

The EU's legal migration *acquis*: Patching up the patchwork

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List of abbreviations

CJEU	Court of Justice of the European Union
CMR	Centre for Migration Law
DG	Directorate-General
EMN	European Migration Network
FRD	Family Reunification Directive
LMT	labour market test
LTR	long-term resident(s)
NGO	non-governmental organisation
ICT	intra-corporate transfer
TCN	third-country national
TFEU	Treaty on the Functioning of the European Union

Executive summary

The European Commission and EU member states must increase the opportunities for the intra-EU mobility of already lawfully present third-country nationals (TCNs). A considerable workforce of TCNs is waiting to work across EU borders in the same way as EU citizens; their waiting is not working towards making the EU legal migration *acquis* patchwork work.

As outlined in its 2020 Communication on the New Pact on Migration and Asylum and subsequent documents, the Commission has set out to make the patchwork work. To do so, the policy tools it must engage are, among others, the enforcement of existing norms and legislative actions to adjust existing norms. The New Pact is written for a post-COVID-19 time when the Commission foresees an increased need for TCN labour migrants to address the EU's demographic, labour market-related and innovation challenges.

The core of the current EU legal migration *acquis* is seven directives adopted between 2003 and 2016. In comparison with the EU asylum *acquis*, where most instruments have been subject to almost constant debate since their adoption between 2003 and 2005, the legal migration *acquis* has remained relatively stable. This legislative stability has, however, hardly promoted the implementation and application of legal migration directives in the member states.

Chapter 2 gives a detailed overview of the implementation practices and problems concerning the Family Reunification Directive, the Long-Term Residents (LTR) Directive, the Single Permit Directive and the Blue Card Directive. We provide the background to the legislative patchwork and suggest **improving the engagement of the available harmonisation instruments** by litigating and setting guidelines. The currently low number of infringement cases on the labour migration directives illustrates the Commission's limited use of this instrument. However, a low number does not necessarily reflect member states' levels of compliance.

With the New Pact, the Commission is striving for more than just compliance. It calls for redesigning parts of the legal migration *acquis*. We recommend that the **redesigning of the Single Permit Directive deals with all procedures** on visas for entry *and* procedures

on renewal and status switching. This could benefit the aim of enabling quick access to LTR status and intra-EU mobility. The Directive also sets a right to equal treatment for all working migrants. To improve its enforcement, a shift in the burden of proof of unequal treatment from the single permit holder to the employer is recommended, as well as **engaging third parties in the enforcement of equal treatment rights**.

We are reluctant to add entry conditions for low-skilled work to the Single Permit Directive, as we fear that the member states will not find a compromise on the topic easily. However, to facilitate migration for medium-skilled jobs, rather than expand the Directive's scope, we **recommend adding an optional 'light blue' alternative for medium-skilled or -qualified labour** to the recast Blue Card Directive.

Chapter 3 focuses on how to reduce the artificial walls between national labour markets for settled TCNs. Citizenship is the ultimate status that grants access to the right of intra-EU mobility. However, naturalisation procedures take time. The waiting time for TCNs to be eligible for naturalisation and become mobile is time lost. The relatively recent Directive on intra-company transferees and the Students and Researchers Directive already facilitate intra-EU mobility. These directives provide examples of different schemes that meet member states' needs for control *and* open European labour markets to the already present TCNs.

We argue that the intra-EU mobility of TCNs is key to patching up the legal migration *acquis* patchwork. It would integrate the legal migration *acquis* into internal market logic to the benefit of migrants, employers and the EU member states. We recommend **facilitating TCNs' intra-EU mobility further**, rather than stimulating new recruitment tools and neglecting the TCNs already lawfully present in the Union.

Along the lines of the rights granted to intra-company transferees, international students and researchers, the EU should enhance possibilities for TCNs to move within the EU for the purpose of work, irrespective of their level of qualification. They are 'staying put' until the ultimate right to move within the Union – EU citizenship – becomes available. Their obligatory waiting is not working towards making the patchwork work.

Introduction

Changing demographic trends in Europe, foreseeable shortages on national labour markets and a lack of talent to promote innovation are challenges that the European Commission intends to address with legal migration and a 'skills and talent package'. In its 2020 New Pact on Migration and Asylum, the Commission presented, first and foremost, an extensive policy agenda on asylum. Plans for furthering the legal migration *acquis* will only be developed in the years to come.

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To improve the legal migration *acquis* for the purpose of demographic and labour market demands, the Commission envisages engaging in at least two policy tools: (i) the enforcement of existing norms; (ii) and the adjustment of existing norms through legislative actions.

In this Issue Paper, we critically discuss these two tools for furthering the EU's legal migration *acquis*. Firstly, we hold that the EU and its member states should work towards harmonisation and engage with the Court of Justice of the EU (CJEU). Secondly, our principal argument is that the Commission and member states must increase opportunities for intra-EU mobility of already present third-country nationals (TCNs). A considerable workforce of lawfully residing TCNs is waiting to work across national borders like EU citizens; their waiting is not making the patchwork work.

This Issue Paper is structured as follows: Chapter 1 briefly introduces the ideas voiced by the Commission in the New Pact on Migration and Asylum. Chapter 2 maps the implementation of the wider legal migration *acquis* and how it remains problematic given the CJEU's limited role. Chapter 3 examines the intra-EU mobility rights of TCNs – one of the Commission's focus points and an understudied policy field that we argue deserves more attention. The Conclusion puts forward five recommendations to guide the Commission and the member states in making the existing EU legal migration patchwork work.

Chapter 1: The New Pact on Migration and Asylum

The Commission's 2020 New Pact suggests that the EU should make new efforts to patch up its patchwork legal migration *acquis*. Four elements seem particularly significant:

1. The Commission suggests amending the Long-Term Residents (LTR) Directive 2003/109/EC to strengthen TCNs' right to reside and work in a second EU country. The status of 'long-term resident' is underused, and so is, in connection, the labour potential of LTR. To promote intra-EU mobility, the Commission suggests facilitating access to the labour market by "strengthening the right of long-term residents to move and work in other Member States."¹ Asylum status holders could also be granted long-term residency already after three years of residence in the first member state.

These ideas would strengthen the use of the European LTR status and provide TCNs with wider access to member states' labour markets. If a political agreement can be reached, this could benefit these labour markets because it entails a substantial increase in opportunities for intra-EU mobility for TCNs. Harmonising the conditions for entry and stay, procedures and rights would lead to more legal certainty for TCNs, employers and administrative bodies.

2. Compliance with the Single Permit Directive 2011/98/EU – which created the single permit for work and residence, simplifying TCN's admission procedures – could be improved. Its scope could also be clarified *and* broadened to include admission and residence conditions for low- and medium-skilled workers.
3. The Commission hopes that agreement on the revised Blue Card Directive 2009/50/EC will be reached soon. The Directive aims to attract highly qualified TCNs for the EU labour market, but this has not yet been delivered. The recast project has been at a standstill for years. The revised Directive would facilitate TCNs' intra-EU mobility and expand its scope to different salary levels for occupations in shortage and recent graduates.
4. An EU talent pool will be set up to link TCNs from partner countries to job vacancies on the European labour market. This somewhat ambitious idea dovetails with the EU Talent Partnerships to facilitate legal migration and mobility. For the time being, using EU funding, the Partnerships produce small-scale migration projects that are primarily related to development cooperation or return policy.²

Considering migrants' interests in long-term settlement, these Talent Partnerships do not, in our reading, offer anything close to a legal migration pathway, yet. The projects offer training or work experience in Europe for citizens from designated

countries in Africa and allow them to build a network for job opportunities in their country of origin. If they were to apply for a Blue Card, for example, they would still need to fulfil the extensive requirements linked to that status.

These Talent Partnerships do not offer anything close to a legal migration pathway, yet.

The Commission's four ideas – they are not yet proposals – refer to **enforcement, adjustment and funding** as the three policy tools for a common approach to TCNs' legal migration in the EU.

The New Pact does not mention the migration of entrepreneurs nor service providers. The topic of an entry route for migrant entrepreneurs was raised in the online public consultation, however, suggesting that it may be part of the proposals to be developed. Interestingly, in its comment on the New Pact, the German Presidency of the Council did call attention to the '(temporary) migration of service providers'.³ This may be a reference to the intra-EU service provision and posting of workers – an interlinking of policy domains we view positively. This may also refer to the need to better implement the mobility chapters in the EU's trade agreements with third countries, including the UK, as of recent.⁴

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The New Pact on Migration and Asylum is written for the post-COVID-19 days. According to the Organisation for Economic Co-operation and Development, migratory flows into the EU decreased by 35% during the pandemic.⁵ Travel restrictions and the suspension of services of consulates and immigration authorities brought an abrupt end to years of increasing migration into the EU for work and study purposes, as well as to years of stable levels of family migration. In essence, the COVID-19 pandemic has made the EU's legal migration patchwork and its consequent challenges highly visible. Three observations can be highlighted in this respect:

1. The pandemic has uncovered how differently member states treat their TCNs. For example, France cherishes its international graduates and facilitates them in extending their stay. Meanwhile, countries like the Netherlands makes it difficult for international graduates to stay.⁶ We posit that **the migration-related challenges of COVID-19 are better addressed if all member states engage with the migrants already present equally.**

2. During the pandemic, the Commission implored member states to make exceptions for ‘essential workers’ so that they could still enter and work in their territories.⁷ Essential workers, in this context, are EU citizens working across Europe, often in lower-skilled jobs. Polish and Romanian nationals, for example, are still travelling to Germany and the Netherlands to harvest or work in the meat-processing industry.

