ADMIGOV

Advancing Alternative Migration Governance

Legal and institutional mapping of regular entry governance regimes in the European Union

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ACRONYMS

AFSJ	Area of Freedom, Security and Justice
EASO	European Asylum Support Office
ECHR	European Convention on Human Rights
EEC	European Economic Community
EES	Entry/Exit System
ECRIS-TCN	European Criminal Records Information System
ETIAS	European Travel Information and Authorisation System
EU	European Union
eu-LISA	European Union Agency for the Operational Management of Large-Scale IT Systems in the Area of Freedom, Security and Justice
EURODAC	European Dactyloscopy
FRONTEX	European Border and Coast Guard Agency
NYD	New York Declaration
SBC	Schengen Borders Code
SDGs	Sustainable Development Goals
SIS	Schengen Information System
SLTD	Interpol's Stolen and Lost Travel Documents database
TCN	third-country national
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
VIS	Visa Information System

INTRODUCTION

The Advancing Alternative Migration Governance (ADMIGOV) programme aims to promote an alternative migration governance model which takes seriously the principles laid out in the New York Declaration for Refugees and Migrants (NYD) and the 2030 Agenda on Sustainable Development to study how alternative approaches to migration governance can be better designed and put into practice.

ADMIGOV Work Package 1 (WP1) focuses on the regimes governing the entry of third-country nationals to the territory of the Member States of the European Union (EU), thus investigating a key moment and place of migration governance intervention. The purpose of this report is to map the EU legislative framework on regular entry for third-country nationals, which, together with the results from field research at the external land- sea- and air borders carried out within WP1, will serve to identify any divergence between entry governance models and practices. Based on this assessment, the goal of WP1 is to make recommendations on entry governance in light of the principles formulated in the NYD and the 2030 Agenda.

In this context, it is important to identify how entry governance is mentioned in the NYD and in the 2030 Agenda. The latter acknowledges that international migration can positively contribute to inclusive growth and sustainable development, and that cooperation is thus needed in order to ensure 'safe, orderly and regular migration' with respect for human rights.[1] It calls on the international community to 'facilitate orderly, safe, regular and responsible migration and mobility of people, including through the implementation of planned and well-managed policies' (SDG 10).[2]

The NYD also commits to cooperating 'closely to facilitate and ensure safe, orderly and regular migration'[3], but emphasises 'that each State has a sovereign right to determine whom to admit to its territory, subject to that State's international obligations.'[4] In broad statement, in the NYD the international community considers 'reviewing our migration policies with a view to examining their possible unintended negative consequences'[5] in terms of furthering inequalities. More specifically, it considers the facilitation of opportunities such as 'employment creation, labour mobility at all skills levels, circular migration, family reunification and education-related opportunities.'[6]

[1] UN General Assembly, Resolution 70/1: Transforming Our World: the 2030 Agenda for Sustainable Development, A/RES/70/01, 21 October 2015, para. 29.
[2] Ibid., p. 21, target 10.7
[3] UN General Assembly, New York Declaration for Refugees and Migrants, A/RES/71//1, 19 September 2016, para. 41
[4] Ibid., para. 42
[5] Ibid., para. 43
[6] Ibid., para. 57

In the 2015 European Agenda on Migration (EAM), which forms the overarching framework for the EU's migration policy, the European Commission calls for a 'clear and well implemented framework for legal pathways to entrance in the EU', by means of an 'efficient asylum and visa system', with the objective of reducing 'push factors' for irregular migration.[7] Since then, the Commission has used the phrasing 'safe and legal pathways', echoing the wording of the NYD and the 2030 Agenda, as seen in a recent report on the implementation of the EAM. [8] These pathways comprise resettlement programmes for persons seeking international protection, and a 'well-developed EU-level legal framework on admission conditions, procedures and rights of third-country nationals' that facilitates legal migration.[9]

The approach of this report will in the first place be descriptive as it provides the legal context for the other research activities within WP1. It will also be dynamic, by investigating the evolution of EU competences in the area of entry governance over time, including recent and on-going developments. The purpose is to map the EU's current legislative framework on the entry of third-country nationals, and to identify which areas remain within the jurisdiction of the Member States. We will take into account the rules covering the actual moment of entry, (i.e. the crossing of the EU's external borders), as well as the legislation on the process leading up to a third-country nationals' admission to the territory of the EU's Member States (i.e. applications for and issue of visas and residence permits). Throughout the report, two key questions are kept in mind. The first regards the scope of the EU's entry regimes: which rules set out the entry conditions and procedures, and to which persons and situations do they apply? Secondly, which authorities or institutions are involved in entry governance, in terms of setting the rules (legislative competence), and carrying them out (operational competence)?

The existing legal framework on the entry of third-country nationals in the EU is multifaceted. While checks at the EU's external borders are governed by a single set of rules based in the Schengen Borders Code,[10] the same cannot be said for the issue of visas and residence permits. Three types of visas are distinguished within the EU. A first category are Airport Transit visas (type-A visas), which do not allow their holders to leave an airport transit zone and enter the territory of the member state and are therefore not considered in this report. Secondly, short-stay visas (type-C visas) for the Schengen Area are issued to nationals of third countries who wish to enter the EU for stays up to three months, and who are subject to a visa requirement based on their nationality. [11] The issue of type-A and type-C visas is harmonised at the EU level by means of the Community Code on Visas. Lastly, national visas (type-D visas) and residence permits for stays exceeding three months or for third-country nationals who wish to take up employment, are governed mainly by national legislation, though some are subject to EU Directives, primarily regarding family migration and labour

[7] European Commission, A European Agenda on Migration*, COM(2015) 240 final*, Brussels, 13 May 2015, p. 6.
[8] European Commission, Progress Report on the Implementation of the European Agenda on Migration*, COM(2019) 126 final*, Brussels, 6 March 2019.
[9] Ibid., p. 16.
[10] Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code), *OJ L 77, 23.3.2016*, p. 1-52.
[11] Regulation (EU) 2018/1806 of the European Parliament and of the Council of 14 November 2018 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement, *OJ L 303, 28.11.2018,* p. 39–58.

migration.[12] The entry of refugees and other persons seeking protection will not be covered by this report, as this will be included in WP4 of the ADMIGOV programme. Moreover, though existing legislation – first and foremost the 1951 Refugee Convention, as well as EU legislation[13] – undeniably affect member states' decisions on the admission of persons seeking protection, the authorisation of their entry is not regulated at the EU level.[14]

The report is divided in three parts. First, we describe the evolution over time of the EU's competences regarding the conditions and procedures for the entry of third-country nationals to the territory of the Member States, in particular in the period leading up to the adoption of the 1997 Amsterdam Treaty, followed by a presentation of the current legal and institutional framework on entry, which is part of the Area of Freedom, Security and Justice (AFSJ) as set out in Part Three, Title V, Chapter II of the Treaty on the Functioning of the European Union (TFEU).

Sections 2-4 examine the EU's Regulations related to controls at the external borders and on the issue of type-C visas for stays up to three months. Here, we discuss the main elements of the Schengen Borders Code and the Community Code on Visas, especially insofar as they regard entry conditions, procedures, and the grounds for refusing entry. In addition, we describe the provisions on entry in the Regulations governing the Schengen Information System (SIS) and the Visa Information System (VIS), as well as other large-scale EU databases that are gaining an increasingly central role in the implementation of the Schengen acquis. Furthermore, we discuss the actors that are involved in border management and issue of short-stay visas for the Schengen Area, and identify the margin of manoeuvre that is maintained by the Member States regarding this aspect of entry governance.

Finally, Sections 5 and 6 focus on the EU's framework for regular migration, distinguishing between entry for family reasons and for employment purposes, which form the two most common grounds for the issue of initial residence permits to third-country nationals by the Member States.[15] Entry for family reasons is discussed first, comparing the rules set out in the Family Reunification Directive and the Citizens' Rights Directive. It is complemented by a short description of the national transposition of rules on family reunification, with the examples of Spain and the Netherlands. Section 6 covers the EU's legal framework on entry for employment purposes, which is established by five Directives that have been adopted since 2009.

Throughout the report, examples will be provided of implementation of EU rules on entry in Greece, the Netherlands, Poland, which are the subject of field research within WP1, and Spain. These Member States represent different profiles of entry, as can be seen especially in the issue of first residence permits.[16] In the final conclusion we reflect on the coherence of

[12] European Migration Network, 'Visa Policy as Migration Channel', Synthesis Report, October 2012.
[13] Qualification Directive, Directive 2011/95/EU, *OJ L 337, 20.12.2011*, p. 9–26; EURODAC Regulation, Regulation (EU) No 603/2013, *OJ L 180, 29.6.2013*, p. 1–30; Dublin III Regulation, Regulation (EU) No 603/2013*, OJ L 180, 29.6.2013*, p. 31–59; Asylum Procedures Directive, Directive 2013/32/EU, *OJ L 180, 29.6.2013,* p. 60-95; Reception Conditions Directive, Directive 2013/33/EU, *OJ L 180, 29.6.2013*, p. 96–116.
[14] European Parliamentary Research Service, 'EU legal framework on asylum and irregular immigration "on arrival", State of play,' Briefing, 18 March 2015, p. 5.
[15] Eurostat, 'First permits by reason, length of validity and citizenship,' *http://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=migr_resfirst&lang=en*, accessed July 2019.
[16] Ibid.

the EU's legislative framework, the margin of manoeuvre that is maintained by the Member States, and the call 'to facilitate and ensure safe, orderly and regular migration' in light of the NYD and 2030 Agenda.

1. Competences on entry in the European Union

Since the establishment of the Schengen Area from 1995 onwards, the majority of EU Member States have abolished checks on persons at internal border crossings, and are sharing a common external border. As a consequence, any person who is admitted to the territory of one Member State can access the territory of all other members of the Schengen Area with relative ease. This has been the justification for the increased harmonisation of the EU's visa policy, which has gradually come to include not just short-term visitors, but migrants as well. In the following, we outline how the competences of the EU to adopt rules regarding the entry of third-country nationals to the territory of its Member States have evolved over time. We furthermore present the current legal framework for the EU's border, asylum and migration policies, which are rooted in the Area of Freedom, Security and Justice.

1.1 Historical developments

The governance of cross-border movements of persons has been on the European agenda since the establishment of the European Economic Community (EEC) in 1957 with the adoption of the Treaty of Rome. Initially, these measures had an economic focus, as Member States committed to removing barriers for the free movement of goods, capital, services and people in order to introduce a Common Market.[17] This commitment included the facilitation of free movement of workers, a policy area that took shape in the 1960s.[18] Nonetheless, many internal barriers remained. In 1985, the European Commission called for the removal of all remaining legal, fiscal and technical boundaries to achieve a true single market by 1992.[19] This aim was repeated in the 1987 Single European Act amending the Treaty of Rome, which was accompanied by a political declaration in which the Member States' governments promised to 'co-operate, without prejudice to the powers of the Community, in particular as regards the entry, movement and residence of nationals of third countries' in order to promote the free movement of persons.[20]

During this development towards a single market, five of the six founding members of the EEC signed the 1985 Schengen Agreement, an international treaty outside of the institutional and legal order of the Communities, in which they committed to the gradual abolition of all internal border checks and the creation of a single common external border for its signatory states, France, West Germany and the Benelux countries (Belgium, the Netherlands and

[17] Art. 2 and 3, Treaty Establishing the European Economic Community (Treaty of Rome), Rome, 25 March 1957.
[18] Regulation (EEC) No 38/64 of 25 March 1964, *OJ 62, 17.4.1964,* p. 965-980; Regulation (EEC) No 1612/68, *OJ L 257, 19.10.1968*, p. 2–12; Council Directive 68/360/EEC of 15 October 1968, *OJ L 257, 19.10.1968, p. 13–16.*
[19] Commission of the European Communities, White paper on the completion of the internal market, *COM(85) 310,* June 1985.
[20] Political declaration by the Governments of the Member States on the free movement of persons, *OJ 169*, *p. 26,* 29 June 1987.

Luxembourg), the latter of which had abolished internal border controls in 1960.[21] With the 1985 agreement, the signing parties furthermore endeavoured to harmonise their visa policies, taking into account the need to protect the full territory of what would become known as the 'Schengen Area' from the risk of irregular immigration and activities that could pose a security threat.[22] While the original Schengen Agreement was largely of a political value, the Schengen Implementing Convention, which entered into force in 1995, build the legal and technical framework for a common visa policy and the abolition of checks on the area's internal borders.[23] As of 2019, most EU Member States have joined the Schengen Area, apart from Ireland and the United Kingdom, while Bulgaria, Croatia, Cyprus and Romania and Cyprus are expected to join in the coming years. In addition, non-EU Member States Switzerland and Liechtenstein have also joined the Schengen Area, as well as Norway and Iceland, whose Nordic Passport Union with Denmark, Sweden and Finland predates the Schengen Agreement.

In its initial stage however, the Schengen agreements existed outside of the European Union framework, and were implemented through intergovernmental cooperation. During this time, the area of immigration policy, including rules governing border crossings and conditions for entry and residence, was first introduced as an area of common interest for EU Member States in the 1992 Maastricht Treaty. This Treaty incorporated all topics related to Justice and Home Affairs, including immigration policy, in its third – intergovernmental – pillar, demonstrating the wish of Member States to maintain control in this area. However, with the adoption of the Amsterdam Treaty of 1997, the Schengen 'acquis', comprising the agreements and any (legal) documents that had sprouted from them, became fully incorporated into the EU legal system.[24] The Amsterdam Treaty furthermore transferred certain aspects of the policies covered by Justice and Home Affairs to the first – supranational – pillar and established an 'Area of Freedom, Security and Justice'.[25] It called for measures on the free movement of persons as well as on 'external border controls, asylum, immigration and the prevention and combating of crime'.[26] The transfer of these competences to the Community level was regarded by some as a form of 'venue-shopping', a way for national actors, such as ministries of interior, to circumvent restrictions posed by domestic actors such as policymakers and courts.[27] However, more recently it has been argued that this interpretation no longer applies, as in recent years a separate 'EU rule of law' has developed in the area of immigration policy, which, instead of providing them with an opportunity to

[21] Convention on the transfer of control of persons to the external frontiers of Benelux, Brussels, 11 April 1960.
[22] Art. 7 and 20, Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, *OJ L 239, 22.9.2000*, p. 13–18.
[23] Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, *OJ L 239, 22.9.2000*, p. 19–62.
[24] Elspeth Guild, 'Amsterdam et Tampere: les ressortissants extra-communautaires et l'Union européenne,' Cultures & Conflits, 45 (2002), p. 39-50; Virginie Guiraudon, 'European Integration and Migration Policy: Vertical Policy-making as Venue shopping', *Journal of Common Market Studies,* no. 2 (2000), pp. 251-271; Protocol integrating the Schengen acquis into the framework of the European Union, *OJ C 340, 10-11-1997*, p. 96.
[25] Article 1(5), Treaty of Amsterdam, 10 November 1997, *C 340, 10 November 1997*, p. 1-144.
[26] Article 2, para. 4, Treaty on European Union (consolidated version 1997), *OJ C 340, 10.11.1997*, p. 145–172.
[27] Guiraudon, 2000.

circumvent legal and political constraints, has limited the legislative power of national governments.[28]

The Amsterdam Treaty's call for measures on border controls and short-stay visas was answered by the adoption of the Schengen Borders Code (2006) and Visa Code (2009).[29] Furthermore, the 1999 Tampere Programme, in which the European Council acknowledged the need for a common European migration policy, formed the starting point for the development of several Directives on regular migration in the following years.[30] The 2009 Lisbon Treaty further strengthened the area of border control, asylum and immigration policy by extending the use of the ordinary legislative procedure to the AFSJ, thus expanding the role of the Commission and the European Parliament. Previously, the national interior ministers Council of the European Union had controlled most of the policymaking in this area with little involvement of the other institutions.[31] The Lisbon Treaty also removed significant limitations on the competence of the Court of Justice of the EU (CJEU), meaning that EU rule of law was fully extended to the field of migration, asylum and border control.[32]

1.2 Current legal basis

Articles 77 – 80 of the TFEU form the legal basis for policies on border checks, asylum and immigration. It is included in Part III, Title V TFEU, which sets out the Area of Freedom, Security and Justice (AFSJ) in accordance with Article 3(2) of the Treaty of the European Union (TEU). The EU and its member states hold a shared competence regarding the AFSJ.[33] This means that Member States may only legislate in areas where the EU has not exercised its competence.[34] In turn, the EU may only adopt legal measures if their objectives cannot be achieved by Member States on the central, regional or local level, in accordance with the principle of subsidiarity. Furthermore, EU measures should be proportional, meaning that they may not go further than what is necessary to achieve the objectives set out in the Treaties.[35]

Article 77 states that the EU shall develop a policy with the objective of preventing any checks on persons crossing the internal borders; ensuring checks and efficient protection at the external border crossings; and gradually introducing an integrated system for the management of the external borders.[36] It furthermore establishes that the ordinary legislative procedure shall be employed when adopting measures to obtain that objective. This includes the common visa policy and the regulation of entry checks at the external borders.[37] Article 78 TFEU concerns the development of a common policy on asylum, subsidiary protection and

[28] Diego Acosta Arcarazo and Andrew Geddes, 'The Development, Application and Implications of an EU Rule of Law in the Area of Migration Policy', *Journal of Common Market Studies,* no. 2 (2013), pp. 179-193.
[29] See section 2-4.
[30] See section 5 and 6.
[31] James Hampshire, 'European migration governance since the Lisbon treaty: introduction to the special issue', *Journal of Ethnic and Migration Studies,* no. 4 (2015), pp. 537-553, p. 6-8.
[32] Hampshire 2015; Acosta Arcarazo and Geddes, 2013.
[33] Art. 4(2)(j), Treaty on the Functioning of the European Union (TFEU), (consolidated version 2012), *OJ C 326, 26.10.2012*, p. 47–390.
[34] Art. 2(2) TFEU
[35] Art. 5 TEU
[36] Art. 77 (1)
[37] Art. 77 (1)

temporary protection which, among other things, asks for common procedures in granting or withdrawing refugee status, but does not touch upon procedures for or conditions of entry for refugees in EU territory. Article 79 TFEU, which covers the development of a common immigration policy, does allow for decisions on the legal entry of TCNs. It confers a competence to act on topics related to regular or 'legal' migration, integration, fighting irregular migration, and concluding readmission agreements. Article 80 TFEU states that the implementation of policies on border checks, asylum and immigration are governed by 'the principle of solidarity and fair sharing of responsibility (…) between the Member States.'

