed effects.

$\mu_c \tau_{t-1}$ - previous country of residence time-specific fixed effects.

ϵ_i - error term.

To see whether there are differences depending on skill level, we also estimate the regression (2) for three different skill groups defined by attained education: low, medium and high.

For estimations we use linear probability models (OLS), the observations are weighted by sampling weights provided in the data. Robust standard errors account for possible heteroscedasticity. We cluster standard errors at the level of the reporting country and year of the survey as it is likely that standard errors are correlated among respondents residing in the same country and answering the survey in the same year.

Corresponding tables with the results: Annex 5: Table 31. Corresponding figure in the text: **Error! Reference source not found..**

Estimating the role of self-reported legal restrictions for work-related outcomes of third-country nationals in the EU

The purpose of this analysis is to evaluate the role of legal restrictions in shaping work-related outcomes of TCNs in the EU. For this, we limit the sample to TCNs residing in one of the Member States and make use of the available question in the EU LFS Ad-hoc Module on Migration (2008 wave): “Is current legal access to the labour market restricted?” We then link answers to this question to current work-related outcomes of TCNs. Equation 3 presents the empirical specification. We take into account a rich set of explanatory variables to reduce possible endogeneity. As in the specification (1) we allow for heterogeneous effect of restrictions depending on gender of respondents, as it is likely that such restrictions are more binding for women TCNs.

$$Y_i = MaleRestricted_i + FemaleRestricted_i + Female_i + Age_i + Education_i + Reason_i + \mu_c v_c + \mu_c \omega_t + v_c \omega_t + \epsilon_i \quad (3)$$

Where:

Y_i – is the work-related outcome variable of a respondent i (see Annex 5: Table 25 for the definitions).

$Restricted_i$ – is the ‘restriction’ dummy. It is coded as ‘1’ if individuals report that their access to the labour market is a) restricted to employment for specific employers/sectors/occupations, b) restricted to self-employment, c) not allowing self-employment, d) falls under any combination of a, b and c. Otherwise, the dummy is set to zero.

$MaleRestricted_i, FemaleRestricted_i$ – are the main explanatory variables of interest. These are interaction variables of the gender and the restriction dummy. For example, $MaleRestricted_i$ equals ‘1’ for men who report that their access to the labour market is restricted. $MaleRestricted_i, FemaleRestricted_i$ show by how much outcomes of TCNs *reporting restricted access to the labour market* differ from those of similar TCNs who do not face such restrictions. These differences are measured in the units of the outcome. For example, in Annex 5: Table 32, column (1) reports differences in employment rates. The coefficient for $MaleRestricted$ equals -0.0552,* meaning that the probability of being employed for TCN men facing restrictions is 5.5 percentage points lower than for TCN men with the same observable characteristics but who do not face such restrictions.

$Female_i$ – is a dummy equal to 1 for women respondents and 0 for men respondents.

Age_i – is an indicator for the age group of a respondent.

$Education_i$ – is an indicator for the attained education level of a respondent.

$Reason_i$ – is an indicator for migration reason.

$\mu_c v_c$ – origin region (μ_c) fixed effects interacted with reporting country (v_c) fixed effects.

$\mu_c \omega_t$ – origin region fixed effects interacted with arrival year (ω_t) fixed effects; controls for any unobservable effects specific to a migrant cohort from a certain origin (e.g. *North Africa2003* – would capture all common factors among migrants leaving North Africa in 2003 and currently residing in one of the Member States).

$v_c \omega_t$ – reporting country (v_c) fixed effects interacted with arrival year (ω_t) fixed effects; controls for any

unobservable effects specific to a migrant cohort entering a certain Member State (e.g. *Italy2003* would capture all common factors among TCNs residing in Italy since 2003).

ϵ_i – error term.

For estimations we use linear probability models (OLS), the observations are weighted by sampling weights provided in the data. Robust standard errors account for possible heteroscedasticity. We cluster standard errors at the level of the reporting country as it is likely that standard errors are correlated among respondents residing in the same country as of 2008.

Corresponding tables with the results: Annex 5: Table 32. Corresponding figure in the text: **Error! Reference source not found.**

Estimating the causal role of extending rights (from ‘third-country national’ to ‘EU national’ status) using the EU enlargement natural experiment

The purpose of this analysis is to evaluate *the causal* role of legal restrictions in shaping outcomes of TCNs in the EU. For this, we exploit the quasi-experimental setting created in the EU after the 2004 and 2007 accessions. Following the accession of their countries to the EU, nationals of new Member States (NMS), who already resided in existing Member States, experienced a change from the status of a ‘third-country national’ to the status of an ‘EU national’. Yet this change in status, i.e. extension of rights, did not happen simultaneously in all Member States. Throughout 2004-14, NMS nationals faced different transitional provisions depending on their country of residence. For example, the UK lifted all restrictions for NMS8 nationals in 2004, while for NMS2 nationals the restrictions were in place until 2014. Italy kept restrictions until 2006 for NMS8 nationals and until 2012 for NMS2 nationals. Germany kept restrictions until 2011 for NMS8 nationals and until 2014 for NMS2 nationals.⁴⁶⁴ As the result, in some Member States, NMS nationals already enjoyed the same rights as other EU nationals, while in other Member States, they still faced restrictions as TCNs. We can, thus, compare how granting more rights, i.e. extending to EU citizen’s rights, affects outcomes of TCNs.

We limit the sample to NMS nationals and TCNs residing in one of the EU-15 Member States (we consider only ‘old’ EU Member States, as these are the relevant destinations for migrants from NMS). We also limit the sample to TCNs and NMS nationals who arrived between 1995 and 2004 to ensure that transitional provisions did not influence the decisions to migrate. Equation 4 presents the empirical specification. We take into account a rich set of explanatory variables to reduce possible endogeneity. As in previous specifications, we allow for heterogeneous effect of restrictions depending on gender of respondents, as it is likely that such restrictions are more binding for female TCNs. We further check the hypothesis that legal restrictions are more binding for family migrants by limiting the sample to individuals who report ‘family reunification’ as their main reason to migrate.

$$Y_i = \text{MaleYearsSinceRights}_i + \text{FemaleYearsSinceRights}_i + \text{Female}_i + \text{Age}_i + \text{Education}_i + \text{SinceEU}_i + \mu_c \omega_t + \nu_c \omega_t + \tau_t + \epsilon_i \quad (4)$$

Where:

Y_i – is the work-related outcome variable of a respondent i (see Annex 5: Table 25 and Annex 5: Table 27 for the definitions).

$\text{YearsSinceRights}_i$ – is the ‘full rights’ variable denoting the number of years since an individual has enjoyed full (EU national) rights in his/her country of residence. For example, as of 2008, this variable will be equal to 4 for a Polish national residing in the UK, 2 for a Polish national residing in Italy, and zero for a Polish national

⁴⁶⁴ Freedom of movement of workers in the EU (https://en.wikipedia.org/wiki/Freedom_of_movement_for_workers_in_the_European_Union).

residing in Germany. For TCNs, this variable is always zero.

$MaleYearsSinceRights_i$, $FemaleYearsSinceRights_i$ – are the main explanatory variables of interest. These are interaction variables of the gender and the ‘full rights’ variable. $MaleYearsSinceRights_i$, $FemaleYearsSinceRights_i$ show by how much outcomes of *NMS nationals* change with every year since obtaining full (EU national) rights, i.e. since converting from the status of a ‘third-country national’ to the status of an ‘mobile EU citizen’. These differences are measured in the units of the outcome. For example, in Annex 5. Table 33, column (1) reports differences in employment rates. The coefficient for $FemaleYearsSinceRights$ equals +0.0192,** meaning that the probability of being employed for foreign women increases by 1.9 percentage points with every year since obtaining full (EU national) rights. The implicit assumption is that this effect is linear, i.e. the same for each year since extension of rights.

$Female_i$ – is a dummy equal to 1 for women respondents and 0 for men respondents.

Age_i – is an indicator for the age group of a respondent.

$Education_i$ – is an indicator for the attained education level of a respondent.

$SinceEU_i$ – number of years since accession to the EU: 2004 for NMS8 nationals and 2007 for NMS2 nationals.