The pandemic has uncovered and possibly exacerbated existing problems of poor living and working conditions of cross-border and seasonal workers.⁸ In response to the European Parliament’s call to protect such workers, essential workers are EU citizens and TCNs alike.⁹ The Commission presented actions to ensure that essential workers would remain available for agri-food businesses, for example, in a safe manner, building on existing legal migration and social norms. Our ongoing research suggests that there is still a world to win in improving the living and working conditions of migrant workers in low-skilled jobs in the EU.¹⁰

3. Returning to the patchwork of legal migration into the EU, TCNs are sometimes welcomed by some member states to then, through their employers’ freedom to provide cross-border services and the instrument of intra-EU posting, work (i.e. perform services) in other member states. Member states that are reluctant to permit employers to hire TCNs in low- and medium-skilled jobs directly have seen an increase in the posting of TCNs.¹¹

For employers, posting has been an attractive scheme because of its lower social protection standards. This has changed to some extent since June 2020, when the revised Posted Workers Directive 2018/957 came into force. Now the ‘core terms and conditions’ of employment of the host member state apply to posted workers instead of the previous ‘minimum standards’, which should raise migrants’ conditions of living and working. The COVID-19-related measures especially hurt posted workers, not just because of border restrictions on the free movement of workers and services, but also because the emergency measures introduced to protect workers (e.g. facilitating teleworking) rarely applied to posted workers.¹²

The Commission did not include posting in its endeavours to patch up the legal migration patchwork. This is understandable, as the freedom to provide services falls under the competence of the Directorate-General (DG) Internal Market, Industry, Entrepreneurship and SMEs, while DG Migration and Home Affairs is responsible for the New Pact. Nevertheless, **if the pandemic has taught us anything, it is the importance of interinstitutional cooperation.**

Chapter 2: The legal migration *acquis* and its implementation in member states

Article 79(2)(b) of the Treaty on the Functioning of the European Union (TFEU) provides that the Union legislator may define “the rights of third-country nationals residing legally in a Member State, including the conditions governing freedom of movement and of residence in other Member States”. At Germany’s insistence, however, an exception was made for the admission of workers from outside the EU. According to Article 79(5), the former provision does “not affect the right of Member States to determine volumes of admission of third-country nationals coming from third countries to their territory in order to seek work, whether employed or self-employed.”

The core of the current EU legal migration *acquis* is made up of seven directives adopted between 2003 and 2016. These include, to begin with, the Family Reunification Directive (FRD) 2003/86/EC and the LTR Directive, both adopted in 2003, and the Students and Researchers Directive 2016/801 of 2016, which merges two directives originally adopted in 2004 and 2005 respectively. It also encompasses three directives on the admission of TCNs for certain categories of employment: the 2009 Blue Card Directive on the admission of highly qualified workers, followed by the Seasonal Workers Directive 2014/36/EU and the Directive on intra-company transferees (ICT Directive) 2014/66/EU in 2014. The final instrument is the Single Permit Directive adopted in 2009.

Together, these seven directives cover the three main categories of legal migration: family members, students and workers. Only the admission of low- and medium-skilled workers, other than seasonal workers, and of self-employed workers is not covered by these instruments.¹³

The EU asylum *acquis* has, since its adoption between 2003 and 2005, been subject to almost constant debate. It has seen recasts from 2009 to 2013, and Commission proposals for drastic changes in 2016 and now again in the New Pact. **In comparison, the legal migration *acquis* remained relatively stable.** The recast and merging of the Students and Researchers Directive in 2016, and the 2016 proposal for a recast of the Blue Card Directive, which was blocked in the Council in 2018, have been the only major (proposed) legislative changes concerning legal migration so far. One could assume that this legislative stability has promoted the implementation and application of the legal migration directives in member states. But what is the current status of the *acquis* in practice?

Full harmonisation is not the aim of the legal migration directives. In Article 79(1) TFEU, the aim of the common immigration policy is worded in rather vague terms: “ensuring, at all stages, the efficient management of migration flows, fair treatment of third-country nationals residing legally in Member States” (and the prevention of illegal immigration and trafficking in human beings). At least three factors undermine harmonisation:

- ▶ All seven directives explicitly allow for more favourable national rules. Thus, the EU rules are de facto minimum rules only. We should, therefore, not be surprised to find diversity between member states.
- ▶ Parallel national statuses exist in some member states. Indeed, in the LTR Directive and the Blue Card Directive, the Union legislator explicitly allows for the continuation or establishment of parallel national residence permits (see section 3.2.).
- ▶ Several member states still admit intra-corporate transfers (ICTs) and seasonal workers (where parallel schemes are not allowed) on the basis of national rules and documents rather than the relevant EU directives.

2.1. IMPLEMENTATION AND APPLICATION OF THE *ACQUIS*

Most member states which are bound by these directives (i.e. excluding Denmark and Ireland) aligned their national laws with these provisions, often after being chased by the Commission. However, to what extent are these directives actually applied in practice?

Possible sources for an answer can be found, to begin with, in Commission reports and infringement procedures. Indeed, detailed information about problems with the implementation is present in the Commission’s most recent reports on three of these directives.¹⁴ Looking at infringement cases on all seven directives, but not including those of late implementation, only four have reached the CJEU so far. Next to those four cases, eight other infringement cases against various member states reached the stage of a formal notice of noncompliance under Article 258 TFEU but were settled later. The low number of infringement cases, however, illustrates the limited use of this instrument by the Commission. It does not necessarily reflect the level of compliance in member states.

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The number of residence permits issued could be another indication. In 2019, a total of 37,000 EU Blue Cards were issued to highly qualified TCNs. More specifically, 29,000 went to Germany and 8,000 to other member states. Around 8,000 ICT permits were issued on the basis of the 2014 directive. These numbers are not very impressive.

In the same year, almost 70% of all LTR TCNs still held a national permanent residence document.¹⁵ Accordingly, and on the basis of the above indicators, certain structural barriers appear to restrict the actual application of several migration directives in member states.

2.2. REFERENCES TO THE COURT OF JUSTICE ON THE LEGAL MIGRATION ACQUIS

Another source may provide additional information on those barriers: the references by national courts to the CJEU. **A reference to the Court in Luxembourg is an indication that a serious dispute on interpretation and hence on (non-)application arose in a member state.** Often, similar issues have occurred in other member states as well.

In Table 1, we present, for all seven directives, the year in which the first reference concerning that directive was made, the total number of references and the member state where these references originated. Not all references resulted in a separate judgment. Cases concerning similar disputes were joined by the Court, references were withdrawn because the Court answered the question in another case or the case before the national court became moot.

Generally, it took five to seven years after the adoption of an instrument until the first reference to it was made. Three of the more recent directives did not give rise to any reference yet. Apparently, it takes many years before

national lawyers and courts begin to take a directive seriously and consider referring questions on their interpretation. These are often questions about the (in)correct implementation or application of the directives by national authorities. Of course, the absence of references on a directive to the Court in Luxembourg does not imply that said directive does not have an effect in practice. Implementation problems may yet be unchallenged in national courts.

Implementation problems may yet be unchallenged in national courts.

Table 1 also clearly indicates that the contribution of national courts in the creation of case-law by the Court of Justice is far more important than the contribution of material infringement cases started by the Commission: 50 judgments on the basis of references, versus 4 cases and 2 judgments on the basis of infringement actions. The number of references varies considerably. The Netherlands and Spain rank highest, with 15 and 10 references respectively. At the lower end, Finland, France, Hungary and Sweden only count one each, while another 17 member states count none. In the middle are Italy with 7 and Austria, Belgium and Germany with 5 references

each. The implementation and the role of the directives in practice vary considerably between member states.

Legal cultures and national courts' propensity to refer questions to the Court varies considerably between member states.¹⁸ Generally, the number of references from larger members states will be higher than from smaller member states. For example, in recent years, the total number of references by German courts in all areas of EU law was three to four times higher than those from Austria.¹⁹ That the numbers of references concerning legal migration instruments from both countries over the last decade are equal (i.e. 5 each) may well reflect differences in the role of the *acquis* in the two countries.²⁰

A high number of references is an indication that the directive plays a role in the member state, and its application is subject to multiple disputes in national courts. It may also be related to an incomplete or incorrect implementation of certain parts of the directive. A low number of references could indicate that the implementation is good, that the application does not give rise to conflicts, or that national courts find other, pragmatic ways to solve the issues brought before them.²¹ Consultancy agencies or lawyers assisting international businesses in the smooth use of the ICT Directive or advising to apply for a national permit rather than the EU Blue Card generally aim to prevent legal disputes.

Conversely, little to no references could indicate that the directive has a limited role in practice in member states, either because TCNs or immigration lawyers lack the knowledge or because immigration authorities prefer to continue applying national rules. The low number of references from Belgium, France and Germany on the LTR Directive clearly correlates with the fact that less than 3% of LTR TCNs have acquired EU status in all three member states. The authorities in those member states made it unattractive for TCNs to apply for EU LTR status or simply continued to issue national permanent resident status.

Member states made it unattractive for third-country nationals to apply for EU long-term resident permits or simply continued to issue national permanent resident status.