Apart from the principle of subsidiarity, several other important limitations are made to EU competence in the field of border control, asylum and immigration, allowing Member States to continue to exert control in this policy area. Firstly, Member States remain competent to determine the 'volumes of admission of third-country nationals coming from third countries to their territory in order to seek work, whether employed or self-employed',[38] which has been emphasised in policy documents including the 2015 European Agenda on Migration.[39] And secondly, the rules regarding the AFSJ are without prejudice to Member States' responsibility to maintain law and order and safeguard their internal security.[40] These two limitations of the EU's competence are echoed in the various directives and regulations that have been established to harmonise the conditions and procedures of entry for various categories of third-country nationals. Furthermore, if a Member State experiences an emergency situation caused by an extraordinary influx of third-country nationals, the Council may decide on temporary measures that diverge from existing EU law, in order to alleviate the situation.[41] This provision has been applied in the new Schengen Borders Code adopted in 2016, which allows for the temporary reintroduction of controls at the internal borders in exceptional circumstances.[42]

1.3 EU legal instruments on entry

The wish of Member States to remain able to shape their own policies regarding the entry of third-country nationals, especially for work purposes, is reflected in the type of legal instruments used for different categories of visitors and migrants from third countries. General procedures and entry conditions for checks at the external borders of the EU are established by means of the Schengen Borders Code (SBC), a new version of which was adopted in 2016 and amended in 2017.[43] The Community Code on Visas (Visa Code)[44], adopted in 2009, regulates the application procedure for short-term visas for third-country

[38] Article 79 (5), TFEU.
[39] European Commission, *A European Agenda on Migration,* Brussels, COM(2015) 240 final, p. 14.
[40] Art. 72, TFEU
[41] Ibid., Art. 78 (3).
[42] European Parliament, 'Internal border controls in the Schengen area: is Schengen crisis-proof?', Directorate-General for Internal Policies, Policy Department C: Citizens' Rights and Constitutional Affairs, Brussels, 2016; Chapter II, SBC.
[43] Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code), *OJ L 77, 23.3.2016*, p. 1–52.
[44] Regulation (EC) No 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas (Visa Code), *OJ L 243, 15.9.2009, p. 1–58.*

nationals entering the EU for a maximum of 90 days in a 180-day period, and is accompanied by a common list of countries whose nationals must hold a visa in order to enter the EU.[45]

The measures in the Schengen framework are Regulations, and are therefore directly binding. On the other hand, the rules on entry for persons staying more than three months and for migrants that are coming for economic, study, or family purposes, are established in national legislation in accordance with EU Directives where they are applicable. Directives are not directly binding, but need to be transposed into national law, within a period determined by the Directive. In doing so, Member States are allowed a certain degree of discretion in choosing the forms and methods for the application of the directive, as long as the directive's objective is met.[46] Thus, Directives leave a larger room for manoeuvre to the Member States than Regulations in the shaping of their entry policies.

In addition, the wording used in the EU's legal instruments also allows for flexibility, especially through the use of 'may'- and 'shall'-clauses. An example of the former can be seen in the Family Reunification Directive, where it is stated that 'Member States may restrict access to employment or self-employed activity' of certain third-country nationals that are family members of EU citizens, thus granting them the option to do so.[47] On the other hand, the SBC's statement that 'a third-country national who does not fulfil all the entry conditions (…) shall be refused entry to the territories of the Member States' poses an obligation to national authorities to act in a certain way.[48] Both types of provisions are found in Directives as well as Regulations. May-clauses thus offer Member States a margin of discretion as they are allowed to adopt or refrain from adopting certain provisions when transposing a Directive or implementing a Regulation, and are granted some freedom in the administrative decision-making process.

On top of the flexibility or discretion that Directives allow for, the EU has opted for a 'sectoral' approach by issuing different Directives for various categories of third-country nationals.[49] The adopted Directives regulate the conditions of entry and residence for third-country nationals falling into one of the categories, and determine minimum standards for application procedures. The rights they grant go further than those for short-term visitors, but they vary between directives. They are the following:

- Directive 2003/86/EC on the right to family reunification;
- Directive 2009/50/EC concerning the entry and residence for highly qualified employment (Blue Card Directive);
- Directive 2014/36/EU concerning the conditions of entry and residence for the purpose of employment as seasonal workers;
- Directive 2014/66/EU on the conditions of entry and residence in the framework of an intra-corporate transfer;

[45] Regulation (EU) 2018/1806, *OJ L 303, 28.11.2018, p. 39–58*
[46] Art. 288, TFEU.
[47] Art. 14 (3), Family Reunification Directive, Directive 2003/86/EC, *OJ L 251, 3.10.2003*, p. 12–18.
[48] Art. 14 (1), SBC.
[49] European Parliamentary Research Service, 'Third-country migration and European labour markets. Integrating foreigners', Briefing, July 2015, p. 4.

- Directive (EU) 2016/801 on the conditions of entry and residence for the purposes of research, studies, training, voluntary service, pupil exchange schemes or educational projects and au pairing (replacing older directives).

In addition, the Single Permit Directive[50] establishes a single application procedure for work and residence permits, meaning that labour migrants no longer have to complete two separate application procedures before they are legally allowed to work and reside in one of the Member States. For refugees, the Qualification Directive[51] provides common standards for the qualification of TCNs as beneficiaries of international or subsidiary protection. Lastly, the Return Directive[52] sets out common standards and procedures for the return of TCNs that do not fulfil the conditions for entry, stay or residence in the EU.

1.4 Conclusion

The Lisbon Treaty has significantly expanded the EU's competence to legislate in the area of immigration. The lifting of barriers to refer prejudicial questions on immigration issues to the CJEU and the introduction the ordinary legislative procedure to the AFSJ have increased options to harmonise Member States' policies regarding entry, visas and residence permits for third-country nationals. However, national authorities continue to be competent in decisions regarding the admission of labour migrants, and may diverge from EU law for security reasons or in an emergency situation. Moreover, the several EU Directives that have been adopted on economic migration leave a layer of interpretation for the implementing Member States. On the other hand, entry for stays up to three months and controls at the external borders are highly regulated on the European level. Nonetheless, the use of 'may' and 'shall' clauses in regulations as well as directives leaves certain decisions up to the Member State. As a result, the EU is not characterised by merely one 'entry regime', but rather by a multi-layered framework of heterogeneous entry regimes, with different legislative and operational powers allocated to the Member States depending on the purpose, duration or conditions of entry and on the type of legal instrument used.

[50] Single Permit Directive, Directive 2011/98/EU, *OJ L 343, 23.12.2011, p. 1–9.*
[51] Qualification Directive, Directive 2011/95/EU, *OJ L 337, 20.12.2011, p. 9–26.*
[52] Return Directive, Directive 2008/115/EC, *OJ L 348, 24.12.2008, p. 98–107.*

2. The Schengen Borders Code

2.1 Introduction

The incorporation of the Schengen Acquis into the EU legal framework and the establishment of the Area of Freedom, Security and Justice by way of the Amsterdam Treaty led to the adoption of the first Schengen Borders Code in 2006, which provided for the abolition of controls at the internal borders, and laid down the entry conditions and entry procedures for third-country nationals crossing the external borders. The SBC was amended several times, and in 2016 a new version of the Code took effect.[53] It is established by an EU Regulation, and therefore has direct legal effect, without the need to be transposed into national law.

2.2 Scope and objective

The legal basis for the SBC is Art. 77(2)(e) TFEU, which calls for the absence of controls on persons crossing the internal borders, no matter their nationality, and Art. 77(2)(b) TFEU, regarding checks on persons crossing the external borders. The SBC is accordingly divided in two main parts, with the rules regarding the external borders being set out in Title II. The SBC applies to any person crossing the internal or external borders, but does not limit the rights of persons enjoying the right to freedom of movement under Union law (i.e. citizens of EU and Schengen states and their family members), or the rights of refugees and persons requesting international protection.[54] According to the SBC's preamble, (external) border control is in the interest of all of the Member States that have abolished internal border control, and has two main objectives: it 'should help to combat illegal immigration and trafficking in human beings', while also preventing 'any threat to the Member States' internal security, public policy, public health and international relations.'[55]

Member State are competent to decide which national services are responsible for border checks, but have to communicate this to the European Commission. They include police forces, customs departments, and designated coast guard and border guard services.[56] In addition, the EU's border agency, Frontex, has the role of managing and coordinating operational cooperation and assistance between the Member States, as well asproviding training curricula for border guards.[57]

[53] Schengen Borders Code (SBC), Regulation (EU) 2016/399, *OJ L 77, 23.3.2016, p. 1-52.*
[54] Ibid., Art. 3.
[55] Ibid., Preamble, Para. 6.
[56] Ibid., Art. 16 (2); List of national services responsible for border-controls, *OJ C 247, 13.10.2006, p. 17–18,* and subsequent amendments.
[57] Ibid., Preamble, para. 19; Artt. 16 and 17 (2).

2.3 Conditions of entry

Article 5 SBC first establishes the rules on entry for all persons crossing the external borders, regardless of whether they are nationals of an EU Member States or not. It states that anyone entering the EU is required to do so at an official border crossing point, during its opening hours, which are communicated by the Member States to the European Commission.[58] Three types of border crossing points are distinguished: air borders, which accounted for the majority of border crossings as reported by Member States in 2018 (178.6 million); land borders (101.0 million); and sea borders (23.1 million).[59] Only in exceptional cases may borders be crossed in other locations, mainly where it concerns persons with work of an international nature, such as seamen, aircraft personnel or diplomatic staff[60]; persons in emergency situations[61]; or persons holding a permit or that are the subject of bilateral agreements such as a Local Border Traffic agreement.[62] In all other cases, Member States should introduce penalties for those crossing the border outside of the official points, except when international protection obligations apply.[63]

The entry requirements that apply specifically to third-country nationals seeking entry for a stay of maximum 90 days within a 180-day period are listed in Article 6 SBC.[64] They should:

1) be in possession of a valid travel document;
2) hold a valid Schengen visa -- depending on their nationality[65] – unless they are in possession of a valid residence permit or long-stay visa for one of the Member States;[66]
3) justify the purpose and conditions of the intended stay;
4) have sufficient means of subsistence, both for the duration of the intended stay and for the return;
5) not be the subject of an alert issued in SIS for the purpose of refusing entry;
6) not pose a threat to public policy, internal security, public health or the international relations of any of the Member States;

2.3.2 Valid travel documents

Travel documents need to have been issued within ten years preceding the entry, and their validity should extend for three months after the intended date of departure from the Schengen area. The SBC does not specify which travel documents are accepted at the external borders. Instead, they are listed in a separate document issued by the Commission, which is

[58] Ibid., Art. 5 (1).
[59] Frontex, *Risk Analysis for 2019*, Warsaw, February 2019, Annex table 14: Passenger flow on entry, p. 50.
[60] Art. 5(2)(c) SBC; Annexes VI and VII SBC.
[61] Ibid., Art. 5 (2)(b).
[62] Ibid., Art. 5 (2)(a) SBC; an example of bilateral agreements allowing for persons to cross outside of official border crossing points are those following the Regulation on Local Border Traffic, Regulation (EC) No. 1931/2006, *OJ L 405, 30.12.2006,* p. 1-22.
[63] Art. 5 (3) SBC
[64] Ibid., Art. 6, SBC.
[65] Regulation (EU) 2018/1806.
[66] The ETIAS Regulation (Regulation 2018/1240, *OJ L 236, 19.9.2018*, p. 1–71) has added the requirement that persons who are not subject to a visa requirement must hold a valid travel authorisation. See section 4

based on the notifications by Member States and revised systematically.[67] The competence to recognise a travel document remains with the Member States, though Member States 'should endeavour to harmonise their positions on the different types of travel documents.'[68] The list shows that ordinary passports, diplomatic passports and service passports are generally accepted by all Member States, while the recognition of other documents, such as refugees' travel documents or laissez-passers depends on the Member State and on the issuing country.[69]

2.3.3 Visa requirement

Nationals of certain third countries are required to have a visa when crossing the external borders of the Member States even if the intended duration of stay is three months or less.[70] The list of countries for which this rule applies is communicated by the European Commission and periodically updated with the input of the Member States. The visa requirement also applies to refugees and stateless persons that are residents of a country included on the list.[71] Other recognised refugees and stateless persons are exempt from the requirement, as are holders of a local border traffic permit.[72] The decision to include a country on the list or to exclude it from the visa requirement should be made 'on the basis of a case-by-case assessment of a variety of criteria', for example relating to a 'risk' of irregular migration, potential economic benefit, or based on the principle of reciprocity.[73] A decision to extend the visa requirement to a certain country may also be motivated by a decrease in cooperation of that country with readmission applications submitted by a Member State.[74] The procedures and requirements for obtaining a visa are established in the Visa Code.[75]

[67] Decision No 1105/2011/EU of the European Parliament and the Council, *OJ L 287, 4.11.2011*, p. 9–12.
[68] Ibid., Preamble, para. 8.
[69] European Commission, 'Travel documents issued by third countries and territorial entities, Based on the notifications from Member States until 8 February 2019', *https://www.consilium.europa.eu/prado/en/prado-recognised-documents.html*, accessed July 2019.
[70] Art. 3 (1) Regulation (EU) 2018/1806
[71] Ibid., Art. 3 (2).
[72] Ibid., Art. 4 (a) and (c).
[73] Ibid., Art. 1, Regulation (EU).
[74] Ibid., Art. 8 (2)(c) and (3) para. 2.
[75] See section 3.

Local Border Traffic Agreements

Member states have the option to relax entry checks and entry requirements for local border traffic, when they conclude bilateral agreements with neighbouring countries in accordance with the Local Border Traffic Regulation (1931/2006/EC). Such agreements allow for residents in a third country neighbouring a member state of the Schengen area to enter the land border of that country without having to fulfil all entry criteria and without the need for a visa. However, this option is reserved for residence of the 'border area' which can extend up to 50 kilometres into the third country. Moreover, it is only valid for persons that have been resident in the area for more than a year, and who are in possession of the required 'local border traffic permit'. The permit is free of charge and valid for 1 to 5 years, and allows for entry up to three months. So far, four of these agreements have entered into force, between on Ukraine on side and on the other Hungary, Slovakia and Poland, and between Poland and the Russian Federation, specifically for the Kaliningrad region. The Local Border Traffic Agreements are based on the principle of reciprocity, as the member states that conclude them should ensure that persons legally residing on the border area of those member states, no matter their nationality, should also be allowed to enter the third country under similar conditions.