$\mu_c \omega_t$ – origin region fixed effects interacted with arrival year (ω_t) fixed effects; controls for any unobservable effects specific to a migrant cohort from a certain origin (e.g. *NMS8 2003* – would capture all common factors among migrants leaving NMS8 countries in 2003 and currently residing in one of the ‘old’ Member States).

$\nu_c \omega_t$ – reporting country (ν_c) fixed effects interacted with arrival year (ω_t) fixed effects; controls for any unobservable effects specific to a migrant cohort entering a certain old Member State (e.g. *Italy2003* would capture all common factors among foreigners residing in Italy since 2003).

τ_t – year of the survey fixed effects.

ϵ_i – error term.

For estimations we use linear probability models (OLS), the observations are weighted by sampling weights provided in the data. Robust standard errors account for possible heteroscedasticity. We cluster standard errors at the level of the reporting country as it is likely that standard errors are correlated among respondents residing in the same country and answering the survey in the same year.

Corresponding tables with the results: Annex 5. Table 33-Annex 5: Table 35 Corresponding figure in the text: **Error! Reference source not found..**

We can argue for a causal interpretation of the results because individual NMS nationals could not influence the exact timing of obtaining full (EU national) rights: the decisions on transitional provisions were taken by the governments of the old Member States and appeared as ‘given’ for NMS nationals who already resided in these States. Moreover, we are able to control for origin and reporting country time-specific effects. Yet limitations of this strategy (external validity, selection to out-migration) should be also acknowledged (see the main text for the discussion).

5.3. Tables with empirical results

General remarks to the tables with empirical results

- Each table shows the estimated coefficients and standard errors in parentheses. To denote statistical significance of the coefficients, we use the following labels: *** - 99% confidence, ** - 95% confidence, * - 90% confidence.
- The samples include individuals aged 20 to 55, currently residing in a Member State.
- The number of observations in regressions varies depending on the availability of dependent and

explanatory variables and on whether we consider the whole population residing in the EU, all foreign nationals, or only TCNs (see the above section for explanations).

- Our results represent an average estimated effect (across all observations – participating countries and survey years – included in a regression).

Tables

Annex 5: Table 28. Conditional differences in work-related outcomes between third-country nationals and EU nationals

VARIABLES	(1) Employed	(2) Monthly pay (income decile)	(3) Overqualifi ed	(4) Permanent contract	(5) Supervisory tasks	(6) Part-time work	(7) Atypical work	(8) Usual working hours (week)
Foreign national from EU, male	0.00317 (0.00941)	-0.636*** (0.161)	0.0659*** (0.0145)	-0.0487*** (0.0132)	-0.0689*** (0.0168)	-0.0416*** (0.0149)	-0.00242 (0.0152)	0.0941 (0.217)
Foreign national from EU, female	-0.0216** (0.00962)	-0.721** (0.279)	0.133*** (0.0228)	-0.0354*** (0.0108)	-0.0530*** (0.0124)	0.0472* (0.0277)	0.0196** (0.00829)	0.698*** (0.211)
Third-country national, male	-0.0527*** (0.0196)	-1.308*** (0.170)	0.119*** (0.0304)	-0.107*** (0.0304)	-0.110*** (0.0152)	0.0418*** (0.0134)	-0.00231 (0.0103)	-0.462** (0.202)
Third-country national, female	-0.156*** (0.0360)	-1.127*** (0.310)	0.143*** (0.0292)	-0.0604*** (0.0171)	-0.0626*** (0.0121)	0.0742*** (0.0201)	0.0220*** (0.00819)	1.032*** (0.265)
Female	-0.128*** (0.0126)	-1.729*** (0.0969)	0.0212*** (0.00202)	-0.0250*** (0.00403)	-0.104*** (0.00580)	0.217*** (0.0245)	-0.0319*** (0.00433)	-2.660*** (0.200)
Medium-skill	0.133*** (0.00746)	0.983*** (0.0741)	0.0808*** (0.0131)	0.0421*** (0.00822)	0.0759*** (0.00822)	-0.0281*** (0.00542)	0.00886*** (0.00287)	-0.221 (0.211)
High-skill	0.221*** (0.00984)	2.827*** (0.108)	0.120*** (0.0171)	0.0457*** (0.0138)	0.232*** (0.0119)	-0.0748*** (0.00745)	-0.0491*** (0.00820)	-0.302 (0.514)
Observations	1,173,494	185,043	303,939	731,196	729,328	868,246	832,894	731,497
R-squared	0.123	0.291	0.103	0.123	0.116	0.144	0.028	0.049
Mean of outcome, nationals of the reporting country	0.754	5.570	0.209	0.867	0.224	0.157	0.216	41.65
SD of outcome	0.431	2.770	0.406	0.339	0.417	0.364	0.265	7.689
Clusters	51	21	25	51	51	51	50	51

Robust standard errors in parentheses; *** p<0.01, ** p<0.05, * p<0.1

Note: Weighted regressions. The sample includes respondents aged 20-55 living in an EU Member State. All regressions control for gender, education, age group (five-year intervals), reporting country and interview year. Baseline group: nationals of the reporting country. Clustered standard errors at the 'reporting country and year' level. Data on monthly pay and overqualification are available only in 2014 wave. Data on outcomes 2-8 are available only for employed individuals. Regression on working hours (outcome 8) includes only individuals working full-time.

Source: Authors, 2018 using EU LFS Ad-hoc Modules on Migration, 2008 and 2014 waves.

Annex 5: Table 29 Conditional differences in work-related outcomes between third-country nationals and EU nationals, accounting for occupation and industry of work

VARIABLES	(1) Monthly pay (income decile)	(2) Overqualified	(3) Permanent contract	(4) Supervisory tasks	(5) Part-time work	(6) Atypical work	(7) Usual working hours (week)
Foreign national from EU, male	-0.250** (0.103)	0.0502*** (0.0115)	-0.0219 (0.0130)	-0.0486*** (0.0158)	-0.0439* (0.0242)	0.00657 (0.00848)	0.0986 (0.410)
Foreign national from EU, female	-0.0446 (0.112)	0.0791*** (0.0154)	-0.0149 (0.00910)	-0.0393*** (0.0131)	-0.00884 (0.0269)	-0.00299 (0.00723)	-0.154 (0.175)
Third-country national, male	-0.626*** (0.0511)	0.0793** (0.0284)	-0.0555** (0.0268)	-0.0884*** (0.0184)	0.0159 (0.0174)	-0.00352 (0.00426)	-0.512** (0.247)
Third-country national, female	0.0609 (0.104)	0.0662*** (0.0191)	-0.0299 (0.0192)	-0.0443*** (0.0137)	-0.0220 (0.0234)	-9.00e-07 (0.00839)	0.619 (0.470)
Female	-1.151*** (0.0834)	0.00512 (0.00463)	-0.0150*** (0.00449)	-0.0678*** (0.00526)	0.135*** (0.0247)	-0.0449*** (0.00532)	-1.861*** (0.159)
Medium-skill	0.437*** (0.0588)	0.117*** (0.0145)	0.0193*** (0.00668)	0.0380*** (0.00622)	-0.00827** (0.00392)	0.0207*** (0.00266)	-0.0152 (0.189)
High-skill	1.085*** (0.126)	0.269*** (0.0224)	0.0157 (0.00991)	0.0784*** (0.0142)	-0.0156*** (0.00449)	0.00743 (0.00473)	0.407 (0.374)
Observations	184,720	303,124	258,211	257,750	310,596	310,583	263,606
R-squared	0.456	0.149	0.165	0.277	0.187	0.283	0.155
Mean of outcome, nationals of the reporting country	5.570	0.209	0.867	0.224	0.157	0.216	41.65
SD of outcome	2.770	0.406	0.339	0.417	0.364	0.265	7.689
Clusters	21	25	25	25	25	25	25

Robust standard errors in parentheses

*** p<0.01, ** p<0.05, * p<0.1

Note: Weighted regressions. The sample includes respondents aged 20-55 living in an EU Member State. All regressions control for gender, education, age group (five-year intervals), reporting country and interview year. Baseline group: nationals of the reporting country. Clustered standard errors at the 'reporting country and year' level. Regression on working hours (outcome 8) includes only individuals working full-time. Data on occupation are available only in 2014 wave. Results from Annex 5: Table 24 qualitatively hold also if only estimated for 2014 wave.

