



Analytical report on the legal situation of third-country workers in the EU as compared to EU mobile workers

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EXECUTIVE SUMMARY

Realising the goal to develop a common immigration policy introduced with the Treaty of Maastricht and further developed since then (see currently Article 79 TFEU), the EU has, in the recent years, adopted legislation on the access of third-country nationals (TCNs) to the EU and their legal situation in the Member States. The various EU migration Directives grant rights to residence and labour market access, require equal treatment with nationals of the host Member State, provide for family reunification, address the issue of social security coordination and guarantee mobility within the EU. As a consequence, the legal situation of TCNs has, to a certain degree, approximated to that of EU workers enjoying free movement since the beginning of European integration.

Nonetheless, important differences remain: First, while the free movement of EU workers is guaranteed by directly enforceable provisions of EU primary law, similar rights for TCNs depend on the enactment of EU secondary law. This implies a wide margin of discretion in designing the regime – notwithstanding fundamental rights requirements such as the right to family life (Article 7 Charter of Fundamental Rights). Second, while all EU workers fall within the personal scope of application of the EU free movement rules (uniform and comprehensive notion of EU worker), the intra-EU mobility regime for TCNs is based on a sector-specific approach with Single Permit Directive 2011/98/EU having a certain residual function. The latter introduces a single application, procedure and general provisions on equal treatment and does not distinguish between a first application for a permit and following intra-EU mobility. Rules with a general scope of application only exist for family reunification and long-term residents (both requiring previous admission to the EU, though). Third, while EU workers enjoy unrestricted labour market access in the EU Member States, significant restrictions such as quotas or preference rules apply to TCNs. Fourth, while EU workers enjoy a comprehensive claim to equal treatment with nationals of the host Member State, such a general prohibition of discrimination does not exist with regard to TCNs. Rather, the EU migration Directives stipulate specific claims to equal treatment subject, moreover, to limitations. Fifth, the right to residence of TCNs is subject to limitations not applying to EU workers. Sixth, the social security coordination regime applies to TCNs legally residing in a Member State. However, there are still no EU instruments on social security coordination with third countries. Seventh, also family reunification with regard to TCNs is subject to stricter conditions than in the context of EU workers. Finally, while the rules on free movement of EU workers do not distinguish between a first establishment in one Member State and subsequent establishment(s) in other Member States and do not apply different rules to these situations, the EU migration Directives are based on such a distinction.

1. INTRODUCTION

Third-country nationals (TCNs¹) constitute a significant part of the EU labour force and contribute to the growth of the economy and the sustainability of the European social model. Indeed, TCNs of working age residing in the EU (14.9 million) outnumber EU citizens of working age residing in a Member State different from that of their nationality (EU mobile workers) (11.8 million). Yet, despite their important role on the EU internal market, TCNs are not covered by the EU provisions on the free movement of workers (Articles 45 *et seq* TFEU). True, other than the provisions on the freedom of establishment (see Article 49 TFEU) and the freedom to provide services (see Article 56 TFEU), the rules on the free movement of workers do not explicitly refer to 'nationals' of a Member State when defining their personal scope, but to 'workers' in general (Article 45(1) TFEU) or to 'workers of the Member States' (Article 45(2) TFEU). Early secondary law introduced such an explicit restriction (see Article 1(1) Regulation (EEC) 15/61, Article 1(1) Regulation (EEC) No 1612/68 and Article 1 Directive 68/360/EEC), an understanding also shared by the Court of Justice of the European Union (CJEU)^{2,3}. As a consequence, only EU citizens enjoy the benefits of this core guarantee of European integration, constituting "*a fundamental right of workers and their families. Mobility of labour within the Union must be one of the means by which workers are guaranteed the possibility of improving their living and working conditions and promoting their social advancement, while helping to satisfy the requirements of the economies of the Member States*" (recital 4 Regulation (EU) No 492/2011). In substance, EU workers enjoy the right to move to and reside in other Member States as well as to seek and to take up employment there; they profit from a strict claim to equal treatment with nationals of the host Member State extended far beyond the work sphere as well as from a prohibition of unjustified restrictions on labour market access.⁴

Having said that, in recent years, the legal situation of TCNs with regard to free movement rights has been addressed by the EU legislature. Already with the Treaty of Maastricht, the task of developing a common immigration policy has been entrusted to the EU (see Article K of that Treaty).⁵ This task includes, as current EU primary law stipulates (see Article 79 TFEU), adopting legislation on "*the conditions of entry and residence, and standards on the issue by Member States of long-term visas and residence permits, including those for the purpose of family reunification*", as well as on "*the definition of the rights of TCNs residing legally in a Member State, including the conditions governing freedom of*

1 TCNs are persons not holding the nationality of an EU Member State (see on the particular situation of persons with dual citizenship and their inclusion in the EU citizens' free movement regime if possessing also an EU nationality *F. Wollenschläger*, *Grundfreiheit ohne Markt*, 2007/2017, p. 144 *et seq*, and notably the judgment of 7 July 1992, *Micheletti*, C-369/90, EU:C:1992:295, and judgment of 19 October 2004, *Chen/Zhu*, C-200/02, EU:C:2004:639). In line with the EC's mandate, citizens from the EEA (and Switzerland) are excluded.

2 Judgment of 5 July 1984, *Meade*, 238/83, EU:C:1984:250, paragraph 7.

3 See *F. Wollenschläger*, *Grundfreiheit ohne Markt*, 2007/2017, p. 143, and, for a different understanding, *R. Plender*, 'An Incipient Form of European Citizenship', in: F. G. Jacobs (ed.), *European Law and the Individual*, London, 1976, p. 39 (42 *et seq*).

4 See in more detail *F. Wollenschläger*, *Grundfreiheit ohne Markt*, 2007/2017, p. 19 *et seq*, and *idem*, *ELJ* 17 (2011), 1 (3 *et seq*).

5 See on the constitutional framework and its development *K. Hailbronner/D. Thym*, *Constitutional Framework and Principles for Interpretation*, in: *idem* (eds), *EU Immigration and Asylum Law*, 2nd edition 2016, Part A, paragraphs 1 *et seq*.

movement and of residence in other Member States” (Article 79 TFEU). The current acquis consists, first, of secondary law addressing the legal situation of TCNs already established in the EU. They enjoy the right to family reunification according to Directive 2003/86/EC. Moreover, after a certain period of residence, Directive 2003/109/EC confers the status of a long-term resident associated, *inter alia*, with free movement and equal treatment rights, also in view of labour market access. Second, a series of sector-specific Directives grant the right to first-time access to the EU to certain categories of TCNs and determine their legal status in the Member States after admission, addressing, *inter alia*, equal treatment with nationals of the host Member State or intra-EU free movement. These acts of secondary law comprise Directive 2009/50/EC (EU Blue Card; highly skilled workers), Directive 2014/36/EU (Seasonal workers), Directive 2014/66/EU (Intra-corporate transfers) and Directive (EU) 2016/801 (Research, studies, training, voluntary service, pupil-exchange schemes or educational projects and au pairing). In contrast and third, Directive 2011/98/EU (Single permit) is of general application but does not lay down substantive conditions for access to the EU.

Against this background of a (limited) approximation of the legal situation of TCNs to that of EU workers, the present report undertakes a comparative analysis of the rather recent EU law framework relating to third-country workers and of the free movement regime for EU workers, which has been a core guarantee of EU law since the beginning of European integration.

The analysis of the two regimes focuses on their scope of application (Chapter 2), the rights to residence (Chapter 3) and access to work (Chapter 4), the rights of jobseekers (Chapter 5), equal treatment (Chapter 6), access to social security (Chapter 7) and social security in the context of moving within the EU (Chapter 8), rights after the end of employment (Chapter 9), rights of members of the family (Chapter 10), defence of rights (Chapter 11) and mobility within the EU (Chapter 12). On this basis, a comparative analysis will highlight similarities and the most salient differences (Chapter 13).

2. SCOPE OF APPLICATION

2.1 Definition of worker

2.1.1 Definition of EU worker

The concept of worker in Article 45 TFEU (and Regulation (EU) No 492/2011) has an autonomous meaning and must not be interpreted narrowly.⁶ The essential feature of an employment relationship is that, for a certain period, a person performs services for and under the direction of another person (subordination), in return for which s/he receives remuneration.⁷ The nature of the legal relationship between the employee and the

⁶ Judgment of 23 March 1982, *Levin*, 53/81, EU:C:1982:105; and more recently judgment of 21 February 2013, *L.N.*, C-46/12, EU:C:2013:97, paragraph 39.

⁷ Judgment of 3 July 1986, *Lawrie-Blum*, 66/85, EU:C:1986:284, paragraph 17; and more recently judgment of 10 September 2014, *Haralambidis*, C-270/13, EU:C:2014:2185, paragraph 34.

employer (public or private) is not decisive,⁸ neither is the sector.⁹ The economic activities must be real and genuine, to the exclusion of purely marginal and ancillary activities.¹⁰ The origin of the funds from which the remuneration is paid or a limited amount of that remuneration does not impact on a person's status as a 'worker'.¹¹ The fact that the income from employment is lower than the minimum required for subsistence does not prevent an employed person from being regarded as a 'worker'.¹² The fact that the employment is of short duration does not in itself exclude this kind of employment from the scope of Article 45 TFEU.¹³ Once these conditions have been satisfied, the motives which may have prompted a worker of a Member State to seek employment in another Member State are of no account and must not be taken into consideration.¹⁴

Jobseekers also come within the scope of the EU provisions on the right of free movement for workers (see in more detail 5.1). Article 45(3) TFEU also entails the right of an EU citizen to move to a Member State in order to seek employment there, as confirmed by the CJEU.¹⁵ By contrast, 'posted workers' are not 'migrant workers'.¹⁶

In certain circumstances an EU citizen can retain, *vis-à-vis* the Member States in which s/he has previously exercised economic activities, his or her status as an employee or self-employed person and the advantages linked to this status (see in more detail 9.1). This is confirmed in Article 7(3) of Directive 2004/38/EC, more specifically in the case where the Union citizen is temporarily unable to work as a result of illness or accident, is in duly recorded involuntary unemployment or embarks on vocational training. This list is not exhaustive.¹⁷

2.1.2 Definition of workers applicable to TCNs

There is no uniform concept of worker applicable to all EU migration Directives.

There is no definition of 'worker' for the application of Directive 2003/86/EC (Family reunification) or Directive 2003/109/EC (Long-term residents). Being a worker as such is not relevant for the implementation of these Directives.

Directive 2009/50/EC (EU Blue Card) applies to TCNs who ask to be admitted to the territory of a Member State for the purpose of highly qualified employment. The latter concept is defined by Article 2(b) of Directive 2009/50/EC as "*the employment of a person who in the Member State concerned is protected as an employee under national*

8 Judgment of 10 September 2014, *Haralambidis*, C-270/13, EU:C:2014:2185, paragraph 40.

9 Like the sport sector: judgment of 15 December 1995, *Bosman*, C-415/93, EU:C:1995:463.

10 Judgment of 23 March 1982, *Levin*, 53/81, EU:C:1982:105, paragraph 17; and more recently judgment of 21 February 2013, *L.N.*, C-46/12, EU:C:2013:97, paragraph 39.

11 Judgment of 3 July 1986, *Lawrie-Blum*, 66/85, EU:C:1986:284, paragraph 21; and more recently judgment of 26 March 2015, *Fenoll*, C-316/13, EU:C:2015:200, paragraph 34. The income can also consist of an indirect contribution, such as board and lodging: judgment of 5 October 1988, *Steymann*, 196/87, EU:C:1988:475.

12 Judgment of 23 March 1982, *Levin*, 53/81, EU:C:1982:105, paragraph 15-16; and more recently judgment of 14 December 1995, EU:C:1995:438, *Nolte*, C-317/93, paragraph 19.

13 Judgment of 21 February 2013, *L.N.*, C-46/12, EU:C:2013:97.

14 Judgment of 23 March 1982, *Levin*, C-53/81, EU:C:1982:105, paragraphs 21-22; and more recently judgment of 21 February 2013, *L.N.*, C-46/12, EU:C:2013:97, paragraph 47.

15 Judgment of 26 February 1991, *Antonissen*, C-292/89, EU:C:1991:80, and judgment of 23 March 2004, *Collins*, C-138/02, EU:C:2004:172.

16 Judgment of 25 October 2001, *Finalarte and Others*, C-49/98 *et seq*, EU:C:2001:564, paragraphs 22-23.

17 See for instance judgment of 19 June 2014, *Saint-Prix*, C-507/12, EU:C:2014:2007.

employment law and/or in accordance with national practice, irrespective of the legal relationship, for the purpose of exercising genuine and effective work for, or under the direction of, someone else". This person must also be paid and in addition have the required adequate and specific competence, as proven by higher professional qualifications. However, this Directive does not apply to some categories of workers, more specifically researchers covered by Directive 2005/71/EC, seasonal workers and posted workers within the meaning of Directive 96/71/EC (Article 3(d), (h) and (j) Directive 2009/50/EC).

Directive 2011/98/EU (Single Permit) covers TCNs who apply to reside in a Member State for the purpose of work and those who have been admitted for reasons of work, but also TCNs who have been admitted for other reasons but are permitted to work in a Member State (Article 3 Directive 2011/98/EU). Article 2(b) of Directive 2011/98/EU defines 'third-country worker' as a TCN "who is legally residing and is allowed to work in the context of a paid relationship in a Member State in accordance with national law or practice". However, a number of categories are excluded from the scope of the Directive, such as posted workers, intra-corporate transferees, seasonal workers, au pairs, persons who are long-term residents in accordance with Directive 2003/109/EC and self-employed workers.

Directive 2014/36/EU (Seasonal workers) applies to TCNs "who reside outside the territory of the Member States and who apply to be admitted, or who have been admitted under the terms of this Directive, to the territory of a Member State for the purpose of employment as seasonal workers" (Article 2(1) Directive 2014/36/EU). Article 3(b) Directive 2014/36/EU defines 'seasonal worker' as a TCN "who retains his or her principal place of residence in a third country and stays legally and temporarily in the territory of a Member State to carry out an activity dependent on the passing of the seasons, under one or more fixed-term work contracts concluded directly between that TCN and the employer established in that Member State". An 'activity dependent on the passing of the seasons' means "an activity that is tied to a certain time of the year by a recurring event or pattern of events linked to seasonal conditions during which required labour levels are significantly higher than those necessary for the usual operations" (Article 3(c) Directive 2014/36/EU). This Directive does not apply to posted workers (Article 2(3)(a) Directive 2014/36/EU).

*Directive 2014/66/EU (Intra-corporate transfers) applies to TCNs "who reside outside the territory of the Member States at the time of application and apply to be admitted or who have been admitted to the territory of a Member State under the terms of this Directive, in the framework of an intra-corporate transfer as managers, specialists or trainee employees" (Article 2(1) Directive 2014/66/EU). 'Intra-corporate transfer' refers to the "temporary secondment for occupational or training purposes from an undertaking established outside the territory of a Member State, and to which the TCN is bound by a work contract prior to and during the transfer, to an entity belonging to the undertaking or to the same group of undertakings which is established in that Member State. It also refers to the mobility between host entities established in one or several second Member States" (Article 3(b) Directive 2014/66/EU). Article 3 of Directive 2014/66/EU further defines the concepts of 'manager', 'specialist' and 'trainee employee'. The Directive excludes from its scope, *inter alia*, posted workers, self-employed workers, TCNs who are assigned by employment agencies or temporary work agencies and those who are admitted as full-time students or who are undergoing a short-term supervised practical training as part of their studies (Article 2(2) Directive 2014/66/EU).*

Directive 2016/801/EU (Researchers, students et al) applies to TCNs “*who apply to be admitted or who have been admitted to the territory of a Member State for the purpose of research, studies, training or voluntary service in the European Voluntary Service. Member States may also decide to apply the provisions of this Directive to TCNs who apply to be admitted for the purpose of a pupil exchange scheme or educational project, voluntary service other than the European Voluntary Service or au pairing*” (Article 2(1) Directive 2016/801/EU). This Directive does not apply to, *inter alia*, long-term residents, intra-corporate transferees or Blue Card holders (Article 2(2) Directive 2016/801/EU). In the definitions of the categories of persons in Article 3, there is no reference to their status as workers under the employment law of the host Member State. Only in the special conditions for researchers is it indicated that the applicant “*shall present a hosting agreement or, if provided for in national law, a contract*” (Article 8(1) Directive 2016/801/EU). Member States may require such hosting agreement to contain information “*on the legal relationship between the research organisation’ and the researcher as well as ‘on the working conditions of the researcher*” (Article 10(3) Directive 2016/801/EU). As regards the special conditions for trainees, Article 13(1)(a)(v) Directive 2016/801/EU provides that the training agreement shall contain the legal relationship between the trainee and the host entity.

2.1.3 Intermediate conclusions

Contrary to what is the case with EU citizens in the context of EU law on free movement of workers, there is no uniform definition of TCN workers covered by the migration Directives. Each of these Directives define their personal scope very diversely and limit it to special categories of workers, excluding other category of workers. These Directives also lack provisions on the right to maintain the status of worker once the TCN concerned has stopped working (on the status of jobseekers see Chapter 5).

2.2 Definition of member of the family

2.2.1 EU worker

Directive 2004/38/EC grants directly enforceable free movement and equal treatment rights to family members of EU workers.

For the purposes of Directive 2004/38/EC ‘family member’ means (a) the spouse, (b) the registered partner, (c) direct descendants who are under the age of 21 or are dependants and (d) the dependent direct relatives in the ascending line (Article 2).

The concept of ‘spouse’ covers a person who is in a marital relationship with a Union citizen as defined by national law.¹⁸ To qualify as a spouse it is immaterial in which country the marriage has been contracted¹⁹ or whether or not the person concerned lives with or under the same roof as the worker.²⁰ Member States must recognise arranged marriages

¹⁸ Judgment of 17 April 1986, *Reed*, C-59/85, EU:C:1986:157.

¹⁹ COM (2009) 313 final, p. 4.

²⁰ Judgment of 13 February 1985, *Diatta*, C-267/83, EU:C:1985:67.

(provided both parties fully and freely consent to the marriage), but not polygamous marriages, forced marriages²¹ or marriages of convenience solely concluded for the purpose of acquiring or enjoying free movement rights.²² The term 'spouse' is gender-neutral and may encompass the same-sex spouse of a Union citizen.²³

'Registered partners' are not regarded as spouses, but they do enjoy similar rights when they meet two conditions. First, the registered partnership must have been contracted on the basis of the legislation of an EU Member State and, second, the legislation of the host Member State must treat registered partnerships as equivalent to marriage and in accordance with the conditions laid down in its legislation.