Source: Local Border Traffic Regulation, Regulation (EC) No 1931/2006, OJ L 405, 30.12.2006, p. 1–22.

Visa Facilitation Agreements

Visa Facilitation Agreements are concluded between the EU and third countries to relax certain requirements in the visa application process. The content of each agreement varies by country. It may lead to a standard practice of issuing multiple-entry visas for certain categories of applicants, or it may include a reduction in the number of documents that should be provided to justify the purpose and conditions of the stay, to the point that an invitation letter by a person or organisation will usually suffice. In any case, it reduces the visa application fee from 60 to 35 euros and the waiting time before a decision from 15 to 10 days. The EU has so far concluded Visa Facilitation Agreements with Russia, Albania, Bosnia and Herzegovina, Montenegro, North Macedonia, Serbia, Georgia, Moldova, Ukraine, Armenia, Azerbaijan and Cape Verde. They are based on the principle of reciprocity, and linked to the third countries' cooperation with Readmission Agreements.

Sources:
Agreement between the European Union and Georgia on the facilitation of the issuance of visas, OJ L 52, 25.2.2011, p. 34–44;
Agreement between the European Union and the Republic of Cape Verde on facilitating the issue of short-stay visas to citizens of the Republic of Cape Verde and of the European Union, OJ L 282, 24.10.2013, p. 3–12

2.3.4 Purpose and conditions of stay

Annex I to the SBC provides a non-exhaustive list of documents that may be used to verify whether the purpose and conditions of the stay are justified.[76] The purposes of stay that are distinguished are business; study or other types of training; tourism or private reasons; and political, scientific, cultural, sports or religious events or other reasons.[77] The documents listed in the SBC's annex, such as entry tickets, invitations, or confirmation of enrolment in a programme, are examples of documents that may be accepted, but Member States may also accept other forms of proof. Spain for example has opted to list possible supporting documents in its aliens act, though also in a non-exhaustive manner.[78] The Netherlands on the other hand has not elaborated on it in any legal instrument.[79] As a result, it is unclear which supporting documents will be considered sufficient proof in order to permit entry, which is illustrated by the appeal of a Moroccan national against a refusal of his visa application by the Dutch consulate in 2013. Despite having submitted a wedding invitation from his brother to justify his three-weeks stay in the Netherlands, the Dutch authorities called his plans in question and demanded further proof in the form of a rental confirmation of the wedding location. The court however judged that since no other grounds had arisen to doubt the applicant's intentions, the wedding invitation should have sufficed, especially considering the short duration of the man's stay.[80]

2.3.5 Sufficient financial means for stay and return

As with the purpose and conditions of stay, the documents used to proof possession of sufficient means of subsistence and return are included in a non-exhaustive list in Annex I of the SBC, from which the Member States may diverge. Moreover, Member States are free to determine the minimum amount of money that is required to show possession of sufficient means for the duration of the stay, as long as it is based on average prices for budget accommodation multiplied by the number of days of the intended visit.[81] Similarly, the third-country national should have sufficient means to return to the country of origin or to another third country, but it is not specified in the SBC how that should be assessed.[82]

The lack of EU guidelines on what constitutes 'sufficient' financial means has resulted in a wide variety in the minimum amounts required by Member States, which do not necessarily correspond to differences in cost of living. For Poland, the minimum amount depends on the purpose of the visitor's stay, starting at 20 złoty (4.78 euros) per day.[83] The Netherlands asks visitors to show that they have an amount of 34 euros at their disposal, multiplied by the days

[76] Art. 6 (3) and Annex I, SBC.
[77] Ibid.
[78] Art. 8, Real Decreto 557/2011, de 20 de abril, «BOE» núm. 103, de 30/04/2011.
[79] Instead, Art. 3 of the Dutch Aliens Act (Vreemdelingenwet 2000) merely references the SBC.
[80] Case AWB 13/25187, Rechtbank Den Haag, 14 November 2013, *https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2013:15325*, accessed July 2019.
[81] Art. 6 (4), SBC
[82] Ibid., Art. 6 (1)(c).
[83] Update of reference amounts for the crossing of the external borders, *OJ C 264, 26.7.2018,* p. 6–7.

of stay, and states that 'this criterion is applied flexibly' depending on the purpose and duration of the stay.[84] Greece on the other hand requires 50 euros per day or 300 euros for stays up to five days, and half that amount when visitors are under 18 years old.[85] For Spain, the requirement is even higher at 73.59 euros per day, at a minimum of 662.31 euros, to be proven by showing cash, certified checks, travellers' checks, or debit or credit card statements.[86] Furthermore, while Spain regards the requirement to have sufficient means to return to the country of origin or transit fulfilled when the visitor provides 'a personal, untransferable and fixed-date ticket', Poland asks for up to 2500 złoty (583 euros) to be at the disposal of the third-country national to guarantee that they can afford to return.[87]

2.4 Border checks

2.4.1 Systematic checks

All persons crossing the external borders of the EU are, as a general rule, subject to systematic checks during which SIS, Interpol's Lost and Stolen Travel Documents (LSTD) database and national databases on travel documents are consulted. Since 2017, the use of these systematic checks has been extended to EU citizens and their family members enjoying freedom of movement, who were previously only required to undergo minimum checks to verify their identity.[88] The amendment also calls on border guards to systematically check 'relevant Union databases' other than SIS.[89]

For third-country nationals, thorough checks are carried out on entry as well as exit. On entry, they serve to verify that the individual meets all the entry conditions as listed above. As such, border guards confirm the purpose of stay, and 'if necessary' the corresponding supported documents are examined.[90] Furthermore, border guards verify whether the person has sufficient means of subsistence, and confirm that the person does not present a threat or is prohibited from entering because of an alert in SIS.[91] Lastly, border guards have to examine any entry and exit stamps in the travel document to see if the maximum duration of stay in the Schengen Area has already been exceeded. If the person is required to hold a visa, the Visa Information System (VIS) is consulted in order to verify the authenticity and validity of the document.[92] However, in cases where border staff have a limited capacity or are overwhelmed by high numbers of traffic, or when no risk related to internal security or irregular migration is perceived, the obligation to consult VIS is limited to randomly checking the visa number and the holder's fingerprints, as long as there are no doubts regarding

[84] Reference amounts for the crossing of the external borders, *OJ C 247, 13.10.2006,* p. 19–24.
[85] Update of reference amounts for the crossing of the external borders, *OJ C 134, 31.5.2008,* p. 19.
[86] Update of reference amounts for the crossing of the external borders, *OJ C 186, 31.5.2018,* p. 10–11*; Art. 2 (2), Orden PRE/1282/2007, de 10 de mayo, sobre medios económicos cuya disposición habrán de acreditar los extranjeros para poder efectuar su entrada en España.*
[87] Update of reference amounts for the crossing of the external borders, *OJ C 264, 26.7.2018,* p. 6–7.
[88] Art. 8 SBC and Art. 1 (1), Regulation (EU) 2017/458, *OJ L 74, 18.3.2017*, p. 1–7.
[89] Preamble, para. 5; Art. Article 1 (1) and 1 (3), Regulation (EU) 2017/458.
[90] Art. 8(3)(a)(iv), SBC
[91] Ibid., Art. 8 (3)(a).
[92] Ibid., Art. 8 (3)(b).

authenticity.[93] Entry checks may also be carried out in advance, on the basis of data communicated by airlines or other carriers.[94]

2.4.2 The use of SIS in border checks

During thorough checks on entry and exit, border guards are required to consult SIS to verify whether any alert has been issued for the third-country national.[95] The conditions, requirements and procedures for the issue of alerts for refusal of entry are set out in Chapter V of Regulation 2018/1861, which forms the cornerstone of the use of SIS in the field of border checks.[96] Article 24 of that Regulation lists the conditions for entering an alert, stating that it should be 'based on an individual assessment which includes an assessment of the personal circumstances of the third-country national concerned and the consequences of refusing him or her entry and stay, that the presence of that third-country national on its territory poses a threat to public policy, to public security or to national security, and the Member State has consequently adopted a judicial or administrative decision in accordance with its national law to refuse entry and stay and issued a national alert for refusal of entry and stay.'[97] However, an individual assessment is not required in cases where the third-country national is subject to an entry ban, previously issued by the Member State in accordance with the Returns Directive.[98]

It is explained that a threat arises when (a) 'a third-country national has been convicted in a Member State of an offence carrying a penalty involving the deprivation of liberty of at least one year'; (b) 'there are serious grounds for believing that a third-country national has committed a serious criminal offence, including a terrorist offence, or there are clear indications of his or her intention to commit such an offence in the territory of a Member State'; or (c) 'a third-country national has circumvented or attempted to circumvent Union or national law on entry into and stay on the territory of the Member States.'[99] SIS alerts should also be issued in case the third-country national is subject to an entry ban in accordance with the Returns Directive[100], or other restrictive measures, such as a travel ban issued by the United Nations' Security Council.[101] However, Member States may also choose not to issue an alert 'for public or national security reasons'.[102]

Before alerts are issued, it should be assessed whether the situation is 'adequate, relevant and important enough' to warrant the alert, i.e. whether it is in line with the principle of proportionality.[103] However, if the decision is related to a terrorist event, an alert will always

[93] Ibid., Art. 8 (3)(c).
[94] Art. 1 (7), Regulation (EU) 2017/458.
[95] Art. 8 (3)(vi), SBC
[96] Regulation (EU) 2018/1861, *OJ L 312, 7.12.2018*, p. 14–55.
[97] Ibid., Art. 24 (1) (a).
[98] Ibid., Art. 24(1)(b); Directive 2008/115/EC on common standards and procedures in Member States for returning illegally staying third-country nationals, *OJ L 348, 24.12.2008, p. 98–107.*
[99] Art. 24 (2) (a-c), Regulation (EU) 2018/1861.
[100] Ibid., Art. 24(1)(b); Return Directive, Directive 2008/115/EC, *OJ L 348, 24.12.2008, p. 98–107;* Art. 24 (1) (b).
[101] Art. 25 (1), Regulation (EU) 2018/1861
[102] Ibid., Art. 21 (2).
[103] Ibid., 21 (1).

be regarded as being proportional.[104] Article 20 of Regulation 2018/1861 provides an exhaustive list of the categories of data that authorities can include in the alert. At a minimum, each alert has to include a surname; date of birth; the reason for the alert; the action that should be taken in the case of a hit; and the basis for the decision to refuse entry as listed above.[105]

If no alert on entry has been issued in SIS, or in any national databases that the competent authorities can access, Member States are still permitted to refuse entry if they consider that the third-country national's poses a threat to public policy, internal security, public health or the international relations of any of the Member States.[106] The reasons for such a situation to arise are not listed in EU legislation, leaving Member States are granted a 'wide discretion' in their assessment of whether the entry conditions are fulfilled.[107] This discretionary power has been somewhat limited by case law of the CJEU, which has maintained a strict interpretation of the "threat" discretion.[108] In brief, it has emphasised that decisions regarding threats should always be based on an individual examination of the case concerned and take into account the principle of proportionality.[109]

2.4.3 Refusing or allowing entry

If it is found that a third-country national does not fulfil the entry conditions, Member States are obligated to refuse their entry.[110] However, the SBC explicitly mentions that this is 'without prejudice to the application of special provisions concerning the right of asylum and to international protection or the issue of long-stay visas.'[111] Exceptions can furthermore be made for persons holding a residence permit or a long-stay visa for one of the Member States and who wish to cross the external border of another Member State for transit purposes only.[112] In some cases, a visa may also be issued at the border crossing point.[113] And lastly, a third-country national who does not fulfil all of the conditions, can be permitted on humanitarian grounds, on grounds of national interest or because of international obligations. National authorities are obliged to inform other Member States of such a decision in cases where the person is the subject of an alert in SIS.[114]

Decisions to refuse entry are to be enforced by the border guards, and should always be substantiated with the precise reasons and communicated to the person in question.[115] The

[104] Ibid., 21 (2).
[105] Ibid., Art. 20 and art. 22 (1).
[106] Art. 6(e), SBC.
[107] Para. 57-62, Rahmanian Koushkaki v. Bundesrepublik Deutschland, *C-84/12.*
[108] Zh. and O, C-554/13, Opinion of Advocate General Sharpston, delivered on 12 February 2015; Tsakouridis, C-145/09, Opinion of Advocate General Bot delivered on 8 June 2010; See also: Theodora Kostakopoulou and Nuno Ferreira, 'Testing Liberal Norms: The Public Policy and Public Security Derogations and the Cracks in European Union Citizenship', *Columbia Journal of European Law,* No. 3 (2014); Jacek Chlebny, 'Public Order, National Security and the Rights of Third-Country Nationals in Immigration Cases', *European Journal of Migration and Law,* no. 20 (2018), pp. 115-134.
[109] Zh. and O, C-554/13, para. 49 and 50.
[110] Art. 14 (1) and (4), SBC.
[111] Ibid., Art. 14 (1).
[112] Ibid., Art. 6 (5)(a).
[113] Ibid., Art. 6 (5)(b). In such cases, a visa with limited territorial validity (LTV) shall be issued, see art. 35(4), Visa Code
[114] Ibid., Art. 6 (5)(c).
[115] Ibid., Art. 14 (2) and (4).

person that is refused entry has the right to appeal in accordance with the national law of the Member State. Doing so, however, does not suspend the decision to refuse entry.[116]

[116] Ibid., Art. 14 (3).

Schengen Information System (SIS)

The second generation of the Schengen Information System (SIS II) entered into force in 2006. The general rules for its operations are set out in a Regulation from that year (1987/2006), but have been amended in 2018. Regulation 2018/1861 forms the legal basis for the use of SIS in border controls, and checks on migrants and persons applying for international protection. It sets out the required information to be included in any SIS alert for refusals of entry and stay, as well as the conditions and data protection guidelines that should be met when doing so. Regulation 2018/1862 on the other hand regards the use of SIS in the field of police and judicial cooperation. Alerts related to law enforcement, such as for missing persons or for persons wanted for arrest, as well as alerts on vehicles, documents and other objects are regulated by this Regulation, and by the Council Decision on the establishment, operation and use of SIS II. Lastly, Regulation 2008/1860 regards the use of SIS in returns procedures.

Sources:
Regulation (EC) No 1987/2006 on the establishment, operation and use of the second generation Schengen Information System (SIS II), OJ L 381, 28.12.2006, p. 4–23;
Council Decision 2007/533/JHA on establishment, operation and use of the second generation Schengen Information System (SIS II), OJ L 205, 7.8.2007, p. 63–84;
Regulation 2018/1860 on the use of the Schengen Information System for the return of illegally staying third-country nationals, OJ L 312, 7.12.2018, p. 1–13;
Regulation 2018/1861 on the establishment, operation and use of SIS in the field of border checks, OJ L 312, 7.12.2018, p. 14–55;
Regulation 2018/1862 on the establishment, operation and use of SIS in the field of police cooperation and judicial cooperation in criminal matters, OJ L 312, 7.12.2018, p. 56–106.

Alerts on persons in SIS

By the end of 2018, 935 497 alerts on persons were entered in SIS. More than half of those (504 590) were for the purpose of refusal of third-country nationals' entry or stay in the Schengen Area. Half of all alerts on persons had been created by Italian and French authorities (444 821 in total). Greece, the Netherlands and Poland each 'owned' ~30 000 alerts on persons, while Spain had created 72 164 alerts on persons. In total, member states reported 47 740 'hits' with alerts issued by another member state for refusal of entry or stay. The database was accessed for viewing purposes – both for alerts on persons and objects – more than 6 billion times.

Source: eu-LISA, SIS II – 2018 Statistics, February 2019.

2.5 Margin of manoeuvre in the Schengen Borders Code

The Schengen Borders Code has coordinated the entry procedures at the external borders by listing the entry conditions that should be fulfilled, the information that should be verified during border checks, and the grounds on which entry should be refused. Moreover, as a result of the SBC, Member States are required to communicate their official border crossing points and the authorities that are responsible for carrying out entry checks to the European Commission, thus clarifying national procedures. On the other hand, the SBC leaves a significant room for discretion to national authorities. In addition to the application of bilateral Local Border Traffic Agreements and the explicitly listed exceptions in which persons may be admitted to an EU Member State despite not fulfilling all entry requirements, the Member States also remain competent to deny entry to third-country nationals if they constitute a threat to public policy, internal security, public health or the international relations of any of the Member States. Although the "threat" discretion has been limited by the CJEU, Member States maintain a level of freedom to determine which situations would lead to such a threat. Furthermore, this discretion can be applied directly by border guards during a check on entry, as well as indirectly through the issue of an alert in SIS, which prevents other Member States from authorising the entry of a third-country national.