Most references concerning the LTR Directive come from EU countries where large numbers of LTR permits have been issued: Austria, Italy and, to a lesser degree, the Netherlands. The Italian cases on equal treatment concerning the Directive were initiated by non-governmental organisations (NGOs) on behalf of migrants. However, NGOs do not have standing in all member states. The relatively large number of references

from Spain originated in a dispute between the Spanish Supreme Court and other courts on the interpretation of the public order clauses in the Directive. Some of these Spanish references were made in cases concerning the Spanish national permanent residence permit rather than the EU permit.²²

In what follows, we study in detail implementation practices and problems in relation to (i) the FRD, (ii) the LTR Directive, (iii) the Single Permit Directive and (iv) the Blue Card Directive. The first directive is discussed because family reunification constitutes about a third of legal migration into the EU and contributes to the EU's attractiveness for sought-after, high-skilled TCNs. The latter three directives are discussed because they are addressed in the New Pact. The analysis relating to each of these directives is linked to the ideas put forward by the Commission's New Pact.

2.3. FAMILY REUNIFICATION DIRECTIVE (2003/86/EC)

Between 2015 and 2019, EU member states issued a total of 670,000 to 810,000 first residence permits for family reunification per year. Between 25% to 30% of all new residence permits were issued for family migration.²³ These high numbers illustrate the (potential) relevance of the FRD in the 25 EU countries bound by this Directive.

The harmonising effect of the FRD was already visible in an early transposition study. Some member states levelled their more liberal national rules down to or just above the minimum standards set by the Directive. **The FRD bars the introduction of restrictive legislation below the common minimum level.** Other member states with only vague rules or national rules, leaving broad discretion for the immigration authorities, or without rules on family reunification for TCNs (e.g. some of the countries that acceded to the EU in 2004) had to align their national laws with the Directive.

An evaluation in 2007 concluded that in ten member states²⁴ the rules adopted to transpose the FRD were more favourable than the pre-existing rules. Four years later, the same researchers observed that the national rules in Poland, Slovenia and Sweden were more liberal than the FDR, whilst four of the six original member states introduced stricter national rules on family reunification after the adoption of the Directive.²⁵

The effect of the FRD is also visible when comparing the situations in member states bound and not bound by the Directive (i.e. Denmark, the UK and Ireland). The minimum age and integration requirements in Denmark – 24 years for both spouses, only to be admitted if together they have more 'ties' with Denmark than with any other country – as well as the high-income requirements and fees in Ireland and the UK clearly exceed the standards set by the Directive.²⁶

The gradual convergence of national family reunification rules is also the product of the many fora provided by the EU for mutual exchange between politicians and

Table 1. Legal migration references to the Court of Justice of the EU (2008-20)

Directive	Year of first reference	Total number of references	Member state of origin of reference
Family Reunification Directive 2003/86/EC	2008	22	NL 10x BE 4x DE 3x AT/FI/HU/ES/SE 1x
Long-Term Residents Directive 2003/109/EC	2010	23	ES 9x IT ¹⁶ /NL 5x AT 3x BE/FR 1x
Students Directive 2004/114/EC	2011	3	DE 2x AT 1x
Students and Researchers Directive 2016/801	/	/	/
Blue Card Directive 2009/50/EC	/	/	/
Single Permit Directive 2011/98/EU	2016	2	IT 2x
Seasonal Workers Directive 2014/36/EU	/	/	/
Directive on intra-corporate transferees 2014/66/EU	/	/	/
TOTAL		50	

Source: Authors' calculations based on *Centre for Migration Law*¹⁷

civil servants on their experiences with national policies. These include the meetings of the Council working groups and the Justice and Home Affairs Council during and after the negotiations, the meetings of the Contact Group Legal Migration convened by the Commission to discuss national implementation practices, or the meetings of member states' agents before the CJEU. Rules introduced by one EU country during the negotiations were copied by others, either at the of transposition or afterwards. Examples are the integration test abroad or the rule that refugees have to apply for family reunification within three months of receiving the refugee status. Before 2005, the first rule only existed in Germany (only for family members of *Aussiedler*, i.e. ethnic German immigrants) and the Netherlands. By 2017, it was in force in 17 member states.

The gradual convergence of national family reunification rules is also the product of the many fora provided by the EU for mutual exchange between politicians and civil servants on their experiences with national policies.

The role of the Court of Justice

In its first judgments, the Court held that the FRD grants spouses and minor children a subjective right to family reunification without a margin of appreciation for the member states.²⁷ For the interpretation of the income requirement in the FRD, in its judgments, the Court repeatedly referred by way of analogy to its case-law concerning a similar requirement in the Free Movement Directive 2004/38/EC. In both cases, the national rules should not go manifestly beyond what is necessary to protect the public finances of that member state.²⁸ **The Court permitted the use of integration conditions subject to a strict proportionality test with regard to language proficiency and the cost and availability of tests and language courses.**²⁹

However, the Court allowed member states more room to apply national standards on non-renewal or withdrawal of a residence permit in cases of serious criminal convictions or fraud.³⁰ Several recent judgments and four of the six cases currently pending before the Court relate to the FRD's privileged regime of family reunification with refugees.³¹ Nevertheless, some of these judgments are also relevant for family reunification with TCNs admitted for employment or other purposes.³²

Better implementation instead of legislative action

Over the years, the Commission consistently chose to focus on a better application of the existing FRD rather than propose amendments. This choice was evident in

its first report on the implementation of the Directive in 2008, then reaffirmed in its conclusions following the public consultation launched with its 2011 Green Paper.³³ The Commission assisted member states by publishing guidelines in 2014.³⁴ It also initiated or supported several comparative studies on the implementation of the FRD.³⁵

In the second implementation report published in 2019, the Commission cautions rising implementation problems in several member states: pre-entry integration conditions, the income requirement, the rules on the privileged treatment of reunion with refugees, difficulties in applying for visas outside of the applicants' country of residence, and the excessive length of the procedure.³⁶ Considering the Court's recent case-law on the FRD, its application on most of those issues can certainly be improved.

So far, the number of infringement cases concerning the FRD is rather modest. Apart from the cases concerning late implementation, only two infringement cases reached the second phase of formal notice of noncompliance under Article 258 TFEU: one against Germany and the other against Sweden. Two more infringement cases were started against the Netherlands and Austria, both concerning the language and integration tests.³⁷ Both cases were concluded after informal discussions with the member states.

The Commission decided to focus on better application rather than propose new legislation. This places the task of better application squarely with national authorities, national courts, and the Court of Justice.

The FRD is not mentioned in the New Pact on Migration and Asylum. The Commission apparently decided to stick to the line it communicated in its 2019 report and earlier documents: focus on better application rather than propose new legislation. This choice is understandable considering the level of harmonisation achieved and the meagre prospect of member states agreeing to raise it further. This decision places the task of better application squarely with national authorities, national courts and the Court of Justice.

2.4. LONG-TERM RESIDENTS DIRECTIVE (2003/109/EC)

The LTR Directive was adopted in 2003. All member states, barring Denmark and Ireland, are bound by it. **It aims to assist the integration of non-EU long-term immigrants** by approximating their legal status (i.e. "as near as possible") to the status of EU citizens,³⁸ **and**

contribute to the effective attainment of an internal market as an area in which the free movement of persons is ensured by enabling mobility to other member states.³⁹

The implementation period ended in 2005. Five years later, a total of 1.3 million EU LTR permits had been issued. By 2019, that number grew to 3 million. This still only covers 30% of the 10 million LTR TCNs in the EU. The Directive's Article 13 allows member states to issue national long-term or permanent residence permits on more favourable conditions. In 2019, almost 70% of LTR were still residing on the basis of such a parallel national status, which does not provide the conditional right to move to other member states.

Eurostat data reveal considerable **differences in application** between member states. Germany, France and Belgium duly transposed the Directive into their national law. However, in 2019, less than 1% of LTR in Germany and Belgium and less than 3% in France acquired EU status – 97% or more resided there on the basis of a national permit. Meanwhile, in Austria, Estonia, Italy, Romania, Latvia, Finland and Slovenia, more than 90% of LTR TCNs acquired the status.⁴⁰ These differences could reflect the preferences of migrants, a low level of information among immigrants, or the attitudes of immigration authorities or national policies. Why, for instance, would almost all Turkish immigrants settled in Austria be interested in acquiring EU status, and none in Germany? EU status could be more attractive for LTR living in countries that do not allow dual nationality.⁴¹ Austria, the Czech Republic and Estonia have extremely low naturalisation ratios.⁴² This may explain why the rate of LTR status acquisition is high in those countries. However, **the differences in member states' use of the status also appear to strongly reflect political choices, national rules or administrative practices, setting the opportunity structure for long-term immigrants.**

Both the Commission and academics have highlighted that national immigration authorities' active promotion of national permits instead of the EU permit undermines the effect utile of the LTR Directive.