Direct *descendants* (children, grandchildren or great-grandchildren) or *ascendants* (parents, grandparents or great-grandparents) of the worker, the spouse and/or the registered partner are regarded as family members when they are dependent on the EU worker. A blood relationship with the worker, the spouse and/or the registered partner is not required. Adopted children, stepchildren, or other forms of a parent-child relationship are covered.²⁴

Descendants under the age of 21 are assumed to be dependent. As regards other family members, dependency concerns a factual situation in which the family members need material support from the Union citizen, the spouse and/or the registered partner.²⁵ The status of dependent family member does not presuppose a right to maintenance. There is no need to determine the reasons for dependency, or to examine whether the family member can support him or herself, the spouse and/or the registered partner.²⁶ The host Member State cannot make the notion of dependency conditional upon the requirement that the family member has tried to obtain employment, to obtain subsistence support from the authorities of his or her country of origin and/or otherwise to support him or herself.²⁷ Dependency must exist in the State of origin at the time²⁸ the family member applies to join the Union citizen. Family members will have to prove that they are materially dependent, but they are free to choose the means: any appropriate form of evidence²⁹ may suffice.

In addition to these persons who are qualified as 'family members' and who enjoy directly enforceable free movement and equal treatment rights, Directive 2004/38/EC also contains provisions³⁰ on more distant relatives of EU workers whose entry and residence must be 'facilitated'. This holds true for (a) any other family members who, in the country from which they have come, are dependants or members of the household of the Union citizen having the primary right of residence, or where serious health grounds strictly require the

21 COM(2009) 313 final, p. 4.

22 Article 35 Directive 2004/38/EC and COM(2014) 604 final.

23 Judgment of 5 June 2018, *Coman*, C-673/16, EU:C:2018:385.

24 COM (2009) 313 final, p. 4–5.

25 Judgment of 18 June 1987, *Lebon*, C-316/85, EU:C:1987:302. Emotional dependence does not suffice; see opinion of 19 October 2004, *Zhu*, C-200/02, EU:C:2004:307.

26 Judgment of 9 January 2007, *Jia*, C-1/05, EU:C:2007:1.

27 Judgment of 14 January 2014, *Reyes*, C-423/12, EU:C:2014:16.

28 Judgment of 9 January 2007, *Jia*, C-1/05, EU:C:2007:1.

29 COM(2009) 313 final, p. 5.

30 Article 3(2) Directive 2004/38/EC.

personal care of the family member by the Union citizen and (b) the partner with whom the Union citizen has a durable relationship, duly attested.³¹

2.2.2 Third-country workers

The EU migration Directives that confer rights on family members – i.e. all Directives included in this study with the exception of Directive 2011/98/EU (Single permit) and Directive 2014/36/EU (Seasonal workers) – define the term ‘family member’ by referring to Directive 2003/86/EC on the right to family reunification, and more specifically Article 4(1) of this Directive. This provision applies to (a) the sponsor’s³² spouse,³³ (b) the minor children of the sponsor and his or her spouse, including adopted children, and (c) the minor children – including adopted children – of the sponsor or the spouse provided the third-country worker or the spouse has custody and the children are dependent on him or her.

Thus, unlike Directive 2004/38/EC, Directive 2003/86/EC (Family reunification) does not oblige the host Member State to confer residence rights on the registered partner, descendants other than minor children and ascendants of third-country workers. However, the host Member State may authorise the entry and residence of (i) first degree relatives in the ascending line of the worker or the spouse who are dependent on them and do not enjoy proper family support in the country of origin,³⁴ (ii) adult unmarried children of the worker or the spouse, where they are objectively unable to provide for their own needs on account of their state of health,³⁵ (iii) the registered partner,³⁶ (iv) the unmarried partner with whom the third-country worker is in a duly attested stable long-term relationship³⁷ and (v) unmarried children who are objectively unable to provide for their own needs on account of their state of health.³⁸

Directive 2011/98/EU (Single permit) and Directive 2014/36/EU (Seasonal workers) do not specifically regulate the legal status of family members and, hence, contain no definition of the term ‘family member’.

2.2.3 Intermediate conclusions

In sum, the definition of the term family member of a Union citizen under Directive 2004/38/EC is significantly broader than the equivalent term contained in Directive 2003/86/EC applicable to third-country workers. Member States, however, may grant additional (residence) rights to family members of third-country workers who do not have such a right under Directive 2003/86/EC.

31 Article 3(2) Directive 2004/38/EC.

32 *I.e.* a TCN residing lawfully in a Member State and applying or whose family members apply for family reunification to be joined by him or her; see Article 2(c) of Directive 2003/86/EC.

33 Article 4(4) of Directive 2003/86/EC specifically states that in the event of a polygamous marriage only one spouse can benefit from family reunification. Another spouse or children of the latter do not enjoy family reunification.

34 Article 4(2) Directive 2003/86/EC.

35 *Ibid.*

36 Article 4(3) Directive 2003/86/EC. Member States are free to decide that such partners are to be treated equally as spouses as regards family reunification.

37 *Ibid.*

38 *Ibid.*

3 RESIDENCE RIGHTS

3.1 EU workers

As EU citizens, EU workers have the right to exit one Member State, to enter another Member State and to reside in the territory of the latter (Article 45(3)(b) and (c) TFEU; Directive 2004/38/EC). In the aforementioned Directive, a distinction is made between residence for a period up to three months, residence for more than three months and permanent residence.

To exercise the 'right of residence up to three months' the worker merely needs to hold a valid passport or identity card.³⁹ This right is not conditional upon any minimum financial resource requirement, but the right can only be retained as long EU workers do not become an unreasonable burden on the host Member State's social assistance system;⁴⁰ however, an expulsion is excluded (Article 14(4)(a) Directive 2004/38/EC).

To be entitled to residence for 'more than three months' the person concerned must possess the status of worker or, if he or she is not a worker (e.g. in case the work concerned is merely marginal or ancillary), possess resources that are sufficient for not becoming a burden on the social assistance system as well as comprehensive sickness insurance.⁴¹ The host Member State may require from workers to register with relevant authorities, and to present a valid identity card or passport, proof of employment or, if the status of worker is not obtained, financial resources and sickness insurance.⁴² A registration certificate shall be issued.

EU workers may acquire the right of *permanent residence* in the host Member State if they have legally resided there for a continuous period of five years. Even though the text of Directive 2004/38/EC does not state so explicitly, the CJEU has held that the EU citizen concerned must have complied with the conditions for residence laid down in Directive 2004/38/EC⁴³ or the Directives it has replaced.⁴⁴ Lawful residence on the basis of national law⁴⁵ does not give entitlement to permanent residence.⁴⁶

Continuity of residence is not affected by temporary absences not exceeding six months a year, or absences of a longer duration (without a maximum specified) for compulsory military service, and (one) absence of a maximum of twelve consecutive months for reasons such as pregnancy and childbirth, serious illness, study or vocational training and posting in another Member State or third country.⁴⁷ However, continuity is broken by an expulsion decision duly enforced and taken in accordance with Directive 2004/38/EC⁴⁸ or by periods of imprisonment imposed by a national court.⁴⁹

39 Article 6 Directive 2004/38/EC.

40 Article 14(1) Directive 2004/38/EC.

41 Article 7(1)(b) Directive 2004/38/EC.

42 Article 8 Directive 2004/38/EC.

43 Judgment of 21 December 2011, *Ziolkowski*, C-424/10 and C-425/10, EU:C:2011:866.

44 Judgment of 7 October 2010, *Lassal*, C-162/09, EU:C:2010:592.

45 Judgment of 21 December 2011, *Ziolkowski*, C-424/10 and C-425/10, EU:C:2011:866.

46 Judgment of 8 May 2013, *Alarape*, C-529/11, EU:C:2013:290.

47 Article 16(3) Directive 2004/38/EC.

48 Article 21 Directive 2004/38/EC.

49 Judgment of 16 January 2012, *Onuekwere*, C-378/12, EU:C:2014:13.

The right of permanent residence can be acquired before completion of a continuous period of five years of residence, under certain conditions, by workers who have reached the age for entitlement to retirement pension, workers who stop working as a result of permanent incapacity to work and frontier workers.⁵⁰

Once acquired, the right to permanent residence of Union citizens is only lost after two consecutive years of absence.⁵¹

The residence rights of workers can be restricted on grounds of public policy, public security or public health (Articles 27-33 Directive 2004/38/EC). Measures restricting these rights shall not serve economic ends; they must be based on the personal conduct of the persons concerned, which must represent a genuine, present and sufficiently serious threat that affects one of the fundamental interests of society; and they cannot be used for purposes of general prevention (Article 27 Directive 2004/38/EC). Only certain diseases with epidemic potential can justify restrictive measures (Article 29 Directive 2004/38/EC). As regards expulsion, Directive 2004/38/EC establishes a system of protection against expulsion measures which is based on the degree of integration in the host Member State.⁵² First, before taking an expulsion decision 'on grounds of public policy or public security', the host Member State must take account in particular of considerations such as how long the individual concerned has resided on its territory, his or her age, state of health, family and economic situation, social and cultural integration into the host Member State and the extent of his or her links with the country of origin (Article 28(1) Directive 2004/38/EC). Second, permanent residents can only be expelled on 'serious' grounds of public policy or public security (Article 28(2) Directive 2004/38/EC). Third, permanent residents⁵³ who have resided in the host Member State for the previous ten years and minors can only be expelled on 'imperative grounds of public security' (Article 28(3) Directive 2004/38/EC).

3.2 Third-country workers

TCNs do not have an unconditional right to reside in the Member States. A distinction has to be drawn between first-time access of TCNs to the EU and intra-EU mobility after establishment in one Member State (on the latter see Chapter 12.2). The EU migration Directives that confer residence rights on third-country workers – i.e. all Directives included in this study with the exception of Directive 2011/98/EU (Single permit) and Directive 2014/36/EU (Seasonal workers) – do so under certain conditions, which are all stricter than those applicable to EU workers (in the context of access to work see further Chapter 4.1).

Directive 2009/50/EC (EU Blue Card) determines the conditions of entry and residence for more than three months of TCNs for the purpose of highly qualified employment as EU Blue Card holders.

50 Article 17 Directive 2004/38/EC.

51 Article 16(4) Directive 2004/38/EC.

52 Judgments of 23 November 2010, *Tsakouridis*, C-145/09, EU:C:2010:708, and of 8 December 2011, *Ziebell*, C-371/08, EU:C:2011:809.

53 Judgment of 17 April 2018, *B and Vomero*, C-316/16 and C-424/16, EU:C:2018:256.

A TCN (or his or her employer – Article 10(1) Directive 2009/50/EC) may apply for a Blue Card when s/he is still residing outside the Member State where s/he wishes to work or when s/he is already staying in that Member State on the basis of a valid visa or residence permit (Article 10(2) Directive 2009/50/EC). The TCN must present, *inter alia*, evidence of an employment contract or job offer, professional qualifications and sickness insurance. The gross annual salary shall be at least 1.5 times the average gross annual salary in the Member State concerned (Article 5(3) Directive 2009/50/EC), or, for employment in certain professions which are in need of TCN workers, 1.2 times such salary (Article 5(5) Directive 2009/50/EC).

Once the EU Blue Card is obtained, the third-country worker is entitled to enter, re-enter and stay in the Member State concerned for as long as the card is valid (which is between one and four years) (Article 7(4) Directive 2009/50/EC *juncto* Article 7(2) Directive 2009/50/EC).

An EU Blue Card can be withdrawn, and legal residence may thus end, *inter alia*, when the holder fraudulently acquired the Blue Card, no longer meets the conditions for acquiring the card, is no longer residing in the Member State for purposes of highly qualified employment, applies for social assistance or fails to communicate his or her address (Article 9 Directive 2009/50/EC; on unemployment see Chapter 9.2).

Directive 2014/66/EU (Intra-corporate transfers) determines the conditions under which certain TCNs may enter and reside in an EU Member State, *i.e.* TCNs who reside in and work for an undertaking established in a third country, and who have been seconded or transferred as managers, specialists or trainee employees to an entity that belongs to that undertaking (or the group to which it belongs) in the EU Member State.

The TCN worker must reside in a third-country at the time s/he (or the employer in the host EU Member State – Article 11(1) Directive 2014/66/EU) applies for the 'intra-corporate transferee permit'. Evidence must be submitted of, *inter alia*, the fact that the host entity and the undertaking in the third State belong to the same undertaking or group of undertakings, employment, salary, duration of the transfer, professional qualifications, sickness insurance and, if the host Member State so requires, sufficient resources (Article 5(1) and (5) Directive 2014/66/EU).

The duration of the transfer, and thus of the residence in the host EU Member State, is at least 90 days (Article 1(a) Directive 2014/66/EU) and must not exceed three years for managers and specialists or one year for trainee employees (Article 12(1) Directive 2014/66/EU). The third-country worker (or the employer) may apply for a permit a second time, but the host Member State may require a period of up to six months to elapse between the maximum duration and the new application.

Conditions laid down in collective labour agreements applicable to similarly situated posted workers must be observed during the transfer and the transferred third-country worker may not be paid less than nationals of the host Member State who carry out comparable work (Article 5 Directive 2014/66/EU). If these requirements are not met, the host Member State may withdraw the permit.

Directive 2014/36/EU (Seasonal workers) lays down the conditions of entry and stay of TCNs for purposes of seasonal employment. Seasonal workers retain their principal place

of residence in a third country and may stay legally in an EU Member State to carry out work that is dependent on the passing of seasons on the basis of fixed-term contracts that are directly concluded between them and an employer based in the Member State concerned (Article 3(b) Directive 2014/36/EU).

TCN workers may apply for admission as a seasonal worker for a period of 90 days or less, or for stays of more than 90 days (Articles 5 and 6 Directive 2014/36/EU). In both cases the TCN will have to submit an employment contract or job offer that specifies, *inter alia*, the place, type and duration of the work, the remuneration and other working conditions, and evidence of sickness insurance as well as adequate accommodation (that may be provided by the employer – Article 20 Directive 2014/36/EU). At the time of application for the permit, Member States must ensure that seasonal workers have no recourse to social assistance (Article 5(3) Directive 2014/36/EU). Thereafter, once the third-country is working, they may grant more favourable rights.

Articles 8 and 9 of Directive 2014/36/EU contain a list of grounds for rejecting or withdrawing the authorisation for seasonal work. This list *inter alia* includes the fact that the employer was sanctioned on the basis of national law for undeclared work or for not having respected the conditions laid down in Directive 2014/36/EU, insolvency of the employer, or the employer's failure to meet legal obligations regarding social security, taxation or labour law.

Seasonal workers whose stays will not exceed 90 days receive a short-stay visa and/or work permit (Article 12(1) Directive 2014/36/EU); those who are authorised to stay for more than 90 days will be issued a long-stay visa and/or a seasonal worker permit (Article 12(2) Directive 2014/36/EU) valid for not less than five months and not more than nine months in a twelve-month period (Article 14(1) Directive 2014/36/EU). The stay may be extended once when seasonal workers extend their contract with the same employer or conclude one with another employer, provided that the total stay does not exceed the maximum of nine months within a twelve-month period (Article 15 Directive 2014/36/EU).

Directive 2016/801/EU (Researchers, students et al) applies to TCNs who apply to be admitted or who have been admitted to the territory of a Member State for the purpose of research (studies, training or voluntary service in the European Voluntary Service). Applications for admission, which may be submitted when the TCN is still residing in the third country or already in the EU Member State concerned, must include, *inter alia*, a valid travel document, evidence of sickness insurance and possession of sufficient resources, and payment of handling fees. In addition, specific conditions apply to researchers (*e.g.* hosting agreement – Article 8(1) Directive 2016/801/EU), students (*e.g.* evidence of admission to a higher education institution, payment of fees and/or sufficient knowledge of the language of the course or programme concerned – Article 11), trainees (*e.g.* training agreement – Article 13 Directive 2016/801/EU), volunteers (*e.g.* agreement with hosting entity – Article 14 Directive 2016/801/EU) and au pairs (*e.g.* agreement with host family and evidence of being between 18 and 30 years old – Article 16 Directive 2016/801/EU). Authorisation for admission is granted in the form of a residence permit or long-stay visa, the duration of which may vary from category to category. For example, researchers and students can stay for at least one year or for the duration of the hosting agreement and/or

studies where this is shorter (Article 18(1) and (2) Directive 2016/801/EU), with the possibility for extension. The maximum duration of the long-stay visa is one year.

Directive 2003/109/EC (Long-term residence) determines the terms for conferring long-term residence status to TCNs legally residing in a Member State and for withdrawing said status. The right to long-term residence may be regarded as the equivalent of, and shows similarities with, the right to permanent residence for EU citizens as provided for by Articles 16 *et seq* Directive 2004/38.⁵⁴

Like the latter right, the right to long-term residence can be acquired upon completion of five years of legal and continuous residence in a Member State (Article 4(1) Directive 2003/109/EC). To calculate the five-year period for purposes of long-term residence status, some deviations nevertheless exist, such as the rule that only half of the periods of residence for study purposes may be taken into account (Article 4(2) Directive 2003/109/EC). To actually obtain the right of long-term residence, the TCN must provide evidence of stable and regular resources sufficient to maintain him or herself and his or her family without having recourse to social assistance, as well as sickness insurance (Article 5(1) Directive 2003/109/EC). In addition, evidence may have to be submitted of appropriate accommodation (Article 7(2) Directive 2003/109/EC). The most notable difference with the EU citizens' right to permanent residence is that Member States may make long-term residence status conditional upon integration measures (Article 5(2) Directive 2003/109/EC).

The right to long-term residence may be lost if it has been fraudulently acquired, if the TCN has been expelled for reasons of public policy, security or health, and in the event of absence from the territory of the Union for a period of twelve consecutive months (Article 9(1) Directive 2003/109/EC). Long-term residents who have exercised their right to move to another Member State (Article 14 *et seq* Directive 2003/109/EC – see Chapter 12.2) may under essentially the same conditions (also) acquire long-term residence status in that second Member State (Article 23 Directive 2003/109/EC).⁵⁵

Third-country workers holding a Blue Card according to Directive 2009/50/EC may also benefit from the Long-term Residence Directive (Article 16(1) Directive 2009/50/EC). A few derogations, however, apply. For example, the EU Blue Card holder who has made use of the possibility to move for purposes of highly qualified employment to another Member State (Article 18 – see further Chapter 12.2) can cumulate periods of residence in both Member States in order to fulfil the requirement of five years residence. Specifically, an EU Blue Card holder can acquire long-term residence status if s/he has legally and continuously resided for two years in the Member State where the application is lodged and for five years in the territory of the Union (Article 16(2) Directive 2009/50/EC).