Source: Authors, 2018 using EU LFS Ad-hoc Modules on Migration, 2014 wave.

Annex 5: Table 30. Conditional differences in life quality between third-country nationals and EU nationals

VARIABLES	(1) Feeling discriminated	(2) Subjective health	(3) Subjective happiness
Foreign national from EU, male	0.00155 (0.0150)	0.0222* (0.0114)	0.00421 (0.00987)
Foreign national from EU, female	0.0569*** (0.0194)	0.0204** (0.00830)	0.00712 (0.00764)
Third-country national, male	0.181*** (0.0215)	0.0159*** (0.00602)	-0.00956 (0.0106)
Third-country national, female	0.149*** (0.0157)	0.00137 (0.00736)	-0.0114 (0.00744)
Female	-0.00828** (0.00364)	-0.0135*** (0.00202)	0.00996*** (0.00186)
Medium-skill	-0.0158** (0.00615)	0.0403*** (0.00300)	0.0209*** (0.00314)
High-skill	-0.000660 (0.00899)	0.0817*** (0.00423)	0.0458*** (0.00429)
Observations	112,258	112,756	112,581
R-squared	0.031	0.092	0.037
Mean of outcome, nationals of the reporting country	0.0900	0.736	0.742
SD of outcome	0.286	0.210	0.180
Clusters	170	170	170

Robust standard errors in parentheses

*** p<0.01, ** p<0.05, * p<0.1

Note: Weighted regressions. The sample includes respondents aged 20-55 living in an EU Member State (Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, Sweden and the United Kingdom). All regressions control for gender, age group, education, reporting country and interview year. Baseline group: nationals of the reporting country. Clustered standard errors at the 'reporting country and year' level. In the data, we cannot directly observe nationality of respondents, but know if an individual is a national of the reporting country. If an individual is not national of his/her reporting country, we proxy his/her nationality by the country of birth.

Source: Authors, 2018 using European Social Survey (2002-2016 waves)

Annex 5: Table 31. Conditional differences in intra-EU mobility rates between EU and non-EU nationals

VARIABLES	(1) Full sample	(2) Low-skilled	(3) Medium-skilled	(4) Highly skilled
Non-EU national	-0.00428*** (0.000422)	-0.00311*** (0.000336)	-0.00583*** (0.000865)	-0.00357*** (0.000926)
Female	-0.00178*** (0.000246)	-0.000111 (0.000324)	-0.00213*** (0.000311)	-0.00225*** (0.000603)
Medium-skill	0.00138*** (0.000276)			
Highly skilled	0.00286*** (0.000403)			
Observations	1,004,752	251,956	522,239	230,557
R-squared	0.165	0.229	0.137	0.245
Mean mobility rate	0.00836	0.00486	0.00902	0.0104
SD of mobility rate	0.0910	0.0695	0.0946	0.101
Clusters	46	46	46	46

Robust standard errors in parentheses

*** p<0.01, ** p<0.05, * p<0.1

Note: Weighted regressions. The sample includes respondents aged 20-55 living in an EU Member State. All regressions control for gender, age group (five-year intervals), education, industry of work, countries of residence (current and previous year) interacted with time effects. Baseline group: EU nationals. Clustered standard errors at the 'current reporting country and year' level.

Source: Authors, 2018 using EU LFS Ad-hoc Modules on Migration 2008 and 2014 wave.

Annex 5: Table 32. The role of self-reported legal restrictions for work-related outcomes of third-country nationals in the EU

VARIABLES	(1) Employed	(2) Permanent contract	(3) Supervisory tasks	(4) Part-time work	(5) Atypical work	(6) Usual working hours (week)
Restricted access, male	-0.0552* (0.0299)	-0.0514 (0.0599)	-0.00771 (0.0170)	0.0216 (0.0142)	0.0184 (0.0194)	1.101** (0.496)
Restricted access, female	-0.135*** (0.0360)	-0.117* (0.0584)	0.0255 (0.0290)	0.0291 (0.0473)	0.0182 (0.0428)	1.021 (0.916)
Female	-0.0574** (0.0217)	0.0578* (0.0293)	-0.0557*** (0.00842)	0.246*** (0.0397)	-0.00313 (0.0568)	-1.509*** (0.245)
Medium-skill	0.0447 (0.0261)	0.0221 (0.0189)	0.0225 (0.0201)	-0.00216 (0.00833)	0.0156* (0.00777)	-0.0574 (0.244)
High-skill	0.0655*** (0.0139)	-0.00635 (0.0503)	0.0866*** (0.0244)	-0.0526* (0.0289)	0.0357 (0.0220)	0.721 (0.499)
	-0.0552* (0.0299)	-0.0514 (0.0599)	-0.00771 (0.0170)	0.0216 (0.0142)	0.0184 (0.0194)	1.101** (0.496)
Observations	12,883	9,367	9,358	10,422	9,022	8,249
R-squared	0.134	0.222	0.228	0.189	0.090	0.134
Mean of outcome, third-country nationals	0.619	0.759	0.121	0.232	0.226	41.89
SD of outcome	0.486	0.428	0.327	0.422	0.266	7.601
Clusters	15	15	15	15	14	15

Robust standard errors in parentheses

*** p<0.01, ** p<0.05, * p<0.1

Note: Weighted regressions. The sample third-country nationals aged 20-55 living in an EU Member State. All regressions control for gender, age group (five-year intervals), education, migration reason, destination* origin, destination* arrival year and origin* arrival year. Baseline group: third-country nationals who do not report restrictions.

Clustered standard errors at the 'current reporting country' level. Regression on working hours (outcome 8) includes only individuals working full-time.

Source: Authors, 2018 using EU LFS Ad-hoc Module on Migration 2008.

Annex 5. Table 33. The role of extending rights (to EU citizens' rights) for work-related outcomes of third-country nationals in the EU

VARIABLES	(1) Employed	(2) Monthly pay (decile)	(3) Overqualifie d	(4) Permanent contract	(5) Supervisory tasks	(6) Part-time work	(7) Atypical work	(8) Usual working hours (week)
Years since extended rights, male	0.00479 (0.00866)	0.0944* (0.0485)	0.00292 (0.0178)	0.0135* (0.00741)	0.000694 (0.00873)	-0.0216** (0.00960)	-0.00865 (0.00575)	0.310** (0.148)
Years since extended rights, female	0.0192** (0.00867)	-0.0350 (0.0521)	0.0128 (0.0174)	0.00560 (0.00556)	-0.00437 (0.00604)	-0.0152** (0.00687)	-0.00402 (0.00592)	-0.0452 (0.168)
Female	-0.228*** (0.0278)	-1.630*** (0.209)	0.0563*** (0.0163)	0.0310 (0.0230)	-0.0399*** (0.00790)	0.288*** (0.0218)	0.0146 (0.0196)	-1.405*** (0.270)
Medium-skill	0.0658** (0.0264)	0.146 (0.0942)	0.213*** (0.0345)	0.0334** (0.0156)	0.0332*** (0.0106)	0.0125 (0.0136)	0.0267*** (0.00797)	0.0210 (0.199)
High-skill	0.108*** (0.0285)	1.244** (0.532)	0.381*** (0.0620)	0.0107 (0.0418)	0.125*** (0.0208)	-0.0360 (0.0225)	0.0332* (0.0170)	0.396 (0.398)
Observations	20,235	3,479	4,185	12,064	12,027	13,491	12,521	10,367
R-squared	0.131	0.282	0.178	0.162	0.196	0.165	0.061	0.068
Mean of outcome	0.643	3.978	0.358	0.764	0.118	0.235	0.226	41.89
SD of outcome	0.479	2.503	0.479	0.424	0.323	0.424	0.269	7.487
Clusters								

Robust standard errors in parentheses

*** p<0.01, ** p<0.05, * p<0.1

Note: Weighted regressions. The sample includes foreign nationals aged 20-55 living in an EU Member State and who had arrived between 1995 and 2004. The sample is limited to the nationals of new EU Member States and third-country nationals residing in one of 'old' EU Member States (Austria, Belgium, Germany, Spain, Finland, France, Greece, Italy, Luxembourg, Portugal, Sweden and the United Kingdom) at the moment of the survey. All regressions control for gender, age group (five-year intervals), education, years since EU entry of the origin (otherwise zero), origin* arrival year (origin-specific time effects in the EU), destination* arrival year (destination-specific time effects) and interview year. Standard errors are clustered on 'reporting country and year' level. Data on monthly pay and overqualification is available only in 2014 wave. Regression on working hours (outcome 8) includes only individuals working full-time.