Secondly, the documents that third-country nationals may be asked to provide upon entry to justify their visit are not clearly defined in the SBC. Some Member States have specified the approved documents in national legislation, while others have not communicated such a list. Moreover, the financial requirements for the duration of the stay and to prove the intention to return vary by Member State. This variation is amplified by the operational discretion that is granted to border guards in performing entry checks, such as in deciding in which situations it is 'necessary' to examine supporting documents. In times of pressure, border guards may furthermore choose to reduce the level of scrutiny of their checks. As a result, it is clear that the SBC, despite a far-going harmonisation of rules on entry, does not constitute a single entry regime for the EU, but rather sets the parameters within Member States can regulate the entry checks at their external borders.

3. The Community Code on Visas

3.1 Introduction

As set out in the SBC, nationals of certain third countries are required to hold a Schengen visa when entering the EU for stays up to three months.[117] The common procedures and conditions for obtaining Schengen visas or 'short-stay visas' are regulated by the Community Code on Visas ('Visa Code'). The Visa Code only regards visas for intended stays not exceeding 90 days in any 180-day period.[118]

3.2 Scope and objective

The Visa Code was adopted on the grounds of Art. 62 (2)(a) and (b)(ii) TEC, which regards border checks and rules on the procedures and conditions for issuing visas by Member States. As with the SBC, the Visa Code is without prejudice to persons enjoying freedom of movement, including third-country nationals that are family members of citizens of the EU or Schengen states.[119] The Regulation also contains provisions regarding the issue of an airport transit visas.[120] However, as airport transit visas do not allow the holder to leave the international transit area of the airport and to enter the territory of the Member State in which they are in transit, and are therefore not included in this section.

3.3 Submitting the visa application

Persons wishing to apply for a short-stay visa need to do so within three months before the intended visit.[121] In general, the application should be submitted to the consulate of the Member State that is the main destination for the visit.[122] If that Member State does not offer consular services in the country or region where the applicant resides, it may be represented by the consulate of another Member State.[123] Member State should try to seek representation if necessary, in order to avoid situations where persons are unable to file a visa application.[124] Member States can also choose to outsource (part of) the application procedure to an external service provider, for example to increase territorial coverage.[125] Of the four countries under study here, as of January 2018 Spain had outsourced the application procedure most often, both in absolute and relative terms, in 162 out of the 236 locations where it is represented. Greece had contracted an external service provider in 93 out of 229

[117] Art. 3 (1) Regulation (EU) 2018/1806.
[118] Art. 1 (1) Visa Code
[119] Ibid., Art. 1 (2).
[120] Ibid., Art. 3 and Annex IV.
[121] Ibid., Art. 9 (1).
[122] Ibid., Art. 4 (5) (1).
[123] Ibid., Art. 8.
[124] Ibid., Art. 8 (5).
[125] Ibid., Art. 40 (3). The rules for cooperation with external service providers are set out in Art. 43 and Annex X.

locations; for the Netherlands, the ratio is 92 out of 206; and for Poland 60 out of 153.[126] External service providers are not allowed to access VIS, and decisions on applications remain the responsibility of consulates.[127]

Short-stay visa applicants need to justify the purpose and conditions of their stay and return, and show that they fulfil the entry requirements as listed above. Similar to the SBC, the Visa Code provides a non-exhaustive list of accepted supporting documents, which is included as an annex.[128] In addition, applicants should show that they are covered by medical insurance for the duration of their stay. Lastly, applicants are required to give fingerprints and to pay a fee of 60 euros.[129] Several categories of persons are exempt from the requirement to provide fingerprints, most notably children under 12.[130] For children under 12 the visa fee is reduced to 35 euros. For children under 6, the visa fee is waived, and Member States may choose to extend that to include children under 12.[131] If a visa application is lodged at an external service provider, an additional fee may be required.[132]

3.4 Examining the application

After the visa application is deemed admissible, meaning that all required forms, documentation and biometric data are submitted and the visa fee is paid, the competent consulate verifies whether the applicant fulfils the entry conditions and 'whether the applicant presents a 'risk' of irregular immigration or a risk to the security of the Member States and whether the applicant intends to leave the territory of the Member States before the expiry of the visa applied for'.[133] In doing so, VIS and SIS should be consulted, and the authenticity of the submitted documents should be verified.

Applicants may be called in for an interview, or may be asked to submit additional documents.[134] A decision should be taken within fifteen calendar days following the date of application. An extension of up to 60 days is allowed if further scrutiny or additional documentation is required.[135] If no grounds for refusal have arisen, the competent Member State is obligated to issue the visa.[136] The visa should normally be valid for the whole Schengen area ('uniform visa'). Uniform visas can be valid for a single entry, two entries, or for multiple entries in a period ranging from 6 months to 5 years, as long as each individual stay does not exceed the limit of 90 days within a 180-day period.[137]

[126] European Commission, 'Overview of Member States' diplomatic missions and consular posts responsible for processing visa applications and representation arrangements in accordance with Article 8(1) of the Visa Code', document of 15 January 2018.
[127] Art. 43 (4) and (5).
[128] Ibid., Annex II.
[129] Ibid., Art. 10 (3) (d) and (e).
[130] Ibid., Art. 13 (7).
[131] Ibid., Art. 16 (4) and (5).
[132] Ibid., Art. 17.
[133] Ibid., Art. 21 (1).
[134] Ibid., Art. 21 (8).
[135] Ibid., Art. 23 (1), (2) and (3).
[136] Ibid., Art. 23 (4).
[137] Ibid., Art. 24.

If the applicant does not meet the entry requirements, including the risk assessment regarding irregular migration or security threats, Member States are obligated to refuse the visa and to enter the refusal in VIS.[138] If the visa is refused, the applicant shall be informed of the reasons, and allowed to appeal according to national law.[139] It is important to note that a previous visa refusal should not lead to an automatic refusal of any subsequent applications.[140] In some cases, the third-country national may be allowed to enter on humanitarian grounds, for reasons of national interest or because of international obligations, despite not meeting all of the entry conditions. In those cases, or when another Member State has objected to the entry, a visa with limited territorial validity will be issued. Visas that are issued at border crossing points will also have limited territorial validity, meaning that they are only valid for the territory of the issuing Member State.[141]

Visa Information System (VIS)

Information on visa applications, and decisions on the issue or refusal of a visa are to be added in the Visa Information System (VIS) and are consulted when the third-country national enters Schengen with the visa. Rules for entry of information in VIS are set out in Regulation (EC) No 767/2008. In general, VIS may only be accessed by visa authorities, border guards and by other competent authorities within the territory of the member state verifying conditions for entry, stay or residence of a third-country (Art. 20 (1)). However, authorities responsible for handling asylum claims can also consult VIS for the examination of applications and in order to determine which member state is competent to handle the claim (Art. 21 and 22). In addition, national and European supervisory authorities can view records in VIS for monitoring purposes (Art. 41 and 42).

Source: Regulation (EC) No 767/2008 (VIS Regulation), OJ L 218, 13.8.2008, p. 60-81.

[138] Ibid., Art. 32 (1) and (5).
[139] Ibid., Art. 32 (2) and (3).
[140] Ibid., Art. 21 (9).
[141] Ibid., Art. 25 (1), Art. 4 (2).

3.5 Margin of manoeuvre in the Visa Code

One of the objectives of the Visa Code, as stated in its preamble, is to prevent practices of 'visa shopping'.[142] But while the common visa policy is among the most successfully harmonised policy areas of the EU, Member States nonetheless have a margin of manoeuvre in how to operationalise the regulation. Official statistics on the issuance of short-stay visas illustrate this divergence. In 2017, Iceland refused only one percent of its visa applications, while Malta had refused a quarter of the applications. Moreover, the Netherlands had the highest share of multiple-entry visas in the EU, with 90.5% of all uniform visas being valid for multiple entries, and an above-average refusal rate at 10.1%. By comparison, the majority of uniform visas issued by Spain were for single or double entries, with only 42.3% allowing for multiple entries. Its refusal rate was around the average at 8.3%. Poland and Greece both had a low refusal rate at 3.9%, and the share of multiple-entry visas was 74.1% and 79.1% respectively.[143]

While the variety in refusal rates and multiple-entry visa rates may be due to differences in the quality or nature of visa applications that are filed, they may also reflect different approaches by Member States to the derogations that the SBC and Visa Code provide for. As mentioned, Member States should refrain from issuing a visa when there is a 'risk' of irregular immigration. In *Koushkaki*, the CJEU clarified that in order to determine whether such a situation applies, a 'complex evaluation' should be carried out of the foreseeable conduct of the applicant, which 'must be based on, inter alia, an extensive knowledge of his country of residence and on the analysis of various documents, the authenticity and the veracity of whose content must be checked, and of statements by the applicant, the reliability of which must be assessed.'[144] Throughout that process, the competent authority may rely on a wide range of documents and methods available. Moreover, the CJEU emphasised that if there exists 'reasonable doubt' – rather than complete certainty – regarding the intention to return, Member States are justified in refusing the visa application, thus leaving room for discretion to the competent authorities.[145]

Member States furthermore have some freedom to relax visa procedures for nationals of a specific country or for certain categories of persons such as business travellers, while still meeting the minimum standards and requirements of the Visa Code. For example, visa application procedures can be sped up by allocating more resources to the consulate, or by offering extra assistance to the applicants. External service providers often provide such additional services, ranging from photography services and support with filling out the application, to providing access to a 'premium lounge' – all for extra costs.[146] In addition, Member States may grant vetted travellers certain benefits in order to encourage repeated visits. The Netherlands, for example, offers an 'Orange Carpet Visa Facility' for staff of businesses that have an interest in the Netherlands. The facility increases access to a five-year

[142] Ibid., Preamble, para. 14 and 18.
[143] European Commission, Visa statistics for consulates 2017, https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/borders-and-visas/visa-policy/docs/2017-consulates-schengen-visa-stats.xlsx, accessed July 2019.
[144] Para. 57, Rahmanian Koushkaki v. Bundesrepublik Deutschland, *C-84/12.*
[145] Ibid., para. 62.
[146] See for example services provided by VFS Global, *https://www.vfsglobal.com/en/individuals/index.html* and BLS International, *https://blsspainvisa.com/*

multiple-entry visa, speeds up the application procedure, and gives applicants access to a 'VIP counter'.[147]

Furthermore, while the margin of discretion that the Visa Code and other Schengen Regulations provide for are narrowed down first and foremost by national policy documents, its day-to-day interpretation is the responsibility of the so-called 'street-level bureaucrats' working at consulates. Their decisions are influenced by personal impressions of and contact with visa applicants as well as by knowledge passed on informally in the consular network. This operational discretion allows for a certain extent of subjectivity in deciding whether to accept or refuse a visa application. It may also affect the issue of visas in more indirect ways, as consular staff can advise applicants on how to fill in their application, or by allowing them to add missing documents to their file rather than immediately rejecting an application, which would increase the chance of being issued a visa.[148]

[147] Kingdom of the Netherlands, 'The Orange Carpet Visa Facility in China', *https://www.netherlandsandyou.nl/your-country-and-the-netherlands/china/travel-and-residence/orange-carpet-visa*, accessed July 2019.
[148] Federica Infantino, 'State-bound visa policies and Europeanised practices: Comparing EU visa policy implementation in Morocco', *Journal of Borderland Studies*, no. 31 (2017), p. 171-186; Alpes, Maybritt Jill and Alexis Spire, 'Dealing with Law in Migration Control: The Powers of Street-level bureaucrats at French Consulates', *Social & Legal Studies*, no. 2 (2014), p. 261-274; Francesca Zampagni, 'Unpacking the Schengen Visa Regime: A Study on Bureaucrats and Discretion in an Italian Consulate', *Journal for Borderland Studies*, no. 2 (2016), p. 251-266.

4. Legislative developments in the Schengen framework

4.1 Introduction

In the last five years (2015-2019), the EU entry regime for short-stay travellers and visitors has undergone significant transformations, involving in particular the adoption of new legislation modifying existing information systems for borders, asylum and migration, and the establishment of new systems. At the time of writing, some of these measures have yet to be implemented, with others still being negotiated within the EU's legislative procedure.

4.2 New information systems and 'interoperability'

Until 2017, three European information systems were in use in the EU's entry governance: SIS, containing alerts for refusals of entry to third-country nationals; VIS, where information on visa applications is stored; and Eurodac, containing fingerprints of persons that were either applying for asylum or protection, found crossing a border, or residing in a member state irregularly.[149] In recent years however, new additions to this framework have been made. The implementation of three new information systems is foreseen: the Entry/Exit System (EES), the European Travel Information and Authorisation System (ETIAS), and the European Criminal Records Information System for Third-Country Nationals (ECRIS-TCN). Furthermore, these information systems are to become 'interoperable', meaning that data stored in one system can be accessed through another. In the following, we discuss these new adopted and proposed Regulations, as well the revisions of the SIS and VIS Regulations and the SBC and Visa Code, and highlight some of the implications for the governance of entry in the EU.

4.2.1 Interoperability

Regulation (EU) 2019/817, adopted in 2019, authorises the interoperability of EES, VIS, ETIAS, Eurodac, SIS and Ecris-TCN, and Europol data for the purpose of borders and visa control.[150] The Regulation has a wide range of objectives, such as improving the effectiveness and efficiency of checks at the external borders, increasing security in EU fighting irregular migration, preventing terrorism, and identifying unknown persons in the event of natural disasters. It argues that, 'in order to maintain public trust in the Union migration and asylum system', the data stored in various EU information systems should be made available to supplement each other. To achieve this interoperability, it creates a European Search Portal (ESP), a shared biometric matching service (shared BMS), a common identity repository (CMR), and a multiple-identity detector (MID).[151] It may be accessed by 'designated authorities' and Europol. EU-Lisa is in charge of the operational management.

[149] The latter category of fingerprint data, also known as CAT3 data in the EURODAC Regulation, is processed but not stored in the EURODAC system, Regulation (EU) No 603/2013.
[150] Regulation (EU) 2019/817, *OJ L 135, 22.5.2019*, p. 27–84.
[151] Ibid., Art. 1(2).

4.2.2 ECRIS-TCN

ECRIS-TCN is established through Regulation (EU) 2019/816.[152] It is meant for use in police and judicial cooperation and forms an expansion of the existing ECRIS database that contains records of EU nationals. The system can be accessed by national central authorities, as well as by Eurojust, Europol and EPPO.[153] While its aim is not to be used in the entry governance of third-country nationals (i.e. border controls and visa applications), it can be used by central authorities to identify which member state holds criminal records information of a third-country national, for the purpose of 'visa, acquisition of citizenship and migration procedures, including asylum procedures), if provided for and in accordance with national law.[154] Thus, while the main purpose of ECRIS-TCN is not to be used in entry and immigration governance, it may affect it nonetheless, especially considering its 'interoperability' with the other large-scale information systems as set out in the Interoperability Regulation.

4.2.3 Entry/Exit System

Regulation (EU) 2017/2226 establishes an 'Entry/Exit System' (EES) for the purpose of registering entry and exit data, as well as refusals of entry, for third-country nationals crossing the EU's external borders for a short stay (maximum 90 days).[155] Its legal basis is found in TFEU provisions on border management (Article 77) and police cooperation (Article 87). The Regulation applies both to travellers holding a visa and travellers that are exempt from the visa requirement. The objectives of the EES are listed in Article 6 of the Regulation, citing among others that it would 'enhance the efficiency of border checks'[156]; 'enable automation of border checks'[157]; and 'gather statistics (…) in order to improve the assessment of the risk of overstays and support evidence-based Union migration policy making'.[158] A second aim is that EES be used in the prevention and detection of terrorism.[159]

For every third-country national to whom this Regulation applies, an individual file is created where the records of each entry, exit and refusal of entry are stored, either manually or by a self-service system or 'e-gate'.[160] Chapter II of the EES Regulation regards the entry and use of this data. The extent of the information stored in EES depends on whether the individual is subject to a visa requirement or not. For those needing a visa for short stays, the file contains the full name, date of birth, nationalities and sex; information of the travel document; and a portrait photo.[161] For persons who are not subject to a visa requirement, fingerprint data are stored as well, except where it concerns children under 12 years old.[162]

[152] ECRIS-TCN Regulation, Regulation (EU) 2019/816, *OJ L 135, 22.5.2019*, p. 1–26.
[153] Ibid., Art. 3(5 and (6).
[154] Ibid., Art. 7(1).
[155] Entry/Exit System (EES) Regulation, Regulation (EU) 2017/2226, *OJ L 327, 9.12.2017*, p. 20–82.
[156] Ibid., Art. 6(a).
[157] Ibid., Art. 6(e).
[158] Ibid., Art. 6(h).
[159] Ibid., Art. 6(2)(a).
[160] Ibid., Art. 14.
[161] Ibid., Art. 16(1).
[162] Ibid., Art. 17(1) and (3).