Directive 2011/98/EU (Single permit) entitles TCNs holding such a single permit to work and reside in the EU Member State concerned. This Directive, however, does not establish

⁵⁴ This is well illustrated by Article 8 of Directive 2003/109/EC, which stipulates that the status of long-term resident shall be 'permanent'.

⁵⁵ Member States may make the issuing of a long-term residence permit subject to payment of fees or charges, provided these are not excessive and disproportionate; see judgment of 26 April 2012, *European Commission v the Netherlands*, C-508/10, EU:C:2012:243, and judgment of 2 September 2015, *CGIL and INCA*, C-309/14, EU:C:2014:523.

the substantive conditions that must be satisfied to obtain the permit and thus the right to reside. Such conditions are laid down by national law of the host EU Member State.

The EU migration Directives – with the exception of Directive 2011/98/EU (Single permit) – allow the host Member State to refuse, withdraw and refuse to renew the permit or authorisation on grounds of public policy, public security or public health (Article 9(3)(a) Directive 2009/50/EC, Article 5(8) Directive 2014/66, Article 6(4) Directive 2014/36/EU, Article 6(1) Directive 2003/109/EC and Article 7(6) Directive 2016/801/EU). The relevant provisions are in most cases brief and do not work out the rights of the persons and the duties of the host Member State in comparable detail as Directive 2004/38/EC does with regard to EU citizens and their family members. With regard to public security, the CJEU has held that Member States enjoy wide discretion in determining whether or not there is a threat to such security.⁵⁶ Two Directives stand out, however. First, *Directive 2003/86/EC (Family reunification)* requires that decisions about the refusal or withdrawal of residence permits based on grounds of public policy or security must consider (i) the nature and solidity of the family relationships, the duration of residence in the host Member State, the existence of the family and cultural and social ties with the country of origin, and (ii) the severity or type of offence committed by the family member or the dangers emanating from him or her (Article 6(3) *juncto* Article 17 Directive 2003/86/EC). Second, comparable to Directive 2004/38/EC, *Directive 2003/109/EC (Long-term residence)* offers long-term residents additional protection against expulsion. A decision to expel must be based on an actual and sufficiently serious threat to public policy or security, which does not include economic considerations and is preceded by consideration of the duration of residence, the age of the person concerned, the consequences for him or her or the family members, and links with the country of residence or absence of links with the country of origin (Article 12 Directive 2003/109/EC). In addition, Article 9(3) of Directive 2003/109/EC allows to withdraw the long-term residence status in case the person “*constitutes a threat to public policy, in consideration of the seriousness of the offences he/she committed, but such threat is not a reason for expulsion within the meaning of Article 12*” of that Directive.

3.3 Intermediate conclusions

To sum up, the residence rights of third-country workers are subject to stricter conditions and limitations than the residence rights of EU workers. These conditions/limitations vary from category to category and are in essence related to the specific aim that the Directives concerned seek to achieve.

⁵⁶ Judgment of 10 September 2014, *Ben Alaya*, C-491/13, EU:C:2014:2187, and judgment of 4 April 2017, *Fahimian*, C-544/15, EU:C:2017:255.

4 ACCESS TO WORK

4.1 Access to work in general

4.1.1 EU workers

EU workers have access to work in another Member State under the same conditions and with the same priority as nationals of the host Member State (Article 45 TFEU and Articles 1 to 6 Regulation (EU) No 492/2011). The CJEU condemned direct and indirect discrimination on grounds of nationality as well as non-discriminatory obstacles regarding access to work in a host Member State.⁵⁷ The only limitation allowed in Article 45 TFEU is the access to posts in the public sector (see further Chapter 4.4).

4.1.2 TCNs

TCNs do not have an unconditional right to take up employment in the Member States. A distinction has to be drawn between first-time access of TCNs to the EU and intra-EU mobility after establishment in one Member State. For the former, Member States may apply various restrictions and monitor the first-time access of TCNs to their labour markets (already in the context of the right to residence see Chapter 3.2). Some Directives also provide for the possibility of intra-EU mobility including the right to exercise an economic activity in other Member States, again subject to specific conditions and limitations (see in more detail Chapter 12.2).

Directives on the right to reside

Under *Directive 2003/86/EC (Family reunification)*, the sponsor's family member shall be entitled, in the same way as the sponsor, to 'access to employment and self-employment in the host Member State' (Article 14(1) Directive 2003/86/EC). However, Member States may lay down "the conditions under which family members shall exercise an employed or self-employed activity in accordance with national law. These conditions shall set a time limit which shall in no case exceed 12 months, during which Member States may examine the situation of their labour market before authorizing family members to exercise an employed or self-employed activity". In addition, Member States may "restrict access to employment or self-employed activities by first-degree relatives in the direct ascending line or by adult unmarried children to whom Article 4(2) of this Directive applies" (Article 14(2) and (3) Directive 2003/86/EC).

Directive 2003/109/EC (Long-term residents) provides that long-term residents shall enjoy equal treatment with nationals as regards 'access to employment and self-employed activity' (Article 11(1)(a) Directive 2003/109/EC). According to Article 11(3)(a) of that Directive, "Member States may retain restrictions to access to employment or self-employed activities in cases where, in accordance with existing national or Community legislation, these activities are reserved to nationals, EU or EEA citizens". In addition,

⁵⁷ See, *inter alia*, judgment of 23 February 1994, *Scholz*, C-419/92, EU:C:1994:62; judgment of 15 December 1995, *Bosman*, C-415/93, EU:C:1995:463; judgment of 31 May 2001, *European Commission v Italy*, C-283/99, EU:C:2001:307.

Article 14(1) Directive 2003/109/EC provides that "[a] long-term resident shall acquire the right to reside in the territory of Member States other than the one which granted him/her the long-term residence status, for a period exceeding three months, provided that the conditions set out in this chapter are met" (see in more detail Chapter 12.2).

Labour migration Directives

Under *Directive 2009/50/EC (EU Blue Card)*, the Member States shall issue an EU Blue Card to a TCN who has applied and who fulfils the criteria for admission defined in Article 5 of Directive 2009/50/EC as far as there is no ground for refusal as provided for in Article 8 of Directive 2009/50/EC. However, according to Article 6 of this Directive, this shall not affect the right of a Member State to determine the volume of admission of TCNs entering its territory for the purposes of highly qualified employment. Pursuant to Article 8(2) of Directive 2009/50/EC Member States may, "before taking a decision on an application for an EU Blue Card, and when considering renewals or authorisations pursuant to Article 12(1) and (2) Directive 2009/50/EC during the first two years of legal employment as an EU Blue Card holder, examine the situation of their labour market and apply their national procedures regarding the requirements for filling a vacancy". They may verify whether the vacancy concerned could not be filled by national or EU workers, by TCNs lawfully resident in that Member State and already forming part of its labour market, or by long-term residents wishing to move to that Member State for highly qualified employment in accordance with Chapter III of Directive 2003/109/EC (Long-term residents). Member States may also reject an application for an EU Blue Card in order to ensure ethical recruitment in sectors suffering from a lack of qualified workers in the countries of origin or if the employer has been sanctioned in conformity with national law for undeclared work and/or illegal employment (Article 8(4) and (5) Directive 2009/50/EC). Article 12 of Directive 2009/50/EC stipulates that "for the first two years of legal employment in the Member State concerned as an EU Blue Card holder, access to the labour market for the person concerned shall be restricted to the exercise of paid employment activities which meet the conditions for admission set out in Article 5 Directive 2009/50/EC. After these first two years, Member States may grant the persons concerned equal treatment with nationals as regards access to highly qualified employment". For the first two years of legal employment as an EU Blue Card holder in the Member State concerned, a change of employer shall be subject to the prior authorisation in writing of the competent authorities of the Member State of residence. Article 18 of Directive 2009/50/EC also provides for the possibility for an EU Blue Card holder, after eighteen months of legal residence in a Member State, to move to another Member State for the purpose of highly qualified employment (see in more detail Chapter 12.2).

Directive 2011/98/EU (Single Permit) does not contain any provisions on the access to work in a Member State. It only provides for a single application procedure and a single permit covering both the right to reside and the right to work in a Member State, without establishing common rules on the admission as such. Article 11(c) of Directive 2011/98/EU states that, when a single permit has been issued in accordance with national law, this shall allow, during its period of validity, its holder to "exercise the specific employment activity authorised under the single permit in accordance with national law".

Under Article 12 of *Directive 2014/36/EU (Seasonal workers)* Member States shall issue TCNs with an authorisation for the purpose of seasonal work provided that they comply with the criteria and requirements set out in Article 5 of Directive 2014/36/EU (for stays not exceeding 90 days) or Article 6 Directive 2014/36/EU (for stays exceeding 90 days) and do not fall within the grounds for rejection laid down in Article 8 of Directive 2014/36/EU. A Member State may reject the application “*if the vacancy in question could be filled by its own nationals or by other Union citizens, or by TCNs lawfully residing in that Member State*” (Article 8(3) Directive 2014/36/EU). In addition, Article 7 of Directive 2014/36/EU provides that this Directive shall not affect the right of a Member State to determine the total number of TCNs entering its territory for the purpose of seasonal work. The authorisation may be extended or renewed under the conditions set out in Article 15 of Directive 2014/36/EU, which include the possibility to change employers. Moreover, Member States “*shall facilitate re-entry of TCNs who were admitted to that Member State as seasonal workers at least once within the previous five years, and who fully respected the conditions applicable to seasonal workers under this Directive during each of their stays*” (Article 16 Directive 2014/36/EU). Once an authorisation for the purpose of a seasonal work permit has been issued, the holder shall enjoy the right to exercise the concrete employment activity permitted under the authorisation in accordance with national law (Article 22(c) Directive 2014/36/EU).

Pursuant to Article 13(1) of *Directive 2014/66/EU (Intra-corporate transfers)* intra-corporate transferees who fulfil the admission criteria set out in Article 5 of Directive 2014/66/EU and for whom the competent authorities have taken a positive decision, taking into account the grounds for rejection listed in Article 7 of Directive 2014/66/EU, shall be issued an intra-corporate transferee permit. Article 17(1) of Directive 2014/66/EU guarantees the intra-corporate transferee ‘during the period of validity of an intra-corporate transferee permit’ ‘the right to exercise the specific employment activity authorised under the permit’. However, pursuant to Article 6 of Directive 2014/66/EU this Directive shall not affect the right of a Member State to determine the volumes of admission of TCNs in accordance with Article 79(5) TFEU. Subject to certain conditions, TCNs “*may enter, stay and work in one or several second Member States*” (Article 20 Directive 2014/66/EU, see Chapter 12.2 for more details).

Directive 2016/801/EU (Researchers, students et al) stipulates in its Article 5 that if all the general conditions and relevant specific conditions are fulfilled, the TCN shall be entitled to an authorisation. The admission of a TCN under this Directive shall be subject to the verification of documentary evidence attesting that the TCN meets the general conditions laid down in Article 7 of Directive 2016/801/EU and the relevant specific conditions in Articles 8, 11, 12, 13, 14 and 16 of Directive 2016/801/EU. In cases where the admission concerns the exercise of economic activities, it implies access to the labour market of the host Member State (e.g. for researchers). Moreover, “*researchers may, in addition to research activities, teach in accordance with national law. Member States may set a maximum number of hours or of days for the activity of teaching*” (Article 23 Directive 2016/801/EU). “*Outside their study time and subject to the rules and conditions applicable to the relevant activity in the Member State concerned, students shall be entitled to be employed and may be entitled to exercise a self-employed economic activity. Where necessary, Member States shall grant students and/or employers prior authorisation in*

accordance with national law. Each Member State shall determine the maximum number of hours per week or days or months per year allowed for such an activity, which shall not be less than 15 hours per week, or the equivalent in days or months per year. The situation of the labour market in the Member State concerned may be taken into account" (Article 24 Directive 2016/801/EU). However, this Directive shall not affect the right of a Member State to determine, in accordance with Article 79(5) TFEU, the total number of admitted TCNs referred to in Article 2(1) of this Directive, with the exception of students, if this Member State considers that they are or will be in an employment relationship (Article 6 Directive 2016/801/EU). This Directive also provides for the possibility of intra-EU mobility for researchers and students in order to carry out part of their studies or research in one or several other Member States including the possibility to work there (Articles 27-32 Directive 2016/801/EU; for more details see Chapter 12.2).

4.1.3 Intermediate conclusions

Contrary to EU workers, TCNs only have the right to work in a Member State provided they fulfil the very specific conditions laid down in the different Directives and in so far as they come under the scope of each of the Directives (see Chapter 2.1.2). These conditions contain, *inter alia*, criteria for admission and grounds for refusal. In addition, the labour migration Directives allow a Member State to determine the total number of TCNs permitted to work on its territory. They also refer to the possibility of a Member State to apply a preference for its own nationals or nationals of other Member States.

4.2 Recognition of professional qualifications

4.2.1 EU workers

EU workers can rely on Directive 2005/36/EC for the recognition of professional qualifications obtained in a Member State with a view to exercising a regulated profession in another Member State. For situations not covered by this Directive, the CJEU consistently held that national rules establishing the conditions for national qualifications may infringe on the free movement of persons if they fail to take account of learning, skills and qualifications already acquired by the person concerned in another Member State. The host Member State must take into consideration all diplomas, certificates and other evidence of qualifications and relevant experience by comparing the specialised knowledge and abilities so certified as well as this experience with the knowledge and qualifications required by national legislation.⁵⁸

4.2.2 TCNs

Directive 2005/36/EC⁵⁹ and the case law of the CJEU on the recognition of professional qualifications in the context of the freedom of movement of persons do not directly apply to TCNs.

⁵⁸ See for a recent overview of this case law: judgment of 6 October 2015, *Brouillard*, C-298/14, EU:C:2015:652.
⁵⁹ See Article 2(1) Directive 2005/36/EC.

However, the migration Directives guarantee equal treatment with nationals of the host State as regards the “*recognition of professional diplomas, certificates and other qualifications, in accordance with the relevant national procedures*” (Article 11(1)(c) Directive 2003/109/EC (Long-term residents), Article 14(1)(d) Directive 2009/50/EC (EU Blue Card), Article 12(1)(d) Directive 2011/98/EU (Single Permit), Article 23(1)(h) Directive 2014/36/EU (Seasonal workers), Article 18(2)(b) Directive 2014/66/EU (Intra-corporate transfers), and Article 22(1)(3) and (4) Directive 2016/801/EU (Researchers, students *et al*).⁶⁰

The recitals of the preamble of some of these Directives confirm that in the Member State granting national treatment to a TCN, professional qualifications acquired by the TCN in another Member State should be recognised in the same way as those of EU citizens. Qualifications acquired in a third country should be taken into account in conformity with Directive 2005/36/EC (see recital 19 Directive 2009/50/EC (EU Blue Card), recital 23 Directive 2011/98/EU (Single permit), and recital 22 Directive 2014/66/EU (Intra-corporate transfers)).⁶¹ In essence, in this latter case the first recognition of third country qualifications in an EU Member State may be obtained in accordance with the rules of the Member State concerned.⁶² Any further requests for recognition in other Member States could be covered by Directive 2005/36, under certain conditions.⁶³

A comparable statement is absent in the recitals of Directive 2003/109/EC (Long-term residents), Directive 2014/36/EU (Seasonal workers) and Directive 2016/801/EU (Researchers, students *et al*), despite the fact that the relevant provisions in the Directives are worded in a similar way. This would suggest that they should be interpreted in the same way. Some recitals also clarify that these Directives do not affect the national procedures on recognition of diplomas (recital 12 Directive 2009/50/EC (EU Blue Card), recital 13 Directive 2011/98/EU (Single permit)).

As a result, a TCN who can rely on Directives guaranteeing equal treatment with nationals with regard to professional qualifications could have the same rights as EU citizens in this respect, depending on their exact situation.

4.3 Language requirement

4.3.1 EU workers

Article 3(1) of Regulation (EC) No 492/2011 allows language requirements by reason of the nature of the post to be filled. However, the CJEU has held that such requirements must be reasonable and necessary in view of the job in question.⁶⁴ Furthermore, Member

⁶⁰ There is no provision regarding the recognition of professional qualifications in Directive 2003/86/EC (Family reunification).

⁶¹ The latter recital adds that such recognition should be without prejudice to any restrictions on access to regulated professions deriving from reservations to the existing commitments as regards regulated professions made by the Union or by the Union and its Member States in the framework of trade agreements, and that in any event, this Directive should not provide for a more favourable treatment of intra-corporate transferees, in comparison with Union or European Economic Area nationals, as regards access to regulated professions in a Member State.

⁶² Article 2(2) of Directive 2005/36/EC.

⁶³ Articles 2(2), 3(3) and 10(g) of Directive 2005/36/EC.

⁶⁴ Judgment of 28 November 1989, *Groener*, C-379/87, EU:C:1989:599.

States and employers may not demand a qualification obtained in the host Member State, excluding equivalent qualifications from other Member States.⁶⁵

4.3.2 TCNs

There is no specific provision regarding language requirements for access to work in Directive 2003/86/EC (Family reunification), Directive 2003/109/EC (Long-term residents), Directive 2009/50/EC (EU Blue Card), Directive 2011/98/EU (Single Permit), Directive 2014/36/EU (Seasonal workers) and Directive 2014/66/EU (Intra-corporate transfers).

Article 11(1)(c) of Directive 2016/801/EU (Researchers, students *et al*) allows Member States to require that in order to be admitted as a student the applicant provides evidence “of sufficient knowledge of the language of the course” s/he intends to take. Member States may also require the applicant trainee to “provide evidence that s/he has received or will receive language training so as to acquire the knowledge needed for the purpose of the traineeship” (Article 13(1)(d) Directive 2016/801/EU) or require the TCN who applies to be admitted as an au pair to provide evidence of “basic knowledge of the language of the Member State concerned” (Article 16(2)(a) Directive 2016/801/EU).

4.4 Access to posts in the public sector

4.4.1 EU workers

Article 45(4) TFEU allows Member States to restrict access to certain posts in the public service to their own nationals. However, the CJEU has given a strict interpretation of this exception. It has consistently held that it only covers posts involving direct or indirect participation in the exercise of powers conferred by public law and duties designed to safeguard the general interests of the State or of other public authorities. Therefore, this exception does not cover posts which, whilst coming under the State or other bodies governed by public law, do not involve any association with tasks belonging to the public service properly so called. In addition, this kind of reservation is only allowed if the powers conferred by public law are actually exercised on a regular basis and do not represent a very minor part of the activities.⁶⁶

4.4.2 TCNs

The EU migration Directives do not grant TCNs any right with regard to access to posts in the public sector. This is entirely left to the Member States.

