



MoveS Webinar

“Third country workers in the EU: a state of affairs”

08 May 2020

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Prof. dr. Filip Van Overmeiren

Filip Van Overmeiren is a Professor at Ghent University and at Brussels University and Director within Deloitte Belgium. He is a lawyer and academic with more than 15 years of experience in national and international social law, with a specialization in cross-border employment and international social security law and a specific interest for international coordination of social security, free movement of workers, posted workers and the social status of individuals. He has a broad network in both academia as within national and supranational institutions. He is a regular speaker at conferences with several publications regarding international employment.



Agenda



Content	Timeslot	Presenter
Introduction	11:30 – 11:40	Prof. dr. Filip Van Overmeiren
Setting the scene: general overview	11:40 – 11:55	Prof. dr. Ferdinand Wollenschläger
Equal treatment of third country nationals	11:55 – 12:15	Prof. dr. Sophie Robin-Olivier
Social security rights of third country nationals	12:15 – 12:35	Prof. dr. Herwig Verschueren
Third country nationals: rights of family members and family reunification issues	12:35 – 12:50	Prof. dr. Anne Pieter van der Mei
Questions and Answers	12:50 – 13:00	Prof. dr. Filip Van Overmeiren



Introduction to MoveS

EU-wide network
of independent legal experts
in the fields of
free movement of workers (FMW) &
social security coordination (SSC)

Key facts about MoveS



- Funded by the European Commission (DG EMPL units D1 'FMW' and D2 'SSC')
- 32 countries covered (EU/EEA/CH)
- Implemented by Eftheia, Deloitte Advisory & Consulting, University of Ljubljana, University of Poitiers
- Four-year project (2018-2021)

Objective 1

- To provide high-quality legal expertise in the areas of FMW and SSC
 - by means of **Legal Reports**
 - by means of monthly **Flash Reports**
 - by means of **replies to ad hoc requests**

Objective 2

- To disseminate expertise and increase experts' and practitioners' knowledge
 - by organising **seminars**
 - by **sharing information**
 - by **building networks between stakeholders**

Seminars and Webinars

- Ca. 10 one-day seminars a year
- Audience: Representatives of competent authorities and institutions, social partners, NGOs, judges, lawyers and academics
- Ca. 2 webinar a year

Cooperation and networking

- MoveS webpage (EUROPA)
<http://ec.europa.eu/social/main.jsp?langId=en&catId=1098>
- MoveS LinkedIn group:
<https://www.linkedin.com/groups/4291726>



Setting the scene: general overview

Prof. dr. Ferdinand Wollenschläger
University of Augsburg

Background

- TCNs constitute a significant part of the EU labour force
- TCNs of working age residing in the EU outnumber EU nationals of working age residing in another MS (14.9/11.8 million)

Background

- Yet: TCNs not covered by the EU free movement of workers limited to EU nationals
- Right to move to and reside in other MS; to seek and to take up employment; strict claim to equal treatment (far beyond work sphere); prohibition of unjustified restrictions on labour market access

Background

- Nonetheless: Situation of TCNs has gradually improved
- Common immigration policy (Treaty of Maastricht; currently Art. 79 TFEU)

Background

- Adoption of legislation on the access of third-country nationals (TCNs) to the EU and their legal situation in the MS
 - Directive 2009/50/EC (EU Blue Card; highly skilled workers)
 - Directive 2014/36/EU (Seasonal workers)
 - Directive 2014/66/EU (Intra-corporate transfers)

Background

- Directive (EU) 2016/801 (Research, studies, training etc.)
- Directive 2011/98/EU (Single permit): general application, but does not lay down substantive conditions for access to the EU
- Directive 2003/86/EC (Family reunification)
- Directive 2003/109/EC (Long-term residents)

State of affairs

- legal situation of TCNs has, to a certain degree, approximated to that of EU workers
 - EU migration Directives grant rights to residence and labour market access,
 - require equal treatment with nationals of the host Member State,

State of affairs

- provide for family reunification,
- address the issue of social security coordination &
- guarantee mobility within the EU

State of affairs

- yet: important differences remain
- **caveat**: rules differ between the aforementioned directives; long-term residents enjoy best position

State of affairs: Basis

EU workers

- free movement is guaranteed by directly enforceable provisions of EU primary law
- “Constitutional guarantee”
- limitations in need of justification

TCN

- similar rights for TCNs depend on the enactment of EU secondary law
- wide discretion
- but: fundamental rights requirements (Art. 7 CFR)

