

# Legal migration

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## TAMPERE CONCLUSIONS

### III. FAIR TREATMENT OF THIRD COUNTRY NATIONALS

*20. The European Council acknowledges the need for approximation of national legislations on the conditions for admission and residence of third country nationals, based on a shared assessment of the economic and demographic developments within the Union, as well as the situation in the countries of origin. It requests to this end rapid decisions by the Council, on the basis of proposals by the Commission. These decisions should take into account not only the reception capacity of each Member State, but also their historical and cultural links with the countries of origin.*

*21. The legal status of third country nationals should be approximated to that of Member States' nationals. A person, who has resided legally in a Member State for a period of time to be determined and who holds a long-term residence permit, should be granted in that Member State a set of uniform rights which are as near as possible to those enjoyed by EU citizens; e.g. the right to reside, receive education, and work as an employee or self-employed person, as well as the principle of non-discrimination vis-à-vis the citizens of the State of residence. The European Council endorses the objective that long-term legally resident third country nationals be offered the opportunity to obtain the nationality of the Member State in which they are resident.*

# PART 1: ASSESSMENT OF THE CURRENT SITUATION

## A. The legislative landscape

Since 2003, the Union legislator has adopted a series of directives in the field of legal migration of third-country nationals (TCNs). Moreover, TCNs are covered and protected by the Race Equality Directive 2000/43/EC, adopted as a consequence of point 19 of the Tampere conclusions and other Union law instruments, such as the social policy directives. The EU Charter of Fundamental Rights (the Charter) grants most fundamental rights to “everyone”, irrespective of nationality or immigration status. Finally, the Employer Sanctions Directive 2009/52/EC protects undocumented third-country workers.

Currently, seven directives on legal migration are in force in the EU. These include the Family Reunification Directive 2003/86/EC, the long-term resident (LTR) directive 2003/109/EC and the Students and Researchers Directive 2016/801. In addition, four directives address the admission and rights of workers: the Blue Card Directive 2009/50/EC on highly qualified workers, the Single Permit Directive 2011/98/EU, the Seasonal Workers Directive 2014/36/EU and the Intra-Corporate Transfer (ICT) Directive 2014/66/EU. Together, these seven directives relate to the three main categories of immigrants who come to the EU for purposes other than asylum: family reunification, study and employment.<sup>2</sup> The main categories not yet covered are workers who are not highly-skilled and are coming for (temporary) employment of more than nine months, and self-employed TCNs and investors.

The early legal migration directives of 2003 and 2004 are still in force, except for two major changes. First, in 2011, the personal scope of the LTR Directive was extended to refugees and beneficiaries of subsidiary protection. Second, the 2003 Researchers Directive and 2004 Students Directive were merged in 2016, introducing more room for intra-EU mobility and the right for students to look for employment in the member state of graduation. The Commission’s highly publicised 2016 proposal to recast the 2009 Blue Card Directive<sup>3</sup> was unsuccessful due to disagreements between member states, mainly about their ability to maintain their national schemes for the admission of highly-qualified workers in parallel to the European Blue Card scheme.

The three most recent legal migration directives, adopted in 2014 (i.e. ICT Directive and Seasonal Work Directive) and the 2016 Students and Researchers Directive are far longer and more complex than the migration directives adopted in 2003/2004. In fact, the latest directive is almost five times as long as the Family Reunification Directive.<sup>4</sup> This complexity is due, for one, to the increasing need to find compromises between the conflicting aims or interests of member states. In addition, it is also linked to member states’ reticence against granting new competences to EU institutions in this field, in order to keep room for national policies. These reasons also explain why the idea of a legally binding EU Immigration Code, tabled by the Commission in 2010,<sup>5</sup> was dropped a few years later. It would have

required very long and complex negotiations and, probably, a transfer of more competences from member states to the EU. In the current political climate, such negotiations would likely result in a reduction of migrants' rights.

## B. Connections to the Tampere agenda

**Publicity and the explicit naming of non-compliant member states in reports will support immigrants, their organisations and lawyers in their political or legal actions aimed at ensuring correct implementation practices.**

### 1. FAIR TREATMENT AND HUMAN RIGHTS

The Tampere conclusions, in line with Article 79(1) TFEU, instructed the Union legislator to ensure “fair treatment” of TCNs legally residing in member states. It has been argued that “fair treatment” equals compliance with human rights. However, this interpretation would deprive the fair treatment clause in the TFEU of its *effet utile*. Human rights treaties and the Charter guarantee almost all human and fundamental rights to “everyone”, including TCNs. Hence, “fair treatment” must imply protection above the minimum level of human rights.