Directive 2003/109/EC (Long-term residents) provides that long-term residents shall enjoy equal treatment with nationals as regards “access to employment and self-employed activity, provided that such activities do not entail involvement, even if this is occasional,

⁶⁵ Judgment of 6 June 2000, *Angonese*, C-281/98, EU:C:2000:296.

⁶⁶ For recent case law see, *inter alia*, judgment of 30 September 2003, *Colegio de Oficiales de la Marina Mercante Española*, C-405/01, EU:C:2003:515, and judgment of 10 September 2014, *Haralambidis*, C-270/13, EU:C:2014:2185.

in the exercise of public authority” (Article 11(1)(a) Directive 2003/109/EC). Article 11(3) Directive 2003/109/EC further specifies that “Member States may retain restrictions to access to employment or self-employed activities in cases where, in accordance with existing national or EU legislation, these activities are reserved to nationals, EU or EEA citizens”.

Article 12(3) of Directive 2009/50/EC (EU Blue Card) allows the Member States to “retain restrictions on access to employment, provided that such employment activities entail occasional involvement in the exercise of public authority and the responsibility for safeguarding the general interest of the State and where, in accordance with existing national or EU law, these activities are reserved to nationals”.

There is no specific provision regarding the access to jobs in the public sector in Directive 2011/98/EU (Single permit), Directive 2014/36/EU (Seasonal workers), Directive 2014/66/EU (Intra-corporate transfers) and Directive 2016/801/EU (Researchers, students et al).

5 RIGHTS OF JOBSEEKERS AND ACCESS TO ASSISTANCE FROM THE NATIONAL EMPLOYMENT SERVICES

5.1 EU jobseekers

Article 45(3) TFEU entails the right for EU citizens to move to a Member State in order to seek employment there.⁶⁷ Article 5 of Regulation (EU) No 492/2011 guarantees EU jobseekers who seek employment in the territory of another Member State the same assistance as that afforded by the employment offices in that State to their own nationals seeking employment. These jobseekers can also rely on the prohibition of discrimination on grounds of nationality in Article 45 TFEU, including with regard to financial benefits intended to facilitate access to employment on the labour market of a Member State.⁶⁸ However, the CJEU considered it legitimate for a Member State to grant such an allowance only after a genuine link between the jobseeker and the labour market of that Member State has been ascertained. The existence of such a link can be more specifically determined by establishing that the person concerned has genuinely sought work in the Member State in question for a reasonable period.⁶⁹ Still, their right to reside depends on them providing evidence that they are continuing to seek employment and that they have a genuine chance of being engaged (Article 14(4)(b) Directive 2004/38/EC). In addition, during this period they cannot claim equal treatment for social assistance in the host Member State.⁷⁰

67 Judgment of 26 February 1991, *Antonissen*, C-292/89, EU:C:1991:80, and judgment of 23 March 2004, *Collins*, C-138/02, EU:C:2004:172.

68 Judgment of 15 September 2005, *Ioannidis*, C-258/04, EU:C:2005:559, and judgment of 4 June 2009, *Vatsouras and Koupatantze*, C-22/08 and C-23/08, EU:C:2009:344, paragraphs 36-37.

69 Judgment of 23 March 2004, *Collins*, C-138/02, EU:C:2004:172, paragraph 69; judgment of 25 October 2012, *Prete*, C-367/11, EU:C:2012:668, paragraph 33.

70 Judgment of 15 September 2015, *Alimanovic*, C-67/14, EU:C:2015:597. In this judgment the CJEU held that the concept of ‘social assistance’ relates to assistance schemes meant to support a person who does not have resources sufficient to meet his or her own basic needs and those of his family. This may also be the case for benefits specifically meant for jobseekers.

5.2 TCNs

The EU labour migration Directives grant only limited rights to TCNs to seek a job in a Member State. In principle, TCNs are only covered by these Directives if they already have a job or a job offer before entering the Member State concerned. However, some Directives include the right to move as a worker between Member States and to accept a job in another Member State (see Chapter 12.2). Still, Directive 2003/86/EC (Family reunification) and Directive 2003/109/EC (Long-term residents) include more rights to seek a job in the host Member State.

Under *Directive 2003/86/EC (Family reunification)*, the sponsor's family member shall be entitled, in the same way as the sponsor, to 'access to employment and self-employment in the host Member State' (Article 14(1) Directive 2003/86/EC). This implies the right to seek a job.

Directive 2003/109/EC (Long-term residents) provides that long-term residents shall enjoy equal treatment with nationals as regards 'access to employment and self-employed activities' (Article 11(1) Directive 2003/109/EC). This implies the right to seek employment in the host Member State. They are also entitled to equal treatment with nationals as regards access to 'services made available to the public' (Article 11(1)(f) Directive 2003/109/EC), which implies access to assistance from national employment services.

Under *Directive 2009/50/EC (EU Blue Card)* a TCN who applies for an EU Blue Card must "present a valid work contract, or if provided for in national law, a binding job offer for highly qualified employment of at least one year in the Member State concerned" (Article 5(1)(a) Directive 2009/50/EC). This means that the applicant must already have a job before s/he applies for an EU Blue Card. No provision in this Directive covers assistance of national employment services for that purpose. However, Article 14(1)(g) of Directive 2009/50/EC guarantees holders of an EU Blue Card equal treatment with nationals of the Member State issuing the Blue Card as regards access to 'services made available to the public', which implies access to assistance from national employment services. This could be relevant if the holder of an EU Blue Card would like to change employers in the host Member State, as provided for in Article 12 of this Directive. In addition, Article 13 of Directive 2009/50/EC specifies that "unemployment in itself shall not constitute a reason for withdrawing an EU Blue Card, unless the period of unemployment exceeds three consecutive months, or if it occurs more than once during the period of validity of an EU Blue Card". "During this period of unemployment this provision allows the EU Blue Card holder to seek and take up employment under the conditions set out in Article 12 Directive 2009/50/EC". This Directive also provides for the possibility for an EU Blue Card holder in a Member State, after eighteen months of legal residence in that State, to move to another Member State for the purpose of highly qualified employment (Article 18 Directive 2009/50/EC). It is unclear whether this also implies the right to look for such a job in another Member State, or that such a move is only allowed once the TCN has already found a job in the second Member State.

Directive 2011/98/EU (Single permit) guarantees equal treatment with the nationals of the host Member State, as regards access to 'services made available to the public' (which includes public employment services), as well as 'advice services given by employment

offices' (Article 12(1)(g) and (h) Directive 2011/98/EU). However, these provisions only apply to TCNs who have already been admitted to the labour market of the host Member State and do not offer any rights in this respect to those who might seek employment in a Member State but have not yet been given permission to work there.

Under *Directive 2014/36/EU (Seasonal workers)* a TCN who applies for admission to a Member State as a seasonal worker must present a "*valid work contract, or if provided for in national law, a binding job offer to work as a seasonal worker in the Member State concerned*" (Article 6(1)(a) Directive 2014/36/EU). This means that the applicant must already have a job before s/he applies for admission. There is no provision in this Directive on assistance of national employment services for that purpose. Once a TCN has been admitted as a seasonal worker by a Member State, s/he is entitled to equal treatment with nationals of the host Member States as regards access to 'services made available to the public' (which includes public employment services), as well as 'advice services regarding seasonal work offered by employment offices' (Article 23(1)(e) and (f) Directive 2014/36/EU). This could be relevant if the seasonal worker applies to be employed by a different employer, as provided for in Article 15(3) and (4) Directive 2014/36/EU.

A TCN who applies for admission under the terms of *Directive 2014/66/EU (Intra-corporate transfers)* "*needs to present a work contract*", which means that the applicant must already have a job before s/he can be admitted to a Member State (Article 5(1)(c) Directive 2014/66/EU). There is no provision in this Directive on assistance of national employment services for that purpose. Once a TCN has been admitted as an intra-corporate transferee by a Member State, s/he is entitled to equal treatment with nationals of the host Member State as regards access to 'services made available to the public' (which includes public employment services), as well as 'services afforded by employment offices' (Article 18(2)(e) Directive 2014/66/EU).

Directive 2016/801/EU (Researchers, students et al) guarantees equal treatment with the nationals of the host Member State, as regards access to 'services made available to the public' (which includes public employment services), as well as advice services offered by employment offices (Article 22 Directive 2016/801/EU, which refers to Article 12(1) Directive 2011/98/EU (Single permit)). For trainees, volunteers and au pairs who are not considered to be in an employment relationship, this right to equal treatment does not concern the 'advice services offered by employment offices' (Article 22(4) Directive 2016/801/EU). Directive 2016/801/EU also provides that after the completion of their research or studies researchers and students "*must have the possibility to stay on the territory of the Member State which issued an authorisation for a period of at least nine months in order to seek employment or set up a business*" (Article 25(1) Directive 2016/801/EU). Still, Member States may decide to set a minimum level of degree that students shall have obtained in order to benefit from this provision.

5.3 Intermediate conclusions

EU citizens have the right to look for a job in another Member State. TCNs covered by Family Reunification Directive 2003/86/EC and the Long-term Residence Directive have the right to look for a job in the host Member State. Other TCNs can in principle only have the right to be admitted to the labour market of the host Member State if they already

have a job or a job offer in that Member State. Once admitted to the labour market of a Member State TCNs enjoy equal treatment with nationals of the host State regarding access to public employment services (for mobility within the EU see Chapter 12.).

6 EQUAL TREATMENT

The right to equal treatment⁷¹ for EU workers is one of the most important achievements of EU law. Aiming at full integration of EU workers in the host Member States, it has been interpreted extensively, and, as a result, EU workers are in a very similar situation as nationals of the host Member State, as long as social and fiscal advantages, widely conceived, are at stake. Although the situation of EU workers has been slightly modified by recent case law (and EU workers' right to equal treatment has been restricted, in certain circumstances), in comparison TCNs continue to lag behind in spite of equal treatment provisions in the Directives concerned with immigration from third countries.

6.1 EU workers

Equal treatment for EU workers is derived mainly from Article 45 TFEU. This Article of the Treaty has direct effect in the legal orders of the Member States and it grants workers "*individual rights, which the national courts must protect*".⁷² Given that Article 45 TFEU is a primary source of EU law with direct effect in national legal systems, secondary sources cannot restrict its scope: they can only specify its content and, possibly, enhance it.⁷³

This direct effect of equal treatment is comprehensive: it applies both vertically and horizontally. Since the early seventies, the CJEU has made it clear that "*the prohibition of discrimination based on nationality applies not only to the actions of public authorities but also to rules of any other nature aimed at regulating in a collective manner gainful employment*".⁷⁴ European workers can therefore invoke Article 45 TFEU to challenge provisions of collective agreements limiting the freedom of movement. Moreover, in *Angonese*,⁷⁵ the CJEU pointed out that Article 45 TFEU can be invoked by a worker to challenge an act or a behaviour of his or her employer violating the freedom of movement (in the case at stake, the request to provide evidence of linguistic knowledge exclusively by means of a particular certificate). Thus, Article 45 TFEU has full horizontal direct effect, and can be invoked by EU workers to challenge both contractual clauses and unilateral acts of the employer. As a result, Article 7(4) of Regulation (EU) No 492/2011 (pursuant to which the clauses of an individual contract or collective agreements discriminating on grounds of nationality are null and void) can be considered the transposition, in secondary law, of a solution that results directly from the TFEU.

Freedom of movement for EU workers requires the removal of all discriminatory measures grounded on nationality, regarding both the access to employment and working conditions

71 For equal access to social security benefits see Chapter 7.

72 Judgment of 4 December 1974, *van Duyn*, 41/74, EU:C:1974:133.

73 Judgment of 25 July 2008, *Metock*, C-127/08, EU:C:2008:449.

74 Judgment of 12 December 1974, *Walrave and Koch*, 36/74, EU:C:1974:140.

75 Judgment of 6 June 2000, *Angonese*, C-281/98, EU:C:2000:296.

(Article 45(2) TFEU). Regulation (EU) No 492/2011 and the Citizens Rights Directive 2004/38/EC clarify and specify the right to equal treatment.

In particular, according to Article 8 Regulation (EU) No 492/2011, “[a] worker who is a national of a Member State and who is employed in the territory of another Member State shall enjoy equality of treatment as regards membership of trade unions and the exercise of rights attaching thereto, including the right to vote and to be eligible for the administration or management posts of a trade union. He may be excluded from taking part in the management of bodies governed by public law and from holding an office governed by public law. Furthermore, he shall have the right of eligibility for workers’ representative bodies in the undertaking.” With regard to the board of bodies governed by public law, this is a rare case in which equal treatment is not required by EU law (as for TCNs, the directives examined in this report do not deal with this issue, see below).

Concerning housing, Article 9 Regulation (EU) No 492/2011 stipulates that “[a] worker who is a national of a Member State and who is employed in the territory of another Member State shall enjoy all the rights and benefits accorded to national workers in matters of housing, including ownership of the housing he needs”.

In addition, Article 7(2) of Regulation (EU) No 492/2011 explicitly states that EU workers enjoy “*the same social and tax advantages as national workers*”. The CJEU has adopted a broad notion of ‘social advantage’ to include all benefits fostering migrant workers’ integration in the host Member State.⁷⁶

The CJEU has construed the prohibition of non-discrimination enshrined in EU primary law broadly and in particular not limited it to the work sphere. For instance, even the registration of motorboats has been included in the right to non-discrimination of EU workers since it constitutes “*a corollary to [the] freedom of movement*”.⁷⁷ The non-discrimination rule is now incorporated in the general principle of equal treatment mentioned in Article 24 of Directive 2004/38/EC. As a result, the protection of EU workers against discriminations on the basis of nationality is currently founded on a series of sources: Directive 2004/38/EC and Article 45 TFEU, to which the general principle of non-discrimination of Article 18 TFEU can be added.

The CJEU has progressively widened the scope of application of the principle of non-discrimination for EU workers. Both direct and indirect discrimination is prohibited.⁷⁸ For instance, residence requirements conditioning the access to employment or the entitlement to specific rights or social and fiscal benefits are *prima facie* cases of indirect discrimination. When, for instance, promotion is based on seniority, but services performed in another Member State are not taken into account, indirect discrimination is found when there is no legitimate justification.⁷⁹ Another case of indirect discrimination was found in provisions limiting the duration of employment contracts of foreign-language assistants, where no

⁷⁶ See for instance, among the earliest cases: Judgment of 31 May 1979, *Even*, 207/78, EU:C:1979:144.

⁷⁷ Judgment of 7 March 1996, *European Commission v France*, C-334/94, EU:C:1996:90, paragraphs 20 *et seq*; Judgment of 12 June 1997, *European Commission v Ireland*, C-151/96, EU:C:1997:294, paragraphs 13 *et seq*. In more detail *F. Wollenschläger*, ELJ 17 (2011), 1 (4 *et seq*).

⁷⁸ Judgment of 23 May 1996, *O’Flynn*, C-237/94, EU:C:1996:206.

⁷⁹ See judgment of 15 January 1998, *Kalliope Schöning-Kougebetopoulou*, C-15/96, EU:C:1998:3, with reference to a collective agreement applicable to public sector employees; in line, mainly, with judgment of 23 February 1994, *Scholz*, C-419/92, EU:C:1994:62.

such limit exists for other teachers.⁸⁰ However, linguistic requirements for access to employment are not considered a violation of EU law if they can be justified “by reason of the nature of the post to be filled” (Article 3(1) Regulation (EU) No 492/2011; see also Chapter 4.3).

Beyond non-discrimination, the CJEU has further extended the scope of application of Article 45 TFEU by also prohibiting non-discriminatory obstacles to free movement which hinder access of workers to the labour market of another Member State:⁸¹ in the seminal decision handed down by the CJEU (the so-called *Bosman* case) the payment of fees in cases of transfer of a football player from a club to another were called in question. The CJEU held that such transfer fees directly affect the player’s access to the job market in other Member States, and are thus capable of impeding freedom of movement.

On the basis of the prohibition of restrictions to free movement, numerous rules were considered violations of EU law. Among them: measures against tax evasion that prevented a worker residing in a Member State to use a company vehicle registered in another Member State,⁸² the refusal to reimburse travel expenses of public employees for a training taking place outside the national territory,⁸³ legislation excluding, for the calculation of the amount of a parental benefit, the periods of employment carried out as an EU official.⁸⁴

Discriminations and restrictions to free movement can be justified. Whereas direct discriminations can only be justified by reasons of public order, public safety and public health, justification of indirect discrimination and the non-discriminatory obstacles is easier: ‘objective justifications’⁸⁵ by reasons of pressing ‘public interest’⁸⁶ allow restrictions to be maintained, as long as the proportionality test is passed. However, Member States cannot invoke the need to protect their national labour market, or other purely economic reasons.⁸⁷

It must be noted that the recent case law of the CJEU has introduced some complexity in the application of the equal treatment rule to EU workers. In particular, the case law on students’ grants is not absolutely clear. Classically, in a case of 2012 concerning the conditions to obtain a student grant aimed at fostering studies abroad (the grant of portable funding depended on the party concerned having resided in the Netherlands for at least three of the six years preceding his or her enrolment for higher educational studies outside that Member State), the proportionality of the requirement imposed by the law of the host Member State was assessed, and the condition was considered disproportionate.⁸⁸ However, soon after, in another (similar) case, the CJEU held that the right to equal treatment for frontier workers resulted from the fact that they contributed to the financing of the social policies of the host Member State.⁸⁹ Despite a presumption that workers fulfil

80 Judgment of 30 May 1989, *Pilar Allué and Carmel Mary Coonan*, C-259/91, C-232/91 & C-233/91, EU:C:1989:222.

81 Judgment of 15 December 1995, *Bosman*, C-415/93 EU:C:1995:463.

82 Judgment of 15 September 2005, *European Commission v Denmark*, C-464/02, EU:C:2005:546.

83 Judgment of 17 March 2005, *Kranemann*, C-109/04, ECLI:EU:C:2005:187.

84 Judgment of 16 February 2006, *Öberg*, C-185/04, EU:C:2006:107.

85 See, among others: Judgment of 23 May 1996, *O’Flynn*, C-237/94, EU:C:1996:206.

86 Among others judgment of 17 March 2005, *Kranemann*, C-109/04, EU:C:2005:187.

87 See judgment of 16 February 2006, *Rockler*, C-137/04, EU:C:2006:106, where the financial burden on the social security scheme was invoked.