EES is developed and managed by eu-LISA, which is also responsible for SIS and VIS.[163] The database itself can be consulted and edited by 'duly authorised staff' of national authorities whose competences are in line with the purpose of EES.[164] Europol can also access EES data if this is considered necessary and proportionate for a specific case and falls within Europol's mandate.[165] The requirements for use by Europol are less strict if EES is consulted only for identification purposes.[166] Furthermore, data may be communicated to third countries and private entities, as well as to the United Nations, IOM, or the Red Cross, in certain situations listed in the Regulation.[167] Lastly, Article 8 of the EES Regulation confirms the 'interoperability' of EES and VIS, meaning that information from VIS can be imported into EES and vice versa. This should occur only in situations specified in the Regulation, such as during the examination of visa applications, or when entry is refused to a person holding a visa.[168]

4.3 ETIAS and SBC reform

The new European Travel Information and Authorisation System (ETIAS) was established in a 2018 Regulation amending the SBC.[169] It finds its legal basis in Article 77 TFEU on controls of the external borders, and Article 87 TFEU on police cooperation. It poses an additional entry requirement for third-country nationals who, based on their nationality, are not subject to a visa requirement for short stays in the EU. In the new situation, prospective travellers to the EU who do not hold a visa have to apply for the travel authorisation online, through the ETIAS website or mobile app, and pay a fee of 7 euros.[170] Valid travel authorisations are then stored digitally in ETIAS.[171] This travel authorisation is introduced for the purpose of assessing whether the third-country national poses a risk of overstaying, or whether their entry would pose a 'security, illegal immigration or high epidemic risk'.[172] The Regulation also applies to family members of EU citizens following the Citizens' Rights Directive, although they are exempt from the assessment of a risk of irregular migration and do not need to pay a fee.[173] Persons under 18 or over 70 years old are also exempt from the application fee.[174]

Applicants have to provide personal information, including the full name, surname at birth, and any aliases; first names of the parents; nationality, including previous nationalities; sex; home address; contact details; the level of education; and the current occupation. Furthermore, information regarding the travel documents and the intended duration and place of stay are required.[175] Applicants are also asked whether they have been convicted of a criminal offence in the past 10 years, or a terrorist offence in the past 20 years; stayed in a

[163] Ibid., Art. 5.
[164] Ibid., Art. 9(1), art. 23-35.
[165] Ibid., Art. 33(1).
[166] Ibid., Art. 33(2).
[167] Ibid., Art. 42(1).
[168] Ibid., Art. 8(2).
[169] ETIAS Regulation, Regulation (EU) 2018/1240, *OJ L 236, 19.9.2018*, p. 1–71.
[170] Ibid., Art. 16 and Art. 18.
[171] Art. 6(1)(b), SBC, as amended by Regulation (EU) 2018/1240
[172] Art. 1(1), Regulation (EU) 2018/1240.
[173] Ibid., Art. 24.
[174] Ibid., Art. 18(2).
[175] Ibid., Art. 17(2).

war or conflict zone in the past 10 years; or been subject to a return decision from an EU member state in the past 10 years.[176]

Applications are automatically processed through the ETIAS central system, which checks the applicant's information against an 'ETIAS watchlist', as well as VIS, SIS, EES, and Eurodac, Europol data, Interpol's STLD and TDAWN databases.[177] As part of the automated processing, the ETIAS central system uses the information provided by applicants and their data in other EU information systems to assess 'specific risk indicators', based on profiling according to statistical categories as described in the 'ETIAS screening rules'.[178] If these checks lead to 'hits', or based on the applicants' responses, e.g. when they affirm a previous conviction of a criminal offence, the application moves to a manual examination by one of the member states, to confirm whether the person poses a security, irregular migration or high epidemic risk. In this stage of the assessment, the competent authorities may request additional information of the applicant, and may consult Europol.[179] Decisions on applications should be taken within four days after their submission.[180] If the risk assessment is inconclusive, i.e. when there exists doubt whether admission of the third-country national would present a risk, a travel authorisation may be issued with a 'flag recommending border authorities to proceed with a second line check'.[181]

4.4 VIS and Visa Code reform

In June 2019, a Regulation amending the Visa Code was adopted, with the objective of making visa application procedures 'as easy as possible' for applicants[182], in particular for 'legitimate travellers who contribute to the growth of the EU economy or to the EU's social and cultural development.'[183] The Regulation provides for the standard issue of multiple-entry visa with a long period of validity for certain applicants, which should be selected 'according to objectively determined common criteria'. It is emphasised that this should not be limited to specific categories of applicants or travel purposes, although Member States 'should have particular regard for persons travelling for the purpose of exercising their professions, such as business people, seafarers, artists and athletes'.[184]

The Regulation amending the Visa Code furthermore provides for a revision of the visa fee and introduces stricter conditions for visa procedures if third countries do not cooperate with readmission of irregular migrants ordered by the EU. In addition, it creates a derogation by which Member States may decide to charge 'central authorities' with the examination of visa applications, rather than consular staff.[185] Member states may only involve central authorities if these 'have sufficient knowledge of local circumstances of the country where the

[176] Ibid., Art. 17(4).
[177] Ibid., Art. 20.
[178] Ibid., Art. 20 and 33.
[179] Ibid., Art. 20, 25-32.
[180] Ibid., Artt. 25-32.
[181] Ibid., Art. 36(2).
[182] Preamble, para. 5, Regulation (EU) 2019/1155, *OJ L 188, 12.7.2019*, p. 25–54.
[183] European Commission, Adapting the common visa policy to new challenges, *COM(2018) 251 final*, Brussels, 14 March 2018, p. 2.
[184] Preamble, para. 11, Regulation (EU) 2019/1155
[185] Ibid., Preamble, para. 4.

application is lodged in order to assess the migratory and security risk, as well as sufficient knowledge of the language to analyse documents, and that consulates are involved, where necessary, to conduct additional examination and interviews.'

In 2018 the European Commission furthermore submitted a proposal for a new VIS Regulation.[186] This amendment was proposed in light of a REFIT evaluation that concluded that the current VIS framework is ineffective. It was furthermore informed by a technical study carried out by eu-LISA.[187] The proposed Regulation mainly introduces technical amendments and aligns the VIS Regulation with the Interoperability Regulation. In addition, it proposes to lower the fingerprinting age for child applicants from 12 to 6 years old.[188] Moreover, it introduces 'specific risk indicators' that should be used when assessing whether a third-country national presents a security risk, a risk of irregular migration or a high epidemic risk. These indicators include statistics generated by EES and VIS. They are furthermore informed by 'abnormal rates of overstayers and a refusals of entry for a specific group of travellers for that Member State.'[189]

Another important addition is the proposed inclusion of information on long-stay visas and residence permits in the VIS database, with the argument that 'third country nationals who are coming to the EU for a long stay are the only category of third country nationals not covered by any of the EU large-scale IT systems'; including them in VIS would thus fill a gap in the role of data in EU entry governance.[190] This development fits in the move towards an integrated border management, first proposed by the Commission in 2008.[191] Moreover, the inclusion of third-country nationals that are subject to (national) immigration policies in the VIS Regulation, which is a measure adopted on the basis of Article 77 TFEU, signifies an increased integration of border management and immigration policy.

4.5 EURODAC

The EURODAC Regulation was first adopted in 2000 as part of the Dublin system, after which it was recast in 2013. The current Regulation distinguishes three categories of third-country nationals whose fingerprints should be taken and added to the EURODAC database: persons applying for international protection[192]; persons found crossing the external border irregularly[193]; and persons who are irregularly residing in the territory of the member states.[194] Fingerprinting is only permitted for persons of at least 14 years old. EURODAC data can be accessed by Europol[195] and by national law enforcement.[196]

[186] European Commission, Proposal for a Regulation of the European Parliament and the Council, *COM(2018) 302 final,* Brussels, 16 May 2018.
[187] Ibid., p. 4.
[188] Ibid., p. 65.
[189] Ibid., Art. 21(a), p. 66-67.
[190] Ibid., p. 7.
[191] European Commission, Preparing the next steps in border management in the European Union, *COM(2008) 69 final*, Brussels, 13 February 2008.
[192] Art. 9, EURODAC Regulation.
[193] Ibid., Art. 14.
[194] Ibid., Art. 17.
[195] Ibid., Art.1(2).
[196] Ibid., Art. 5 and 6.

In 2016, the Commission again submitted a proposal to amend the EURODAC Regulation with the aim of 'facilitating the identification of illegally staying third country nationals or stateless persons through the use of biometrics'.[197] It would authorize more data to be stored – a facial image and the personal information of the migrant, i.e. name, sex, nationality – and for a longer period. Furthermore, it would reduce the age of children that can be fingerprinted to six years.[198] The proposal showcases an increased use of EURODAC not just as an asylum information system or a law enforcement measure, but also as an instrument to enforce migration governance. The role of EURODAC in entry governance will be further discussed in ADMIGOV WP4.

[197] European Commission, Proposal for a Regulation of the European Parliament and of the Council, *COM(2016) 272 final*, Brussels, 4 May 2016, p. 3.
[198] Ibid.

5. Family migration

5.1 Introduction

Joining a family member is among the most common reasons for third-country nationals seeking entry to the EU. For persons receiving a residence permit for the first time, it is the second most common reason for entry. In 2017, one in every four first residence permits issued by EU Member States was for family reasons (832 124 out of 3.1 million). Spain, Greece and the Netherlands each issued an relatively large percentage of first permits for family reasons, with Spain issuing more than half for family reasons (125 627 out of 231 153), Greece slightly less (13 798 out of 29 995) and the Netherlands a third (30 968 out of 97 395). On the other side of the spectrum, Poland issued only 3 500 first residence permits for family reasons, out of 683 288 in total. [199] Family migration – which includes reunification of a 'sponsor' with family members who stayed behind, families entering the EU together with the sponsor, and 'family formation' where the family unit did not exist prior to entry – is thus an important channel for third-country nationals to enter the EU legally. At the same time, rules regarding family reunification are relevant for persons that consider migrating to the EU, as they determine who may be joined by their family, which family members qualify, and under what conditions. Facing legal or procedural obstacles, family members may lead to family members seeking entry in an alternative – irregular – manner, especially when it concerns the spouse or children of someone residing in the EU.[200]

In the following, we identify the main legislation regarding entry for family reasons, and discuss their scope, conditions and procedures. A comparison is made of the (residence) rights and requirements that apply to applicants based on the EU's Citizens' Rights Directive[201], which contains rules on the entry of third-country nationals on the grounds of being a family member of a mobile EU citizen, and the Family Reunification Directive[202], which regulates family reunification in cases where both the sponsor and the family member are third-country nationals. Lastly, the degree of variation between national rules is illustrated through the examples from the Netherlands and Spain – two countries where family migration is relatively popular, but whose rules differ from each other in many ways[203] – regarding their conditions on accommodation, resource and integration in light of the Family Reunification Directive, as well as their rules regarding interviews and DNA testing. The purpose of this comparison is to

[199] Eurostat, 'First permits by reason, length of validity and citizenship,' *http://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=migr_resfirst&lang=en*, accessed July 2019.
[200] European Union Agency for Fundamental Rights, *Fundamental rights of migrants in an irregular situation in the European Union,* Luxembourg: Publications Office of the European Union, 2011, *https://fra.europa.eu/sites/default/files/fra_uploads/1827-FRA_2011_Migrants_in_an_irregular_situation_EN.pdf*, p. 100.
[201] Citizens' Rights Directive, Directive 2004/38/EC, *OJ L 158, 30.4.2004, p. 77–123.*
[202] Family Reunification Directive, Directive 2003/86/EC, *OJ L 251, 3.10.2003, p. 12–18.*
[203] In 2017, more than half of first residence permits issued by Spain were for family reasons. In the Netherlands, a third of first residence permits were for family reasons. For a discussion of variations in the transposition of optional provisions throughout the EU, see European Migration Network, 'EMN Synthesis Report for the EMN Focussed Study 2016: Family Reunification of Third-Country Nationals in the EU plus Norway: National Practices', Migrapol EMN, April 2017.

understand the extent of the legislative competence and the operational discretion held by the Member States.

5.2 Policy context

Family migration is regulated at the EU level in two key instruments, the Family Reunification Directive and the Citizens' Rights Directive. While both Directives govern the entry of third-country nationals to the EU, they have a distinct legislative background, with the Family Reunification Directive being part of the EU's efforts to develop a common immigration policy (Article 79 TFEU), while the Citizens' Rights Directive has sprouted from a different policy area, as it defines the right to freedom of movement for EU citizens.

The right of EU nationals to be joined by their family members has long been established in the EU legislative framework on free movement of workers, and was initially reserved for family members of EU nationals that were (self-)employed in a different Member State.[204] A revision of this framework was deemed necessary in light of the establishment of an 'EU citizenship', introduced in the 1992 Maastricht Treaty. A 1997 Commission report concluded that, since the establishment of EU citizenship, EU nationals had developed higher expectations of their rights. It suggested that the EU should be brought 'closer to the people by making it more open, more understandable and more relevant to daily life'.[205] Therefore, in 2001 a proposal for what would later be known as the Citizens' Rights Directive was issued by the Commission, with the aim of making the right of entry and residence less complicated, and of ensuring that mobile EU citizens and their family members would no longer suffer from 'unwieldy and disproportionate' administrative procedures.[206] It was argued that family members should be included in the Directive because 'while it is true that the right of movement and residence of family members of Union citizens is not explicitly referred to by the Treaty, the right does flow from the right to preserve family unity, which is intrinsically connected with the right to the protection of family life', and which are protected in EU law and the Charter of Fundamental Rights.[207] After an amended proposal[208] was accepted, the Citizens' Rights Directive was adopted in 2004, with transposition being required by the year 2006.

The Family Reunification Directive was proposed shortly after the entry into force of the Amsterdam Treaty in 1999, which called for the gradual establishment of the AFSJ, authorized the development of common conditions for entry and residence of third-country nationals, and brought this policy area to the community level. The rationale for adopting legislation regarding regular immigration was that a complete restriction of immigration would be impossible and unjustified, as well as unwanted due to demographic factors and economic needs of the European Union. Furthermore, it was based on a desire to remain open to the

[204] Regulation (EEC) No 1612/68, OJ L 257, 19.10.1968, p. 2-12; Directive 73/148/EEC, *OJ L 172, 28.6.1973*, p. 14-16.
[205] European Commission, Proposal for a European Parliament and Council Directive, COM(2001) 257 final, OJ C 270E , 25.9.2001.
[206] Ibid., p. 3.
[207] Ibid., p. 4.
[208] COM(2003) 1999 final.

outside world, in particular to befriended non-Member States.[209] The Family Migration Directive was among the first measures adopted on regular immigration following the Amsterdam Treaty. The fact that this Directive on family reunification was prioritised is explained in the proposal by the fact that family migration formed the 'chief form of legal immigration of third-country nationals' at that time.[210] Moreover, it was argued that the rules regarding family reunification were already 'substantially outside the scope of national legislation, being laid down by international instruments', such as the UN Declaration of Human Rights, the Convention on the Rights of the Child and the European Convention on Human Rights.[211] Nonetheless, Member States would continue to have a significant margin of discretion – more so than with regards to the Citizens' Rights Directive – as will be discussed below.