The right to admission and the rights of admitted TCN immigrants granted by the legal migration directives clearly go far beyond the minimum level guaranteed by the European Convention on Human Rights (ECHR) and, since 2009, the Charter. The directives grant a right to family reunification, admission for study or employment for certain categories of workers, under conditions specified in the instruments and many other rights not guaranteed by current European or human rights standards.

The Tampere conclusions also stated that the EU legal migration instruments should take the reception capacity of member states into account, as well as their historical and cultural links with the countries of origin. This guideline is not explicitly reflected in any of the seven directives. The directives' frequent optional or may-clauses and exceptions nevertheless create room, to some extent, for member states to take those three factors into account when adopting national rules within the framework set out by the directives.

### 2. PARTIAL APPROXIMATION

Most legal migration directives did not introduce a new EU residence status but rather laid down common rules

on admission conditions, procedures or migrants' rights after admission. On the contrary, the LTR directive and the Blue Card Directive did introduce a new residence status. Both types of directives undeniably contributed to the "approximation of national legislation on the conditions for admission and residence", as intended by the Tampere conclusions.<sup>6</sup> For the directives that instituted a new common EU residence status, this effect is – at least in part of the member state – clear (e.g. there are three million valid EU LTR residence permits in 2017).

For the other directives, the approximation was more the result of amendments to national legislation to comply with the EU rules, reducing the national rules to the prescribed level, or introducing national rules on issues that had not yet been covered by national rules before. Moreover, the common rules created a minimum standard (far above the minimum of human rights instruments) which prohibited the introduction of lower or more restrictive national rules. This effect is visible when comparing, for instance, the Family Reunification Directive with the national rules of two member states which are not bound by that directive – Denmark and the UK. The UK has introduced high fees and a very high income requirement. Denmark has introduced a minimum age of 24 years for spouses, a requirement of 'special ties' with Denmark, a requirement that the application of reunification with children can only be lodged within two years after the sponsor acquired a permanent status, and privileged rules that only apply to spouses who have held Danish citizenship for at least 28 years. Such requirements would be clearly prohibited by the Family Reunification Directive. Some of the Danish requirements are even incompatible with the ECHR or the EEC-Turkey association law.<sup>7</sup>

### 3. ACCEPTANCE AND IMPLEMENTATION OF DIRECTIVES BY MEMBER STATES

The Tampere Council's request for

"rapid decisions" on the legal migration instruments proved to be too optimistic. Especially in the field of labour migration it proved to be difficult to reach agreement between member states. The first two directives in that field (i.e. Blue Card and Single Permit) were adopted only a decade after Tampere. Generally, the implementation and correct application of the directives in member states took considerable time as well.

The central dilemma is that in legal migration (as in asylum), the aims and political interests of member states vary considerably due to differences in geographical locations, economic situation, language and (colonial) history. However, common interests and aims can only be achieved by applying binding EU rules. Accordingly, member states remain reluctant, as shown by the slow and difficult process of EU approximation of national rules in the area of labour migration since 1999, to give up room of manoeuvre and national policies (as part of their 'sovereignty'), which is the inherent effect of adopting and effectively implementing common rules.

The Family Reunification Directive was adopted in 2003 and had to be implemented in 2005. The first reference by a national court to the Court of Justice (CJEU) in the case *Chakroun* was made in 2008 and the Court's judgment came in 2010. It took another five to seven years before immigration officials, lawyers and judges in the member state from which the reference was made began to take all elements of that judgment into their practices seriously. References from other member states asking for an interpretation of the Directive were made only from 2013 onwards.<sup>8</sup>

The 2003 LTR Directive had to be implemented in 2006. According to Eurostat data, a total of 1.2 million EU LTR permits had been issued two years later. In 2017, the total number had increased to over 3 million.<sup>9</sup> The first CJEU judgment on this directive came in 2012.

A reference to the CJEU is an indication that the EU instrument and its implementation raise issues. Apparently, it is important to grant member states and their institutions, courts and lawyers time to become familiar with EU rules if they are to be taken seriously. The absence of references is no guarantee that the national practice complies with a directive.