Source: Authors, 2018 using EU LFS Ad-hoc Modules on Migration 2008 and 2014 wave.

Annex 5: Table 34. The role of extending rights (to EU citizens' rights) for work-related outcomes of third-country nationals (family migrants) in the EU

VARIABLES	(1) Employed	(2) Monthly pay (decile)	(3) Overqualifie d	(4) Permanent contract	(5) Supervisory tasks	(6) Part-time work	(7) Atypical work	(8) Usual working hours (week)
Years since extended rights, male	0.0181*	0.0380	0.0292	0.0330**	-0.00364	-0.0316	0.00778	-0.161
	(0.0104)	(0.0672)	(0.0225)	(0.0151)	(0.00932)	(0.0256)	(0.0128)	(0.341)
Years since extended rights, female	0.0439***	-0.121	0.0126	0.0319**	0.0128**	-0.0313**	0.00558	-0.437
	(0.00938)	(0.0789)	(0.0227)	(0.0141)	(0.00493)	(0.0120)	(0.00851)	(0.361)
Female	-0.280***	-1.262***	0.0732**	0.0139	-0.0699***	0.334***	0.00129	-1.216***
	(0.0343)	(0.107)	(0.0299)	(0.0200)	(0.0187)	(0.0298)	(0.0285)	(0.351)
Medium-skill	0.0918***	0.176	0.150***	0.0482	0.0240	-0.0295	0.0127	0.0333
	(0.0307)	(0.151)	(0.0338)	(0.0240)	(0.0188)	(0.0217)	(0.0182)	(0.507)
High-skill	0.120***	1.407**	0.226***	0.0235	0.105***	-0.0966***	0.0308**	0.175
	(0.0383)	(0.469)	(0.0597)	(0.0317)	(0.0211)	(0.0333)	(0.0144)	(0.621)
Observations	6,933	913	1,126	3,287	3,280	3,629	3,398	2,375
R-squared	0.183	0.272	0.190	0.183	0.202	0.211	0.106	0.164
Mean of outcome	0.487	3.552	0.385	0.756	0.0995	0.340	0.220	40.58
SD of outcome	0.500	2.275	0.487	0.429	0.299	0.474	0.263	6.846

Robust standard errors in parentheses

*** p<0.01, ** p<0.05, * p<0.1

Note: Weighted regressions. The sample includes foreign nationals aged 20-55 living in an EU Member State and who had arrived between 1995 and 2004. The sample is limited to the nationals of new EU Member States and third-country nationals (who indicate 'family reasons' as the reason for migration) residing in one of 'old' EU Member States (Austria, Belgium, Germany, Spain, Finland, France, Greece, Italy, Luxembourg, Portugal, Sweden and the United Kingdom) at the moment of the survey. All regressions control for gender, age group (five-year intervals), education, years since EU entry of the origin (otherwise zero), origin* arrival year (origin-specific time effects in the EU), destination* arrival year (destination-specific time effects), and interview year. Standard errors are clustered on 'reporting country and year' level. Data on monthly pay and overqualification is available only in 2014 wave. Regression on working hours (outcome 8) includes only individuals working full-time.

Source: Authors, 2018 using EU LFS Ad-hoc Modules on Migration 2008 and 2014 wave.

Annex 5: Table 35 The role of extending rights (to EU citizens' rights) for employment and life quality of third-country nationals

VARIABLES	(1) Employed	(2) Feeling discriminated	(3) Subjective health	(4) Subjective happiness
Years since extended rights, male	0.0793*** (0.0257)	0.00136 (0.0264)	-0.00654 (0.0109)	-0.0207 (0.0138)
Years since extended rights, female	0.0542** (0.0250)	0.00152 (0.0214)	-0.00606 (0.0102)	-0.0159* (0.00958)
Female	-0.178*** (0.0577)	-0.0735 (0.0486)	0.0142 (0.0249)	-0.0184 (0.0233)
Medium-skill	0.0917 (0.0642)	-0.0659 (0.0484)	6.97e-05 (0.0257)	0.0598** (0.0242)
High-skill	0.164** (0.0738)	0.00426 (0.0647)	0.0461 (0.0291)	0.0507* (0.0286)
Observations	850	835	853	852
R-squared	0.363	0.342	0.425	0.393
Mean of outcome	0.593	0.240	0.757	0.732
SD of outcome	0.491	0.427	0.205	0.199

Robust standard errors in parentheses

*** p<0.01, ** p<0.05, * p<0.1

Note: Weighted regressions. The sample includes foreign nationals aged 20-55 living in an EU Member State and who had arrived between 1995 and 2004. The sample is limited to the nationals of new EU Member States and third-country nationals residing in one of 'old' EU Member States (Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, Sweden and the United Kingdom) at the moment of the survey. All regressions control for gender, age group (five-year intervals), education, origin, years since EU entry of the origin, destination* arrival year, and interview year. In the data, we cannot directly observe nationality of respondents, but know if an individual is a national of the reporting country. If an individual is not national of his/her reporting country, we proxy his/her nationality by the country of birth.

Source: Authors, 2018 using ESS data, 2002-2016 waves.

ANNEX 6. KEY PARAMETERS TO ASSESS IMPACTS OF GAPS IN EMPLOYMENT AND WAGES

Annex 6. Table 36. Key parameters to assess impacts of gaps in employment and wages

Native population (nationals of the reporting country)						
	Low-skill		Medium-skill		High-skill	
	Male	Female	Male	Female	Male	Female
Share in EU population (20-55-years-old)	10.8%	9.9%	24.1%	22.9%	10.6%	14.7%
Employment rate ²	66.6%	48.2%	78.5%	66.2%	87.8%	81.9%
Average monthly pay decile ⁴	5.21	3.16	5.93	4.12	7.54	6.17
Foreign nationals from within the EU						
	Low-skill		Medium-skill		High-skill	
	Male	Female	Male	Female	Male	Female
Share in EU population (20-55-years-old)	0.3%	0.4%	0.7%	0.7%	0.5%	0.7%
Employment rate ²	75.2%	60.5%	80.8%	66.3%	88.3%	76.8%
Conditional difference in employment rate to the native population, percentage point	4.47***	10.1***	0.255	-3.21**	-2.61**	-9.42***
Average monthly pay decile ⁴	4.50	2.58	5.11	3.22	7.25	5.49
Conditional difference in monthly pay decile to the native population	-0.588**	-0.448**	-0.931***	-0.931**	-0.313	-0.614**
Third-country nationals						
	Low-skill		Medium-skill		High-skill	
	Male	Female	Male	Female	Male	Female
Share in EU population (20-55-years-old)	0.8%	0.8%	0.7%	0.7%	0.3%	0.5%