State of affairs: Scope of Application

EU workers

- all EU workers

TCN

- sector-specific approach
- Single Permit Directive
2011/98/EU: certain residual function – but no substantive criteria for (market) access

State of affairs: Scope of Application

EU workers

- all EU workers

TCN

- general scope of application: family reunification & long-term residents, ...
- ... but: both requiring previous admission to the EU

State of affairs: Labour market access

EU workers

- unrestricted labour market access

TCN

- significant restrictions, such as quotas, preference rules or limited duration
- jobseeking (no right to entry; limitations after first employment)

State of affairs: Equal treatment

EU workers

- comprehensive claim to equal treatment

TCN

- no general prohibition of discrimination
- but: specific claims
- moreover: limitations (e.g. residence requirements; only core benefits for long-term residents)

State of affairs: Right to residence

EU workers

- far reaching
- public-policy proviso (including restrictions & procedural safeguards)

TCN

- no similar protection
- further limitations
- no retention of status (rule)

State of affairs: Social security coordination

EU workers

- Reg. 883/2004

TCN

- applies to TCNs legally residing in a MS (Reg. 1231/2010)
- equal treatment for portability of pensions
- but: no coordination with third countries (notably: aggregation of periods)

State of affairs: Family reunification

EU workers

- Dir. 2004/38/EC

TCN

- stricter definition of family members (exclusion of registered partners, descendants other than minor children and ascendants)
- stricter conditions (minimum period of residence)

State of affairs: Intra-EU mobility

EU workers

- no distinction between first and further establishment

TCN

- different rules apply
- limitation on further establishment(s), such as on labour market access



Equal treatment of third country nationals in EU law

Prof. dr. Sophie Robin-Olivier
University Paris 1 Panthéon Sorbonne
La Sorbonne school of law

Overview



I- Non-discrimination on ground of nationality in EU law (general approach)

II- Non-discrimination on ground of nationality for TCN (immigration policy)

I- Non-discrimination on ground of nationality in EU law (general approach)



- ❖ Narrow conception of the scope of the prohibition of discriminations on ground of « nationality »
- ❖ Extensive equal treatment reserved to EU workers
- ❖ Derived rights for TCN

❖ Narrow conception of the scope of the prohibition of discrimination on ground of nationality



EU law (free movement of workers)

Article 45 TFEU

« freedom of movement shall entail the abolition of any discrimination based on nationality ***between workers of the Member States*** as regards employment, remuneration and other conditions of work and employment »

More generally

TFEU - Article 18- NON-DISCRIMINATION AND CITIZENSHIP OF THE UNION

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

❖ Extensive Equal treatment reserved to EU workers



Fiscal and social advantages (Regulation 1612/68 – now 492/2011)

General principle of equal treatment in the field of EU law (art 24 directive 2004/38 on free movement of **EU citizens**)

Beyond direct & indirect discriminations: prohibition of restrictions to free movement of workers

See CJEU, 10 October 2019, Krah, C-703/17

❖ Derived rights for TCN

Family members

Directive 2004/38- Article 24 - Equal treatment

The benefit of the right to equal treatment « shall be extended to family members who are not nationals of a Member State and who have the right of residence or permanent residence »

Posted workers

Ex.: CJEU, 9 August 1994, Vander Elst, C-43/93

II- Non-discrimination on ground of nationality for TCN (immigration policy)



- ❖ Equality envisaged
- ❖ Current situation

❖ Equality envisaged (Tampere)

The European Council, at its special meeting in Tampere on 15 and 16 October 1999, stated that the legal status of third-country nationals should be approximated to that of Member States' nationals and that a person who has resided legally in a Member State for a period of time to be determined and who holds a long-term residence permit should be granted in that Member State a set of uniform rights which are as near as possible to those enjoyed by citizens of the European Union

In order to constitute ***a genuine instrument for the integration*** of long-term residents into society in which they live, long-term residents should enjoy ***equality of treatment with citizens of the Member State*** in a wide range of economic and social matters, under the relevant conditions defined by this Directive.