In addition, the actual acceptance and application of legal migration directives vary considerably between member states. This is visible with directives that introduced a new EU residence status while allowing for parallel national status (i.e. the LTR Directive and the Blue Card Directive). In Germany, France, Sweden, Portugal and Belgium, less than 3% of LTR TCNs have an EU LTR permit; while in Austria, Italy, the Czech Republic, Romania, Estonia and Finland, 50% to 100% of LTRs acquired EU status.

In Germany and Austria, Turkish nationals are the largest TCN group. In both countries, the integration requirement is at the same level. Nevertheless, according to Eurostat data in 2017, less than 1% of LTRs in Germany had EU status, while in Austria it was 94%. Political choices, administrative instructions or practices and the incorrect idea that the national status is better than EU status most probably explain the difference between those two member states. Generally, the EU status is more favourable because national permits do not allow free mobility within the EU and provide less protection against expulsion.

In 2019, only 27% of the highly-skilled third-country workers admitted in the EU received a Blue Card. In Germany and the Czech Republic, almost all highly-skilled workers received EU permits. In Finland and the Netherlands, however, it was less than 5% – instead, almost all received a national permit.<sup>10</sup>

**No legislative change should be considered before a serious evaluation of the practices and experiences in the member state has been carried out.**

#### **4. NATIONALITY LAW**

One issue mentioned in the Tampere conclusions – “the objective that long-term legally resident third country nationals be offered the opportunity to obtain the nationality of the Member State in which they are resident”<sup>11</sup> – was not addressed by the Union legislator in the past two decades, mainly due to the lack of competence. The CJEU judgments in *Rottmann* and *Tjebbes* confirmed that it is generally up to each member state, having due regard to international law, to lay down the conditions for acquisition and loss of nationality.<sup>12</sup> However, the judgments also highlighted that EU rules on free movement and Union citizenship do restrict, to a certain extent, this freedom when it comes to national rules relating to the loss of nationality.

Moreover, the debate on the EU-wide consequences of certain member states granting their nationality to third-country investors illustrates how legislation and practices of nationality law will increasingly become an issue for consultation and discussion between member state, and action by the Commission. The latter has held discussions with Maltese and Cypriot authorities on the inclusion of an effective residence criterion in their investor citizenship scheme legislation, which resulted in amendments of the legislation in both states.<sup>15</sup> This could also be applied to the intra-EU mobility and labour market consequences that result from the acquisition of Union citizenship by other

TCNs naturalising after long residence in a member state.<sup>14</sup> The relationship between the integration and labour market position of immigrants, on the one hand, and their acquisition of the nationality of their country of residence on the other is well established.<sup>15</sup>

The EU has developed several other instruments to reach an approximation of national rules, separate from binding legislation that can already be used to address the above issues. These include expert committees, working groups of national civil servants convened by the Commission, the development of legally non-binding guidelines and the so-called ‘open method of coordination’.

## PART 2: IDEAS AND SUGGESTIONS FOR THE FUTURE

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### A. General considerations

All legal migration directives are based on the principles that guided the gradual development of the rules on free movement since 1961: equal treatment coupled with access to employment and education, family reunification, and a secure residence right to enhance the integration of the migrant in the host society. The Tampere conclusions explicitly referred to “rights and obligations comparable to those of EU citizens”, and for long-term residents, to “rights which are as near as possible to those enjoyed by EU citizens”.<sup>16</sup> Comparable rights do not mean the same rights; ‘rights which are as near as possible’ does not imply equal rights.

Academic and political debates, as well as judicial disputes on this issue, tend to focus on the differences between the rights of EU citizens under the Citizens’ Rights Directive 2004/38/EC and the rights granted to TCNs in the legal migration directives. Undeniably, those latter directives do not grant the same, but rather fewer rights to TCNs. It should not be forgotten, however, that the principles and rules on the free movement of Union citizens acted as a model. During the drafting and negotiating of the directives and during the interpretation by the Court, those principles were taken into account.<sup>17</sup> In the years to come, the EU should continue to stick to them.