A comparison between Italy and Germany illustrates this point. Italy is the only major member state which issued EU status to almost all its 2 million LTR, possibly with the aim to promote their mobility to other member states. Meanwhile, Germany's Federal Ministry of the Interior instructed local immigration authorities to withdraw German permanent residence permits from the EU permit applicants. Many years later, the highest administrative court held this to be incompatible with

the Directive. Nevertheless, the administrative practice to rarely issue the EU permit – which grants more rights and better protection against expulsion – continued after the judgment. Both the Commission and academics have highlighted that national immigration authorities' active promotion of national permits instead of the EU permit undermines the effect utile of the LTR Directive.⁴³

TCNs can acquire EU status after five years of lawful residence in a member state, irrespective of whether they were originally admitted for employment, family reunification or international protection. Students can acquire the status if they are admitted for one of these purposes post-graduation, their residence as a student counts for half. The EU LTR status provides *denizenship* (i.e. half-way status) with a third country to TCNs, for whom the acquisition of full citizenship of the member state of residence is impossible or unattractive. The status provides equal treatment as citizens on a wide range of social rights (i.e. employment, education, social security, social assistance) – issues that are also regulated in most other legal migration directives. A recent study on human rights and EU migration policy suggested that the EU LTR status could serve as a "template for a 'general status' of third-country nationals residing in the EU."⁴⁴

Restrictions on access to the EU status (by e.g. excluding ICTs from its scope; counting international students' residence as only half, while students in national schemes are entitled to permanent status after five years of legal residence) reduce its attractiveness.

The LTR Directive has also fulfilled **unexpected functions** in several member states. It has played an important role in creating a secure residence status for ethnic minorities who did not acquire the nationality of a newly independent country (e.g. Russian speakers in Estonia) or lost their lawful residence status some years post-independence (e.g. residents in Slovenia born in other ex-Yugoslav republics). In both cases, **the EU LTR status functioned as a denizenship status for members of ethnic minority groups, as long as access to the nationality of the country of residence was blocked.**

The LTR status may also provide additional rights for UK nationals residing in the EU27. In 2018, the Commission suggested that the LTR Directive could provide a secure residence status for the 1 million UK nationals living in the EU in the case of a no-deal Brexit.⁴⁵ As of January 2020, those UK nationals are defined as TCNs in EU law. Following the end of the transitional period on 1 January 2021, their residence status in the member states is now regulated in the EU–UK Withdrawal Agreement. The Agreement does not provide for intra-EU mobility of UK nationals living in the EU. Moreover, it allows member states and the UK to apply national rules in cases of expulsion on public order grounds.⁴⁶ Acquisition of the EU LTR status will grant UK nationals additional rights, such as strong protection against expulsion from the member state of residence and a conditional right of intra-EU mobility.

The role of the Court of Justice

In the past 14 years, two infringement cases started by the Commission on material issues concerning the LTR Directive reached the CJEU. One concerned the high fees for EU permits levied in the Netherlands. The judgment of this case clarified several central elements of the Directive.⁴⁷ It also functioned as a precedent to restrict other member states' similar tendencies to levy high fees for residence permits issued on the basis of other legal migration directives. The second infringement case, which is still pending, relates to the exclusion in Hungarian law of TCNs with the EU LTR status from certain professions. The Commission views this as a violation of the equal treatment clause in the Directive.⁴⁸

All 14 other judgments concerning the LTR Directive were answers to references to the Court by national courts. Most references relate to **the income requirement,⁴⁹ expulsion on the basis of a criminal conviction⁵⁰ or fraud,⁵¹ the equal entitlement to family benefits,⁵² or housing benefits made conditional on language skills.⁵³**

The New Pact on Migration and Asylum

In its 2011 and 2019 reports on the LTR Directive, the Commission highlights that the implementation and application of the rules on intra-EU mobility in several member states are still highly problematic. This part of the Directive is underused, and member states' practices give rise to numerous complaints.⁵⁴ **Most EU countries continue to apply their national rules on first admission to LTR coming from other member states, rather than the relevant rules of the Directive.**

In its Communication on the New Pact on Migration and Asylum, the Commission announced a revision of the Directive to provide LTR with an effective right to intra-EU mobility by strengthening their right to move and work in other member states.⁵⁵ We support this aim but question whether it does indeed require a full recast of the Directive. Serious improvements could be realised by amending merely two or three clauses in the current Directive (e.g. deleting the labour market test, reducing exceptions to equal treatment in employment and self-employment, EU rules on the recognition of professional qualifications).⁵⁶ Hopefully, member states will not use a revision of the Directive as an opportunity to reduce the rights of LTR.

Hopefully, member states will not use a revision of the LTR Directive as an opportunity to reduce the rights of long-term residents.

Finally, in the new proposal for a Regulation on Asylum and Migration Management, **the Commission proposes amending the LTR Directive in such a way as to facilitate the integration of beneficiaries of international protection into the member state of residence** by allowing them to acquire the LTR status after three years of residence instead of the current five.⁵⁷ The other conditions for the status, such as stable and regular income and health insurance, would still have to be fulfilled. Some member states systematically review protection needs after three years. Such a review would allow, in cases where they continue to be present, for an ex officio review of whether the beneficiary fulfils the conditions for the acquisition of the LTR status and a suggestion to the person concerned to apply for said status.

2.5. SINGLE PERMIT DIRECTIVE (2011/98)

The Single Permit Directive was adopted in 2011 after four years of negotiations. All member states, except Denmark and Ireland, are bound by it. The aim of this Directive is twofold. **It facilitates the procedure for TCNs to work and reside in a member state through a 'single permit', which is a combined work and residence permit.** The second main objective is to ensure equal treatment between working TCNs (irrespective of whether they entered for the purpose of work) and member state nationals.

To achieve this, **the Directive provides a common set of rights for TCN workers** in areas such as working conditions, education and training, access to goods and services, and social security. The Directive also includes a number of procedural safeguards based on general good administration principles.⁵⁸ Excluded from its scope are, amongst others, seasonal workers, au pairs, beneficiaries of international protection, LTR, self-employed workers and posted workers.⁵⁹

Much debated was the exclusion of posted workers, which includes ICTs.⁶⁰ The Single Permit Directive does not explicitly refer to Directive 96/71/EC on the posting of workers in the framework of the provision of services. However, TCN workers posted under the latter directive are excluded from the scope of the former for as long as they are posted. Given that posting is – or, at least pre-COVID-19, was – on the rise as an instrument to legally engage TCNs in low-skilled work in the EU, renegotiating the scope of the Single Permit Directive could mean reopening the debate on the equal treatment of posted workers. This debate also led to the recently revised Posted Workers Directive discussed above.⁶¹

In 2018, five countries had issued 76% of all EU single permits.⁶² If anything, Eurostat data again reveal considerable **differences in application** between member states (see Table 2). The especially low number of single permits for the Netherlands (2,691) stand out considering the country granted 57,420 permits to family migrants (37,580) and economic migrants (19,840).⁶³ These numbers reflect a national practice to deflect from

the application of EU migration law and to prioritise national migration schemes. This was, to our knowledge, not a prominent finding from the 2019 implementation evaluation and fitness check.⁶⁴ It was possibly

overlooked. The Commission could bring such evading implementation practices before the CJEU to enforce the proper implementation of the scope of the Single Permit Directive. This would not require new legislation.

Table 2. Single permits issued by type of decision (2016-18)

	2016				2017				2018			
	Total	First permit (% of total)	Change of status permit (% of total)	Renewed permit (% of total)	Total	First permit (% of total)	Change of status permit (% of total)	Renewed permit (% of total)	Total	First permit (% of total)	Change of status permit (% of total)	Renewed permit (% of total)
EU	2,634,589	29.2	5.2	65.6	2,635,896	32.9	4.5	62.6	2,582,842	41.3	5.6	53.1
Austria	86,365	/	/	/	82,046	/	/	/	84,075	/	/	/
Belgium	/	/	/	/	/	/	/	/	/	/	/	/
Bulgaria	267	52.1	45.7	2.2	307	47.2	51.8	1.0	450	61.6	37.6	0.9
Croatia	6,842	64.5	4.2	31.4	12,326	69.2	2.6	28.2	36,392	72.3	1.0	26.7
Cyprus	30,009	35.7	0.0	64.3	29,273	45.1	0.0	54.9	33,010	40.1	0.0	59.9
Czechia	10,923	51.6	0.0	48.4	19,293	63.2	6.8	30.0	19,293	63.2	6.8	30.0
Denmark	/	/	/	/	/	/	/	/	/	/	/	/
Estonia	11,009	39.1	7.5	53.4	11,431	36.8	9.8	53.4	10,505	49.0	10.4	40.6
Finland	42,110	39.8	0.0	60.2	45,410	35.8	0.0	64.2	43,387	38.2	0.0	61.8
France	987,995	20.3	0.0	79.7	915,031	22.3	0.0	77.7	741,469	29.5	0.0	70.5
Germany	179,726	83.5	16.5	0.0	235,504	89.0	11.0	0.0	292,859	89.2	10.8	0.0
Greece	0	/	/	/	0	/	/	/	0	/	/	/
Hungary	10,395	55.2	24.0	20.7	20,535	69.8	18.4	11.9	41,792	75.2	5.2	19.6
Ireland	/	/	/	/	/	/	/	/	/	/	/	/
Italy	574,355	7.8	0.2	92.0	550,521	8.6	0.3	91.1	523,478	12.2	5.1	82.7
Latvia	27,397	19.7	1.8	78.6	33,160	17.7	3.2	79.0	37,751	21.5	1.7	76.7
Lithuania	6,017	49.9	0.0	50.1	10,145	70.0	0.0	30.0	15,292	59.8	0.0	40.2
Luxembourg	1,968	33.0	6.9	60.1	2,996	38.8	3.0	58.1	3,032	42.8	3.4	53.9
Malta	7,660	39.6	2.7	2.7	10,949	49.8	2.1	48.2	19,664	50.4	1.4	48.2
Netherlands	2,362	39.5	1.5	1.5	2,967	55.9	1.0	43.1	2,681	71.6	1.0	27.4
Poland	76,674	53.2	26.4	20.4	86,707	57.4	19.3	23.3	93,872	70.7	18.6	10.7
Portugal	107,149	9.2	1.1	89.7	109,572	12.6	1.3	86.2	99,780	38.3	2.0	59.7
Romania	13,967	53.9	0.6	45.5	18,301	45.7	1.9	52.3	20,300	50.6	0.9	48.6
Slovakia	12,794	49.5	3.9	46.6	17,713	57.5	3.8	4 38.7	25,236	65.9	2.7	31.4
Slovenia	12,805	54.7	1.5	43.8	24,267	51.2	1.1	7.7	39,657	53.8	1.0	45.2
Spain	276,477	35.5	25.6	38.9	259,306	38.6	22.4	38.9	267,873	42.1	19.6	38.3
Sweden	149,323	79.4	1.8	18.8	138,136	69.0	1.5	29.5	130,994	65.9	2.4	31.7