Directive 2003/109/EC

on the status of third-country nationals who are long-term residents, recitals 2 & 12

❖ Current situation

- Directive 2003/109 – Long term residents
- Directive 2011/98 – Single permit
- Directive 2009/50 – Blue card
- Directive 2014/36 – Seasonal workers

Directive 2003/109/EC

Article 11(1) « Equal treatment »

- 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
- Free access to the entire territory of the Member State

Most extensive conception of equal treatment

Limits to equal treatment in directive 2003/109

Article 11(2) : Member State concerned may restrict equal treatment to cases where the ***registered or usual place of residence of the long-term resident, or that of family members for whom he/she claims benefits, lies within the territory of the Member State concerned.***

Request for a preliminary ruling by Supreme Court of Cassation, Italy) 11 April 2019 - Case C-302/19



Question: can family members of a foreign national be excluded from a family unit for the purposes of calculating the « family unit allowance » (social assistance & social security) **when their place of residence is not in Italy**

National court refers to:

- recital 20 of **Directive 2011/98/EU**: ‘... The right to equal treatment in the fields specified by this Directive should be granted ... including **family members of a third-country worker who are admitted to the Member State** in accordance with Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification’

- recital 24: ‘Third-country workers should enjoy equal treatment as regards social security ... This Directive...**should not grant rights in relation to situations which lie outside the scope of Union law, such as in relation to family members residing in a third country.** This Directive should grant **rights only in relation to family members who join third-country workers to reside in a Member State on the basis of family reunification or family members who already reside legally in that Member State.**’

Limits to equal treatment in Directive 2003/109



Article 11(3): Member States may restrict equal treatment with nationals in the following cases:

(a) 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**;

(b) Member States may require proof of **appropriate language proficiency for access to education and training**. Access to university may be subject to the fulfilment of specific educational prerequisites.

Article 11(4): Member States may limit equal treatment in respect of **social assistance and social protection to core benefits**.

Strict interpretation of limits to equal treatment

(equal treatment is the general rule)

- Derogations can only be relied on if the authorities responsible for the implementation of the Directive have stated clearly that they intended to rely on them
- core benefits must be interpreted in the light of Article 34 of the Charter of Fundamental Rights - right to social and housing assistance to ensure a decent existence for all those who lack sufficient resources

⇒ 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.

CJUE, 26 April 2012, European Commission v Netherlands, C-508/10
CJUE, 4 June 2015, P and S, C-579/13



Civic integration examination

- Not incompatible with the equal treatment rule
- As long as 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

Article 14 Equal treatment

- 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 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.

Limits

- Article 12: Free access to the job market is not granted;
- Article 14(2): Possible restrictions to study and maintenance grants and loans or other; grants and loans regarding secondary and higher education and vocational training and procedures for obtaining housing;
- access to university and post-secondary education can depend on specific prerequisites;
- equal treatment can be subjected to residence on the territory.

Directive 2011/98 –single permit



Very similar provision on equal treatment as in Directive 2009/50

In addition: 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

« like Directive 2003/109, Directive 2011/98 provides for certain third-country nationals a right to equal treatment, which is the general rule, and lists the derogations from that right which the Member States have the option of establishing.

Those derogations can therefore be relied on only if the authorities in the Member State concerned responsible for the implementation of that directive ***have stated clearly that they intended to rely on them*** »

Directive 2014/36/EU - Seasonal workers



Very similar equal treatment clause as in other directives (Article 23)

Particular aspects:

- Insists on non-discrimination concerning minimum working age or collective action, including the right to strike
- Equal treatment does not apply to:
 - housing
 - education and vocational training to education or training directly linked to the specific employment activity, and MS may exclude study and maintenance grants and loans

Conclusion



Long-term residents = the most privileged category of TCNs

Still do not benefit from the same extensive equal treatment rule as EU workers, especially for social advantages (grants and loans for education, specific procedures to obtain housing; condition of residence to benefit from social advantages)

ECJ decisions remain rare and do not indicate a general line (extensive or restrictive)



Social security rights of third country nationals under EU-law

Prof. dr. Herwig Verschueren
University of Antwerp

Overview



Social security rights of TCNs under the migration directives

TCNs and social security coordination between Members States' systems

Social security rights of TCNs and international agreements concluded by the EU

Brexit: UK nationals as TCNs

Social security rights under the EU migration directives



- Specific provisions in the various directives
 - Differently and sometimes even ambiguously worded
- Directive 2003/109: Long-term residence
 - Article 11(1)(e): equal treatment for 'social security, social assistance and social protection as defined by national law'
 - May be limited to 'core benefits'
 - Broad interpretation by the CJEU in *Kamberaj*
 - See pending case C-303/19, *VR*
 - On the payment of an Italian family benefit for family members residing in a third country (Pakistan), when such a benefit is granted to Italian children residing in a third country
- Directive 2009/50 (Blue Card)
 - Equal treatment for branches of social security of Reg. 1408/71