5.3 Citizens' Rights Directive (2004/38/EC)

5.3.1 Legal basis and objective

The Citizens' Rights Directive finds its legal basis in the TFEU's provisions on EU citizenship, the internal market, and freedom of movement, which sets it apart from other rules on the entry and residence of third-country nationals that are written with the objective of establishing a common immigration policy.[212] The purpose of the Directive is to guarantee the right to move and reside freely within EU territory for all EU citizens, and to ensure that this same right is extended to their family members.[213] It follows from the notion that the right to freedom of movement would be impeded if EU citizens would not be able to lead a normal family life in the host Member State.[214] As such, this Directive provides the conditions for the right of entry and residence in EU Member States for EU citizens and their family members; the right of permanent residence in the host Member State; and the limits for reasons of public policy, public security or public health.[215] While the 'sponsor'[216] needs to be an EU citizen in order to fall within the scope of the Directive, the family members to which it applies can be other EU citizens or third-country nationals. As with other Directives, it is transposed into national legislation, and Member States are allowed to adopt more favourable provisions.[217]

5.3.2 Scope

The Citizens' Rights Directive applies only to citizens of an EU Member State who have used their right to freedom of movement by moving to or working in a different Member State. It

[209] European Commission, Proposal for a Council Directive on the right to family reunification, *COM(1999) 638 final*, Brussels, 1 December 1999, pp. 2-3
[210] Ibid., p. 3.
[211] Ibid.
[212] Art. 12, 34, 38, 46, 153 (2), TFEU.
[213] Preamble, Para. 4 and Art. 37, Citizens' Rights Directive.
[214] C-127/08, Metock and others, Para. 62
[215] Art. 1, Citizens' Rights Directive.
[216] The Citizens' Rights Directive does not refer to mobile EU citizens who wish to be joined by their family members as 'sponsors', but consequently addresses them as 'Union citizens'. However, the word 'sponsor' is used here for readability and to increase comparability with the Family Reunification Directive, which uses the word 'sponsor' when referring to third-country national residents in the EU who wish to be reunited with their family.
[217] Preamble, Para. 29, Citizens' Rights Directive.

does not apply to sponsors that are third-country nationals, which are covered by the Family Reunification Directive. In principle, it also does not cover cases in which the sponsor is a static EU citizen, i.e. nationals of a Member State that live in their country of citizenship. However, through case law of the CJEU, it has been determined that in some situations, non-mobile EU citizens – and their families – can derive rights from the Directive[218], as well as nationals returning to their country of citizenship after staying in a different Member State.[219]

The Directive authorises the entry and residence of family members in the EU citizen's host Member State, regardless of whether they entered together with the EU citizen, arrived later, or were already residing there; and regardless of whether the relationship started before or after the sponsor's arrival.[220] 'Family members' are defined as the spouse of the EU citizen or as the registered partner. It also includes the underage or dependent (grand)children of the sponsor or the spouse/partner, and the (grand)parents if they are dependent on the sponsor or the spouse/partner. [221]

Other family members do not have an automatic right to entry and residence, but Member States may apply the Directive to family members 'who, in the country from which they have come, are dependants or members of the household' of the EU citizen, or 'where serious health grounds strictly require the personal care of the family member' by the EU citizen.[222] In such cases, the degree of relatedness does not play a role.[223] Member States may also extend the Directive to unregistered partners who are in a duly attested durable relationship. [224] The Directive obligates Member States to 'undertake an extensive examination of the personal circumstances' before they refuse entry to any of these family members.[225]

[218] In the *Ruiz Zambrano* case (*C-23/09*), a third-country national father of two minor children with EU citizenship derived rights from the Citizens' Rights Directive, despite the fact that the children had never exercised their right to freedom of movement. The father was authorized to stay, as his departure would have meant that the children would be forced to leave the EU as well, thus depriving them from their fundamental rights as EU citizens; see also European Migration Network, 'Ad-Hoc Query on Misuse of family reunification rights by Third Country nationals granted under Directive 2004/38/EC', 2018.
[219] See box: the Surinder Singh route
[220] C-127/08, Metock and others, para. 87-88, 92-94.
[221] Art. 2 (2), Citizens' Rights Directive; In cases where the sponsor is a student, parents are excluded; in that case, they can be authorised to enter as 'beneficiaries' Art. 3(2) and 7(4), Citizens' Rights Directive.
[222] Ibid., Art. 3(2)(a).
[223] European Commission, Communication on guidance for better transposition and application of Directive 2004/38/EC, *COM(2009) 313 final*, Brussels, 2 July 2009, p. 5.
[224] Art. 3(2)(b), Citizens' Rights Directive
[225] Ibid., Art. 3, para. 2.

The 'Surinder Singh' route

While the Citizens' Rights Directive only applies to cases in which EU citizens use their right to freedom of movement, most member states have applied similar or more favourable rules for family migration to their non-mobile citizens.[1] Others however have adopted rules that can be more restrictive towards non-mobile nationals. Examples of such regimes are the UK and the Netherlands. In these situations, the so-called 'Surinder Singh route' is sometimes used, the name of which refers to a CJEU case treating a preliminary question regarding the Citizens' Rights Directive.

In *Surinder Singh*, the CJEU found that the EU's rules regarding freedom of movement also apply to nationals returning to their country of citizenship, after having worked or resided in a different member state.[2] In the context of family migration, in order to avoid the restrictive national rules and instead enjoy the rights derived from the Citizens' Rights Directive, the *Singh* ruling thus led to some nationals deliberately moving to a different member state with their family, in order to be able to return home together.

However, the rights derived from the Directive only apply when the residence abroad has been 'genuine', and when family life has been 'created or strengthened' during that time.[3] There is no straightforward answer as to what constitutes 'genuine' residence, but it is determined based on the duration of stay, the degree of integration in the host country, and the purpose of the stay.[4]

[1] *European Commission, Report on the implementation of Directive 2003/86/EC on the right to family reunification,* COM(2019) 162 final*, Brussels, 29 March 2019, p. 3.*
[2] *C-370/90, Surinder Singh; see also C-291/05, Eind; C-60/00, Carpenter.*
[3] *C-456/12, O., para. 54, 61.*
[4] *See for example the criteria used by the UK in: Home Office, Free Movement Rights: family members of British citizens, version 4.0, 29 March 2019, pp. 14-20.*

5.3.3 Conditions

Because the Citizens' Rights Directive regards family unity as a right that should be safeguarded in order to facilitate EU citizens' freedom of movement, the main conditions determining whether family members can enter and reside in the territory of a Member State are those that regulate EU citizens' right to freedom of movement. For periods up to three months, every EU citizen has the right to intra-EU mobility and to bring their family members with them, as long as they comply with administrative requirements, i.e. carrying a valid travel document, and with restrictions on the ground of public policy, public security and public health.[226] For periods exceeding three months, the right to reside in another Member State is limited to EU citizens who are (self-)employed or, if they are students or economically inactive, who have sufficient resources and comprehensive sickness insurance covering

[226] Ibid., Art. 6.

themselves and their family members.[227] The threshold for resources to be considered 'sufficient' cannot be set at a specific amount, but 'must take into account the personal situation of the person concerned'.[228] Unlike in the case of the Family Reunification Directive, Member States are only allowed to ask EU citizens and their families to comply with integration requirements on a voluntary basis.[229]

5.3.4 Procedures

For short stays, family members have the right to enter and reside in the host Member State with only a valid passport and, if so required, an entry visa.[230] Visas should be made available free of charge and through an accelerated procedure. The only supporting documents that applicants are required to present are a valid passport and proof of the relationship with the sponsor, including evidence of their dependency or the existence of health grounds if those entitle them to family reunification with the EU citizen. No further documents, such as proof of accommodation or resources, are required of the family member, as their right to entry is already derived from the EU citizen's mobility.[231] Family members that are covered by the Directive have a *right* to obtain an entry visa.[232] Therefore, if a family member enters the territory of the host Member State without a valid visa or travel document, the authorities should allow them to obtain those documents or to otherwise prove that they are covered by the Citizens' Directive, 'before turning them back'.[233]

If they plan to stay longer than three months, family members furthermore have the right to obtain a special residence card with a validity of five years or less, depending on the EU citizen's envisaged stay.[234] They retain the right of residence for as long as the EU citizen and their family members do not become an 'unreasonable burden on the social assistance system of the host Member State', a notion that has been interpreted differently across the EU.[235]

5.3.5 Residence rights

Along with the right to reside in the host Member State, family members are automatically entitled to take up (self-)employment there, and they have the right to equal treatment.[236] However, unemployed EU citizens and their family members do not have the right to social assistance within the first three months of residence, and can be excluded from other (financial) support such as student grants until they become permanent residents.[237] Because workers contribute to public funds, employed EU citizens and their family members can access all social security benefits under the same conditions as nationals. This sets them apart

[227] Ibid.,Art. 7, Citizens' Rights Directive.
[228] Ibid.,Art. 7(4), Citizens' Rights Directive
[229] European Commission, *COM(2009) 313 final*, 2009, p. 7.
[230] Art. 5, Citizens' Rights Directive.
[231] European Commission, *COM(2009) 313 final*, 2009, p. 6.
[232] C-503/03, Commission v Spain, para. 42, as referenced in: European Commission, *COM(2009) 313 final*, 2009, p. 6.
[233] Art. 5(4), Citizens' Rights Directive
[234] Ibid., Art. 9 (1) and (3).
[235] Ibid., Art. 14(1); Marta Ballesteros et al., 'Obstacles to the right of free movement and residence for EU citizens and their families. Comparative analysis', *European Parliament, Directorate-General for Internal Policies, Policy Department C: Citizens' Rights and Constitutional Affairs*, Brussels, 2016, pp. 40-41.
[236] Art. 23 and 24, Citizens' Rights Directive.
[237] Ibid., Art. 24.

from other family migrants, whose right to benefits depends on the social integration in the host Member State, or on national requirements such as a minimum period of residence.[238]

The Citizens' Rights Directive establishes that death of the sponsoring EU citizen may not lead to the loss of residence rights for family members who are third-country nationals, if they were already residing in the host Member State for at least one year.[239] The degree of protection in case of departure of the EU citizen, or in the event of divorce or separation is lower, but may still lead to the retention of residence rights, especially where the family unit involves minor children.[240] Family members may also continue to have the right to acquire permanent residence, if they meet the conditions regarding sufficient resources and sickness insurance.[241] Under normal circumstances, family members have the right to permanent residence after residing in the country for five years.[242]

[238] C-90/97, Swaddling; C-158/07 Förster; see also: Eva-Marie Poptcheva, 'Freedom of movement and residence of EU citizens, access to social benefits', European Parliamentary Research Service, Brussels, 2014.
[239] Art. 12(2), Citizens' Rights Directive.
[240] Ibid., Art. 12(3) and 13(2).
[241] Ibid., Art. 12(2) and 13(1).
[242] Ibid., Art. 16(1) and (2).

The right to respect for private and family life

The right to respect for private and family life is enshrined in Article 8 of the ECHR and Article 7 of the Charter of Fundamental Rights. It is a fundamental right that applies to the EU's legal framework as a whole, and to member states individually. Although 'Article 8' should be respected whether EU law applies or not, its application to the Family Reunification Directive is underlined in the directive's preamble[1], and has been emphasised in case law. [2]

What constitutes 'family life' has been defined in case law by the European Court of Human Rights. In essence, it recognises the right of family members to lead a normal family life and to enjoy each other's company. This applies irrespective of whether the family has previously been living together legally or in an irregular situation. [3] The right to respect for private and family life may only be restricted in accordance with law, and as long as it is 'necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.' [4] The right to family life is especially pressing where it concerns children, as it then acts in conjunction with the obligation to take due regard of the best interest of the child.[5]

Regarding family migration, the right to respect for private and family life is particularly relevant in three distinct ways. First, it may be a ground for authorising the entry and residence of family members who are not covered by the directives or by national rules. Secondly, it forms the main limitation of national authorities' power to deny entry or to order a deportation on the grounds of public order, public security or public health.[6] And thirdly, it should be considered in general whether refusing to authorize entry or to renew a residence permit constitutes an infringement of the right to family life.[7]

For example, in Poland, the obligation to respect the right to family life and the rights of the child, can form the basis to issue a temporary residence permit to foreigners that reside irregularly in the country.[8] The Netherlands operates a separate 'Article 8' family migration procedure, for third-country nationals who do not fall within the scope of other legislation, and uses 'Article 8 assessments' as a standard in other procedures as well.[10]

[1] Preamble, para. 4, Family Reunification Directive
[2] C-540/03, Parliament v Council; C-578/08, Chakroun; C-127/08, Metock and others; C-60/00, Carpenter; C-109/01, Akrich.
[3] European Court of Human Rights, 'Guide on Article 8 of the European Convention on Human Rights. Right to respect for private and family life, home and correspondence', Council of Europe/European Court of Human Rights, 30 April 2019, para. 235.
[4] Art. 8, Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950.
[5] C-540/03, Parliament v Council, para. 59.
[6] C-60/00, Carpenter; C-109/01, Akrich; Boultif v Switzerland 54273/00 ECHR; Üner v. the Netherlands, 46410/99, ECHR.
[7] C-540/03, Parliament v Council, para. 53-54; European Commission, 2019, p. 12; Art. 17, Family Reunification Directive.

5.4 Family Reunification Directive (2003/86/EC)

5.4.1 Legal basis and objective

The Family Reunification Directive provides common criteria and conditions family reunification of third-country nationals.[243] It finds its legal basis in Article 63 of the Treaty establishing the European Community (corresponds with Article 79(2)(a) TFEU), which calls for the adoption of common measures on immigration, specifically regarding 'conditions of entry and residence, and standards on procedures for the issue by Member States of long-term visas and residence permits, including those for the purpose of family reunion'.[244] The Directive has been criticised for having a low binding character, as its many 'may-clauses' leave a significant margin of appreciation for Member States.[245] However, in certain situations the Directive nonetheless 'imposes precise positive obligations'[246] on Member States to authorise the entry of family members, and where derogations exist, they 'must be interpreted strictly'.[247] Moreover, Member States are allowed to adopt more favourable rules than those set out in the Directive.[248]

5.4.2 Scope

The Family Reunification Directive applies to cases in which both the sponsor of an application and his family members are third-country nationals. The sponsor needs to be residing legally in one of the Member States with a permit for at least one year, and with 'reasonable prospects of obtaining the right of permanent residence'.[249] The family members that are allowed to join him are, at a minimum, the spouse and the minor children of the sponsor or spouse.[250] In addition, Member States may decide to allow reunification with a registered partner or a partner with whom the sponsor is in a 'duly attested stable long-term relationship', as well as with dependent parents or adult, unmarried children of the sponsor or spouse.[251] For reunification with partners, a minimum age of 21 years may be established for both the sponsor and the spouse, in order to prevent forced marriages.[252] Furthermore, the authorisation of entry of multiple partners, i.e. in the case of polygamy, is prohibited.[253]

[243] Preamble, para. 6; Art. 1; Art. 3(5), Family Reunification Directive, Directive 2003/86/EC, *OJ L 251, 3.10.2003, p. 12–18.*
[244] Art. 63 (3)(a), Treaty establishing the European Community, consolidated version 2002, *OJ C 325, 24.12.2002, p. 33–184.*
[245] European Commission, Report on the application of Directive 2003/86/EC, *COM(2008) 610 final*, Brussels, 8 October 2008, p. 14.
[246] C-540/03, Parliament v Council, para. 60.
[247] C-578/08, Chakroun, para. 43.
[248] Art. 3(5).
[249] Ibid., Art. 3(1).
[250] Ibid., Art. 4(1).
[251] Ibid., Art. 4(2) and (3).
[252] Ibid., Art. 4(5).
[253] Ibid., Art. 4(4).