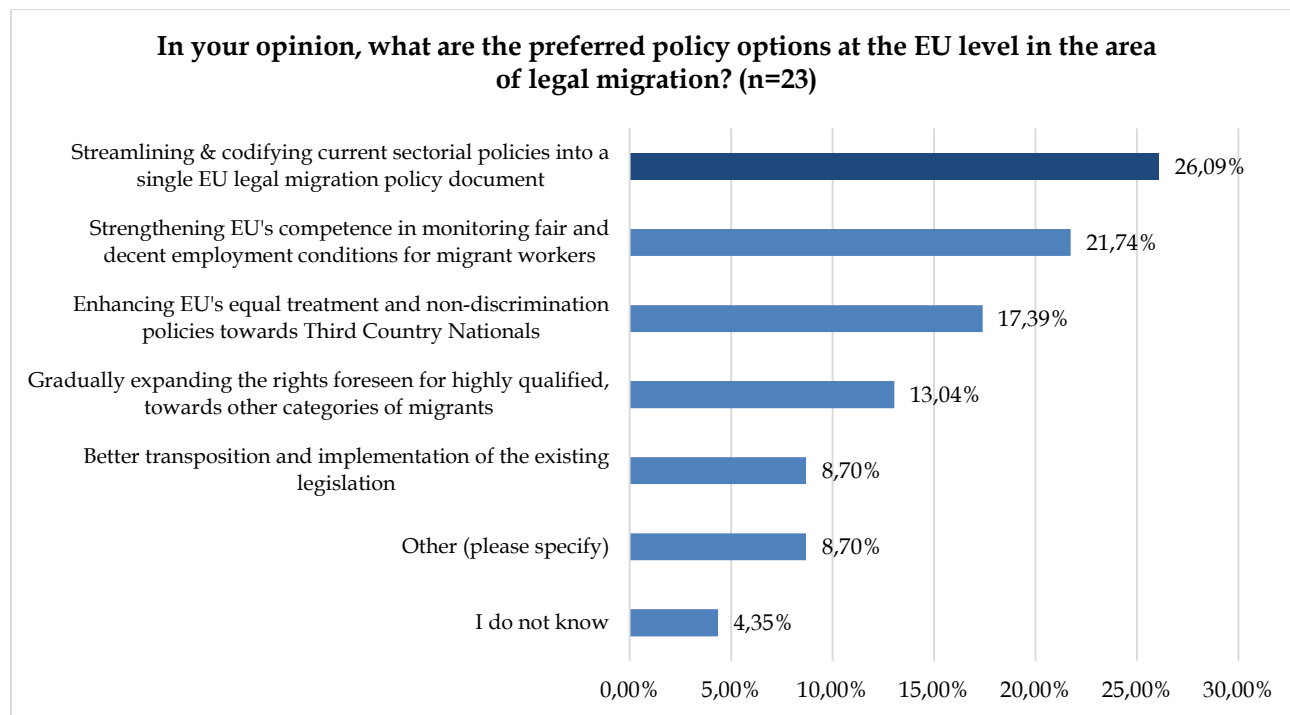
Employment rate ²	64.2%	42.5%	70.0%	51.5%	75.5%	54.2%
Conditional difference in employment rate to the native population, percentage point	-2.19	-8.39*	-6.37***	-12.8***	-13.9***	-26.5***
Average monthly pay decile ²	3.80	2.48	4.38	2.75	6.49	4.88
Difference in monthly pay decile (to the native population) to the native population	-1.317***	-0.536***	-1.695***	-1.426***	-1.013*	-1.323*

Notes: ¹ Estimated from Eurostat and LFS analysis. ² Descriptive statistics from LFS analysis - Ad-hoc Module on Migration, 2014. ³ Findings from econometric analysis of LFS - Ad-hoc Module on Migration, 2008 and 2014 for employment and 2014 for monthly pay. Population between aged 20 to 55; stars: *** p<0.01, ** p<0.05, * p<0.1.

Source: Authors, 2018

ANNEX 7. PREFERRED POLICY OPTIONS

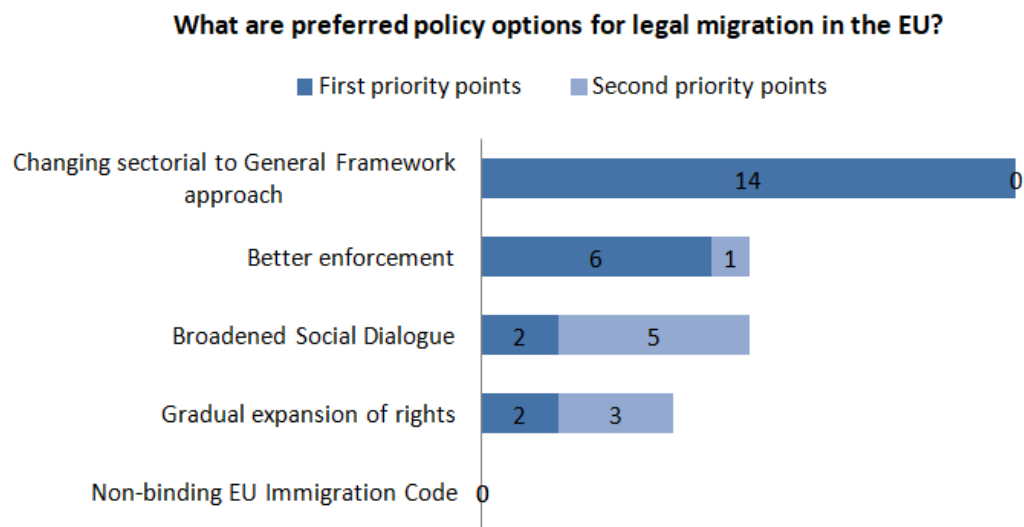
Annex 7: Figure 30. Percentage of e-questionnaire respondents on preferred policy options at EU level



Source: E-questionnaire, February-April 2018.

Delphi method discussants held two main positions on the most preferred policy options for legal migration policy in the EU. More than a half of Delphi method discussants felt very strong about changing the sectoral approach via a Binding Immigration Code or streamlined horizontal directive and saw added value in a broadened social dialogue as a complementary measure (see Figure 39). Others felt that the way forward should be through better enforcement of currently existing EU *aquis* (directives) in the area of legal migration, gradual expansion of EU Blue Card holder rights to other third-country nationals, covering new sectors and broadening the social dialogue.

Annex 7: Figure 31. Votes of Delphi method discussants on preferred policy options at EU level



Source: Authors, based on Delphi method discussion, Brussels, 9 March 2018.

ANNEX 8. CASE STUDIES ILLUSTRATING GAPS AND BARRIERS

This Annex provides practical and theme-specific case studies illustrating the gaps and barriers. Two case studies below provide examples of possible and potential trajectories of a seasonal worker (see Box 1), a Blue Card holder (see Box 2), third country nationals in domestic work sector (Box 3), and discrimination of third country nationals in the labour market (Box 4). They illustrate how gaps and barriers affect the lives of individuals and what exactly are/could be the individual costs.

Box 1. A possible trajectory of Seasonal Workers

Case Study: A possible migrant trajectory of seasonal workers under the Seasonal Workers Directive

Workers who decide to engage in seasonal work under the SWD need to be based in a third country (see B2). They first need to check what activities are considered seasonal in the Member State where they want to work. They then need to find an employer who is willing to offer them a valid work contract or a binding job offer. They also need to have health insurance and evidence of adequate accommodation. Depending on the duration of the seasonal work, they might need to apply for a visa or/and work authorisation. If they, however, come from a country with which the EU has visa liberalisation (e.g. Ukraine), they might be exempted from the visa application. Nevertheless, the Member State where the seasonal worker wants to be employed might require a labour market test as part of the application process, meaning that the prospective employer needs to prove to the administration that there are no other national, EU or legally residing TCN workers available to perform the job (see B2).

Once provided with a visa and/or work permit, seasonal workers might be hosted in accommodation arranged by the employer, who must ensure an adequate standard of living according to national law and/or practice (see G5). They cannot apply for family reunification to bring their spouses during the period of stay as a seasonal worker (see G9). They can, however, change employers at least once depending on the Member State (see G3). After the end of their contract and the expiry of the work authorisation, seasonal workers need to leave the territory of the Member State after a maximum of nine months, unless the host country provides an opportunity according to its national law for in-country application and/or transition to a national permit (see G6). If seasonal workers fully respect the conditions under the directive during their stay, they can benefit from facilitated entry the following year, which varies according to host Member State (see B3). However, if seasonal workers have the option to stay in the host Member State, the period during which they resided as seasonal workers will not be counted in the five-year residence period required to obtain an EU long-term residence permit (see G6).

Source: Authors, 2018.

Box 2. A possible trajectory of Blue Card holders

Case Study: A possible migrant trajectory of Blue Card holders

Depending on where Blue Card permit applicants would like to work, they might be able to apply for such a permit while already residing legally in a Member State; otherwise, they are required to do so while they are outside the territory of the Member State (see B2). TCNs who apply for Blue Card permits need to find a job and an employer in a Member State who is willing to offer them a valid work contract or a binding job offer of at least one year, as well as a salary which is at least 1.5 times the average gross annual salary in the Member State concerned. In addition, they need to meet other requirements such as having health insurance and present documents attesting to their relevant professional qualifications in the field specified in their contract or, if engaged in a regulated profession, present a document attesting fulfilment of the conditions set out under national law for the exercise of the profession (see G10). Depending on the host Member State, they might also be

required to provide their address in the territory of the host country concerned (see B2). Furthermore, the Member State where Blue Card applicants want to be employed might require a labour market test as part of the application process, meaning that the prospective employer needs to prove that there are no other national, EU or legally residing TCN workers available to perform the job (see B2).