Source: Eurostat (2020)⁶⁵

The aim to establish a ‘one-stop shop’ has not been successful because additional national procedures are still intact (see Figure 1). The Directive does not set norms with regard to other procedures prior to the arrival, such as visa procedures, the approval of employers as trusted sponsor or diploma recognition. In its fitness check, the Commission reiterated the need to include visa applications in the procedure if the intended efficiency of a single application procedure is to be achieved.

Finally, there are problems regarding the transposition of the equal treatment provisions. The CJEU gave two rulings on this theme,⁶⁶ and the *ASGI* case (C-462/20) is still pending. All three cases followed preliminary questions raised by Italian courts on the application of the right to equal treatment (Article 12 of the Single Permit Directive). The CJEU ruled that Article 12 must be interpreted as precluding national legislation under which a TCN holding a single permit cannot receive benefit, such as those granted to households having at least three minor children, which Italian law makes available for its nationals. Clearly, the implementation of the Directive’s provision on equal treatment has benefitted from this CJEU case-law.

The New Pact on Migration and Asylum

In the New Pact, the Commission announced a review of the Single Permit Directive for 2021. The Commission has labelled the shortcomings of the Directive as ‘regulatory failures’ and aims to address these shortcomings with legislative action.

The topics the Commission is to address, as listed in its Inception Impact Assessment,⁶⁷ can be grouped into three themes: scope, procedural efficiency and migrant worker protection.

- 1. The Commission wants to expand the material scope of the Directive – now limited to procedures and equal treatment. Hence, the Directive might be changed to include actual admission conditions for low- and medium-skilled workers.** According to the Commission, this is necessary because significant labour shortages are expected in certain sectors of the EU economy (e.g. agriculture, manufacturing, construction, health care, domestic care). The changes are to contribute to addressing these shortages, which are, also according to the Council, a major challenge for European competitiveness.⁶⁸ We feel priority should be given to TCNs already present in the EU, especially when it comes to low skilled jobs. For medium-skilled workers, expanding the Directive to include admission conditions could have an added value if it includes some sort of intra-EU mobility scheme to avoid these migrants from being stuck in one member state. Thus, from a rights perspective, a ‘light’ Blue Card might be preferable (see section 2.6.).
- 2. The Commission wants to improve the efficiency of the single permit procedure.** As Figure 1 demonstrates, the Directive has not simplified pre-entry procedures. The Commission does not mention if it will also address the conditions for renewing and withdrawing the single permit. Whether there is indeed a need to harmonise those procedures might come to the fore in the foreseen impact assessment, to be prepared in the first half of 2021. From a legal certainty perspective, we welcome the Commission’s endeavour to include all procedures in the one-stop-shop. We add that **just and clear procedures** on the renewal of permits or switching status are especially relevant in view of acquiring the LTR status.

- On migrant worker protection, the Commission finds that the equal treatment provisions are incoherent, include numerous exceptions and are difficult to interpret and implement. In addition, it finds the Directive to be ineffective in protecting TCNs from exploitation because the Directive does not prevent member states from tying a migrant worker to a single employer. Such practices enhance the risk of TCNs falling victim to labour exploitation. **Employers who cover the costs of a labour migrant’s relocation prefer to have some security as to their period of employment and residence. A proper balancing of interests is necessary.** Furthermore, the Commission finds it a shortcoming that the Directive has no provisions on sanctions or inspections for compliance with the equal treatment provisions.

We would like to add that for a migrant worker, a breach of equal treatment is hard to prove, and the barrier to take ones’ employer to court is high. To facilitate possibilities for migrant workers to claim their rights, the Commission could look to two other Directives in the social and migration policy spheres for inspiration:

- 1. Directive 2006/54 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast)** requires appropriate procedures to be put in place by the member states (recital 29), and adequate judicial or administrative procedures for the enforcement of the obligations imposed by the Directive (recital 30). In addition, when persons consider themselves wronged because the principle of equal treatment has not been applied to them, it may be presumed that there has been direct or indirect discrimination. The respondent – who would be an employer or a member state’s administrative authority in this case – would then have to prove that there has been no breach of the principle of equal treatment.⁶⁹
- 2. Directive 2009/52 on sanctions against employers of illegally staying TCNs** also obliges member states to ensure that illegally employed, undocumented migrants have the benefit of the presumption of three months of employment if they claim unpaid wages.⁷⁰ This Directive also requires member states, in accordance with their national law, to allow third parties with a legitimate interest to engage either on behalf of or in support of an illegally employed TCN, with his or her approval, in any administrative or civil proceedings provided for with the objective of implementing this Directive.⁷¹ However, there are very little cases where migrants have successfully claimed rights or used this article at all.

It must be noted that NGOs initiated all three cases on the Single Permit Directive brought before the CJEU. Not all member states grant NGOs standing before their national courts in equal treatment cases, hence such cases are seldomly brought before the courts. This hinders the Directive’s implementation. Possibly, the newly established European Labour Authority, whose activities

cover TCNs who are legally residing in the Union, can improve accessibility of justice in this respect.⁷²

We recommend improving the enforcement of the Single Permit Directive by:

- ▶ shifting the burden of proof of unequal treatment from the single permit holder to the employer; and
- ▶ granting third parties (e.g. work councils, NGOs) legal standing to engage in proceedings before national courts on behalf of or in support of single permit holders.

In general terms – and this is relevant to all migrant workers, irrespective of which Directive governs their entry into the EU –, we advise European institutions and the member states to give the enforcement of labour rights protection the highest priority. This is a point that is also prevalent in public consultation submissions.⁷³

2.6. BLUE CARD DIRECTIVE (2009/50/EC)

The Blue Card Directive was adopted in 2009 after two years of negotiations and is an important element of implementing the Commission’s Lisbon Strategy. Member states had until 19 June 2011 to transpose the Directive, which 20 of the then 27 failed to do on time.⁷⁴ **The Blue Card Directive sets conditions for entry and residence of TCNs for highly qualified employees, a right to equal treatment with nationals, and rights for family members.** It also includes a limited intra-EU mobility right (see Chapter 3). All member states, except Denmark and Ireland, are bound by it. In its 2014 evaluation of the Directive’s implementation, the Commission concluded that **the wide variety of implementation practices of the Directive resulted from, amongst others, the fact that it only sets minimum standards and leaves much leeway to the member states through the many “may-clauses” and references to national legislation it embeds.**⁷⁵

Excluded from the Directive’s current scope are, amongst others, beneficiaries of international protection, researchers, posted workers, and those who enter “under commitments contained in an international agreement facilitating the entry and temporary stay of certain categories of trade and investment-related natural persons”.⁷⁶

As we have seen, only Germany took the Directive’s provisions to heart. Germany issued 27,000 EU Blue Cards in 2018, which was 83% of the EU total of 32,678. This increased to almost 29,000 a year later, or 78% of the total of 36,806.⁷⁷ In 2019, Germany was trailed by Poland (2,104; 5.7%) and France (2,039; 5.5%). The remaining member states granted less than 800 Blue Cards each. Again, Eurostat data reveal considerable **differences in application** between member states, as most have retained national entry channels for high-skilled migration, which are apparently more attractive to its users than the Blue Card. The implementation of