88 Judgment of 14 June 2012, *European Commission v Kingdom of the Netherlands*, C-542/09, EU:C:2012:346.

89 Judgment of 20 June 2013, *Giersch*, C-20/12, EU:C:2013:411.

this condition of contribution to the social system of the host Member State, and, thus, of integration in that Member State, it is nonetheless a new condition applied to EU workers, in order for them to benefit from equal treatment.

In sum, as far as EU workers are concerned, the scope of application of the right to equal treatment (and the prohibition of obstacles to free movement, even if these obstacles are not the result of discriminatory provision) applies in the whole scope of application of EU law. This includes, namely, but not only: social rights and advantages (working conditions, trade union rights, education and training, housing etc), tax advantages and the benefit of goods and services.

6.2 TCNs

As a general rule, EU law does not prohibit discrimination of TCNs based on nationality. However, some of the Directives that apply to TCNs contain (sector-specific) equal treatment rules. The equal treatment rule included in Directive 2011/98/EU on the Single permit (see below) extends to all TCNs legally working in a Member States or admitted to work that are not covered by the specific schemes.

Long-term residents benefit from the most extensive equal treatment rule. Indeed, as recitals 4, 6 and 12 in the preamble to *Directive 2003/109/EC (Long-term residents)* indicate, the principal purpose of that Directive is the integration of TCNs who are settled on a long-term basis in the Member States.⁹⁰ Thus, the conception of equal treatment in Directive 2003/109/EC on long-term residents puts this category of TCNs in a situation very comparable to the situation of EU workers (this should come as no surprise, since it was the Directive's initial objective). Long-term residents benefit from equal treatment with nationals concerning access to employment and self-employed activity; conditions of employment and working conditions; education and vocational training, including study grants; recognition of professional diplomas, certificates and other qualifications; tax benefits; access to goods and services and the supply of goods and services made available to the public and to procedures for obtaining housing; freedom of association and affiliation and membership of an organisation representing workers or employers or of any organisation whose members are engaged in a specific occupation, including the benefits conferred by such organisations (Article 11(1) Directive 2003/109/EC). Free access to the entire territory of the Member State concerned is also provided (Article 11(1)(h) Directive 2003/109/EC).

Although equal treatment seems to be quite extensive in the Directive, the interpretation is not as extensive as for EU workers. When, for instance, Member States choose to oblige long-term residents to pass a civic integration examination, this obligation is not, as such, considered incompatible with the equal treatment rule.⁹¹ The CJEU only requires Member States to make sure that the achievement of the objectives of the Directive is not jeopardised by the payment of a fine in the event of failure to comply with this obligation, in addition to payment of the costs incurred to sit the examination.

⁹⁰ Judgment of 26 April 2012, *European Commission v Kingdom of the Netherlands*, C-508/10, EU:C:2012:243.
⁹¹ Judgment of 4 June 2015, *P and S*, C-579/13, EU:C:2015:369.

The CJEU has made it clear, however, that the right to equal treatment is the general rule. Derogations from that right, which the Member States have the option of establishing (what distinguishes long-term residents from EU workers), can only be relied on if the authorities in the Member State concerned responsible for the implementation of the Directive have stated clearly that they intended to rely on them.⁹²

In particular, some social benefits can be made dependent upon a condition of residence on the territory (Article 11(2) Directive 2003/109/EC), whereas such a condition would be considered indirect discrimination for EU workers.

In addition, Member States are allowed to restrict equal treatment with nationals to reserve some jobs or activities for nationals or EU citizens (Article 11(3)(a) Directive 2003/109/EC; see Chapter 4.1.2). Concerning trade union rights, although the Directives are silent on this issue, TCNs can probably (just as EU citizens) be excluded 'from taking part in the management of bodies governed by public law and from holding an office governed by public law' (this is one of the rare remaining exceptions to equal treatment for EU citizens under Regulation (EU) No 492/2011, see above). Another major difference lies in the possibility for Member States to limit equal treatment in respect of social assistance and social protection to 'core benefits' (Article 11(4) Directive 2003/109/EC).⁹³ The CJEU has ruled that these limits must be given a strict application.⁹⁴ According to the CJEU this notion of core benefits includes "*social assistance or social protection benefits granted by the public authorities, at national, regional or local level, which enable individuals to meet their basic needs such as food, accommodation and health*".⁹⁵ Moreover, the CJEU has ruled that the notion of core benefits must be interpreted in the light of Article 34 of the Charter of Fundamental Rights (CFR), requiring the EU to recognise and respect the right to social and housing assistance so as to ensure a decent existence for all those who lack sufficient resources.⁹⁶ As a result, all benefits that fulfil the purpose set out in Article 34 CFR must be considered core benefits under Article 11(4) of Directive 2003/109/EC. This ruling has limited the power of Member States to restrictively interpret the right to equal treatment regarding social assistance and social protection.

Member States can also require proof of appropriate language proficiency for access to education and training and access to university can be subject to the fulfilment of specific educational prerequisites (Article 11(3)(b) Directive 2003/109/EC).

Other Directives applying to TCNs contain an equal treatment rule, albeit not as extensive as the one benefiting long-term residents. In particular, the equal treatment provision of Article 14 of *Directive 2009/50/EC (EU Blue Card)* covers working conditions; freedom of association and affiliation and membership of an organisation representing workers or employers or membership of any organisation whose members are engaged in a specific occupation; education and vocational training; recognition of diplomas, certificates and

⁹² Judgment of 24 April 2012, *Kamberaj*, C-571/10, EU:C:2012:233.

⁹³ In this respect recital 12 to this Directive states that "*with regard to social assistance, the possibility of limiting the benefits for long-term residents to core benefits is to be understood in the sense that this notion covers at least minimum income support, assistance in case of illness, pregnancy, parental assistance and long-term care*".

⁹⁴ Judgment of 24 April 2012, *Kamberaj*, C-571/10, EU:C:2012:233.

⁹⁵ *Ibid.*

⁹⁶ *Ibid.*

other professional qualifications; tax benefits; access to goods and services and the supply of goods and services made available to the public including procedures for obtaining housing as provided by national law; advice services offered by employment offices. Free access to the job market is not granted. In addition, some restrictions can apply: Member States can restrict equal treatment as regards study and maintenance grants and loans or other grants and loans regarding secondary and higher education and vocational training; procedures for obtaining housing; access to university and post-secondary education can depend on specific prerequisites; and, more importantly, equal treatment can be subjected to residence on the territory (Article 14(2) Directive 2009/50/EC). In addition, equal treatment is not granted by Directive 2009/50/EC when an EU Blue Card holder moves to a second Member State until a positive decision on the issuing of an EU Blue Card has been taken (Article 14(4) Directive 2009/50/EC).

Directive 2011/98/EU (Single permit) contains a very similar provision on equal treatment (Article 12(1) Directive 2011/98/EU). Similarly, Member States are allowed to introduce restrictions, but, as for Directive 2003/109/EC, derogations can be relied on only if the authorities in the Member State concerned responsible for the implementation of that Directive have clearly stated that they intended to rely on them.⁹⁷ The list of possible limitations is similar, but not without specificities. It includes the possibility to restrict equal treatment by requiring the payment of tuition fees with respect to access to university and post-secondary education and to vocational training, which is not directly linked to the specific employment activity, or to restrict access to housing.

The same equal treatment rule also applies to researchers covered by *Directive 2016/801/EU* on the conditions of entry and residence of TCNs for the purposes of research, studies, training, voluntary service, pupil-exchange schemes or educational projects and au pairing. Article 22(1) of this Directive explicitly refers to the equal treatment rule of Directive 2011/98/EU. A list of possible restrictions (specifically applying to researchers) is also included in the text of Directive 2016/801/EU. The equal treatment rule is extended to trainees, volunteers and au pairs, when they are considered to be in an employment relationship, and students (Article 22(2) Directive 2016/801/EU). Restrictions apply, however, like in all other Directives concerning TCNs.

The equal treatment provision in Article 23 of *Directive 2014/36/EU (Seasonal workers)* is close to the one included in other Directives⁹⁸ concerning TCNs, but it insists on some particular aspects: e.g. minimum working age or collective action, including the right to strike. These elements are usually considered to be part of the working conditions, and that explains why they are not explicitly cited in other Directives. Other specificities may be noted. As far as seasonal workers are concerned, equal treatment does not apply to housing, quite surprisingly. Moreover, Member States may limit equal treatment concerning education and vocational training to education or training directly linked to the

⁹⁷ Judgment of 21 June 2017, *Martinez Silva*, C-449/16, ECLI:EU:C:2017:485.

⁹⁸ It covers: terms and conditions of work, right to collective action, including strike; freedom of association; back payments to be made by the employers, concerning any outstanding remuneration to the TCN; access to goods and services and the supply of goods and services made available to the public, except housing, without prejudice to the freedom of contract in accordance with Union and national law; advice services on seasonal work afforded by employment offices; education and vocational training; recognition of diplomas, certificates and other professional qualifications; tax benefits.

specific employment activity, and they may exclude study and maintenance grants and loans.

The situation of intra-corporate transferees is slightly different due to the situation of mobility from one Member State to another, while remaining employed by the same company. This creates a situation where a conflict of laws must be solved, to begin with. Article 18 of *Directive 2014/66/EU (Intra-corporate transfers)*, which is dedicated to equal treatment, must be understood in this particular context.

First, this provision requires that, whatever the law applicable to the employment relationship, intra-corporate transferees must enjoy, in the Member State where the work is carried out, the same equal treatment rule applying to posted workers covered by Directive 96/71/EC concerning the terms and conditions of employment. In addition, intra-corporate transferees are granted equal treatment with nationals of the Member State where the work is carried out as regards: freedom of association and affiliation and membership of an organisation representing workers or employers or membership of any organisation whose members are engaged in a specific occupation, including the rights and benefits conferred by such organisations; recognition of diplomas, certificates and other professional qualifications; access to goods and services and the supply of goods and services made available to the public, except procedures for obtaining housing as provided for by national law, without prejudice to freedom of contract in accordance with EU and national law, and services offered by public employment offices.

In sum, it has become evident that even the most privileged category of TCNs (long-term residents) does not benefit from the same, particularly extensive equal treatment rule as EU workers. Since judgments on equal treatment of TCNs are rare and since these judgments do not indicate a general line (extensive or restrictive), it is hard to predict whether the CJEU will interpret the equal treatment rule for TCNs in a way approximating them closer to EU workers. As for now, a number of differences remain, especially concerning social advantages. In particular, grants and loans for education can be refused, specific procedures can apply to housing and a condition of residence to benefit from social advantages is not always prohibited. Compared to EU workers, TCNs cannot, as a matter of fact, claim equal treatment 'within the scope of the Treaty'.

7 ACCESS TO SOCIAL SECURITY

7.1 EU workers

The principle of equal treatment, as confirmed in Article 4 of Regulation (EC) No 883/2004, guarantees that in social security matters nationals of a Member State are in principle⁹⁹ treated by any other Member State as if they were nationals of the latter State. It applies to direct discrimination on grounds of nationality,¹⁰⁰ as well as to indirect discrimination, meaning all forms of discrimination which, through the application of other distinguishing

⁹⁹ For the exceptions, see e.g. the judgment of 14 June 2016, *European Commission v United Kingdom*, C-308/14, EU:C:2016:436 and the judgment of 15 September 2015, *Alimanovic*, C-67/14, EU:C:2015:597.

¹⁰⁰ Judgment of 9 November 2011, *Chateignier*, C-346/05, EU:C:2011:711.

criteria, lead in fact to the same result.¹⁰¹ Indirect discriminatory provisions are accepted provided that they are appropriate for securing the attainment of a legitimate objective and do not go beyond what is necessary to attain that objective.¹⁰² The same applies to non-discriminatory obstacles to free movement.¹⁰³ The principle of equal treatment is further developed in Article 5 of Regulation (EC) No 883/2004 on the equal treatment of benefits, income, facts or events. It makes sure that aspects of a person's situation which might be relevant for his or her social security rights but which are linked to another Member State should be taken into account. Access to social security is also guaranteed by the provisions on the aggregation of periods (Article 6 and other specific articles of Regulation (EC) No 883/2004).

Social security benefits are also covered by the prohibition of discrimination on grounds of nationality for 'social advantages' in Article 7(2) of Regulation (EC) No 492/2011.¹⁰⁴

7.2 TCNs

7.2.1 Equal treatment for social security benefits

In principle the EU migration Directives guarantee TCNs equal treatment with the nationals of the host Member State regarding social security benefits. Still, this right is subject to specific exceptions which are differently worded in these Directives.

There is no provision regarding access to social security in *Directive 2003/86/EC (Family reunification)*.

Directive 2003/109/EC (Long-term residents) guarantees long-term residents the right to equal treatment with the nationals of the host Member State as regards 'social security, social assistance and social protection as defined by national law' (Article 11(1)(e) Directive 2003/109/EC). However, Article 11(4) of Directive 2003/109/EC allows Member States to limit equal treatment as far as social assistance and social protection are concerned to core benefits (see Chapter 6.2). This right to equal treatment also applies to long-term residents who have received a residence permit in a second Member State (Article 21(1) Directive 2003/109/EC).

Directive 2009/50/EC (EU Blue Card) entitles in its Article 14(1)(e) the holders of an EU Blue Card to equal treatment with nationals of the Member State who issues the Blue Card for the 'branches of social security as defined in Regulation (EEC) No 1408/71' (now Regulation (EC) No 883/2004). No exception is provided for.

Article 12(1)(e) of *Directive 2011/98/EU (Single permit)* stipulates that third-country workers, who are covered by this Directive and who have been admitted to work in the host Member State, shall enjoy equal treatment with nationals of the Member State where

101 See, *inter alia*, judgment of 27 November 1997, *Meints*, C-57/96; EU:C:1997:564; judgment of 5 May 2011, *European Commission v Germany*, C-206/11, EU:C:2011:283.

102 See, *inter alia*, judgment of 11 September 2008, *Petersen*, C-228/07, EU:C:2008:494, paragraph 54; judgment of 14 June 2016, *European Commission v United Kingdom*, C-308/14, EU:C:2016:436, paragraph 79.

103 Judgment of 26 January 1999, *Terhoeve*, C-18/95, EU:C:1999:22; judgment of 18 July 2006, *De Cuyper*, C-406/04, EU:C:2006:491, paragraph 40.

104 Judgment of 27 May 1993, *Schmid*, C-310/91, EU:C:1993:221.

they reside with regard to the 'branches of social security, as defined in Regulation (EC) No 883/2004'.¹⁰⁵ However, Article 12(2)(b) of this Directive contains some limitations in this respect. Member States may limit equal treatment for these rights for those third-country workers "who are no longer in employment after having been employed for less than six months". Also third-country workers who have only been authorised to work for a period not exceeding six months, or TCNs who have been admitted for the purpose of study or who are allowed to work on the basis of a visa, may be refused family benefits. Recital 24 states that this Directive does not grant rights in situations which lie outside the scope of EU law, such as in the case of family members residing in a third country.

Directive 2014/36/EU (Seasonal workers) guarantees seasonal workers equal treatment with nationals of the host Member State with regard to the branches of social security, as defined in Regulation (EC) No 883/2004 (Article 23(1)(d) Directive 2014/36/EU). However, Article 23(2)(i) of Directive 2014/36/EU allows Member States to restrict equal treatment for social security by excluding family benefits and unemployment benefits. Moreover, since under the definition of 'seasonal worker' in Article 3(b) of Directive 2014/36/EU these workers retain their principal place of residence in a third country, these workers could be further deprived of the entitlement to social benefits which under the national law of the Member States is based on residence in that State.

Article 18(2)(c) of *Directive 2014/66/EU (Intra-corporate transfers)* provides, in principle, for equal treatment with regard to all "branches of social security defined in Article 3 of Regulation (EC) No 883/2004". However, with regard to family benefits Article 18(3) of this Directive allows the Member States to derogate from equal treatment for intra-corporate transferees "who have been authorised to reside and work in the territory of a Member State for a period not exceeding nine months". In addition, this right to equal treatment does not apply if "the law of the country of origin applies by virtue of bilateral agreements or the national law of the Member State where the work is carried out, ensuring that the intra-corporate transferee is covered by the social security legislation in one of those countries". This sentence in Article 18(2)(c) of Directive 2014/66/EU refers to the issue that has to be solved before the equal treatment clause can be applied. Indeed, it has to be decided first if the intra-corporate transferee is at all covered by the social security system of a Member State. If a bilateral agreement on social security has been concluded between a Member State and a third country, the intra-corporate transferee could remain subject to the social security system of the third country of origin. In that case this person cannot rely on the right to equal treatment in the host Member State.

Article 22(1) of *Directive 2016/801/EU (Researchers, students et al)* guarantees researchers equal treatment with nationals of the host Member State as provided for by Article 12(1) and (4) of Directive 2011/98/EU (Single permit; see above). These clauses guarantee the right to equal treatment with regard to branches of social security, as defined by Regulation (EC) No 883/2004 (Article 12(1)(e) Directive 2011/98/EU), as well as with regard to the right to equal treatment in terms of the export of old age, invalidity and death statutory pensions (see Chapter 7.2.2). Article 22(2)(b) of Directive 2016/801/EU allows Member States to restrict equal treatment as regards researchers by

¹⁰⁵ For a recent application by the CJEU see judgment of 9 November 2017, *Martinez Silva*, C-449/16, EU:C:2017:485.

not granting family benefits to researchers who have been given the right to reside in the territory of the Member States concerned for a period not exceeding six months. Other categories of TCNs covered by this Directive (trainees, volunteers and au pairs) as well as students shall also be entitled, when they are considered to be in an employment relationship, to equal treatment with nationals of the host Member State as provided for in Articles 12(1) and 12(4) of Single Permit Directive 2011/98/EU. However, this right is subject to the restrictions laid down in Article 12(2) of the latter Directive. These restrictions concern the rights of third-country workers who are no longer in employment after having been employed for less than six months, as well as the right to family benefits of third-country workers who have only been authorised to work for a period not exceeding six months, of TCNs who have been admitted for the purpose of study, or of TCNs who are allowed to work on the basis of a visa.