## B. Existing *acquis* and how to take it forward

**A proposal for a directive on the admission of TCN entrepreneurs for establishment, self-employment or investment should not set common admission conditions.**

1. In its recent reports on three legal migration directives (Family Reunification Directive, LTR and Single Permit), the Commission rightly decided not to propose legislative amendments, but to monitor and support the instruments' correct implementation by member states instead. Until 2019, the Commission stimulated the correct implementation, mainly through so-called 'pilot procedures'. In the past decades, only one infringement case on the incorrect application of a legal migration directive reached the Court regarding the level of fees for residences permits.<sup>18</sup> The judgment in that case resulted in better implementation of legal migration directives in several other member states.

In July 2019, the Commission decided to start formal infringement procedures against seven member states concerning the incorrect implementation or application of six out of the seven legal migration directives. In two of its three recent reports, the Commission explicitly mentions member states that are not correctly implementing the directive(s) by name. This monitoring of a more active and public nature is the right way forward.

In addition, the Commission could consider publicly announcing the start, end and results of pilot procedures in this field. Such publicity and explicit naming of non-compliant member states in reports will support immigrants, their organisations and lawyers in their political or legal actions aimed at ensuring correct implementation practices. It will also increase the chances of these directives being taken seriously by national courts.

2. The Students and Researchers Directive had to be implemented by 2018. The Commission's report on member states' implementation of the Directive is set for 2023. No legislative change should be considered before a serious evaluation of the practices and experiences in the member state has been carried out. This also applies to the two directives adopted in 2014, the Seasonal Work Directive and ICT Directive.

Better coordination between policies on migration and those on education, research and foreign affairs – at the EU as well as national levels – could lead to the admission of more students and researchers in the EU, in particular by promoting the innovative mechanism of admission of researchers.

## C. Labour migration

Considering the large differences in labour market needs and member states' opposition to the 2016 proposal for a new Blue Card Directive, a common policy on the admission of highly-skilled workers or the temporary admission of workers without high skills appears to be unrealistic. As long as employers, workers and national authorities prefer the flexibility of the national admission schemes and consider the EU directives in this field as too complex, member states will prefer to issue residence permits under their national schemes. The complexity of the recent labour migration directives is at least partly due to the predominance of Ministries of Home Affairs over the Ministries of Economic Affairs and of Social Affairs in the legislative process. Prior to 2001, it was these latter ministries that played a predominant role in the legislative and policy debates both at the EU and national level.

3. EU policy documents should not mention 'circular migration' or 'opening up channels for legal migration for employment' when member states are not prepared to offer serious and concrete opportunities for TCNs without higher education. Creating false expectations outside the EU risks backfiring and should be avoided.

4. The EU and member states have an interest in creating visible and viable alternatives for irregular labour migration. Hence, the Commission could:

(a) conduct a systematic evaluation of experiences in member states that introduced liberal rules on admission for employment in recent years (e.g. Sweden, Spain, Germany's *Fachkräfteeinwanderungsgesetz*).

(b) check which member states would be interested in participating, on an optional basis, in an EU jobseekers visa scheme for TCNs with or without a certified job offer in the member state.

(c) check which member states would be interested in participating, on an optional basis, in the supply-driven Expression of Interest model developed by the Organisation for Economic Co-operation and Development. The model entails creating a pool of pre-screened, highly-skilled candidates which could serve national or EU schemes. The Commission should also check the possible advantages of this model compared with the current EU Skills Profile Tool, and whether the high investment in such a model would be justified by the interest among member states;

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(d) develop an EU scheme to improve understanding among employers and authorities in member states about educational and professional qualifications acquired outside the EU.

5. The EU institutions should clarify whether their understanding of the notion of “common immigration policy” in Article 79 TFEU with regard to labour migration is that an EU policy should only be *complementary* to member states’ policies. It should also clarify whether it considers that the future labour market and demographic needs are better addressed at the national rather than EU level. What role would the Council and the Parliament play in such an interpretation of the Treaty? How would such an interpretation fit with the aim of making the EU more attractive for highly-skilled workers from outside the EU, and with the idea of one EU labour market?

6. The Commission’s Legal Migration Fitness Check observed that the current directives do not cover two main categories: the admission of temporary migration (more than the maximum of nine months per year covered by the Seasonal Workers Directive), and the admission of TCN entrepreneurs for establishment, self-employment or investment (who are currently not covered by the Single Permit Directive). Increasing

flexibility on the labour market (e.g. employees increasingly being replaced by fully or partially self-employed persons) could be a reason to consider the latter issue.