Fig. 1

THE PATCHWORK OF POSSIBLE PROCEDURES FOR MIGRANT WORKERS COMING TO AND REMAINING IN THE EU

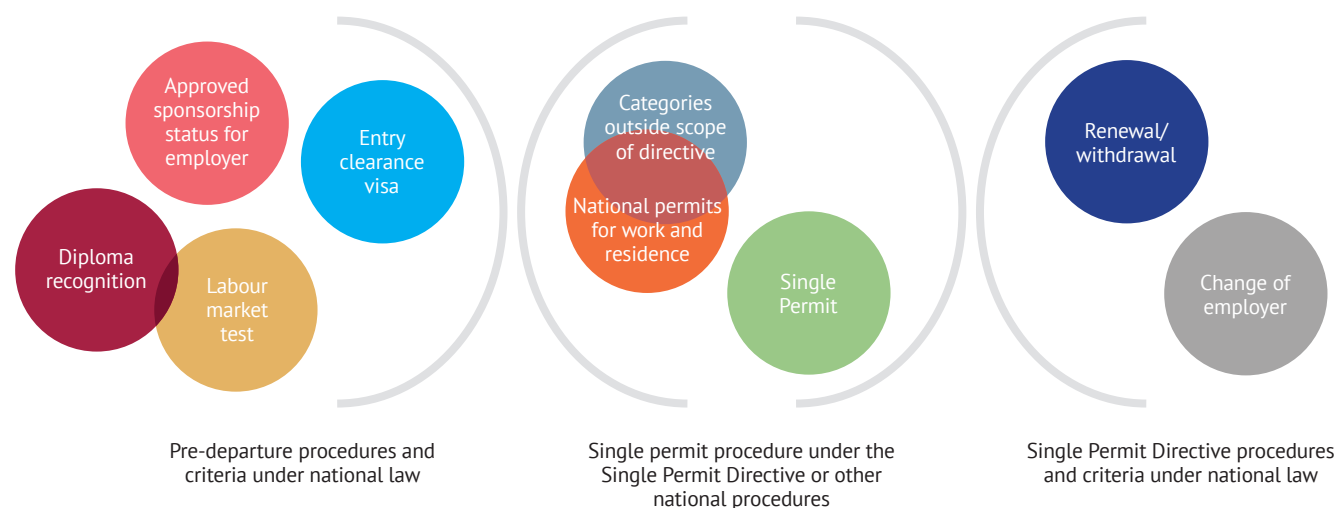


Table 3. 2009 Blue Card Directive vs 2016 recast

	Conditions and rights	2009 BCD	2016 BCD Commission Proposal
Scope		TCN with at least bachelor diploma or higher	TCN, including family of EU citizens & beneficiaries of international protection, with at least bachelor diploma or three years experience
Procedure	Decision period	90 days	60 days, or 30 days if sponsor is recognised
	Fast-tracking for recognised sponsor	Not possible	Possible: member states' discretion
Admission criteria	Salary threshold	At least 1.5x average gross salary; 1.2x average gross salary for professions in particular need	1.0x - 1.4x average gross salary
	Contract period	12 months	6 months
Refusal grounds	Labour market test	Member states' discretion	Only under serious disturbance of labour market (high threshold)
TCN rights	Social rights	Equal treatment with nationals	Equal treatment with nationals
	LTR permit	After five years with favourable derogations from LTR Directive	After three years with favourable derogations from LTR Directive
	Intra-EU mobility	After 18 months	After 12 months, and possibility of business trips shorter than 90 days
	Family reunification	FRD applies with favourable derogations, decision within 6 months	FRD applies with favourable derogations, decision within 2 months
	Self-employed activity	Not possible	Possible
Parallel national schemes		Possible	(Not) Possible

the Directive has not moved forward through case-law: there is no case-law to report, apart from the recent questions in *ASGI* raised by the Italian court on equal treatment already mentioned above.

Following its first evaluation of the Directive,⁷⁸ the Commission concluded that **the Directive had failed to make the EU an attractive destination for highly skilled migrants and presented a recast proposal in 2016.**⁷⁹ Table 3 lists some major changes proposed by the Commission in this recast. Forbidding member states to maintain parallel schemes is key. Furthermore, the proposal expanded the definition of *skills*, lowered the salary threshold, and increased intra-EU mobility rights, also for short-term business purposes. For our discussion, **expanding the scope of the recast Directive to include beneficiaries of international protection, as well as family members of Union citizens, is important.** This would allow them to pursue an intra-EU career as a Blue Card holder and thus improve their opportunities for participating in the EU.⁸⁰

For almost five years, negotiations on the proposal have been stuck. A major obstacle is the inability to keep parallel national high-skilled migration schemes. The Commission agreed in 2020 to depart from this requirement to finalise the negotiations. Indeed, as legal scholar Jean-Baptiste Farcy notes,

“for highly skilled workers to prefer the blue card, conditions of admission and stay should be more attractive. As such, suppressing national schemes will not help to attract more highly skilled workers to Europe.”⁸¹

Another obstacle to concluding the negotiations is the proposal’s lower salary threshold and lower condition of experience (i.e. three years instead of a diploma), which would **facilitate medium-skilled labour migration.** This development is shunned by some member states.

The Blue Card Directive has been criticised in literature and by the Commission for, amongst others, allowing member states to keep national residence permits for high-skilled migrant workers. The Directive has, therefore, remained underused.⁸² It has also been reprimanded as ineffective in attracting high-skilled migrant workers as it is a demand-driven tool, tying the worker to a specific employer.⁸³ Others have argued that the EU does not need a common labour migration policy at all because of divergent labour market needs across the Union.⁸⁴

In its Communication, the Commission clearly insists on the need for this recast Directive, and we agree that it could be beneficial. We view the Directive not only as an instrument for employers and local administrations to attract businesses by offering an attractive labour migrant scheme. **It also offers protection to migrant workers, such as the rights to leave one’s employer (eventually) and be mobile within the EU without losing acquired entitlements to permanent residence.**

In November 2020, the German Presidency started testing the waters for a compromise that would “give the Blue Card the attractiveness it needs while at the same time maintaining the necessary level of flexibility with regard to national labour markets.”⁸⁵ The Presidency articulated five topics to find compromises on with the European Parliament and the member states, suggesting that the other topics have been agreed upon earlier.

The five topics on the agenda concern the level of harmonisation, the definition of skills, the facilitation of long-term mobility, rights in case of unemployment, and national labour market tests (LMTs). Briefly, what the German Presidency hoped to achieve was the following:

1. Member states allowed to **maintain parallel national schemes** with different material rights, such as access to long-term residence. Migrants with a national permit should be supported in switching to the Blue Card, and their time spent with a national permit should be included in the period of residence required for long-term residence.
2. A limited but mandatory **opening of the scope to highly skilled** (instead of highly qualified) professionals. This would only apply to the information and communications technology sector to start,⁸⁶ as member states previously opposed a general opening towards professional skills. Whether skills are to be attained over three (as proposed by the Parliament and Presidency) or five years of professional experience (the Council) will be a matter of debate.
3. **A notification – instead of an application – procedure for long-term mobility introduced** at the discretion of member states. Inspiration can be drawn from the notification procedure in the ICT Directive and Students and Researchers Directive. This entails that:

- a. the Blue Card holder should be allowed to **start working immediately** upon notification or application in the second member state; and
- b. **the procedure is simplified**, as less documentation needs to be submitted to the second member state. This could mean that the Blue Card holder would not need to have diplomas, certifications and other professional qualifications that are already recognised in the first member state to be recognised again in the second member state.

4. Departing from the idea of **raising the maximum period of temporary unemployment** as a ground to lose the status to six months. Instead, this should be brought back to three consecutive months in the first two years of residence as a Blue Card holder. Only someone who has held a Blue Card for two years or more will not lose the status in the case of six months of unemployment.
5. **LMTs made conditional, only to be applied** in cases of ‘disturbances’, such as a high level of unemployment in a given occupation, sector or region, and during the first 12 months of stay in case of switching employers. Furthermore, no LMTs would apply to family members to facilitate their integration, provided that such a test is not applied to the Blue Card holder.

If no compromise is reached over adding entry conditions to the Single Permit Directive for low- and medium-skilled work (see section 2.5.), we suggest keeping an opening in the Blue Card Directive to add a ‘light Blue Card’. This could include, for instance, expanding the proposed mandatory opening for highly skilled *professionals* to (medium) qualified or skilled *workers*, albeit only in the context of essential professions (e.g. care workers). As suggested by the German Presidency, an implementing act should suffice for adding such professionals. Member states that do not want to participate in such extensions can always apply a volume of admissions to mitigate the effect on their national labour market.

We suggest keeping an opening in the Blue Card Directive to add a ‘light Blue Card’ for (medium) qualified or skilled workers.

We hail the Commissions’ endeavours to bring the recast back to life because it will facilitate beneficiaries of international protection and family members of Union citizens to pursue an intra-EU career as a Blue Card holder. It will increase opportunities for developing their professional career and participating in the European labour market. For employers, it will open a reservoir of highly skilled migrants.

Chapter 3. Intra-EU mobility for third-country nationals⁸⁷

In Chapter 2, we discuss how the Commission's New Pact announced two proposals to facilitate intra-EU mobility of third-country workers already in the EU. **The LTR Directive should be amended** to (i) strengthen the right of LTR to move and work in other member states; and (ii) grant these rights to refugees already after three years, rather than the current five years, of lawful residence in a member state.⁸⁸ Allowing TCNs with several years of lawful residence in a member state to respond to the demand for workers elsewhere in the EU would be advantageous for the member states concerned and TCN workers alike. This applies to all workers, irrespective of their level of qualifications. However, the reduction of artificial walls between national labour markets for settled TCNs causes fears of loss of control on immigration and the labour market. The experience with other legal migration instruments may tell us how real needs for control can be met.

Two relatively recent directives – the ICT Directive and the Students and Researchers Directive – already facilitate such intra-EU mobility. The experience with the exchange of information between the immigration authorities of the first and second member states and with the other administrative practices of the two directives may well provide a sound basis for more general rules that also protect the genuine immigration control interests of member states. This chapter maps the history of intra-EU mobility legislation for TCNs, the specific control instruments in the current EU instruments, and the opportunities which intra-EU mobility offers for the future legal migration *acquis*.