For the first two years Blue Card holders are allowed to exercise only the employment activities for which they were granted a work authorisation. During these two years, Blue Card holders can change their employer only after prior authorisation by the competent authorities of the Member State of residence (see G3). If Blue Card holders become unemployed, they have three months to look for a job during which they are allowed to stay in the territory of the Member State (see G4). They can reunite with their family members (see G9). They can also reside in other Member States and accumulate periods of residence in different Member States in order to fulfil the five-year residence requirement for access to long-term residence (see G6). They can also benefit from circular migration outside the EU before and after getting long term-residence status because they are allowed extensive periods of absence compared to other categories of migrants (see B3).

Source: Authors, 2018.

Box 3. Case study: Third-country nationals in domestic work sector

Case Study: A possible trajectory of migrant domestic workers

With the ageing population and increased female participation in the EU's labour market, the need to outsource someone else to perform cleaning, child care or elder care tasks has increased.⁴⁶⁵ In light of these societal developments at a global level, the ILO has called for a Decent Work for Domestic Workers Convention (No. 189).⁴⁶⁶ The European Parliament's Committee on Employment and Social Affairs (EMPL Committee) made a concrete suggestion for the EU-level intervention in the motion for the above-mentioned resolution. The EMPL Committee stressed "the necessity of adapting European migration policies to the needs of the labour market in terms of domestic workers, in order to protect female migrants from ending up in illegal work situations."⁴⁶⁷

There are certain barriers that various academics⁴⁶⁸ attempted to deconstruct, firstly because domestic work is not considered proper 'work' and in many Member States is not properly regulated. In particular, labour laws in many countries do not have tools to enforce labour rights standards in private households, as it is an atypical place for employment. For example, the possibility for a labour inspectorate to enter the house was for a long time an exception found only in Ireland. Secondly, it is perceived as 'low value' work that does not require any 'skills' or 'qualifications', as it is misperceived, from the standpoint of the feminisation of migration, that any female possesses them 'by nature'.⁴⁶⁹ Thirdly, such work is low-paid and carries a 'low social status'.

The entry channels and labour conditions for domestic workers thus have been left entirely at the discretion of Member States. For example, Spain, Italy, Greece and Cyprus have created a quota system for migrant domestic workers, whereas the UK and Ireland have opened borders only for migrants from the European Economic Area (EEA).⁴⁷⁰ On the other hand, the Scandinavian countries,

⁴⁶⁵ F. Anthias and M. Cederberg (2010), "Gender, Migration and Work: Perspectives and Debates in the UK", in *Women in New Migrations*, K. Slany, M. Kontos and M. Liapi (eds), Cracow: Jagellonian University Press, p. 35.

⁴⁶⁶ ILO (2011).

⁴⁶⁷ European Parliament (2016), REPORT on women domestic workers and carers in the EU, A8-0053/2016, 5 April (2015/2094(INI)), Opinion of the Committee on Employment and Social Affairs by co-Rapporteur Tania González Peñas, Committee on Employment and Social Affairs (www.europarl.europa.eu/sides/getDoc.do?type=REPORT&mode=XML&reference=A8-2016-0053&language=EN).

⁴⁶⁸ Frank and Spehar (2010); H. Schwenken, "'Domestic Slavery' versus 'Workers Rights': Political Mobilizations of Migrant Domestic Workers in the European Union", Working Paper 116, January, The Center for Comparative Immigration Studies, University of California, San Diego; H. Lutz (ed.) (2008), *Migration and Domestic Work: A European Perspective on a Global Theme*, Hampshire: Ashgate.

⁴⁶⁹ In particular, M. Hrzenjak (2007), *Invisible Work*, Ljubljana: Mirovni inštitut, pp. 59-61.

⁴⁷⁰ Gallotti (2009).

the Netherlands and Germany have been criticised by migrant domestic workers' interest groups for not including any legal entry channels for migrant domestic workers "in their [national] managed migration policies."⁴⁷¹

A common pattern among Member States is the employment of migrant women for whom domestic work is a main entry point into the labour market. Data from the 2004 European Community Labour Force Survey show that 36% of all female migrant workers in Spain find work as domestic workers. Similarly, 27.9% and 21.1% of all female migrant workers are hired by private households in Italy and France. This category of migrant workers has a precarious legal status and is more vulnerable to abusive treatment.⁴⁷² In addition, many Member States maintain possibilities to bring domestic workers for diplomats, and in these cases they are often tied to a particular employer and live-in arrangement.

Despite these figures, among a majority EU Member States there is a reluctance to recognise households as places for paid employment and to create an admission category for migrant domestic workers in their national legislation. Therefore, often domestic work becomes part of informal economy, where migrant domestic workers are undeclared and subsequently risk falling in an irregular situation. For this reason, they often cannot benefit from the rights provisions under Single Residence Permit.

'Au pairs' as covered by the recasted Students and Researchers Directive is to a certain extent acknowledging the growing needs for the domestic work in the EU, however it is conceptualised as a 'cultural exchange' and not a 'employment' scheme entailing the lack of labour rights safeguards. The Seasonal Workers Directive, aimed to facilitate entry and labour conditions for perceived 'low skilled/low qualified' jobs also do not cover migrant domestic workers, though domestic work in households is not 'seasonal' but 'long-term'. Therefore, growing needs for migrant domestic work in Europe are not covered by any of the current EU first admission or sectoral directives.

Currently, the EU Family Reunification Directive is *de facto* the sole legal entry means for women who are willing to engage in domestic work in line with national labour rights standards. Other avenues for migrant women are more fragile, for example touristic and, to a lesser extent, student visas to work in the undeclared domestic work sector. In these latter cases, legal entry for another purpose ends up in the woman overstaying her visa and leads to irregular status.

The high risks of labour exploitation, heightened by 'live-in' arrangements, include situations of servitude that are well-documented by legal cases in national and European courts,⁴⁷³ as well as the phenomenon of 'modern slavery' that is often portrayed in the media. Migrant domestic workers claim the possibility to claim their labour rights and have legal entry channels would be the best cures for labour exploitation and modern slavery.⁴⁷⁴ Inability to enter legally in the country for Migrant Domestic Workers could be compared with the situation of asylum seekers that are arriving into the EU and residing in an irregular situation. The later due to inability and/or fear of deportation when asking for help, thus resulting in 1.3-1.8% higher estimated risk of mortality rates.⁴⁷⁵

⁴⁷¹ Frank and Spehar (2010), p. 54.

⁴⁷² ILO (2013).

⁴⁷³ For example, at the European Court of Human Rights, *Siliadin v. France*, (application no. 73316/01). ECtHR Chamber Judgment delivered on July 26, 2005. 43EHRR16 (2006); *Kawogo v the United Kingdom* (application no. 56921/09), communicated to the Government in June 2010; *C.N. v the United Kingdom* (application no. 4239/08), communicated to the Government in March 2010.

⁴⁷⁴ Frank and Spehar (2010), p. 54.