5.4.3 Conditions

The conditions for family reunification are set out in optional provisions, meaning that when transposing the Directive into national law, Member States can opt to include the conditions or to leave them out, but they cannot pose more restrictive requirements. Following the Directive, Member States may ask sponsors to fulfil three basic requirements: to have suitable accommodation for themselves and their family members; to have sickness insurance covering all persons involved; and to have stable and regular resources that are sufficient to maintain the whole family and that prevents them from having to rely on the social assistance system of the Member State.[254] There is no common standard for the assessment of what amount of resources is considered sufficient, and as a result the amount required by Member States ranges between roughly 149 (Poland, 2016) and 1615 (Netherlands, 2019) euros per month. Furthermore, the interpretation of 'stable and regular' varies across the EU, and not every Member State has opted to use this requirement. The CJEU has ruled that Member States may consider the six months preceding the date on which the application is submitted in order to determine whether the resources are likely to remain at the sponsor's disposal for at least one more year.[255] And lastly, it should not matter what the origin of the resources is, i.e. whether they are the income of the sponsor, the family member, or someone else, as long as they are at the disposal of the applicant.[256]

In addition, Member States may choose to allow family reunification only after the sponsor has been staying in the country for a certain amount of time, up to two years.[257] The sponsor's family members may have to comply with integration measures before their entry is authorised.[258]

5.4.4 Conditions for refugees

The Directive includes more favourable rules for sponsors who are refugees. Member States are not allowed to set the requirement of a minimum period of legal residence with regards to refugees, and may not set integration requirements as a precondition for family members' entry.[259] Member States may also decide to allow reunification with more family members outside of the 'nuclear family', if they are dependent on the refugee.[260] If the refugee is an unaccompanied minor, their parents' entry must be authorised and potentially that of a legal guardian or another family member.[261] In such situations, the minor's age at the moment of entry in the EU is decisive, meaning that refugees who apply for family reunification after they turn 18 years old can still be subject to the more favourable rules for unaccompanied minors.[262] Furthermore, the accommodation, insurance or income requirements do not apply

[254] Ibid., Art. 7(1).
[255] C-558/14, Khachab.
[256] C-370/90, Surinder Singh, para. 74.
[257] Art. 7(2), Family Reunification Directive.
[258] Ibid., Art. 8.
[259] Ibid., Art. 7(2) para. 2 and art. 12(2).
[260] Ibid., Art. 10(2).
[261] Ibid., Art. 10(3).
[262] European Commission, Report on the implementation of Directive 2003/86/EC on the right to family reunification, *COM(2019) 162 final*, Brussels, 29 March 2019, p. 5; C-550/16, A and S; see also: European Council on Refugees and Exiles,

to refugees; although Member States may reserve this provision for applications that were submitted within three months of obtaining refugee status.[263] Moreover, Member States may choose to apply the more favourable rules for refugees only in cases where the family relationship was established before the sponsor's arrival.[264]

Family reunification for refugees in Greece

In Greece, refugees enjoy special rights regarding family reunification, while other beneficiaries of protection do not.[1] Reportedly, administrative obstacles hamper refugees' access to apply for family reuniciation and, 'as a result, only 245 applications for family reunification in Greece were submitted before the Asylum Service in 2017'.[2] Such obstacles were found by the German NGO *Pro Asyl,* who argue that it can be difficult for refugees to provide the required documentary evidence, and that failure to do so has led to automatic refusals. In addition, there is a strict three-month deadline for refugees wanting to apply for family reunification, of which many are unaware. And lastly, the NGO found that even when family reunification applications had been approved, entry visas were routinely not issued to the family members.[3]

[1] Council of Europe, 'Report of the Commissioner for Human Rights of the Council of Europe Dunja Mijatović following her visit to Greece from 25 to 29 June 2018', CommDH(2018)24*, 6 November 2018, p. 12.*
[2] Ibid.
[3] Stiftung Pro Asyl, 'Legal note on the living conditions of beneficiaries of international protection in Greece', 23 June 2017.

5.4.5 Procedures

The Directive does not specify where an application for family reunification must be submitted and by whom.[265] Some Member States allow applications to be submitted by the sponsor who is residing in the EU, while in others the designated person is the family member.[266] If the applicant is not the sponsor, the general rule is that applications should be submitted outside of the Member States' territory.[267] Usually, this should be done at an embassy or consulate in the country of origin, residence, or a neighbouring country. However, some Member States allow family members to apply for reunification within their territory, or – in the case of Ireland, Finland and Sweden – to apply online.[268]

The application should be accompanied by certified copies of the family members' travel documents.[269] The other evidence that is to be submitted is not narrowly defined; it is stated

'ECRE/ELENA Legal Note on Ageing Out and Family Reunification. The right of unaccompanied children who 'age out' to family reunification in light of international and EU law', June 2018.
[263] Art. 12(1), Family Reunification Directive.
[264] Ibid., Art. 9(2).
[265] Ibid., Art. 5(1).
[266] European Migration Network, 'EMN Synthesis Report for the EMN Focussed Study 2016: Family Reunification of Third-Country Nationals in the EU plus Norway: National Practices', Migrapol EMN, April 2017.
[267] Art. 5(3), Family Reunification Directive.
[268] European Migration Network 2017, p. 32.
[269] Art. 5(2), para. 1, Family Reunification Directive.

that 'documentary evidence' should be provided as proof that the family relationship exists and that the conditions are fulfilled. Interviews and 'other investigations' may be used to determine the authenticity of the family relationship.[270] In practice, Member States are found to have opted for a 'flexible approach', using documents 'ranging from asylum interviews, evidence from an appeal hearing, notarised declarations or written statements to photos of events and receipts', as well as statements by witnesses.[271] DNA tests also form an option in the majority of the Member States, mostly in cases where documentary evidence has already been submitted but is found to be incomplete or unreliable.[272]

5.4.6 Decisions

Decisions should be made within nine months after an application is submitted, although extensions may occur.[273] The authorities examining the application should, in all cases, 'have due regard to the best interests of minor children'[274], and 'take due account of the nature and solidity' of the family relationship, as well as the sponsor's attachment to the Member State and to the country of origin.[275] Applications may be rejected if the conditions are not met, or if the entry and residence of the family member present a threat to public policy, public security or public health.[276] Illness or disability alone cannot automatically lead to a rejection.[277] Neither should a criminal offence: it depends on the 'severity or type of offence' or on 'the dangers that are emanating from such person'.[278] The threat-clause can be interpreted by analogy to the extensive case law on its application regarding the Citizens' Rights Directive, although it is unclear whether the interpretation should always be the same.[279]

If an application is rejected, the applicant is to be notified of the reasons[280], and shall be granted legal access to challenge the refusal.[281] On the other hand, if applications are approved, Member States are obligated to authorise the entry and residence of family members immediately, and to 'grant such persons every facility for obtaining the requisite visas', as well as granting a renewable first residence permit for at least one year.[282]

[270] Ibid., Art. 5(2).
[271] European Migration Network, 2017, p. 33.
[272] Ibid., p. 33; see section 4.4.5.
[273] Art. 5(4), Family Reunification Directive.
[274] Ibid., Art. 5(5).
[275] Ibid., Art. 17.
[276] Ibid., Art. 6(1).
[277] Ibid., Art. 6(2).
[278] Ibid., Art. 6(2).
[279] This question is currently under consideration by the CJEU in C-318/18 and C-382/18, as referenced in European Commission, 2019, p. 10.
[280] Art. 5(4), para. 3, Family Reunification Directive
[281] Ibid., Art. 18.
[282] Ibid., Art. 13.

5.4.7 Residence rights

Upon entry, the family members have the same right to (self-)employment, education and other training as is granted to the sponsor; in other words, if a sponsor's residence permit limits their right to work, this may limit the family member's right to work as well. In line with Member States' right to control access to their labour markets, which is enshrined in Article 79(5) TFEU, the Directive furthermore allows Member States to limit the right to employment for a period of 12 months, and may prohibit parents or adult unmarried children from taking up employment.[283] However, most Member States have not used these restrictions.[284]

After five years of residence, family members have the right to an autonomous residence permit, independently of their sponsor. [285] However, this only applies to the partner or spouse of the sponsor, and their children that have reached the age of majority. For other family members, Member States may set their own rules regarding their eventual right to an autonomous residence permit. Although the Directive does not obligate them to do so, all Member States have adopted rules in order to grant an autonomous residence permit in the event that the family relationship is affected by widowhood, divorce, separation or death.[286]

Residence permits of family members may be withdrawn or refused to be renewed if the conditions for entry are no longer satisfied; if the family relationship ceases to exist; if the original permit was obtained through false or misleading information or fraud; or if the sponsor has left the host Member State.[287] However, before withdrawing a residence permit or refusing to renew it, Member States should always consider the nature and solidity of the person's family relationships, the duration of their residence in the Member State, and the existence of family, cultural and social ties with their country of origin, and they should respect the principles of proportionality and legal certainty.[288]

[283] Ibid., Art. 14(2) and (3).
[284] European Commission, Report on the implementation of Directive 2003/86/EC on the right to family reunification, *COM(2019) 162 final,* Brussels, 29 March 2019, p. 14.
[285] Art. 15(1), Family Reunification Directive.
[286] Ibid., Art. 15(3), Family Reunification Directive; European Commission, 2019, p. 3.
[287] Ibid., Art. 16.
[288] Ibid., Art. 17; European Commission, 2019, p. 12.

5.5 Transposition of the Family Reunification Directive

5.5.1 Introduction

This section aims to illustrate the implementation of the Family Reunification Directive in national legal frameworks. While it is clear that the Family Reunification Directive contains stricter requirements on the entry of third-country nationals than the Citizens' Rights Directive, it is important to stress that as the Directive is transposed into national law, Member States may adopt more favourable provisions. Moreover, the use of 'may-clauses' in the Family Reunification Directive grants a significant discretionary power to the Member States, leading to extensive variation between the rules adopted by different Member States.

While it goes beyond the scope of this paper to perform an in-depth analysis of the distinct national legal frameworks and procedures regarding family migration across EU Member States, in the following we illustrate the implementation of the Family Reunification Directive through several key elements of the directive, with examples from Spain and the Netherlands. The topics discussed are the requirements to have suitable accommodation[289] and to have stable and regular resources[290]; the requirement to comply with integration measures[291]; and the requirement for sponsors to have a residence permit of one year or more with 'reasonable prospects of obtaining the right to permanent residence'.[292] Furthermore, we discuss the use of DNA testing and interviews during the examination of the application.[293]

5.5.2 Accommodation requirement

Most Member States make use of the possibility to set requirements regarding the accommodation that the sponsor can provide to his or her family members. Exceptions are Finland, the Netherlands, Slovenia and Sweden.[294]

Spain requires third-country nationals applying for family reunification to have 'adequate accommodation' (*vivienda adecuada*) for themselves and their family members.[295] This needs to be attested in a report issued within thirty days of the date of application, after which it is sent to the *Oficina de Extranjería* (Immigration Office). The institution responsible for assessing housing is determined by the Autonomous Community in which the applicant resides, but usually involves the municipality.[296] The report includes a rental contract or deed, and furthermore takes stock of the number of rooms in the house and their purpose; the number of inhabitants; and the 'conditions of habitability and equipment'.[297] For that last

[289] Ibid., Art. 7(1)(a).
[290] Ibid., Art. 7(1)(c).
[291] Ibid., Art. 7(2).
[292] Ibid., Art. 3(1).
[293] Ibid., Art. 5(2).
[294] Réka Friedery, Luigino Manca and Ralf Rosskopf (eds.), Family Reunification: International, European and National Perspectives, Berlin: Berliner Wissenschafts-Verlag, 2018, pp. 61-62.
[295] Art. 18 (2), Ley Orgánica 4/2000, de 11 de enero, «BOE» núm. 10, de 12/01/2000; Art. 55, Real Decreto 557/2011.
[296] Secretaría de Estado de Migraciones, Informe sobre vivienda adecuada, *http://extranjeros.mitramiss.gob.es/es/InformacionInteres/Informes_CCAA_Entidades_locales/Informe_vivienda_adecuada/index.html*, accessed July 2019.
[297] Art. 55, Real Decreto 557/2011.

point, observations are made regarding ventilation, lighting, hygienic conditions, and the availability of utilities.[298]

5.5.3 Resources requirement

The resource requirement is upheld by all Member States except Sweden.[299] However, the required amounts vary greatly. In 2016, Polish authorities reported that the threshold for a 'steady and regular income' was set at 634 PLN (149 EUR) per month for single applicants, or 514 PLN (120 EUR) per person for couples. To proof that the requirement was met, applicants needed to provide income statements for the past three months when submitting their application.[300]

In Spain, sponsors are required to show proof of 'sufficient economic resources', which are calculated according to the 'IPREM', a yearly-amended index based on the Spanish minimum income. The income may be provided by the sponsor, but also by his or her partner or spouse, or another close relative residing in Spain.[301] If the reunited family comprises only two persons (e.g. the sponsor and their spouse), the required monthly resources are 150% of the IPREM (799 euros, 2019). For every additional family member, another 50% of the IPREM (299 euros, 2019) are required.[302] Social benefits are excluded from the calculation.[303] Fulfilment of the income requirement is furthermore conditional on whether the applicant is expected to maintain the income for one year after submitting the application, based on the six months preceding it.[304] The income requirement may be lowered in certain situations, especially when the application involves minors.[305]

The Netherlands requires sponsors to have at least the adult minimum income at their disposal (1 615,80 euros, 2019).[306] For single parents, 70% of the minimum income is required (1 131,06 euros, 2019).[307] The resources are required to be 'durable', a broad criteria that includes situations in which the applicant has had a stable income for three years prior to the application, or when it is apparent that the resources will remain available for another year.[308] In practice, the income requirement is at least 1 615,80 euros, unless the sponsor is a single parent, in which case the set amount is 1 131,06 euros.[309] However, if sponsors do not meet that requirement, the application should not automatically be rejected, as Member States are obligated to take the individual circumstances into account. It does not matter who provides

[298] Secretaría de Estado de Migraciones, Secretaría de Estado de Migraciones, 'Informe de adecuación de vivienda para tramitación de autorizaciones de residencia por reagrupación familiar', p. 3.
[299] Réka Friedery et al., 2018., p. 62.
[300] European Migration Network, Family Reunification of TCNs in the EU: National Practices, Poland, EMN Focussed Study 2016, 16 September 2016 , p. 24.
[301] Art. 54 (4), Real Decreto 557/2011, de 20 de abril, «BOE» núm. 103, de 30/04/2011.
[302] Art. 54 (1), Real Decreto 557/201; Secretaría de Estado de Migraciones , Portal de Inmigración, Autorización de residencia temporal por reagrupación familiar, *http://extranjeros.mitramiss.gob.es/es/InformacionInteres/InformacionProcedimientos/Ciudadanosnocomunitarios/hoja012/index.html*, accessed July 2019.
[303] Art. 54 (4), Real Decreto 557/2011.
[304] Ibid., Art. 54 (2).
[305] Ibid., Art. 54 (3).
[306] Art. 3.74, Vreemdelingenbesluit 2000.
[307] Art. 3.19(1), Voorschrift Vreemdelingen 2000.
[308] Ibid., Art. 3.75, Vreemdelingenbesluit 2000.
[309] Immigratie- en Naturalisatiedienst, 'Normbedragen inkomenseis', *https://ind.nl/Paginas/normbedragen-inkomenseis.aspx*, accessed July 2019.

the income, as long as it is at the disposal of the sponsor, and can be verified by the competent authorities.[310]

5.5.4 Integration requirement

The Family Reunification Directive allows Member States to pose an integration requirement for family members reuniting with a third-country national, unless the sponsor has refugee status.[311] There are certain limitations: the requirements have to be proportional, and must have the objective of facilitating the integration of family members.[312] In other words, integration requirements may not be used merely as a way of restricting the right of entry for third-country nationals, and may not go against the objective of the Directive, which is to promote family reunification.[313]

Most Member States do not set integration requirements in family reunification procedures, but there are exceptions, most notably Austria, Germany and the Netherlands, each of which had adopted integration requirements as part of their migration policy prior to the Family Reunification Directive's entry into force.[314] The three Member States require family members to have basic proficiency in German or Dutch before they are admitted. The costs of courses and examinations are for the applicants.[315] In addition, Austria and the Netherlands require them to obtain a further level of proficiency upon arrival in the Member State. Civic integration exams are also used, either as part of the general integration programme or as a requirement for permanent settlement.[316] Some Member States do not use integration requirements as a condition for approving the family reunification application, but nonetheless make it compulsory for third-country nationals to enrol in integration programmes upon arrival.[317]

5.5.5 Interviews and DNA testing

In Spain, if the submitted documentation in a family reunification application is incomplete or deemed unreliable, family members are required to undergo an interview at the consulate. Subsidiaries of international protection may be subject to DNA tests, which is the responsibility of the forensic police. DNA tests are obligatory for parents of children whose birth was registered late. These tests are carried out by the consulate in cooperation with selected laboratories.[318]

The Netherlands offers DNA testing and interviews when 'inability to meet the standards of evidence' is acknowledged. Sponsors undergo testing in the Netherlands, at the office of the central immigration authority (Immigratie- en Naturalisatiedienst, IND), while family

[310] Immigratie- en Naturalisatiedienst, 'Werkinstructie 2018/4, Het recht van de Europese Unie', 20 March 2018, *https://ind.nl/Documents/WI_2018-4.pdf*, p. 13.
[311] Art. 7(2), Family Reunification Directive.
[312] European Commission, Communication on guidance for application of Directive 2003/86/EC on the right to family reunification, *COM(2014) 210 final,* Brussels, 3 April 2014, p. 15.
[313] C-153/14, K and A, para. 49-50.
[314] Sara Wallace Goodman, 'Fortifying Citizenship. Policy Strategies for Civic Integration in Western Europe', *World Politics,* no. 4 (2012), pp. 659-698, p. 664.
[315] European Migration Network, 2017, p. 26.
[316] Ibid., 2017, p. 27.
[317] Ibid., , 2017, p. 27.
[318] European Migration Network, Family Reunification of TCNs in the EU: National Practices, Spain, 2016, p. 28; p. 36-37.

members are tested at a Dutch embassy or consulate. For partners and foster children, whose relationship cannot be evidenced by DNA testing, the IND conducts identification interviews in the Netherlands and abroad. Children under 12 are not interviewed, and for older children a 'child-friendly' interview procedure is used.[319]

5.6 Comparison

Placing the Family Reunification Directive and the Citizens' Rights Directive side by side, it becomes clear that the right of third-country nationals to family reunification is limited compared to that of mobile EU citizens. First of all, EU citizens have the right to be joined by their partner or spouse, minor children, and dependent (grand)parents or adult (grand)children, while the Family Reunification Directive only establishes the right of third-country nationals to be joined by their spouse and minor children. Moreover, sponsors who are third-country nationals qualify only if they have a residence permit of at least one year and reasonable prospects of obtaining the right of permanent residence, while EU citizens can enter with their family members irrespective of the expected duration of stay.