3.1. THE HISTORICAL DEVELOPMENT OF THIRD-COUNTRY NATIONALS' INTRA-EU MOBILITY

Since the 1960s, the rules on free movement grant EU nationals the right to work and reside in other member states. These rules also apply to family members with the nationality of a non-EU state. Those non-EU family members may accompany the EU worker or self-employed person and are entitled to work only in that EU country. This also applies to Turkish workers and their family members with a privileged residence and employment status under the EU-Turkey Association Agreement. This privileged status is restricted to one member state only;⁸⁹ intra-EU mobility is not an entitlement tied to the status under the Agreement.

Restricting a considerable number of workers to only work in one member state contradicts the idea of a Single Market for goods, capital and persons, established in the EU since 1991. In the 1997 Treaty of Amsterdam, member states created in Article 64 TEU the competence for the Union to make binding rules on the right of TCNs lawfully resident in one member state to reside in other EU countries.

The 2003 LTR Directive was the first directive to allow TCNs who acquired the EU LTR status in one member state the conditional right to live and work or study in another member state with their family members.⁹⁰ They must first apply for a residence permit in the second EU country and meet the income and health insurance requirements. The second member state may apply a LMT to those coming for employment during their first year.⁹¹ Once these conditions are met, LTR are entitled to the residence permit and may also bring family members admitted in the first member state to the second EU country. However, most member states simply continued to apply their national admission rules to TCNs who acquired the EU LTR status in another member state, thereby disregarding this part of the Directive (see section 3.2.).

The 2003 LTR Directive was the first directive to allow third-country nationals who acquired long-term residency in one member state the conditional right to live and work or study in another member state with their family members.

Next, the first directives on the admission of students (2004) and of researchers (2005) from third countries provided limited intra-EU mobility, as part of the EU's request for highly qualified workers from outside the EU.⁹² Both directives required TCNs admitted in one member state and intending to stay more than three months in another to file a new application for a residence permit in that second state. Bringing family members also required the permission of the second member state. These requirements seriously reduced the practical effect of these early rules on intra-EU mobility. In practice, most non-EU students and researchers preferred using their right to travel within the Schengen area and to stay in another Schengen state for up to three months.

The Blue Card Directive provides that highly qualified workers admitted in one member state may, after 18 months, move to a second but would still have to apply for a separate residence permit in the latter. That application may be refused on labour market grounds. However, if admitted, they are entitled to bring their family members to the second state. Periods of residence in both states can be accumulated to fulfil the mandatory five years of residence to acquire LTR status, thus facilitating the acquisition of that status and the related intra-EU mobility rights.

3.2. NATURALISATION AS AN ALTERNATIVE PATH TO INTRA-EU MOBILITY

Since rules on mobility in EU directives are either made non-operational by national law or blocked by administrative barriers, settled non-EU immigrants use two other avenues to mobility within the Union. Firstly, their right to travel in the Schengen area to look for employment opportunities and, secondly, acquisition of the nationality of the member state of residence.

Since rules on mobility in EU directives are either made non-operational or blocked by administrative barriers, settled non-EU immigrants use their right to travel in the Schengen area to look for employment opportunities or acquire the nationality of the member state of residence.

With naturalisation, they acquire the full right to free movement not restricted by conditions for intra-EU mobility in the EU migration directives. Naturalisation, moreover, is a road to mobility to EU member states that are not bound by those directives or are outside the Schengen area (i.e. Denmark and Ireland). Before Brexit, this road was used quite often for migration to the UK. In 2011, more than 200,000 EU citizens who were naturalised in another member state were living in the UK. **Relocation patterns of Sri Lankan, Iraqi, Afghani and Nigerian migrants from Denmark, Netherlands, Sweden and Germany to the UK and between current member states are well documented.**⁹³

The reasons why immigrants move to another member state vary: better employment opportunities, anti-immigrant climate or policies in the first member state, the possibility to live within a larger diasporic community, or to correct the Dublin system's entrapment of refugees in a member state other than the one of their preference.⁹⁴ For immigrants at the lower end of the labour market, who are explicitly or implicitly excluded from the EU labour migration directives, naturalisation will be the only alternative to irregular migration to their preferred member state. The relative attractiveness of these avenues depends on national naturalisation rules and practices. Most member states apply residence and language or integration requirements. Some have income requirements.

Some of these new EU citizens return to the country of their first nationality sooner or later or move on to elsewhere in the EU. The latter group may perceive themselves primarily as EU citizens. In an anthropological study of these mobile Union nationals, a young Dutch Somali in the UK is quoted as saying,

"Nobody can tell me where to go, what to do. I am an EU citizen."⁹⁵

For settled immigrants, naturalisation may function as a shield against expulsion, a source of security or as an opportunity for further mobility.⁹⁶

In the directives on legal migration, intra-EU mobility is often not a right, and rather is dependent on the permission of authorities in the second member state.⁹⁷ The 2016 Students and Researchers Directive is the first to create a right to stay elsewhere in the EU: 6 months for researchers and up to 12 for students. Immigrants from outside the Union are well aware that for EU nationals, irrespective of their birthplace or ethnic origin, mobility to other member states is a right. From the available statistical data, it appears that in the first two decades of this century, the acquisition of the nationality of a member state as a pathway to intra-EU mobility was used far more often than the limited possibilities in the EU migration directives.

3.3. MORE LIBERAL INTRA-EU MOBILITY RULES IN RECENT DIRECTIVES

Both the 2014 ICT Directive and 2016 Students and Researchers Directive provide detailed rules on mobility within the EU.⁹⁸ The latter grants students the right to study for up to a year in another member state during the validity of their residence permit in the first member state. Researchers may choose between short-term (up to 6 months) and long-term mobility (more than 6 months). Member states may decide to require students and researchers for short-term mobility to notify the immigration authorities of the second state about their intended movement. However, they can also decide not to require such notification, in which case, the mobility is not subject to an immigration procedure. In the case of notification, the TCN must send documents and information to the second member state and may move to that state immediately after the notification. This is clearly simpler and faster than the earlier requirement of applying for a residence permit in the second state. For long-term mobility, the second member state may require an application for a permit but cannot apply a LMT. Family members have the right to accompany the researcher.

In the case of notifying the immigration authorities of the second member state of their intended movement, third-country nationals must send documents and information and may move to that state immediately after the notification. This is clearly simpler and faster than the earlier requirement of applying for a residence permit in the second state.

Table 4. Forms of control chosen by 25 member states

Form of control/ Directive	ICT		Researchers		Students
	Short	Long	Short	Long	
Length of stay	Short	Long	Short	Long	
Application no LMT	/	21	/	19	/
Notification	16	4	17	5	19
No procedure	9	0	8	1	6

Source: Authors' calculations based on Contact Group Legal Migration (2020) and Calers (2020)¹⁰⁰

The ICT Directive, which served as a model for the Students and Researchers Directive, has similar schemes for short- and long-term mobility: the former is limited to 90 days maximum, and the latter to over 90 days.

Four methods of controlling intra-EU mobility by second member states

In the directives discussed, second member states use **four forms of control for intra-EU mobility:**

- ▶ application for a permit and a LMT;
- ▶ application for a permit without a LMT;
- ▶ notification of the second member state; or
- ▶ no procedure.

The first form of control – a permit and a LMT – is only used in two ‘older’ directives: the 2003 LTR Directive and 2009 Blue Card Directive. The three other, less stringent forms of control are used in the 2014 ICT Directive and 2016 Students and Researchers Directive. These two ‘newer’ directives allow member states to choose between the three forms of control.⁹⁹

Table 4 presents the choices made by the 25 member states bound by the ‘newer’ directives for those TCNs intending a short or long stay in the second EU country.

Several members states have chosen the most liberal option (i.e. no procedure) for the intra-EU mobility of students and the short-term mobility of researchers and ICTs.¹⁰¹ Most member states still require an application for long-term mobility. Interestingly, six EU countries¹⁰² consider notification to be sufficient for the long-term mobility of researchers. Most member states only require a simple notification for short-term mobility (i.e. up to 6 months) and students.

The practical effect of this liberalisation of mobility is not yet known. However, these various instruments developed by the Union legislator over the last decade, which allow different levels of control over intra-EU mobility, may be used on a more general basis in other directives. The Commission proposes to enhance intra-

EU mobility for refugees. However, the intra-EU mobility of other categories, such as highly qualified TCNs admitted on the basis of a national residence permit or TCN workers with qualifications other than high ones, could be enhanced similarly.

Various instruments of control over intra-EU mobility may be used on a more general basis, including when mobilising workers without high qualifications.

All three directives with detailed rules on intra-EU mobility primarily concern workers or students with higher education, high qualifications or considerable salaries. No rules on intra-EU mobility are to be found in the Single Permit Directive covering all lawfully employed TCNs nor in the 2014 Seasonal Workers Directive. Why not accumulate periods of lawful residence in different members states for the five years of residence required for the LTR status, or reduce the five years to three for TCN workers without high qualifications?