⁴⁷⁵ van Ballegooij, V., C. Navarra, V. Moreno-Lax, M. Fernandes (2018) Humanitarian Visas European Added Value Assessment accompanying the European Parliament's legislative owninitiative report (Rapporteur: Juan Fernando Lopez Aguilar), July 2018, Brussels. (<http://www.europarl.europa.eu/cmsdata/150782/eprs-study-humanitarian-visas.pdf>)

Box 4. Case study: Discrimination of immigrants in the labour market

Discrimination of immigrants in the labour market
<p>Discrimination in the labour market represents a situation when an employer treats differently two (potential) employees who only differ with respect to characteristics that do not affect their productivity at work.⁴⁷⁷ Hiring-productivity or wage-productivity gaps may arise for different reasons. The classical explanations provided by Phelps & Arrow are “statistical discrimination” and “preference-based discrimination”.⁴⁷⁸ Statistical discrimination arises due to negative stereotypes or a general misconception of native employers about the productivity of immigrants. This situation can turn into a “self-fulfilling prophecy” if it reduces the expected return on human capital investments and thus discourages immigrants to improve their skills. Preference-based discrimination refers to a situation when the preferences of employers – or their employees or customers – translate into lower demand and lower wages for foreign workers.</p> <p>Carlsson & Rooth present evidence of ethnic discrimination in the recruitment process in Sweden by sending fake applications (that were randomly assigned Middle-Eastern names, like ‘Mohamed’ or Swedish names) to real job openings.⁴⁷⁹ They find that applications with Swedish names receive 50% more invitations to interviews. They explain this result by the “ethnic penalty”, which denotes the difference in labour market positions of immigrants as opposed to the native individuals and that cannot be explained by demographic and human capital factors. A potential explanation for wage discrimination (relating to statistical discrimination) can be that education and labour market experiences acquired abroad are less valued than domestically acquired human capital.⁴⁸⁰ Friedberg studies Israeli labour market wage differences and finds that this perception can fully account for the wage penalties on immigrants with the same professional and productivity characteristics as native individuals. Bratsberg & Ragan also find a link between wage penalties and foreigner education attainment in the US. They show that any additional schooling in the US upgrades previous education.⁴⁸¹</p> <p>Statistical discrimination is also documented in the experimental study by Oreopoulos: thousands of randomly manipulated resumes were sent in response to online job postings in Canada to investigate why economic immigrants, who are allowed in the country based on their skills, still struggle in the labour market.⁴⁸² The study finds substantial discrimination across a variety of occupations against applicants with foreign experience and/or those with Indian, Pakistani, Chinese, and Greek names compared to English names. Listing language fluency, multinational firm experience, education from highly selective schools, or active extracurricular activities had no diminishing effect. Recruiters had tendency to justify this behaviour based on language skills concerns.</p> <p><i>Policy implication: Such evidence points to the importance of transparent systems for recognition of foreign skills and qualifications, which are trusted by native employers. Language, however, appears to be a bona fide concern and can be used as justification for indirect discrimination. Competence-based assessments, such as during interview or requests for written samples, can simply and efficiently prove language skills by avoiding the discriminatory outcomes based on negative biases.</i></p>

⁴⁷⁶ L. Vosyliūtė (2011), “Migrant Domestic Workers In The European Union: Potential Human Rights Avenues For Empowerment”, Budapest: Central European University.

⁴⁷⁷ Heckmann (1998).

⁴⁷⁸ Phelps (1972); Arrow (1973).

⁴⁷⁹ Carlsson and Rooth (2007).

⁴⁸⁰ Friedberg (2000).

⁴⁸¹ Bratsberg and Ragan (2002).

⁴⁸² Oreopoulos (2011).

Kampelmann & Rycx use Belgian firm-level data and direct information on wages and labour productivity to measure discrimination against immigrants in the labour market.⁴⁸³ The results suggest that not all of the observed wage differences between immigrants and native individuals are explained by productivity differences (for instance, due to lower language skills). Despite the strong anti-discrimination laws in Belgium, the authors still find evidence for some wage discrimination against immigrants. They find that a 10 percentage point increase in the share of male immigrants in a Belgian firm is associated with a 0.2% average wage decrease in this firm. Using the same methodology, Bartolluci finds stronger effects for Germany, where a 10 percentage point increase in the share of male immigrants in a firm is associated with a 1.3 percent average wage decrease in this firm.⁴⁸⁴

Bartolluci also reports double-discrimination against female immigrants in Germany: a 10 percentage point increase in the share of female immigrants is associated with a 2.7% lower average firm wage. Yet such results might not be driven by discrimination per se, but rather by the fact that immigrants have lower bargaining power, for instance, due to legal obstacles, e.g. employment is tied to a specific employer/sector, or high costs of unemployment. Kampelmann & Rycx find that institutional factors like collective bargaining and firm size appear to decrease wage discrimination against immigrants.

Source: Authors, 2018.

⁴⁸³ Kampelmann and Rycx (2016).

⁴⁸⁴ Bartolluci (2014).

ANNEX 9. SOCIO-ECONOMIC IMPACTS

The economic research has examined the impacts of legal immigration across various economic and social aspects. In this overview, we focus on the empirical studies that evaluated the impact of immigration on the labour markets, ageing, growth and productivity.

1) The impact of immigration on the labour markets

The recent study by Edo et al. surveys the vast literature on the effects of immigration on the labour market in the destination countries.⁴⁸⁵ The authors report a certain consensus in the literature: studies find that immigration has a negligible average impact on the wages and employment of national workers (belonging to the native population). However, because adjustments take time, the initial and longer run impacts of immigration can differ: while in the shorter term immigrants can indeed displace national workers with similar age and skill profiles, in the longer term, both the national workers and local employers can adjust to higher and more diverse labour supply due to immigration.

Moreover, a number of studies has shown that national and immigrant workers are complementary in production: immigrants specialise in different production tasks due to different abilities and experiences and therefore rather than causing lower wages or higher unemployment, they can instead complement the national workers and even make the latter more productive through occupational reallocation and specialisation in more advanced tasks.⁴⁸⁶

2) The impact of immigration on demographic developments

Peri discusses the impact of immigration on demographic issues in the EU.⁴⁸⁷ He argues that immigrants, who are younger and have higher fertility relative to the native population, could change the age composition and the rates of population growth of receiving European countries. Peri evidences that young immigrants would increase the ratio of working to retired population and hence improve the sustainability of the welfare systems.⁴⁸⁸ In the labour markets, immigrants could provide the skills and the abilities for jobs to be performed by young workers, preserving the demand for complementary jobs performed by older population.

Such positive effects, however, are possible given a certain level of professional qualifications (or, at least, the potential to acquire or upgrade them). For instance, a recent report by OECD has identified a substantial number of jobs at the risk of automation, mainly in low-skill or high-routine occupations. Therefore, it would be risky if immigrants concentrate in these segments of the labour market.⁴⁸⁹

One positive example where immigrants have already contributed to filling the labour demand relates to home and health services (among others, to the elderly population). In several EU countries, especially in southern Europe, large part of these services is already performed by immigrants. In the absence of immigrants, these services would be performed mainly by stay-at-home women, affecting their labour force participation and their retirement decision.⁴⁹⁰ However, as Annex 8 Box 3. Case study: Third-country nationals in domestic work sector

⁴⁸⁵ Edo, A., Ragot, L., Rapoport, H., Sardoschau, S., & Steinmayr, A. (2018). *The Effects of Immigration in Developed Countries: Insights from Recent Economic Research* (No. 2018-22). CEPII research center.

⁴⁸⁶ Peri, G., & Sparber, C. (2009). Task specialization, immigration, and wages. *American Economic Journal: Applied Economics*, 1(3), 135-69. Cattaneo, C., Fiorio, C. V., & Peri, G. (2015). What Happens to the Careers of European Workers When Immigrants "Take Their Jobs"? *Journal of Human Resources*, 50(3), 655-693. Foged, M., & Peri, G. (2016). Immigrants' effect on native workers: New analysis on longitudinal data. *American Economic Journal: Applied Economics*, 8(2), 1-34.

⁴⁸⁷ Peri, G. (2011). Immigration and Europe's Demographic Problems: Analysis and Policy Considerations. *CESifo DICE Report*, 9(4), 3-8.

⁴⁸⁸ Peri, G. (2011). Immigration and Europe's Demographic Problems: Analysis and Policy Considerations. *CESifo DICE Report*, 9(4), 3-8.

⁴⁸⁹ Nedelkoska, L. and G. Quintini (2018), "Automation, skills use and training", OECD Social, Employment and Migration Working Papers, No. 202, OECD Publishing, Paris.

⁴⁹⁰ Peri, G., Romiti, A., & Rossi, M. (2015). Immigrants, domestic labor and women's retirement decisions. *Labour Economics*, 36, 18-34.

is predominantly undeclared work, where migrant women often fall into irregularity. Such workers are by and large not seen in the explicit EU and in many national first admission categories.