Social security rights under the EU migration directives



- Directive 2011/98 (Single permit)
 - Broad personal scope
 - Equal treatment for branches of social security of Reg. 883/2004 (Art. 12(1)(e))
 - Also for export of pensions to third countries
 - Exceptions (Art. 12(2)(b))
 - For those 'who are no longer in employment after having been employed for less than six months'
 - Family benefits for those who have only been authorised to work for a period of less than six months and for students
 - Case law
 - C-449/16, *Martinez Silva*

Social security rights under the EU migration directives



- Directive 2014/36 (Seasonal workers)
 - Equal treatment for branches of social security of Reg. 883/2004 (Art. 23(1)(d))
 - Also for export of pensions to third countries
 - Family benefits and unemployment benefits may be excluded (Art. 23(2)(i))
 - However: seasonal workers remain resident in country of origin

Social security rights under the EU migration directives



- Directive 2014/66 (Intra-corporate transferees)
 - Equal treatment for branches of social security of Reg. 883/2004 (Article 18(2)(c))
 - Also for export of pensions to third countries
 - Exceptions:
 - Family benefits for those authorised to work for less than nine months
 - Implementation of an existing bilateral agreement (if any) with the country of origin: takes precedence
 - The ICT possibly remains subject to the social security system of the country of origin
 - Reg. 883/2004 applies in cross-border situations between Member States

Social security rights under the EU migration directives



- Directive 2016/801 (researchers and students)
 - Researchers: equal treatment for branches of social security of Reg. 883/2004 (Article 22(1))
 - Not for family benefits for researchers authorised to reside and work for less than six months
 - Other categories: equal treatment only when they are considered to be in an employment relationship

Social security coordination between Member States' systems

- Regulation 1231/2010 extended the scope of Reg. 883/2004
 - Provided the TCNs are legally residing in a MS and in a cross-border situation between more than one MS
- Only concerns situations in a MS
 - For instance no export of family benefits for children residing in a third country
- CJEU C-477/17, Baladin, on what is 'legally residing'

Balandin: Facts

- Third-country ice skaters working for 'Holiday on Ice' touring in various Member States
- 'Holiday on Ice': company registered in Amsterdam with headquarters in Utrecht
- Employees:
 - Periods of training in NL
 - Performances in various MSs
 - Dispute on employees who had stayed and worked in the EU temporarily, but who continued to reside outside the EU
 - 'stay' was covered by a Schengen visa and national visas
 - Dutch competent institution refused to apply the EU regulations to those employees

Balandin: judgment of 24.1.2019

- Concept of 'legal residence' in Reg. 1231/2010 differs from the concept of 'residence' in Reg. 883/2004
 - The latter is intended to determine the connection with a MS and not to determine the personal scope (as Reg. 1231/2010 does)
- Refers to '*travaux préparatoires*' (Commission's proposal)
 - '*temporary or permanent right of residence*'
 - legal 'presence' in second MS is sufficient
- Length of residence in the EU or having the center of interest in a third country is not relevant
- So: Reg. 1231/2010 is applicable to these situations and consequently to Article 13 Reg. 883/2004 as well

Social security coordination between Member States' systems and systems of third countries



- The migration directives do not contain provisions on coordination with systems of third countries
 - Some provide for equal treatment regarding the export of pensions
- Nothing on aggregation of periods which may result in TCNs not being entitled to social security benefits
- Continues to depend largely on existing bilateral agreements
- See also EU agreements with third countries such as Turkey and the Maghreb

International agreements concluded by the EU



- Decision 3/80 (Association Agreement Turkey)
 - Limited legal effect in the absence of an implementing decision
 - Direct effect of
 - Article 3 (equal treatment)
 - Article 6 (export of benefits, including to Turkey)
 - Long list of case law on the export of the 'special non-contributory benefits' to Turkey: *Akdas*, *Demirci*, *Çoban*, *Solak*

International agreements concluded by the EU



- Association Agreements with Maghreb countries
 - Equal treatment provisions
 - But no agreement so far in the Association Councils on further coordination provisions
- Large number of Partnership and Cooperation or Stabilisation and Partnership agreements
 - No directly applicable provisions on social security
 - In a few: mandate to the Association Councils to take social security measures
 - No agreements reached so far

Brexit

■ Withdrawal agreement:

- EU Regulations remain applicable during the transitional period
 - until 31.12.2020, unless prolonged
- EU Regulations remain applicable to EU citizens, UK citizens and third-country nationals in a cross-border situation between UK and a MS at the end of the transition period
 - As long as they continue to be in such a cross-border situation
 - Possibly lifelong
- Parts of the EU Regulations remain applicable to those who were in a cross-border situation in the past or will be in the future
 - Such as rules on aggregation of periods, export of family benefits, entitlement to health care

■ Future relations: to be negotiated



Third country nationals: rights of family members and family reunification issues

Prof. dr. Anne Pieter van der Mei
Maastricht University

Family members of EU citizens
VS
family members of TCNs

Directive 2004/38
VS
Directive 2003/86

Definition of family member

Family reunification:

- the entry into and residence in a Member State by family members meant to preserve the family unit and the right to family life (art.7 EUCFR)
- contributes to freedom of movement for EU citizens
- creates sociocultural stability facilitating the integration of in the host Member State, which also serves to promote economic and social cohesion

Definition of family member

Right to reside	Family members of EU citizens Art.2(2) jo 3(1) Dir.2004/38	Family members of TCNs Art.4 Dir.2003/86	
	Spouse	Spouse (only 1)	
	Registered partner		
	(Grand)children of EU citizen or spouse/registered partner <21 years or dependent	Minor children (incl.adopted, must be unmarried)	of sponsor and spouse
	(Grant)parents of EU citizens or spouse/registered partner dependent		of sponsor or spouse, provided custody, dependency and, if shared custody, consent other parent
Facilitate	Art.3(2) Dir.2004/38	Art.4(3) Dir.2003/86	
	Other family members dependency in country of origin	Registered partner	
	because of serious health reasons, need personal care from EU citizen	Unmarried partner (long-term relationship)	
	Partners durable relationship	Dependent parents without proper family support back home	
	duly attested	Adult unmarried children who, because of health reasons, who cannot take care of themselves	



C-673/16 *Coman*

Q: Does the term ‘spouse’ cover a same-sex spouse?

CJEU	Term ‘spouse’ is gender-neutral
	MS are free to define marriage, but
	“the refusal to recognise”, for residence purposes, the marriage of a TCN to a “Union citizen of the same sex, concluded, during the period of their genuine residence in another Member State,” hampers freedom of movement
	No justification as such recognition for residence purposes only does not require that Member State to provide for same-sex marriage in its national law

Family members of TCNs? Same-sex marriage in third country?

C-129/18 SM

Direct descendants: biological, adopted, stepchildren – yet also ‘*Kafala* children’?

CJEU	Because the placing of a child under <i>kafala</i> system does not create a parent-child relationship between the child and its guardian, such a child cannot be regarded as a ‘direct descendant’ (art.2(2) 2004/38).
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	However, when the child and its guardian lead a genuine family life, the right to family life plus the rights of the child demand, in principle, that that child be granted a right of entry and residence in order to enable it to live with its guardian in his or her host Member State (art.3).
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C-706/18 *Xv Belgium*

Case C-246/17 *Diallo*
(2004/38)

National rule which requires the automatic issuing of a residence card for a family member in case the (6 month) decision-making period is exceeded

Diallo: such a rule is at odds with 2004/38 as it implies the grant of a residence card to a person who might not qualify as a family member

X v Belgium: Before granting a residence permit MS must actually check whether an applicant satisfies the requirements laid down in Dir.2003/86

Joined cases C-133/19	<i>B.M.M.</i>	Art.4 2003/86 – 'Minor child'	AG: Child who is minor at time of application but attains procedure, retains minor status
C-519/18	<i>TB</i>	Art.10 2003/86 Other family members of refugees	CoJ: - MS may only facilitate reunification of dependent family members - MS must take special situation of refugees in mind
C-557/17	<i>YZ</i>	Art.16 2003/86 – 'fraud'	CoJ: - Child may also lose residence if parent submits fraudulent docs, even if /she did not know - Individual, case-by-case investigation of all relevant facts remains required
C-836/18	<i>RH</i>	Art.20 VWEU	CoJ: - LS mogen bestaansmiddelen eis stellen maar moeten afhankelijkheidsverhouding wel onderzoeken - Wettelijke plicht tot samenleving volstaat niet voor bestaan afhankelijkheidsverhouding
C-93/18	<i>Bajratari</i>	Art.7 2004/38: 'Sufficient resources'	CoJ: Income derived from unlawful employment can be taken into account for applying the requirement of having sufficient resources



Questions and Answers

**Thank you for your
attention!**



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08 May 2020

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