7.2.2 Export of pensions to third countries

Some Directives contain provisions on the right to equal treatment with nationals of the host State as regards the export of pensions when TCNs move to a third country or for the TCNs' survivors when they reside in a third country (Article 14(1)(f) Directive 2009/50/EC (EU Blue Card); Article 12(4) Directive 2011/98/EU (Single permit); Article 23(1) Directive 2014/36/EU final paragraph (Seasonal workers); Article 18(2)(d) Directive 2014/66/EU (Intra-corporate transfers). The export of these benefits is guaranteed insofar as this is provided for on behalf of nationals of the Member State involved and at the same rate applied to the latter. However, the export of pensions is conditional upon having satisfied the national eligibility conditions for becoming entitled to a pension. Still, the analysed directives do not contain any provisions on aggregation of periods of insurance, employment or residence. As a result, TCNs who, previous to their employment in a Member State, worked in a third country where they fulfilled such periods, cannot bring these into account to obtain the right to benefits, such as old-age, invalidity or survivors' pensions, unless they can rely on provisions in a bilateral agreement concluded by a Member State with a third country. They can also rely on Regulation (EC) 1231/2010 if the TCN was employed in two or more Member States.

7.2.3 Association agreements

Only a limited number of Association Agreements grant the TCNs covered by them the right to equal treatment with the nationals of the host Member State with regard to social security benefits.

The EU-Turkey Association Council also adopted Decision No 3/80 on the application of the social security schemes of the Member States to Turkish workers and members of their families.¹⁰⁶ The Decision applies to workers¹⁰⁷ who are or have been subject to the legislation of one or more Member States and who are Turkish nationals, as well as to the members of the families of these workers resident in the territory of one of the Member States and the survivors of these workers (Article 2). The material scope is identical to the

¹⁰⁶ OJ 1983 C110/60.

¹⁰⁷ Article 1 provides for a more detailed definition of 'worker'.

material scope of Regulation (EC) No 883/2004 (Article 4). However, the CJEU has ruled that in the absence of any measures to implement Decision No 3/80 its legal effect is limited.¹⁰⁸ Still, the CJEU has recognised the direct effect of the equal treatment provision of Article 3 of Decision No 3/80 and of the provision of Article 6 regarding the export of benefits to Turkey.¹⁰⁹

The Association Agreements with the Maghreb countries (Morocco, Tunisia and Algeria) guarantee workers who are nationals of these countries and the members of their families equal treatment in the field of social security.¹¹⁰ The CJEU has confirmed the direct effect of these provisions.¹¹¹ The concept of social security in these Agreements is the same as in Regulation (EC) No 883/2004,¹¹² including the special non-contributory benefits.¹¹³ Still, the right to receive family benefits is limited to those members of their families who are resident in the EU. With regard to the concept of worker and of members of the family under the non-discrimination clauses of these agreements, the CJEU accords these concepts an autonomous meaning, which does not refer to the definitions in the national legislation of the Member States.¹¹⁴ The relevant Association Councils have not yet adopted provisions to further implement these agreements with regard to social security, in particular as regards the coordination between the social security schemes of the EU Member States on the one hand and of the three other countries on the other.

Other agreements concluded by the EU with third countries, such as the Partnership Agreements, Partnership and Cooperation Agreements or Stabilisation and Association Agreements, do not contain any directly applicable provisions on the social security rights of persons covered by these agreements.¹¹⁵ The social security rights of these persons may be determined by the decisions of the relevant Association Councils yet to be taken.

7.2.4 Intermediate conclusions

Like EU citizens, TCNs covered by the Directives in principle enjoy equal treatment with nationals of the host Member States for what concerns social security benefits. In addition, the Directives also guarantee equal treatment with nationals of the host Member States as regards the export of pensions to a third country. However, the Directives allow for some exceptions, which are differently worded in these Directives. TCNs who can rely on Association Agreements only enjoy full equal treatment with nationals of the host Member State if this is provided for in these agreements.

108 Judgment of 10 September 1996 *Taflan-Met*, C-277/04, EU:C:1996:315.

109 See, *inter alia*, judgment of 4 May 1999, *Sürül*, C-262/96, EU:C:1999:228; judgment of 14 March 2000, *Kocak and Örs*, C-211/98, EU:C:2000:119; judgment of 26 May 2011, *Akdas*, C-485/07, EU:C:2011:346; judgment of 14 January 2015, *Demirci*, C-171/13, EU:C:2015:8.

110 Article 65 Agreement with Tunisia; Article 65 Agreement with Morocco; and Article 68 Agreement with Algeria. The CJEU has confirmed the direct applicability of these equal treatment provisions.

111 See, *inter alia*, judgment of 31 January 1991, *Kziber*, C-18/90, EU:C:1991:36; judgment of 20 April 1994, *Yousfi*, C-58/93, EU:C:1994:160.

112 See, *inter alia*, judgment of 31 January 1991, *Kziber*, C-18/90, EU:C:1991:36, paragraph 24; judgment 13 June 2006, *Echouikh*, C-336/05, EU:C:2006:394, paragraph 51.

113 See, *inter alia*, judgment of 5 April 1995, *Krid*, C-103/94, EU:C:1994:97, paragraphs 32-33.

114 See, *inter alia*, judgment of 31 January 1991, *Kziber*, C-18/90, EU:C:1991:36, paragraph 27; judgment of 12 February 2003, *Alami*, C-23/02, EU:C:2003:89, paragraph 27; judgment of 17 April 2007, *El Yousffi*, C-276/06, paragraph 65.

115 The only exception is the agreement with San Marino: Agreement of 16 December 1991 on Cooperation and Customs Union with San Marino (OJ 2002 L 84/43; Article 21).

Still, the analysed Directives or Association Agreements neither contain any provisions on the social security coordination with social security schemes of third countries, nor such provisions regarding aggregation of periods of insurance, employment or residence. Since the national legislation of a number of Member States does require the fulfilment of a certain period of employment and payment of contributions for entitlement to benefits such as old-age, invalidity or survivors' pensions, it is quite likely that the TCNs involved will not be able to fulfil the necessary periods during their limited period of work in the host Member State. Consequently, they will not be entitled to such benefits.

8 SOCIAL SECURITY IN THE CONTEXT OF MOVING WITHIN THE EU

8.1 EU workers

EU workers in cross-border situations between two or more Member States can rely on the provisions of Regulation (EC) No 883/2004 and Regulation (EC) No 987/2009 or, if necessary, directly on Article 45 TFEU.¹¹⁶

8.2 TCNs

TCNs are also covered by Regulation (EC) No 883/2004 and Regulation (EC) No 987/2009. Stateless persons and refugees residing in a Member State, as well as third-country family members of nationals of a Member State or their survivors are directly covered by Regulation (EC) No 883/2004 and Regulation (EC) No 987/2009 (Article 2(1) Regulation (EC) No 883/2004). In addition, the personal scope of these regulations was extended by Regulation (EU) No 1231/2010¹¹⁷ to other TCNs and to members of their families and to their survivors, provided that they are legally resident in the territory of a Member State and are in a situation which is not confined in all respects within a single Member State.

There are no provisions on access to social security in the context of moving within the EU in Directive 2003/86/EC (Family reunification), Directive 2011/98/EU (Single permit) and Directive 2016/801/EU (Researchers, students *et al*).

Directive 2003/109/EC (Long-term residents) grants a TCN with a long-term resident status in a Member State the right to move to a second Member State, under the conditions and limitations set out in its Articles 14 and 15. Article 14(6) of Directive 2003/109/EC provides in this respect that the implementation of these provisions is without prejudice to the relevant EU law on social security with regard to TCNs. Implicitly this provision refers to Regulation (EU) No 1231/2010.

¹¹⁶ See *e.g.* judgment of 22 November 1995, *Vougioukas*, C-443/93, EU:C:1995:394.

¹¹⁷ Regulation (EU) No 1231/2010 replaced Regulation (EC) No 859/2003 which extended Regulation (EC) No 1408/71 on social security coordination to third country nationals. Due to its legal base in Article 79(2)(b) (common immigration policy), Denmark does not participate in Regulation (EU) No 1231/10. However, in the context of the Administrative Commission Denmark has stated that in practice it applies the coordination rules to third country nationals. The UK also chose not to opt into Regulation (EU) No 1231/10, but the UK is still bound by Regulation (EC) No 859/2003, meaning that the UK still applies the (old) rules of Regulation (EC) No 1408/71 to third country nationals in a cross-border situation involving the UK and other Member States.

Directive 2009/50/EC (EU Blue Card) refers in its Article 14(1)(e) on equal treatment for social security to the special provisions in the annex to Regulation (EC) No 859/2003. This regulation was replaced by Regulation (EU) No 1231/2010, which does not contain an annex with special provisions.

Article 23(2)(i) of *Directive 2014/36/EU (Seasonal workers)* specifies that restrictions to equal treatment for social security by excluding family benefits and unemployment benefits are “*without prejudice to Regulation (EU) No 1231/2010*”.

Article 18(2)(c) of *Directive 2014/66/EU (Intra-corporate transfers)* stipulates that “*in the event of intra-EU mobility, and without prejudice to bilateral agreements ensuring that the intra-corporate transferee is covered by the national law of the country of origin, Regulation (EU) No 1231/2010 shall apply accordingly*”. Moreover, the derogation of the equal treatment principle for family benefits for intra-corporate transferees who have been authorised to reside and work in the territory of a Member State for a period not exceeding nine months in Article 18(3) of *Directive 2014/66/EU* applies “*without prejudice to Regulation (EU) No 1231/2010*”.

9 RIGHTS AFTER THE END OF EMPLOYMENT

9.1 EU workers

According to Article 45(3)(d) TFEU, freedom of movement entails the right, “*to remain in the territory of a Member State after having been employed in that State, subject to conditions which shall be embodied in regulations to be drawn up by the Commission*”. The conditions under which the right to remain on the territory of another Member State can be claimed (and a residence permit should be granted), which were initially laid down in Directives 68/360/EEC (unemployment) and Regulation (EEC) No 1251/70 (retirement), are now mentioned in *Directive 2004/38/EC*.

Concerning unemployment, according to Article 7(3) of *Directive 2004/38/EC*, a Union citizen who is no longer a worker or self-employed person retains the status of worker or self-employed person in four different cases: (a) if the worker is temporarily unable to work as the result of an illness or accident; (b) when s/he is in duly recorded involuntary unemployment after having been employed for more than one year and has registered as a jobseeker with the relevant employment office; (c) when s/he is in duly recorded involuntary unemployment after completing a fixed-term employment contract of less than a year or after having become involuntarily unemployed during the first twelve months, when the worker has registered as a jobseeker with the relevant employment office; and (d) when s/he embarks on vocational training. In the latter case, unless the worker is involuntarily unemployed, the retention of the status of worker requires the training to be related to the previous employment. This list is not exhaustive. For instance, the right of residence will also be retained if a person gives up (seeking) work because of the physical constraints of the late stages of pregnancy and the aftermath of childbirth, provided she returns to work or finds another job within a reasonable period after the birth of her child.¹¹⁸

¹¹⁸ Judgment of 19 June 2014, *Saint Prix*, C-507/12, EU:C:2014:2007.

As far as retirement is concerned, Article 17(1)(a) of Directive 2004/38/EC recognises a right to permanent residence to workers or self-employed persons who, at the time they stop working, have reached the age laid down by the law of the host Member State for entitlement to an old-age pension, or to workers who cease paid employment to take early retirement, provided that they have been working in the host Member State for at least the preceding twelve months and have resided there continuously for more than three years. If the law of the host Member State does not grant the right to an old-age pension to certain categories of self-employed persons, the age condition is considered to be met once the person concerned has reached the age of 60. Since they retain the status of workers, after employment, EU citizens who remain on the territory of another Member State, under the conditions mentioned in Directive 2004/38/EC, benefit from equal treatment (Article 24 of the Directive) under the same conditions as workers exercising an economic activity in the host Member State (see above). This solution is meant to foster the mobility of workers and the integration of EU citizens in the host Member State.

9.2 TCN workers

The situation of TCNs is different to that of EU workers. In general, unless they are family members of EU citizens, they cannot claim a right to remain in the territory of a Member State, after employment, on the basis of EU law. EU Blue Card holders are an exception. According to Article 13 of Directive 2009/50/EC, devoted to 'temporary unemployment', unemployment in itself does not constitute a reason for withdrawing an EU Blue Card, unless the period of unemployment exceeds three consecutive months, or unless it occurs more than once during the period of validity of the EU Blue Card. During this period the holder may seek and take up employment and may stay until the competent authorities in the host Member State have decided to either grant or deny authorisation to work for a new employer (Article 13(3) *juncto* Article 12(2) Directive 2009/50/EC).

10 RIGHTS OF FAMILY MEMBERS

10.1 EU workers

Because of their relationship with an EU worker, family members enjoy, irrespective of their nationality, the right to join and accompany the worker in the host Member State for a period of three months (Article 6(2) Directive 2004/38/EC), the right to reside for a period of more than three months (Article 7(2) Directive 2004/38/EC) and, when they have resided with the EU worker for a continuous period of five years, the right of permanent residence (Article 16(2) Directive 2004/38/EC). Family members are not obliged to live under the same roof as the EU worker¹¹⁹ and do not have to have been lawfully resident in a Member State before they join or accompany the EU worker.¹²⁰ In principle, family members retain these rights for as long as and under the same conditions as the EU workers do (Articles 14 and 17(3) Directive 2004/38/EC).

¹¹⁹ Judgment of 13 February 1985, *Diatta*, 267/83, EU:C:1985:67.

¹²⁰ Judgment of 25 July 2008, *Metock*, C-127/08, EU:C:2008:449.

These rights can be enjoyed irrespective of the nationality of the family members. However, some differences exist between family members who are EU citizens and those who are TCNs. For example, family members who themselves are EU citizens receive a registration certificate or a document certifying permanent residence (Articles 8(5) and 19 Directive 2004/38/EC); and family members who are not EU citizens receive a (permanent) residence card (Articles 10 and 20 Directive 2004/38/EC). Furthermore, in the event of the death of the EU worker, the conditions under which family members may retain residence rights differ. This event does not affect the right to reside of family members who are EU citizens themselves, provided they meet the requirement of being workers or self-employed persons or have sufficient resources and have comprehensive sickness insurance or satisfy the conditions for residence as a student (Article 12(1) *juncto* Article 7(1) Directive 2004/38/EC). Family members who are not EU citizens are subject to the same conditions, but must in addition have resided in the host Member State for at least one year before the EU worker's death (Article 12(2) Directive 2004/38/EC).

For situations of divorce, annulment of marriage or termination of a registered partnership specific rules exist for the retention of residence by family members who are not EU citizens. They can retain residence (i) if the marriage or registered partnership has lasted for at least three years (including one year in the host Member State), (ii) if the spouses or partners have agreed that the one who lacks EU citizenship has custody of the children or has access to the child, or (iii) in particularly difficult circumstances, such as having been a victim of domestic violence (Article 13 Directive 2004/38/EC).

Additional residence rights may be derived from Article 10 of Regulation (EU) No 492/2011, which entitles children of EU workers to gain access to education when they are residing in the host Member State. The CJEU has interpreted this provision to imply that where the EU worker has left the territory of the host Member State, a child and that child's carer may retain the right of residence during the period that the child needs to complete his or her education.¹²¹

Family members can enjoy the right of permanent residence under the same conditions as EU workers. If the latter, however, dies before having acquired permanent residence his or her family members may acquire that right on condition that (i) the worker has resided continuously in the host Member State for two years, (ii) the death resulted from an accident at work or an occupational disease, or (iii) the surviving spouse lost the nationality of that Member State following marriage to the worker (Article 16(4) Directive 2004/38/EC). Furthermore, the CJEU has held that periods of residence completed solely on the basis of Article 10 of Regulation (EU) No 492/2011 may not be taken into consideration for the acquisition of permanent residence.¹²²

Family members are entitled to the above residence rights. Relatives that are not covered by the definition of family member (see Chapter 2.2.1) do not enjoy these rights, but the host Member State must facilitate their entry and residence (Article 3(2) Directive

121 Judgment of 15 March 1989, *Echternach & Moritz*, Joined Cases C-289 and C-390/87, EU:C:1989:130; Judgment of 17 September 2002, *Baumbast*, C-413/99, EU:C:2002:493; Judgment of 23 February 2010, *Ibrahim*, C-310/08, EU:C:2010:80; Judgment of 23 February 2010, *Teixeira*, C-480/08, EU:C:2010:83; and Judgment of 13 June 2013, *Hadj Ahmed*, C-45/12, EU:C:2013:390 as well as Article 12(3) Directive 2004/38/EC.

122 Judgment of 8 May 2015, *Alarape*, C-529/11, EU:C:2015:290.

2004/38/EC). This holds true for (i) family members who, in the country from which they have come, are dependants or members of the household of the Union citizen having the primary right of residence, or where serious health grounds strictly require the personal care of the family member by the Union citizen and (ii) the partner with whom the Union citizen has a durable relationship, duly attested.¹²³

In addition to the residence rights discussed above, family members of EU workers are entitled to take up employment or self-employment in the host Member State (Article 23 Directive 2004/38/EC) and to claim equal treatment with nationals of the host Member State within the scope of application of the Treaty (Article 24 Directive 2004/38/EC), notably including access to education and student financial aid (Articles 7(2)¹²⁴ and 10 Regulation (EU) No 492/2011¹²⁵).

10.2 TCN workers

As noted above (see Chapter 2.2.2), the EU migration Directives that provide for residence rights of family members (*i.e.* all Directives included in this study with the exception of Directive 2011/98/EU (Single permit) and Directive 2014/36/EU (Seasonal workers)) all refer to Directive 2003/86/EC on the right to family reunification. Accordingly, Member States must authorise the entry and residence of (a) the sponsor's spouse, (b) the minor children of the sponsor and his or her spouse, including adopted children, and (c) the minor children – including adopted children – of the sponsor or the spouse provided the third-country worker or the spouse has custody and the children are dependent on him or her. It is required, however, that the sponsor (i) is a TCN (Article 2(c) Directive 2003/86/EC), (ii) holds a residence permit that is valid for at least one year and (iii) has reasonable prospects of obtaining the right to permanent residence (Article 3(1) Directive 2003/86/EC).

The first residence permit is granted for at least one year and is renewable (Article 13 Directive 2003/86/EC). After five years of residence, spouses, unmarried partners and children who have reached majority are entitled to an autonomous residence permit independent of that of the sponsor; moreover, an autonomous residence permit may be issued “[i]n the event of widowhood, divorce, separation, or death of first-degree relatives in the direct ascending or descending line” (Article 15 Directive 2003/86/EC).