Inability to enter legally in the country for such categories could be compared with the situation of asylum seekers that are arriving into the EU and residing in an irregular situation. Recent European Parliament study found, that despite many basic social, employment and health rights applicable to such categories the outcomes show that their situation and in particular health is suffering due to inability and/or fear of deportation when asking for help, thus resulting in 1.3-1.8% higher estimated risk of mortality rates.⁴⁹¹

3) The impact of immigration on innovation and growth

Several studies have found a positive effect of immigration on innovation though patenting in destination countries. Kerr and Lincoln use random visa allocations to find causal effects for the United States.⁴⁹² They find that admission of high-skilled immigrants leads to an increase in science and engineering employment and patenting through direct contributions by immigrants. Hunt and Lioselle reach a similar conclusion; they evaluated whether skilled immigrants increase innovation in the US. Using state panel data from 1940-2000, they find that a 1 percentage point increase in immigrant college graduates' population share increases patent per capita by 9-18 percent.⁴⁹³ Peri analyses the impact of immigration on state employment, average hours worked, physical capital accumulation, and total factor productivity.⁴⁹⁴ He finds no evidence that immigrants crowd out employment and hours worked by natives, however there is robust evidence that they increase the total factor productivity and decrease capital intensity. Another channel that may exert a positive productivity effects but is harder to measure may arise from the "place of birth" variety among workers due to immigration. This may generate more ideas and increase the variety of goods and services supplied locally or enhance productivity.⁴⁹⁵ Several studies find that cultural diversity is an important channel to generate new ideas and innovation in Europe.⁴⁹⁶

Regarding aggregate economic impact, a report by the IMF in 2016 finds that immigration increases the GDP per capita of receiving economies, mostly by raising labour productivity.⁴⁹⁷ The estimated effect is economically significant: a 1 percentage point increase in the share of migrants in the adult population can raise GDP per capita by up to 2 percent in the long run. Both high- and low-skilled migrants contribute, in part by complementing the existing skill set of the population. Similarly, Alesina, Harnoss, and Rapoport and Ortega and Peri found that a higher share of immigrants increases GDP per capita.⁴⁹⁸ The effect of migration appears to

⁴⁹¹ van Ballegooij, V., C. Navarra, V. Moreno-Lax, M. Fernandes (2018) Humanitarian Visas European Added Value Assessment accompanying the European Parliament's legislative owninitiative report (Rapporteur: Juan Fernando Lopez Aguilar), July 2018, Brussels. (<http://www.europarl.europa.eu/cmsdata/150782/eprs-study-humanitarian-visas.pdf>)

⁴⁹² Kerr, W. R., & Lincoln, W. F. (2010). The supply side of innovation: H-1B visa reforms and US ethnic invention. *Journal of Labor Economics*, 28(3), 473-508.

⁴⁹³ Hunt, J., & Gauthier-Loiselle, M. (2010). How much does immigration boost innovation?. *American Economic Journal: Macroeconomics*, 2(2), 31-56.

⁴⁹⁴ Peri, G. (2012). The effect of immigration on productivity: Evidence from US states. *Review of Economics and Statistics*, 94(1), 348-358.

⁴⁹⁵ Di Giovanni, J., Levchenko, A. A., & Ortega, F. (2015). A global view of cross-border migration. *Journal of the European Economic Association*, 13(1), 168-202. Ortega, Francesco, and Giovanni Peri. "Openness and income: The roles of trade and migration." *Journal of International Economics* 92, no. 2 (2014): 231-251.

⁴⁹⁶ Bosetti, V., Cattaneo, C., & Verdolini, E. (2015). Migration of skilled workers and innovation: A European perspective. *Journal of International Economics*, 96(2), 311-322. Parrotta, P., Pozzoli, D., & Pytlikova, M. (2014). The nexus between labor diversity and firm's innovation. *Journal of Population Economics*, 27(2), 303-364. Ozgen, Ceren, Cornelius Peters, Annekatrin Niebuhr, Peter Nijkamp, and Jacques Poot. "Does cultural diversity of migrant employees affect innovation?." *International Migration Review* 48 (2014): S377-S416.

⁴⁹⁷ Jaumotte, M. F., Koloskova, K., & Saxena, M. S. C. (2016). *Impact of migration on income levels in advanced economies*. International Monetary Fund.

⁴⁹⁸ Alesina, Alberto, Johann Harnoss, and Hillel Rapoport. "Birthplace diversity and economic prosperity." *Journal of Economic Growth* 21, no. 2 (2016): 101-138. Ortega, F., & Peri, G. (2014). The aggregate effects of trade and migration: evidence from OECD countries. In *The Socio-Economic Impact of Migration Flows* (pp. 19-51). Springer, Cham.

operate through an increase in total factor productivity, reflecting an increased diversity in productive skills and, to some extent, a higher rate of innovation. Looking at OECD countries, Aleksynska and Tritah also find a positive effect of immigration on income per capita and productivity of receiving countries, especially for prime-age immigrants.⁴⁹⁹

⁴⁹⁹ Aleksynska, M., & Tritah, A. (2015). The Heterogeneity of Immigrants, Host Countries' Income and Productivity: A Channel Accounting Approach. *Economic Inquiry*, 53(1), 150-172.

ANNEX 10. GLOSSARY OF TERMS

TERM	Working Definition for the Purposes of this Research Paper
EU national	A person holding the nationality of an EU Member State. For statistical purposes this category is often referred to as 'native population' of the EU MS. It includes mobile EU citizens, i.e. EU nationals residing and working in a second EU Member State. It is also referred to as 'EU born' population.
Intra-EU mobility	The possibility for third-country nationals and EU citizens to move from one EU Member State to another for the purpose of employment, self-employment, studies, etc.
Irregular migration	As distinguished from legal migration, this usually refers to a situation when a third-country national entered the EU in an irregular manner (bypassing border controls, on forged documents), or resides irregularly, or who entered regularly and subsequently fell into an irregular situation (by overstaying the visa, if employment was terminated).
Labour migration	The main component of EU legal migration: third-country nationals who come to the EU for the purpose of employment or self-employment.
Legal migration	The area of EU migration policies covering conditions of entry/residence and rights for purposes of employment and self-employment, studies, family reunification and long-term residence. Thus legal migration is broader than labour migration.
Migrant	Any person who leaves his/her country for periods longer than three months for the purposes of residence and/or employment, studies, family reunification, etc., in another country.
Migrant worker	A migrant who comes for purpose of employment to the EU or elsewhere. The term is used in various international and regional documents.
Mobile EU citizen	An EU Member State national living and/or working in an EU Member State other than his/her own. Such citizens collectively can be also defined as 'EU born population', 'mobile EU citizens' or 'EU immigrants', depending on data source.
Native population	EU Member State nationals born and living and/or working within their own country. Also referred to as 'natives' or 'nationals of a Member State'.
Sectoral directives	These are four EU legal migration directives assigning different statuses and rights depending on the category. These directives are: EU Blue Card Directive, Intra-Corporate Transferee Directive, Seasonal Workers Directive, Students and Researchers Directive.
Third-country national	A national of a non-EU country who resides legally (unless indicated otherwise) within the EU. This category covers all persons from third countries regardless of their purpose of stay in the EU. In this study TCNs who are migrant workers can also be referred to as 'third-country workers', their family members as 'third-country family members', and TCNs who are students as 'third-country students'.
Highly qualified worker	A 'highly qualified' migrant, used in reference to the EU's current Blue Card scheme.
Highly skilled worker	A broader term that includes those with skills that are lacking at the national level, used in reference to national schemes that are based on actual skill levels and not official qualifications. The new Blue Card revision mentions replacing 'highly qualified' with 'highly skilled'.

The EU seeks to build a comprehensive immigration policy in which legally residing non-EU nationals, referred to as third-country nationals (TCNs), should be treated fairly and in a non-discriminatory manner. The EU has adopted secondary legislation covering different categories of TCNs and various stages of the migration process. However, a number of gaps and barriers can still be identified. These concern notably the lack of incorporation and implementation of international and EU human rights and labour standards. Furthermore, they stem from the sectoral approach taken in the EU legal framework, not covering all TCNs and not in the same way, and in part leaving parallel national schemes in place. Different treatment between TCNs and further barriers result in differences in their employment rate, over-qualification, lower job quality, lower earnings and poorer long-term integration outcomes. At societal level, these deficiencies undermine the EU's ability to attract workers, to tackle EU labour market shortages in specific sectors or occupations, to address demographic changes (an ageing population), and to boost innovation and growth. Further EU action in this area could address these gaps by better implementing and enforcing existing standards, gradually extending the EU legislation to include other sectors, or revisiting the idea of adopting a binding immigration code covering all TCNs. Depending on the policy option pursued, some €21.75 billion in individual and economic benefits could be achieved each year.

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