Considering the member states’ reaction to the 2016 proposal for the Blue Card Directive recast, a proposal for a directive on the admission of TCN entrepreneurs for establishment, self-employment or investment should not set common admission conditions. However, the new proposal could cover the admission procedure and equal treatment by proposing rules similar to those in the Single Permit Directive but adapted to the circumstances of self-employment. Furthermore, the Directive should provide for intra-EU mobility – similarly to the ICT Directive and the new Students and Researchers Directive – and a standstill clause. The personal scope could also cover start-ups, truck drivers, airline pilots and inland shipping crews. In case the EU would wish to set limits to the GIG economy with a labour market characterised by the prevalence of short-term contracts or freelance work as opposed to permanent jobs, a minimum investment in the member state of residence could be required. Moreover, the EU should start implementing the right of establishment as provided in agreements with the Western Balkans, Russia and other third countries.

## D. Long-term residence status and intra-EU mobility for third-country nationals

7. The EU legislator should refrain from introducing administrative sanctions that create new barriers for the acquisition of EU LTR status, such as in Article 44 of the 2016 proposal for a Qualification Regulation.<sup>19</sup> Such sanctions that require reliable information on possible irregular residence in another member state will be

hard to apply correctly and fairly. They will be counterproductive to the integration of TCNs and create a barrier to intra-EU mobility. The Union legislator should stimulate, not punish intra-EU mobility of admitted TCNs.

8. For seasonal workers or other third-

country workers with periods of lawful employment of more than five consecutive years in a member state, those periods should count for the five years of lawful residence required to obtain EU LTR status in order to avoid their permanent exclusion from that status even after being lawfully employed for eight or ten years. This would require a minor amendment to the Seasonal Workers Directive.

9. Stimulate intra-EU mobility of lawful TCN residents with two years of lawful residence in one member state and a confirmed job offer in another. Intra-EU mobility should not be limited to highly-skilled workers. Several member states have an urgent demand for medium- or low-skilled workers. Why admit workers from outside the EU to meet that demand rather than workers who are already lawfully present in the EU? This could reduce irregular employment since the workers would no longer be ‘locked’ in one member state. This would also be a way to implement the principle of EU priority.

10. The practical experience of the more flexible and practical rules of the 2014 ICT Directive (as a new model based on mutual recognition) and on intra-EU mobility as found in the 2016 Students and Researchers Directive should be systematically evaluated. This can form the basis for proposals for opening up intra-EU mobility to lawfully resident third-country workers more generally.

**The Union legislator should stimulate, not punish intra-EU mobility of admitted TCNs.**

**Intra-EU mobility should not be limited to highly-skilled workers.**

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3. European Commission (2016a), [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) 378 final, Strasbourg.
4. The Family Reunification Directive has 18 preambles and covers 7 pages in the Official Journal of the European Union (OJ) and the long-term resident directive has 26 preambles and covers 10 pages. The 2014 Seasonal Work Directive has 55 preambles and covers 16 pages, the 2014 Intra-Corporate Transfer Directive has 48 preambles and covers 22 pages, and the 2016 Students and Researchers Directive has 68 preambles and covers 37 pages in the OJ. The latter two are seven and five times as long as the first one, respectively.
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6. European Council (1999), [Tampere European Council 15 and 16 October 1999: Presidency conclusions](#), para.20.
7. See *Case of Biao v Denmark* (2016), Judgment of the Grand Chamber of the European Court of Human Rights, Application no. 38590/10; *Caner Genc v Integrationsministeriet* (2016), Judgment of the Court of Justice of the European Union, C-561/14; *A v Udlændinge- og Integrationsministeriet* (2019), Judgment of the Court of Justice of the European Union, C-89/18.
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16. European Council (1999), *op.cit.*, para.18 and 21.
17. See e.g. *X v Belgische Staat* (2019), Judgment of the Court of Justice of the European Union C-302/18.
18. *European Commission v Kingdom of the Netherlands* (2012), Judgment of the Court of Justice of the European Union, C-508/10.
19. European Commission (2016b), [Proposal for a Regulation of the European Parliament and of the Council on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection and for the content of the protection granted and amending Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents](#), COM(2016) 466 final, Brussels.