The entry and residence of these family members is subject to a number of conditions/restrictions that do not apply to the family members of EU workers. For example, applications for family reunification, in principle, must be submitted and examined when the family members are residing outside the territory of the Member State in which the sponsor resides (Article 5(3) Directive 2003/86/EC). Furthermore, the Member States concerned may require that (i) the sponsor has stayed lawfully on their territory for a period not exceeding two years (Article 8 Directive 2003/86/EC), (ii) the sponsor or the family member who submits the application for family reunification to provide evidence

123 Article 3(2) Directive 2004/38/EC, as interpreted in the judgment of 5 September 2012, *Rahman*, C-83/11, EU:C:2012:519.

124 Judgment of 21 June 1988, *Lair*, 39/86, EU:C:1088:322.

125 Judgment of 15 March 1989, *Echternach & Moritz*, Joined Cases C-289 and C-390/87, EU:C:1989:130.

that the sponsor has 'normal' accommodation, sickness insurance for himself or herself and the family members as well as stable and regular resources sufficient to maintain the family without recourse to social assistance¹²⁶ (Article 7(1) Directive 2003/86/EC); (iii) third-country family members comply with integration measures (Article 7(2) Directive 2003/86/EC);¹²⁷ (iv) the sponsor and the spouse are of a minimum age (of 21 years at the most) before the spouse can join the sponsor (Article 4(5) Directive 2003/86/EC);¹²⁸ and (v) applications for minor children are submitted before the age of 15 (Article 5(5) Directive 2003/86/EC).

As noted above (see Chapter 2.2.2), unlike Directive 2004/38/EC, Directive 2003/86/EC does not oblige the host Member State to confer residence rights on the registered partner, descendants other than minor children and ascendants of third-country workers.¹²⁹ However, the host Member State may authorise the entry and residence of (a) first-degree relatives in the ascending line of the worker or the spouse who are dependent on them and do not enjoy proper family support in the country of origin, (b) adult unmarried children of the worker or the spouse, where they are objectively unable to provide for their own needs on account of their state of health, (c) the registered partner, (d) the unmarried partner with whom the third-country worker is in a duly attested stable long-term relationship and (e) unmarried children who are objectively unable to provide for their own needs on account of their state of health.¹³⁰

Directive 2003/86/EC as such applies to the aforementioned four migration Directives, but the latter do contain some derogations. For example, Directive 2009/50/EC (EU Blue Card), Directive 2014/66/EU (Intra-corporate transfers) and Directive 2016/801/EU (Researchers, students *et al*) do not require that the sponsor has resided for a minimum period in the host Member State or has reasonable prospects of obtaining the right to permanent residence, and only allow application of the integration conditions and measures to be applied after family unification has been granted (Article 15 Directive 2009/50/EC; Article 19 Directive 2014/66/EU and Article 26 Directive 2016/801/EU).

126 Member States may make the application of this requirement conditional upon a prospective assessment of the likelihood of the sponsor retaining, or failing to retain, the necessary stable and regular resources in the year after submission of the application for family reunification; see judgment of 21 April 2016, *Khachab*, C-558/14, EU:C:2016:285. The faculty provided by Article 7(2) must be exercised in the light of Articles 7 and 24(2) and (3) CFR, which require the Member States to examine applications for family reunification in the interests of the children concerned and also with a view to promoting family life, and avoiding any undermining of the objective and the effectiveness of that Directive; see judgment of 6 December 2012, *O and S*, C-356/11, EU:C:2012:776. In applying the income requirement, no distinction can be made depending on whether the family relationship arose before or after the sponsor entered the territory of the host Member State; see judgment of 4 March 2010, *Chakroun*, C-507/08, EU:C:2010:117. Access to special assistance meant to meet exceptional, individually determined, essential living costs, tax refunds granted by local authorities on the basis of his or her income, or income-support measures in the context of local authority minimum income policies does not necessarily constitute a reason to reject family reunification; see judgment of 4 March 2010, *Chakroun*, C-507/08, EU:C:2010:117.

127 Member States may require TCNs to pass a civic integration examination, which consists in an assessment of basic knowledge both of the language of the Member State concerned and of its society and which entails the payment of various costs, provided that the conditions of application of such a requirement do not make it impossible or excessively difficult to exercise the right to family reunification; see judgment of 9 July 2015, *K and A*, C-153/14, EU:C:2015:453.

128 Member States may require this age requirement to be fulfilled by the date when the application for family reunification is lodged; see judgment of 17 July 2014, *Noorzia*, C-338/13, EU:C:2014:2091.

129 Moreover, dependent children of either the third-country worker or the spouse are only regarded as family members when the worker or the spouse has custody.

130 Article 4(2) and (3) Directive 2003/86/EC.

Upon entry in the host Member State, the sponsor and the family members are entitled to access (i) education, (ii) employment and self-employed activities and (iii) vocational guidance, initial and further (re-)training (Article 14 Directive 2003/86/EC). Member States may, for a maximum of twelve months, examine the situation in their labour market before authorising family members to exercise (self-)employed activities (Article 14(2) Directive 2003/86/EC).

11 DEFENCE OF RIGHTS AND ACCESS TO SUPPORT TO DEFEND RIGHTS

11.1 EU workers

EU workers' defence of rights was recently strengthened by the adoption of Directive 2014/54/EU. This Directive contains specific rules for effective enforcement of free movement rights granted to EU workers and aims at facilitating a better and more uniform application of the substantive rules governing the freedom of movement of workers under Article 45 TFEU and Regulation (EU) No 492/2011. The Directive applies to access to employment, conditions of employment and work, membership of trade unions and eligibility for worker's representative bodies, access to social and tax advantages, education and training and housing as well assistance by employment offices.

As far as 'defence of rights' (Article 3 Directive 2014/54/EU) is concerned, this recent Directive essentially affirms already existing rights: recourse with regard to adverse decisions must be available before a competent authority and access to judicial procedures must be granted. But the Directive is not limited to this right to seek redress. In addition, it also introduces a series of new obligations for Member states in order to foster enforcement of free movement rights.

First, Member States must ensure that associations, organisations, including the social partners, or other legal entities, which have a legitimate interest in ensuring that the Directive is complied with, may engage, either on behalf of or in support of EU workers and members of their family in any judicial and/or administrative procedure (Article 1(2) Directive 2014/54/EU). To avoid 'victimisation', Member States must also introduce measures to protect EU workers from adverse treatment as a reaction to a complaint or proceedings aimed at enforcing compliance with free movement rights (Article 1(6) Directive 2014/54/EU). Moreover, the Directive requires Member States to designate a body in charge of the promotion of equal treatment and support to EU workers and members of their family (Article 4 Directive 2014/54/EU). These national bodies are responsible for the promotion, analysis, monitoring and support of equal treatment of EU workers and members of their family. Lastly, the Directive requires access to and dissemination of information concerning the rights of workers (Article 6 Directive 2014/54/EU).

11.2 Third-country workers

As far as TCNs are concerned, procedural guarantees in *Directive 2003/109/EC (Long-term residents)* have set the reference that was followed, by and large, in all the other

Directives. It requires motivation of decisions which reject an application for a long-term resident status in a Member State or which withdraw that status. It also requires notification to the TCN concerned, including information on available redress procedures and the time within which the person concerned may act (Article 10(1) Directive 2003/109/EC). The right to a 'legal challenge' of negative decisions is also laid down in this Directive, without any further detail: whether this means that access to a court should be possible or that appeal before an administrative authority is sufficient, is not clear (Article 10(2) Directive 2003/109/EC). The same guarantees are granted to long-term residents, according to Article 20 of Directive 2003/109/EC when they apply for residence permits in other Member States.

The same guarantees are granted to third-country nationals under *Directive 2009/50/EC (EU Blue Card)*: a negative decision must be notified in writing, include the reasons for the decision and mention a legal possibility to contest it (Article 11 Directive 2009/50/EC).

Directive 2011/98/EU (Single permit) clearly mentions (as opposed to the Directive on long-term residents and the Directive on the EU Blue Card) that negative decisions can be contested before a court or an administrative authority (Article 8 Directive 2011/98/EU). It also requires Member States to provide adequate information to the TCN and the future employer on the documents required to make a complete application (Article 9 Directive 2011/98/EU). In addition, it addresses the question of fees: although Member States are allowed to require applicants to pay fees, it requires the level of such fees to be proportionate and based on the services actually provided for the processing of applications and the issuance of permits (Article 10 Directive 2011/98/EU). Under Article 11(d) of Directive 2011/98/EU, the beneficiary of a permit has the right to be informed about his or her rights linked to the permit (conferred by the Directive and/or national law). Member States must also provide information to the public about the conditions of TCNs' admission and residence on the territory for work purposes (Article 14 Directive 2011/98/EU).

Directive 2014/66/EU (Intra-corporate transfers) and *Directive 2016/801/EU (Researches, students et al)* both provide classic procedural guarantees: the written notification of decisions within a limited delay, the notification of missing information and the setting of a reasonable deadline for providing it, the written motivation of a negative decision and the possibility to challenge decisions in court or before an administrative authority (Article 15 Directive 2014/66/EU; Article 34 Directive 2016/801/EU). The Directives, as the one on the single permit, require that access to information about documents needed for an application and about entry and residence rights and conditions, is easily accessible (Article 10 Directive 2014/66/EU; Article 35 Directive 2016/801/EU). As in that Directive, too, Member States are not prevented from applying fees for the handling of notifications and applications, but their level must not be disproportionate or excessive (Article 16 Directive 2014/66/EU; Article 36 Directive 2016/801/EU).

Directive 2014/36/EU (Seasonal workers) includes the same procedural rights as the ones granted by the other Directives (see Article 11 Directive 2014/36/EU on access to information, Article 18 Directive 2014/36/EU on procedural safeguards, and Article 19 Directive 2014/36/EU on fees). In addition, in the case of an application for an extension of stay or for the renewal of the authorisation, it requires Member States to ensure that the seasonal worker is not obliged to interrupt his or her employment relationship with the

same employer, or prevented from changing employer, due to on-going administrative procedures: Member States must allow the worker to stay on the territory during the procedure for extension or renewal until the competent authorities have taken a decision on the application (Article 18(2) Directive 2014/36/EU).

A specific protection is also granted to seasonal workers, as compared to other TCNs, for the facilitation of complaints (Article 25 Directive 2014/36/EU): effective mechanisms must exist through which seasonal workers may lodge complaints against their employers directly, through third parties which have a legitimate interest in ensuring compliance with this Directive, or through a competent authority of the Member State (Article 25(1) Directive 2014/36/EU). In addition, as for EU workers, the Directive requires that third parties which have, under national law, a legitimate interest in ensuring compliance with the Directive may engage either on behalf of or in support of a seasonal worker in administrative or civil proceedings (Article 25(2) Directive 2014/36/EU). Protection against victimisation also applies, as it does for EU workers under Directive 2014/54 (Article 25(3) Directive 2014/36/EU).

In sum, procedural rights of TCNs are not very different from EU workers' rights, especially when seasonal workers are concerned. This is not only the result of EU Directives applicable to TCNs: all persons covered by EU law, whatever their nationality, benefit from Article 47 CFR, which grants effective judicial protection. This should lead to an extensive protection of TCNs, even though it would still not impose the designation of a national body in charge of enforcing the rights of TCNs, whereas EU workers should be able to count on the support of such national bodies in the near future.

12 MOBILITY WITHIN THE EU

12.1 EU workers

Article 45 TFEU and the legislative instruments in which it is worked out in further detail govern the rights of EU workers and their family members who move from one Member State to another. No distinction is made between the movement from Member State A of which the worker holds the nationality to another Member State B, and the subsequent movement to yet another Member State C. The rules on free movement of workers, as described in the previous sections, apply equally to the movement from Member State A to Member State B, and to the movement from Member State B to Member State C.¹³¹

12.2 TCNs

TCNs who have been admitted to one of the Member States cannot rely on Article 45 TFEU to claim a right to work in another Member State. However, EU law does provide for cross-border mobility rights for such workers.

¹³¹ EU workers and their family members who wish to return to the Member State of their nationality (Member State A) cannot benefit from Directive 2004/38/EC (Article 3(1)), but they can claim residence under similar conditions in this Member State on the basis of national law (EU worker) or Articles 45 or 21 TFEU; see judgment of 12 March 2014, *S.*, C-457/12, EU:C:2014:136.

12.2.1 Posting

First, the Treaty provisions on free movement of services offer employers established in a Member State the possibility to send their employees to perform economic activities in another Member State.¹³² This holds true also in case the posted workers are TCNs.¹³³ TCNs, however, must be lawfully residing and working in the Member State where their employer is based.¹³⁴

As regards labour law, the Posting of Workers Directive does not interfere with the law applicable to the employment contract which, in most cases, will be the legislation of the 'sending' Member State. However, the 'receiving' or host Member State must ensure that, whatever the law applicable to the employment relationship, posted workers enjoy in their territory the terms and conditions of employment, laid down by law, collective agreements that have been declared universally applicable, covering inter alia maximum work periods and minimum rest periods, minimum paid annual holidays, minimum rates of pay, and health, safety and hygiene at work. (Article 3(1) of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services).¹³⁵ As regards social security, posted workers remain subject to the legislation of the Member State from which they are posted for a maximum period of 24 months (Article 12 Regulation (EC) No 883/2004). This special conflict rule for posted workers can only be applied when (i) the posted worker has been subject to the legislation of the sending State prior to the posting, (ii) a direct link continues to exist between the posted worker and the undertaking that posts him or her, (iii) the undertaking concerned normally pursues activity in the territory of the State in which they are established and (iv) the worker is not posted to replace another who has previously completed a period of posting¹³⁶ on behalf of the same or another employer.¹³⁷ To ensure the practical application of the conflict rule for posted workers, the competent institution of the Member State in which the undertaking is based (posting Member State) must issue an A 1-certificate, which states that the worker remains subject to the legislation of the competent State. This certificate must be accepted by the institutions and courts¹³⁸ of the other Member States for as long as they have not been withdrawn or declared invalid by the Member State in which they were issued (Article 5 Regulation (EC) 987/2009), unless the certificate has been obtained fraudulently.¹³⁹

12.2.2 Migration Directives

In addition, some of the EU migration Directives primarily confer upon TCNs and their family members the right to move from the first Member State that admitted them to a second Member State (on labour market access see also Chapter 4.1.2). This holds true for Directive 2003/109/EC (Long-term residents), Directive 2009/50/EC (EU Blue Card), Directive 2016/801/EU (Researchers, students *et al*) and Directive 2014/66/EU (Intra-

132 Judgment of 27 March 1990, *Rush Portuguesa*, C-113/89, EU:C:1990:142.

133 Judgment of 9 August 1994, *Vander Elst*, C-43/93, EU:C:1994:310.

134 Judgment of 9 August 1994, *Vander Elst*, C-43/93, EU:C:1994:310.

135 OJ 1997 L 18, p. 1.

136 Judgment of 10 February 2000, *FTS*, C-202/97, EU:C:2000:75.

137 Judgment of 6 September 2018, *Alpenrind*, EU:C:2018:669.

138 Judgment of 26 January 2006, *Herbosch Kiere*, C-2/05, EU:C:2006:69.

139 Judgment of 6 February 2018, *Altun*, C-359/16, EU:C:2018:63.

corporate transfers). It has to be noted that, because of the negotiated opt-outs, the cross-border mobility rights discussed below do not extend to Denmark, Ireland and the United Kingdom.

Directive 2003/109/EC (Long-term residents) entitles long-term residents to residence for a period of more than three months in a Member State other than the one in which they have acquired long-term residence for work, or for educational or other purposes (see Article 14(1) and (2) Directive 2003/109/EC).

That second Member State may, however, (i) examine the situation of its labour market and apply its national procedures on vacancies and the exercise of (self-)employed activities, (ii) give preference to EU citizens or TCNs enjoying preferential status by virtue of EU legislation as well as TCNs who lawfully reside on its territory and receive unemployment benefits (Article 14(3) Directive 2003/109/EC). Moreover, “[b]y way of derogation [...] Member States may limit the total number of persons entitled to be granted a right of residence, provided that such limitations were already set out for the admission of third-country nationals in the existing legislation at the time of the adoption of this Directive” (Article 14(4) Directive 2003/109/EC). Furthermore, “Member States may decide, in accordance with national law, the conditions under which long-term residents who wish to move to a second Member State with a view to exercising an economic activity as seasonal workers may reside in that Member State. Cross-border workers may also be subject to specific provisions of national law” (Article 14(5)(2) Directive 2003/109/EC).

Residence in the second Member State may be made subject to (i) submission of evidence of sufficient resources, (ii) proof of sickness insurance coverage, (iii) integration measures and (iv) submission of an employment contract, evidence of funds needed to conduct a self-employed activity or enrolment at an educational institution (Article 15 Directive 2003/109/EC). Upon having received a residence permit in the second Member State, the TCNs enjoy equal treatment regardless of nationality in the same fields as they do in the first Member State where they have acquired long-term residence status (Article 21 Directive 2003/109/EC; see notably (2) for restrictions with regard to access to the labour market¹⁴⁰). Long-term residence status may also be obtained in the second Member State (Article 23 Directive 2003/109/EC).

As regards the right of *family members* to join or accompany the TCN who has acquired long-term residence status in another Member State, the Directive makes a distinction between three categories. The first category comprises members of a family which was already constituted in the first Member State and who belong to the core group (see Chapter 2.2.2). These family members must be authorised to reside with the long-term residence holder in the second Member State (Article 16(1) Directive 2003/109/EC). The second category comprises other members of a family that was already constituted in the first Member State. These family members may be authorised to join or accompany the

¹⁴⁰ Article 21(2) of Directive 2003/109/EC provides: “Long-term residents shall have access to the labour market in accordance with the provisions of paragraph 1. Member States may provide that the persons referred to in Article 14(2)(a) shall have restricted access to employed activities different than those for which they have been granted their residence permit under the conditions set by national legislation for a period not exceeding 12 months. Member States may decide in accordance with national law the conditions under which the persons referred to in Article 14(2)(b) or (c) may have access to an employed or self-employed activity.”

long-term residence holder in the second Member State (Article 16(2) Directive 2003/109/EC). The third category consists of members of a family that was not already constituted in the first Member State. These family members may reside in the second Member State under the conditions laid down in Family Reunification Directive 2003/86/EC (Article 16(5)). Once they have received the residence permit, family members shall in the second Member State enjoy equal treatment as regards access to education, (self-) employment and vocational training (Article 21(3) Directive 2003/109/EC).