3.4. WHY IS INTRA-EU MOBILITY ATTRACTIVE?

As of yet, only limited numbers of TCN workers have actually used the provisions on intra-EU mobility in the LTR Directive and other legal migration directives. In its 2019 report on the application of the LTR Directive, the Commission points to the detailed conditions and their strict implementation by member states. The Commission also reports receiving numerous complaints about those obstacles to intra-EU mobility.¹⁰⁵ Only a very small minority of those TCN workers could use the avenues for mobility provided in the legal migration directives. Most TCN workers and their employers used other schemes (i.e. national rules, posting by service providers) to realise mobility from one member state to another.¹⁰⁴

Opening up opportunities for lawfully residing but unemployed TCNs to take up employment in another member state reduces unemployment in the EU. It also reduces the demand for new recruitment from outside the Union. The logic and advantages of the common EU labour market are not restricted to EU citizens. They also apply to lawfully residing TCN workers, highly qualified or otherwise.

Several member states have unfulfilled demands for low- and medium-skilled workers. Why should TCN workers who have been lawfully resident or employed for years in one member state remain locked up in that state until they acquire its nationality and thus the EU citizens’ right to free movement? Their experience of integration in one member state could well assist their integration in other member states’ labour markets. We recommend allowing settled TCNs to work in another member state rather than allow service providers in other member states to recruit workers from outside the EU and post them in low- or medium-paid (semi-)permanent jobs.

For TCN beneficiaries of international protection, intra-EU mobility may function as a welcome correction of the irrationalities of the Dublin system. This system obliges many refugees to apply for asylum in a member state to which they have no connection or whose language they do not speak. Intra-EU mobility after admission and lawful residency in the first member state would provide them with the opportunity to work and live in their desired member state of destination. **Such lawful ‘secondary movements’ within the EU create advantages for both the protected persons and the states concerned.**

For third-country beneficiaries of international protection, intra-EU mobility may function as a welcome correction of the irrationalities of the Dublin system.

There is a need to address intra-EU mobility in the legal migration *acquis* since naturalisation is an alternative with many restrictive conditions. The minimum period of residence in the country before an application for naturalisation can be made is five years in most member states, but ranges from three to ten years across the EU.¹⁰⁵ The decision on a naturalisation application often takes another year or more. This creates a considerable waiting period for this avenue to mobility.

Hence, **we recommend allowing, after three years of lawful residency in a member state, TCNs to look for a job in another member state. If successful, after notifying the certified job offer to the authorities of the second state, they should be allowed to accept the employment under the validity of their residence permit in the first member state.** When that permit expires, the migrant would have to choose between applying for a permit in the second member state or returning to the first member state. In the case of the latter, the time spent in another member state should not be ‘lost’ to the migrants’ right to naturalisation.

The time spent waiting for third-country nationals to be eligible for naturalisation and become mobile is time lost.

The general take away from the overview and analysis provided in Chapters 2 and 3 is that there is ample room for improving TCNs’ right to intra-EU mobility. The time spent waiting for TCNs to be eligible for naturalisation and become mobile is time lost. Stimulating intra-EU mobility of TCNs will help make the legal migration *acquis* patchwork work. It would integrate the legal migration *acquis* into internal market logic to the benefit of migrants, employers and the EU member states.

Conclusions and policy recommendations

The EU legal migration *acquis* is a legislative patchwork. As outlined in its 2020 Communication on the New Pact on Migration and Asylum and subsequent documents, the European Commission has set out to make the patchwork work. To do so, the policy tools it must engage are, among others, the enforcement of existing norms and legislative actions to adjust existing norms.

We discuss these plans critically in this Issue Paper. Our main takeaway is that the Commission and EU member states must increase the opportunities for the intra-EU mobility of already lawfully present TCNs. A considerable workforce of TCNs is waiting to work across EU borders in the same way as EU citizens; their waiting is not working towards making the patchwork work.

The core of the current EU legal migration *acquis* is seven directives adopted between 2003 and 2016. In comparison with the EU asylum *acquis*, where most instruments have been subject to almost constant debate since their adoption between 2003 and 2005, the legal migration *acquis* has remained relatively stable. This legislative stability, however, has hardly promoted the implementation and application of legal migration directives in the member states.

The Commission's New Pact suggests that the EU should take a new turn in stitching up its legal migration *acquis* patchwork: amend the LTR Directive to strengthen the right to reside and work in a second EU country, increase compliance with the Single Permit Directive, and agree on the revised Blue Card Directive. We welcome the ambition of harmonising further the conditions for entry, stay and intra-EU mobility, procedures and rights, which would positively contribute to the needs of all involved.

We study the implementation practices and problems in relation to the FRD, the LTR Directive, the Single Permit Directive and the Blue Card Directive in detail. We especially hail the endeavours to bring the recast Blue Card back to life because it will facilitate the pursuit of an intra-EU career for beneficiaries of international protection and the family members of Union citizens. For this reason, the LTR Directive should also be amended to allow TCNs with several years of lawful residence in a member state to respond to the demand for workers elsewhere in the EU, preferably irrespective of the level of their qualifications.

Reducing the artificial walls between national labour markets for settled TCNs may cause fear of loss of control among member states. However, two relatively recent directives – the ICT Directive and the Students and Researchers Directive – already facilitate such intra-EU mobility. The experience with these legal migration instruments provides examples of different schemes that meet member states' needs for control and open up European labour markets to the present TCNs.

Finally, we present citizenship as the ultimate access to the right of intra-EU mobility. However, naturalisation procedures take time. The time spent waiting for TCNs to be eligible for naturalisation and become mobile is time lost. Stimulating the intra-EU mobility of TCNs makes the legal migration *acquis* patchwork work. It would integrate the legal migration *acquis* into internal market logic to the benefit of migrants, employers and the EU member states.

The intra-EU mobility of third-country nationals integrates the legal migration *acquis* into internal market logic to the benefit of migrants, employers and the EU member states.

If the Commission aims to address Europe's demographic trends and the foreseeable shortages in the continent's national labour markets, a strong focus on enhancing the intra-EU mobility of TCNs already present in the EU is imperative. We present five key recommendations that would improve the patchwork legal migration *acquis*.

RECOMMENDATION 1 ENGAGE HARMONISATION INSTRUMENTS BETTER

Full harmonisation of the legal migration *acquis* is not the immediate aim of EU member states but could become the target in the long term. In the meantime, the Commission can take action to lift uncertainties over the meaning and subsequent implementation of the patchwork *acquis*. The Commission can bring infringement procedures against member states before the Court of Justice. Regarding family migration as well as access to long-term residency, the CJEU has already played an important role. We believe that more legal certainty can only be experienced if the labour migration directives are used and litigated. Thus, there is room for infringement proceedings to bring existing standards to fruition so that they contribute to making the patchwork work.

Alternatively, other harmonisation tools can be used. The European Commission could establish guidelines and/or comparative studies that can support national authorities and courts in their interpretation of the EU legal migration *acquis*.

RECOMMENDATION 2 REDESIGN THE SINGLE PERMIT DIRECTIVE TO DEAL WITH ALL PROCEDURES

The Single Permit Directive should, as a general directive on procedures, expand its subject matter to include all procedures on visas for entry *and* procedures on renewal and status switching. This could benefit the aim of enabling quick access to the LTR status and intra-EU mobility.

RECOMMENDATION 3 ENGAGE THIRD PARTIES IN THE ENFORCEMENT OF EQUAL TREATMENT RIGHTS

We recommend improving the enforcement of the Single Permit Directive by first shifting the burden of proof of unequal treatment from the single permit holder to the employer. Second, third parties (e.g. work councils, NGOs) should be granted legal standing to engage in proceedings before national courts on behalf of or in support of single permit holders. In general terms – and this is relevant to all migrant workers, irrespective of the directive which governs their entry into the EU –, we recommend prioritising labour rights protection to the highest degree.

RECOMMENDATION 4 DESIGN A 'LIGHT BLUE CARD' FOR MEDIUM-SKILLED LABOUR

To facilitate migration for the purpose of medium-skilled jobs, rather than expand the scope of the Single Permit Directive, we suggest adding an optional or add-on, 'light blue' alternative for medium-skilled or -qualified labour (e.g. care work) to the recast Blue Card Directive.

RECOMMENDATION 5 FACILITATE THE INTRA-EU MOBILITY OF THIRD-COUNTRY NATIONALS

Rather than allow employers to use intra-EU posting to hire 'cheap' TCN workers in substandard conditions in low- and medium-skilled jobs, TCNs already lawfully present in the Union should get priority to access the EU labour market. Instead, under the current practice, they face barriers in accessing European jobs. Therefore, the access of TCNs to intra-EU mobility should be facilitated.

Along the lines of the rights granted to ICTs, international students and researchers, the EU should enhance possibilities for TCNs to move within the EU for the purpose of work, irrespective of their level of qualification. Fast-tracking TCNs into the EU LTR status could also work towards this end – if the intra-EU mobility of LTR is further facilitated. A reservoir of (highly) skilled or experienced migrant workers is available in the EU but not engaged in the internal market. They are 'staying put' until the ultimate right to move within the EU becomes available – EU citizenship. Their obligatory waiting is not working towards making the patchwork work.

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- 16 The recent *ASGI* case C-462/20 is listed under the Long-Term Residents (LTR) Directive only. This case could also be listed under the Single Permit Directive or the Blue Card Directive. However, the LTR Directive is listed first in the referral, and Italy has over a million LTRs against less than 500 migrants with a Blue Card, for example.
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- 30 Judgment of 12 December 2019, *G.S. and V.G.*, C-381/18, ECLI:EU:C:2019:1072; Judgment of 14 March 2019, *Y.Z. and Others*, C-557/17, ECLI:EU:C:2019:203.
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