Directive 2009/50/EC (EU Blue Card) entitles EU Blue Card holders to move to another Member State for the purpose of highly qualified employment after eighteen months of legal residence in the first Member State (Article 18(1) Directive 2009/50/EC). Within a month after entering the territory of the second Member State the TCN concerned must apply for a Blue Card there. The conditions for admission, the procedural rules applicable as well as the rights granted to the TCN in the second Member State are essentially the same as in the first Member State. The family members may be authorised to join the EU Blue Card holder (Article 19 Directive 2009/50/EC). If the family was not already constituted in the first Member State, the application and procedures are subject to the same rules as in the first Member State, which implies amongst other things that, in principle, the application must be submitted from outside the State where the sponsor lives (Article 15(6) Directive 2009/50/EC). Members of a family that was already constituted can simply join the Blue Card holder and apply for a residence permit upon arrival (Article 15(2) Directive 2009/50/EC).

Directive 2014/66/EU (Intra-corporate transfers) allows TCNs “*who hold a valid intra-corporate transferee permit issued by the first Member State, on the basis of that permit and a valid travel document and under the conditions laid down in Article 21 and 22 and subject to Article 23, [to] enter, stay and work in one or several second Member States*” (Article 20 Directive 2014/66/EU). A distinction is made between short-term mobility and long-term mobility. The former implies that the third-country worker concerned can stay in any second Member State and work in any other entity that is established in that Member State and belongs to the same undertaking or group of undertakings for a period of 90 days (in any 180-day period) per Member State (Article 21(1) Directive 2014/66/EU). Long-term mobility concerns third-country workers who have obtained an intra-corporate transferee permit and wish to stay for more than 90 days in another Member State to work in an entity belonging to the same undertaking. As regards such mobility the second Member State may decide to either allow the third-country worker to stay and work on its territory on the basis of and during the period of the validity of the permit granted to him or her in the first Member State or require him or her to start a fresh application for an intra-corporate transferee permit in the second Member State (Article 22(1) Directive 2014/66/EU).

Directive 2016/801/EU (Researchers, students et al) provides for the possibility of intra-EU mobility for researchers and students in order to carry out part of their studies or research in one or several other Member States (Articles 27-32 Directive 2016/801/EU). During this mobility, researchers may, in addition to research activities, teach and students may, in addition to their studies, work in one or several second Member States in accordance with the conditions laid down in Articles 23 and 24 of Directive 2016/801/EU, respectively (Article 27(2) Directive 2016/801/EU). With regard to researchers, this

Directive, too, distinguishes between short-term and long-term mobility between the Member States. Researchers who wish to stay in the second Member State for a period of up to 180 days (in any 360-day period) can do so on the basis of the authorisation given by the first Member State (Article 28(1) Directive 2016/801/EU). The researcher or one of the two research organisations involved may be required to notify the second Member State. As regards researchers who wish to stay for research purposes in a second Member State for more than 180 days, the second Member State shall either allow the researcher to stay on its territory on the basis of the authorisation given by the first Member State or require him or her to submit an application for a new authorisation (Article 29 Directive 2016/801/EU). The second Member State may define a maximum period for such long-term mobility of researchers, provided this will not be less than 360 days (Article 29(1) Directive 2016/801/EU). Family members may accompany the researcher, both in the cases of short-term mobility and of long-term mobility, on the basis of either the authorisation granted in the first State or by applying for a new authorisation in the second Member State (Article 30 Directive 2016/801/EU). The conditions for mobility of students are defined in Article 31 of Directive 2016/801/EU. Finally, Article 32 of Directive 2016/801/EU lays down safeguards and sanctions in cases of mobility.

12.2.3 Intermediate conclusions

In sum, various EU migration Directives confer upon TCNs rights to move to and reside and/or work in a Member State other than the one in which they arrived. The conditions differ, however. The right to move between the Member States, as granted by these Directives, provides for a freedom of movement that is, to a certain degree, approximated to EU citizens' free movement rights, however, with significant differences and restrictions.

13 COMPARATIVE ANALYSIS

The aforementioned analysis reveals that following the enactment of the EU migration Directives, the legal situation of TCNs has been, at least to a certain degree, approximated to that of EU workers. More specifically, these Directives grant rights to residence and labour market access, require equal treatment with nationals of the host Member State, provide for family reunification, guarantee mobility within the EU, address the issue of social security coordination and comprise procedural rights. Nonetheless, the rights of TCNs are subject to specific conditions and consequently significant differences remain, the most salient of which shall be highlighted in this section.

13.1 Constitutional guarantee for EU workers versus discretionary entitlement for TCNs by EU legislation

A fundamental difference between the free movement regime for EU workers and for TCNs is that the former constitutes a constitutional guarantee and the latter merely an entitlement conferred by a discretionary choice of the EU legislature, albeit subject to the respect of fundamental rights, such as the right to family life (Article 7 CFR). Thus, while an EU worker enjoys a right of residence and of access to work as well as the right to equal treatment in all Member States by virtue of directly enforceable provisions of EU primary

law, similar rights for TCNs depend on the enactment of EU secondary law. This implies a wide margin of discretion with regard to the extent of granting free movement rights to TCNs, which is reflected in the various conditions and limitations identified in this study.

13.2 Uniform and comprehensive scope of application (EU workers) versus entitlements for specific groups of persons (TCNs)

A further and important conceptual difference between free movement rights for EU workers and for TCNs lies in the scope of application of the respective free movement regimes. While EU citizens enjoy free movement rights if being a worker within the meaning of Article 45 TFEU and the respective secondary law, a concept which is, moreover, understood broadly, the entitlement of TCNs depends on falling within the specific personal scope of application of one of the various acts of EU secondary law on the free movement of TCNs. In that regard, market access is based on a sector-specific (and thus fragmentary) approach and granted under Directive 2009/50/EC (EU Blue Card) for highly qualified employment, under Directive 2014/36/EU for employment as a seasonal worker, under Directive 2014/66/EU in case of an intra-corporate transfer, or under Directive 2016/801/EU for research, studies, training or voluntary service in the European Voluntary Service. True, Directive 2011/98/EU (Single permit) follows a general approach by referring to 'work'; however, it does not lay down substantive criteria for market access. Also Directives 2003/109/EC (Long-term residence) and 2003/86/EC (Family reunification) have a general scope of application; they require previous admission to a Member State, though. Thus, the provisions on the free movement for EU workers are based on a uniform and comprehensive scope of application, while the free movement regime for TCNs is based on a sector-specific approach with Single Permit Directive 2011/98/EU having a certain residual function.

13.3 Unrestricted (EU workers) versus restricted (TCNs) access to the national labour markets

While EU workers have the right to work in another Member State under the same conditions and with the same priority as nationals of the host Member State (Article 45 TFEU and Articles 1 to 6 Regulation (EU) No 492/2011), significant restrictions apply to the labour market access of TCNs. The various acts of secondary EU law contain diverging regimes.

First-time labour market access of TCNs according to the EU migration Directives is subject to specific conditions (Article 5 Directive 2009/50/EC; Articles 5 and 6 Directive 2014/36/EU; Article 5 Directive 2014/66/EU; Articles 7 and 8 Directive 2016/801/EU). It is also subject to various restrictions, notably quotas (Article 6 Directive 2009/50/EC; Article 7 Directive 2014/36/EU; Article 6 Directive 2014/66/EU; Article 6 Directive 2016/801/EU), preferences (not only) for (EU) nationals (Articles 8(2)(2) and 12(4) Directive 2009/50/EC; Article 8(3) Directive 2014/36/EU) as well as limitations for reasons of labour market policy (Article 8(2)(1) and 8(4) Directive 2009/50/EC), with regard to changing the employment (Article 12(2) Directive 2009/50/EC; Article 11(c) Directive 2011/98/EU; Article 15(3) and (4) Directive 2014/36/EU) and in terms of the scope of

employment (Article 23 et seq. Directive 2016/801/EU). In contrast, it is left to the host Member State to lay down substantive criteria to acquire the right of residence and of access to work for persons falling under Single Permit Directive 2011/98/EU.

A more generous regime applies to long-term residents enjoying “*equal treatment with nationals as regards [...] access to employment and self-employed activity*” (Article 11(1)(a) Directive 2003/109/EC). This is, however, subject to the possibility to retain preferences for nationals, EU or EEA citizens “*in accordance with existing national or Community legislation*” (Article 11(3)(a) Directive 2003/109/EC). Yet, persons falling under this Directive must already have been admitted to a Member State and have resided there for a period of five years. A generous regime also applies in the context of family reunification, allowing only temporary restrictions on labour market access for the sponsor’s family members (see Article 14 Directive 2003/86/EC, with an exception for first-degree relatives in the direct ascending line or adult unmarried children).

Further conditions are: not relying on social assistance (Article 9(3) Directive 2009/50/EC), having a sickness insurance (Article 5(1)(e) Directive 2009/50/EC; Article 5(1)(g) Directive 2014/66/EU; Article 7(1)(c) Directive 2016/801/EU), and having sufficient resources (Article 5(5) Directive 2014/66/EU; Article 5(3) Directive 2014/36/EU; Article 7(1)(e) Directive 2016/801/EU). Directive 2014/36/EU formulates exclusions in case of professional misconduct of the employer (see Article 8(2), (4)(a) and (b), Article 9(2) and (3) Directive 2014/36/EU). Moreover, the duration may be limited (Article 7(2) Directive 2009/50/EC; Article 12(1) Directive 2014/66/EU; Articles 14(1), 15 Directive 2014/36/EU; Article 18 Directive 2016/801/EU).

As a consequence of the restricted labour market access, TCNs, unlike EU citizens, are also not entitled to enter a Member State for the purpose of job seeking. An exception applies in the context of family reunification (see Article 14(1) Directive 2003/86/EC). The situation is different once a TCN has been admitted to a Member State according to the EU migration Directives, whereby the provisions of these Directives differ. A person exercising a highly qualified employment may change his or her employer under the conditions set out in Article 12 of Directive 2009/50/EC and thus look for a new job; the same applies to seasonal workers under the conditions specified in Article 15(3) and (4) of Directive 2014/36/EU. In contrast, Article 17(c) of Directive 2014/66/EU only grants “*the right to exercise the specific employment activity authorised under the permit in accordance with national law in any host entity belonging to the undertaking or the group of undertakings in the first Member State.*” After acquisition of the status as long-term resident according to Directive 2003/109/EC, a TCN enjoys equal treatment with nationals as regards access to employment (Article 11(1) Directive 2003/109/EC). This implies the right to seek employment in the host Member State. Single Permit Directive 2011/98/EU does not contain specific rules.

Moreover, the claim to equal access to services made available to the public granted to TCNs comprises assistance from national employment services (Article 11(1)(f) Directive 2003/109/EC; Article 14(1)(g) Directive 2009/50/EC; Article 12(1)(g) Directive 2011/98/EU, also *juncto* Article 22 Directive 2016/801/EU; Article 23(1)(e) Directive 2014/36/EU; Article 18(2)(e) Directive 2014/66/EU). Some Directives also contain specific provisions with regard to equal treatment (see Article 12(1)(h) Directive 2011/98/EU –

also *juncto* Article 22 Directive 2016/801/EU¹⁴¹ – and Article 23(1)(f) Directive 2014/36/EU for advice services afforded by employment offices; further Article 18(2)(e) Directive 2014/66/EU for services of public employment offices).

13.4 Further limitations with regard to the right of residence

The limitations of labour market access applicable to TCNs (see Chapter 13.3) also concern their right of residence. Moreover, further deviations from the privileged position of EU workers have become manifest.

First, in view of restrictions of the right of residence on grounds of public policy, public security or public health applicable to both EU citizens and TCNs, it has to be noted that generally speaking the EU migration Directives, unlike Directive 2004/38/EC applicable to EU citizens, do not formulate further conditions which may result in a weaker level of protection of TCNs. Only after acquisition of the right of long-term residence according to Directive 2003/109/EC, additional protection is offered (Articles 9(3), 12 Directive 2003/109/EC). Moreover, also Family Reunification Directive 2003/86/EC contains further limitations for such measures (Article 6(3) *juncto* Article 17).

Next, comparing the right to permanent residence granted to EU citizens according to Articles 16 *et seq* of Directive 2004/38/EC and the right to long-term residence granted under Directive 2003/109/EC, both depending on a period of previous, continuous residence of five years in the host Member State, the conditions of acquiring the latter are stricter, notably with regard to the calculation rules (Article 4(2) Directive 2003/109/EC), the required evidence of sufficient resources and sickness insurance (Article 5(1) Directive 2003/109/EC) and of appropriate accommodation (Article 7(1)(2) Directive 2003/109/EC) as well as the permissibility of integration requirements (Article 5(2) Directive 2003/109/EC).

Finally, while EU workers may retain their right to residence and equal treatment also after their employment has ended, notably in the event of unemployment and retirement under the conditions specified in Articles 7(3) and 17(1)(a) of Directive 2004/38/EC, TCNs – with the exception of EU Blue Card holders (see, also for the conditions Article 13 Directive 2009/50/EC) – may not claim a right to remain in the territory of a Member State after their employment.

13.5 Comprehensive (EU workers) versus limited (TCNs) prohibitions of non-discrimination

EU workers enjoy a comprehensive claim to equal treatment with nationals of the host Member State. This right is enshrined in EU primary law (Article 45(2) TFEU) and concretised in various provisions of EU secondary law, notably in view of social and tax advantages (Article 7(2) Regulation (EU) No 492/2011) and social security benefits (Article 4 Regulation (EC) No 883/2004).

¹⁴¹ Article 22(4) of Directive 2016/801/EU allows to exclude “*trainees, volunteers, and au pairs, when they are not considered to be in an employment relationship in the Member State concerned, and school pupils*” from “*grant[ing] them equal treatment in relation to [...] services provided by public employment offices*”.

In contrast, EU law does not comprise a general prohibition of discrimination with regard to TCNs. Rather, the EU migration Directives stipulate sector-specific claims to equal treatment comprising limitations.

For purposes of illustration, Article 11(1) Directive 2003/109/EC may be referred to. This Article extends the long-term resident's claim to equal treatment to "(a) access to employment and self-employed activity, provided such activities do not entail even occasional involvement in the exercise of public authority, and conditions of employment and working conditions, including conditions regarding dismissal and remuneration; (b) education and vocational training, including study grants in accordance with national law; (c) recognition of professional diplomas, certificates and other qualifications, in accordance with the relevant national procedures; (d) social security, social assistance and social protection as defined by national law; (e) tax benefits; (f) access to goods and services and the supply of goods and services made available to the public and to procedures for obtaining housing; (g) freedom of association and affiliation and membership of an organisation representing workers or employers or of any organisation whose members are engaged in a specific occupation, including the benefits conferred by such organisations, without prejudice to the national provisions on public policy and public security; (h) free access to the entire territory of the Member State concerned, within the limits provided for by the national legislation for reasons of security." Yet, Article 11(2) of Directive 2003/109/EC explicitly allows residence requirements with regard to certain benefits ((b), (d), (e), (f) and (g)), and Article 11(4) of Directive 2003/109/EC allows to limit "equal treatment in respect of social assistance and social protection to core benefits". The other EU migration Directives follow a similar technique with differs in detail (see Article 14 Directive 2009/50/EC; Article 12 Directive 2011/98/EU; Article 23 Directive 2014/36/EU; Article 22 Directive 2016/601/EU; and also, with peculiarities, Article 18 Directive 2014/66/EU).

13.6 Application of the social security coordination regime to TCNs

By virtue of Regulation (EU) No 1231/2010 TCNs are, like EU workers, covered by the EU social security coordination regime of Regulation (EU) No 883/2004, provided that they are legally resident in the territory of a Member State and are in a situation which is not confined in all respects within a single Member State. Some EU migration Directives refer to this by stating that their provisions apply without prejudice to Regulation (EU) No 1231/2010 (Article 14(6) Directive 2003/209/EC; Article 23(2)(i) Directive 2014/36/EU; Article 18(2)(c) and 18(3) Directive 2014/66/EU).

The EU migration Directives do not address the issue of coordination between the social security schemes of the Member States and those of third countries. Still, some Directives provide for equal treatment with nationals of the host Member State as regards the portability of pension rights to a third country (Article 14(1)(f) Directive 2009/50/EC; Article 12(4) Directive 2011/98/EU; Article 23(1) Directive 2014/36/EU final paragraph; Article 18(2)(d) Directive 2014/66/EU). The absence of any provision on aggregation of periods of insurance, employment or residence fulfilled in a third country may result in TCNs not being entitled to social security benefits in the host Member States, when these

benefits depend on the previous fulfilment of such periods. This issue may be dealt with by existing bilateral social security agreements between Member States and third countries.

13.7 Stricter rules for family reunification for TCNs

Both EU workers as well as TCNs enjoy the right to family reunification. However, stricter rules apply to the latter. The personal scope of application is narrower (exclusion of registered partners, descendants other than minor children and ascendants) and additional conditions/restrictions apply (such as a minimum period of residence of the sponsor or compliance with integration measures – not applying, though, according to Article 15 Directive 2009/50/EC (EU Blue Card), Article 19 Directive 2014/66/EU (Intra-corporate transfers) and Article 26 Directive 2016/801/EU (Researchers, students *et al*)). Moreover, while family members of EU workers enjoy a comprehensive claim to non-discrimination (see notably Article 24(1)(2) Directive 2004/38/EC), the right to equal treatment of family members of third-country workers is limited to access to education, employment and self-employed activities and vocational guidance, initial and further (re-)training (Article 14 Directive 2003/86/EC; time limits for access to employment may be applied according to Article 14(2) Directive 2003/86/EC, if not explicitly excluded such as in Article 15(6) Directive 2009/50/EC).

13.8 Specific regime for mobility to other Member States

While the rules on free movement of EU workers do not distinguish between a first establishment in one Member State and subsequent establishment(s) in other Member States and apply different rules to these situations, the EU migration Directives are based on such a distinction.

The primary focus of the latter Directives is the establishment of a TCN in a specific EU Member State. Nonetheless, some Directives – namely Directive 2003/109/EC (Long-term residents), Directive 2009/50/EC (EU Blue Card), Directive 2016/801/EU (Researchers, students *et al*) and Directive 2014/66/EU (Intra-corporate transfers) – also grant the right of establishment (including access to work and equal treatment in certain areas) in another Member State. However, conditions and limitations apply which differ between the aforementioned Directives.

Long-term residents, for instance, are entitled to move to another Member State to exercise economic activities there; the latter may, however, apply restrictions for reasons of labour market policy according to Article 14 of Directive 2003/109/EC; once a residence permit has been issued by the second Member State, the equal treatment rule of Article 11(1)(a) of Directive 2003/109/EC applies (see, also for limitations, Article 21 Directive 2003/109/EC).

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