Secondly, the Family Reunification Directive allows Member States to pose conditions on accommodation, and to require applicants to have sickness insurance as well as stable, regular and sufficient resources. The Citizens' Rights directive, on the other hand, only poses a requirement of having 'sufficient resources' and sickness insurance for cases in which the EU citizen is not (self-) employed. Moreover, family members of EU citizens may only be expected to comply with integration measures on a voluntary basis, whereas family members of third-country nationals can face such measures as a precondition for family reunification.

In addition, family members of EU citizens have the right to obtain an entry visa free of cost and within four weeks. If they want to stay longer than three months, they furthermore obtain a residence card within six months. Family members of third-country nationals are met with a maximum waiting period of nine months, which can be further extended. The examination of their application is also more extensive, as it can include interviews or DNA tests rather than documentary evidence.

Lastly, both Directives grant socio-economic rights to family members after their entry in the host Member State, but to a different extent. In accordance with the Citizens' Rights Directive, family members who are third-country nationals immediately have the right to take up employment in the host Member State. However, if the sponsor is a third-country national, the family member's right to take up employment is determined by the sponsor's residence permit, and may be limited by the host Member State. Moreover, the Citizens' Rights Directive contains provisions on third-country nationals' right to permanent residence, and goes further than the Family Reunification Directive in granting family members the right to remain resident in case the family relationship is disrupted.

[319] European Migration Network, Family Reunification of TCNs in the EU: National Practices, the Netherlands, May 2017, p. 45.

5.7 Critique and REFIT process

The European Commission has identified several issues regarding family reunification with third-country national sponsors, among which are 'disproportionate charges for issuing permits, the notion of stable and regular resources, access to employment for family members, incorrectly applied waiting periods, and the proportionality of pre-integration conditions.'[320] Applicants' access to family reunification was furthermore found to be hindered when Member States require them to appear in person on the embassy. Other obstacles were the long processing times for applications, and some applicants' inability to show proof of the identity and family ties when official documents were lacking. Lastly, national authorities may not have the right tools to detect forced or sham marriages and other forms of fraud.[321] In the REFIT assessment, experts suggested that the provisions regarding which family members are eligible to join a third-country national residing in the EU should be expanded. However, representatives of the Member States 'considered that the current rules on family reunification should not be changed'.[322] Regarding family members of EU citizens, the final report of the REFIT assessment of the Family Reunification Directive furthermore emphasised that the exclusion of family members of non-mobile EU citizens from the EU's legal framework could lead to discriminatory situations where 'Member States may treat their own 'non-mobile' nationals less favourable than the 'mobile ones' or TCNs covered by the [Family Reunification Directive]'.[323]

No amendments of either Directive have been proposed. However, in 2019 a Regulation on strengthening the security of the identity cards of EU citizens and their family members was adopted, complementing the Citizens' Rights Directive.[324] Regarding the set of Directives on regular immigration as a whole – which exclude the Citizens' Rights Directive – the Commission concluded that they are 'fit for purpose'. However, it made several recommendations for improvements, including to ensure a stronger enforcement of the Directives, and to raise awareness of the rights and procedures that they establish.[325]

[320] European Commission, Report on the implementation of Directive 2003/86/EC on the right to family reunification, *COM(2019) 162 final,* Brussels, 29 March 2019, pp. 1-2.
[321] European Migration Network, 2017, p. 37.
[322]European Commission, Fitness Check on EU Legislation on Legal Migration, *SWD(2019) 1055 final*, Brussels, 29 March 2019, p. 37.
[323] Ibid.
[324] Regulation (EU) 2019/1157, *OJ L 188, 12.7.2019,* p. 67–78.
[325] European Commission, *SWD(2019) 1055 final*, Brussels, 29 March 2019, p. 105.

5.8 Conclusion

The legal framework regarding family migration as an entry channel to the EU in essence consists of three separate regimes: rules for family members of mobile EU citizens, covered by the Citizens' Rights Directive; rules that apply to sponsors who are third-country nationals themselves, as set out in the Family Reunification Directive; and rules determined by Member States that apply to their own, non-mobile citizens. However, these three regimes are not rigid; their application depends on the individual situation of the persons involved, as different rules apply for example to sponsors who are refugees, workers, or students. Moreover, key principles of international law, especially the right to respect for private and family life and the best interests of the child, apply to everyone residing in the EU irrespective of whether they are covered by a certain legal act, and can therefore also be a ground to authorize the entry of third-country nationals for family reasons.

The picture becomes even more complex when considering that Member States have a significant legislative discretion regarding the transposition of the two Directives in their own legal frameworks. As a result, each EU Member State has their own distinct set of rules and practices, not just regarding entry conditions, but also affecting the application procedures and the residence rights bestowed on family members after their entry is authorized. This section has provided an overview of the different entry regimes resulting from this margin of discretion. A further administrative or operational discretion may apply to the institutions and 'street-level bureaucrats' involved in family reunification application procedures, for example in the assessment of accommodation, or when deciding whether the existence of a family relationship is sufficiently proven. The extent to which these practices form a barrier to third-country national's entry, are outside of the scope of this report, but should be taken into consideration when assessing whether current legal pathways for regular migration are safe and realistic.

6. Entry for employment purposes

6.1 Introduction

In 2017, one-third of all first residence permits issued to third-country nationals by EU member states were for the purpose of carrying out remunerated activities, making it the most common category.[326] While most first permits for work purposes were issued to seasonal workers (540 226 out of 1 009 543), these were issued almost exclusively by Poland (525 384). The second most common group, and the most consistent across EU Member States, were first residence permits for 'other' work purposes, comprising (self-) employed persons who have entered under national rules (405 488).[327]

Indeed, the entry of third-country nationals for employment purposes is regulated almost exclusively under national rules. Each Member State offers multiple types of residence permits or visas for work purposes, with different procedures and admission criteria. The process by which applications for work permits are studied often depend on the applicant's profession or the work sector, and is tackled differently in each Member State. As such, the policy of admission for work purposes in the EU is fragmented and complex.

Nonetheless, several attempts have been made to coordinate the entry of labour migrants at the EU level. Currently, 'economic migration' is regulated by a set of four Directives targeting specific groups of foreign workers – highly qualified workers, seasonal workers, students and researchers, and intra-corporate transferees – paired with a horizontal instrument, the Single Permit Directive.[328] In the following, we will contextualise and compare these Directives. After a brief description of the political context preceding the Directives' adoption, we first introduce the Single Permit Directive, Intra-Corporate Transfer Directive and Students and Researchers Directive. A more detailed description is given of the Blue Card and Seasonal Workers Directive, whose focuses are at the opposite ends of low- and high-wage employment. For both Directives, a brief note on the main points of critique and current legislative developments will be given. Lastly, we sketch the situation of national frameworks on the admission of third-country nationals for employment purposes, followed by a conclusion on the extent of EU governance on economic migration.

[326] 3 137 431 first residence permits were issued in total. 3 051 080 were for family reasons, 2 134 021 for education reasons, and 2 874 551 for other reasons. 'First residence permits' are residence permits with a duration of at least three months, that are issued to a person for the first time, or at least six months after the expiry of a previous permit. Source: Eurostat, 'First permits by reason', https://ec.europa.eu/eurostat/databrowser/view/tps00170/default/table?lang=en, 9 July 2019, accessed July 2019.

[327] Eurostat, 'First permits issued for remunerated activities by reason, length of validity and citizenship [migr_resocc], last updated 22 July 2019', *http://appsso.eurostat.ec.europa.eu/nui/submitViewTableAction.do*, accessed July 2019.

[328] Single Permit Directive 2011/98/EU, *OJ L 343, 23.12.2011*, p. 1–9.

6.2 Policy background

With the adoption of the Treaty of Amsterdam in 1997 and the 1999 European Council meeting in Tampere on the AFSJ, a mandate was created for the development of common policies on immigration. In the Council, a migration policy working group was tasked specifically with the issue of 'admission'.[329] As seen in the previous section, a proposal for a Family Reunification Directive was submitted almost immediately, but it would take until 2009 before common rules on the admission of TCNs for employment purposes would materialise.

The 2002 Action Plan for Skills and Mobility concluded that 'due to demographic changes' third-country national workers would be needed to complement the 'declining EU workforce'.[330] An EU-wide immigration policy was thought necessary, as it would 'help geographic mobility into and throughout the Union by removing some of the obstacles to the freedom of movement for third-country nationals'.[331] Such a policy would also support labour migrants' social integration, and recognise 'rights comparable to those of EU citizens and proportionate to the length of their stay'.[332] Along with the Action Plan, a first proposal was presented to harmonise the conditions of entry and residence of *all* third-country nationals entering the EU for the purpose of (self-) employment.[333] However, the proposed Directive did not gain support from the Council.[334] As unanimity in the Council was still required for adoption of legislation in this policy area at the time, it was eventually withdrawn.[335]

Despite the initial Directive's failure, the adoption of legislation in order to regulate labour migration remained high on the policy agenda. The 2004 Green Paper on an EU Approach to Managing Economic Migration [336] touched on questions such as which degree of harmonization was desirable for economic migration; what the admission procedures for labour migrants should look like, and what rights labour migrants should have. It also discussed whether applications for work and residence permits could be combined in one procedure, and touched on the 'accompanying measures', such as integration requirements. One of the suggested options was to follow a 'sectoral approach' – adopting several Directives with a narrow scope targeted at specific categories of workers – which was already being used

[329] Council of the European Union, Strategy on Migration and Migration Policy*, 5337/99,* Brussels, 19 January 1999.
[330] European Commission, Commission's Action Plan for skills and mobility, *COM(2002) 72 final*, Brussels, 8 February 2002, p. 4.
[331] Ibid., p. 11.
[332] Ibid., p. 19.
[333] European Commission, Proposal for a Council Directive on the conditions of entry and residence of third-country nationals for the purpose of paid employment and self-employed economic activities, *COM(2001) 386 final — 2001/0154(CNS)*, *OJ C 332E , 27.11.2001*, pp. 248–256.
[334] European Commission, Proposal for a Council Directive on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment, *COM(2007) 637 final*, Brussels, 23 October 2007, p. 3.
[335] Judy Fudge and Petra Herzfeld Olsson, 'The EU Seasonal Workers Directive: When Immigration Controls Meet Labour Rights', *European Journal of Migration and Law,* no. 16 (2014), pp. 439-466, p. 444.
[336] European Commission, Green Paper on an EU approach to managing economic migration, *COM(2004) 811 final*, Brussels, 11 January 2005.

with regards to Students[337] and Researchers[338], whose entry and stay was governed by two separate Directives.[339]

The Hague Programme of March 2005, which set out the priorities in strengthening freedom, security and justice in the European Union, emphasised the importance of legal migration for 'enhancing the knowledge-based economy in Europe'.[340] It invited the Commission 'to present a policy plan on legal migration including admission procedures capable of responding promptly to fluctuating demands for migrant labour in the labour market', while pointing out that the competence to determine volumes of admission would remain with the Member States.[341] This Policy Plan, released in December 2005,[342] described the political and economic context as one characterized by a *need* for labour migrants in many EU countries, paired with concerns regarding integration and irregular migration.[343] It reiterated how the initial 'horizontal framework' proposal had failed due to a lack of support from the Member States. As an alternative, a 'general framework directive' was suggested, to be complemented by four specific directives.[344] Together, their objective would be to 'offer a fair, rights-based approach to all labour immigrants on the one hand and attracting conditions for specific categories of immigrants needed in the EU, on the other.'[345]

Four specific directives were foreseen for highly qualified workers; seasonal workers; Intra-Corporate Transferees; and remunerated trainees[346]. The 'general framework directive' would be a horizontal instrument, which would not touch on admission conditions and procedures, but only 'guarantee a common framework of rights to all third-country nationals in legal employment already admitted in a Member State, but not yet entitled to the long-term residence status.'[347]

[337] Council Directive 2004/114/EC of 13 december 2004 on the conditions of admission of third-country nationals for the purposes of studies, pupil exchange, unremunerated training or voluntary service, *OJ L 375, 23.12.2004*, p. 12–18.
[338] Council Directive 2005/71/EC of 12 October 2005 on a specific procedure for admitting third-country nationals for the purposes of scientific research, *OJ L 289, 3.11.2005*, p. 15–22.
[339] European Commission, Green Paper on an EU approach to managing economic migration, *COM(2004) 811 final*, Brussels, 11 January 2005, p. 5.
[340] European Union, The Hague Programme: strengthening freedom, security and justice in the European Union, *OJ C 53, 3.3.2005*, pp. 1–14, p. 4.
[341] Ibid., p. 4.
[342] European Commission, Policy Plan on Legal Migration, *COM(2005) 669 final*, Brussels, 21 December 2005.
[343] Ibid., p. 4
[344] Ibid., p. 5.
[345] Ibid., p. 5.
[346] At the time of the Policy Plan's release, two Directives regarding the admission of students and unremunerated trainees (2004/114/EC) and researchers (2005/71/EC) had already been adopted. They were later recast as one Directive that includes remunerated trainees. (Directive (EU) 2016/801)
[347] European Commission, Policy Plan on Legal Migration, *COM(2005) 669 final*, Brussels, 21 December 2005, p. 6-8.

6.3 The sectoral approach

The resulting Directives that set out the conditions of entry and residence for TCNs for employment purposes are:

- Directive 2009/50/EC regarding highly qualified employment (Blue Card Directive)[348]
- Directive 2011/98/EU on a single application procedure for a single permit, and on a common set of rights for third-country workers (Single Permit Directive)[349]
- Directive 2014/36/EU regarding employment as seasonal workers (Seasonal Workers Directive) [350]
- Directive 2014/66/EU regarding employment in the framework of an intra-corporate transfer (Intra-Corporate Transfer Directive)[351]
- Directive 2016/801/EU regarding research, studies, training, voluntary service, pupil exchange schemes or educational projects and au pairing (Students and Researchers Directive) (recast)[352]

All five Directives[353] find their legal basis in Art. 79(2)(a) and (b) TFEU, which calls for the adoption of measures on the conditions of entry and residence and standards on the issue of long-term visa and residence permits; and on the definition of rights of legal residents, including on freedom of movement and residence in other Member States (intra-EU mobility). However, they differ greatly in terms of aim, scope, admission criteria, recognised rights, and the maximum duration of stay, as is discussed below. Two common provisions can be found in all Directives. Firstly, they do not affect the right of the Member States to determine the volumes of admission to their labour markets. Secondly, they all contain provisions describing the right to equal treatment with nationals of that Member States for third-country nationals that are admitted through the Directives, in accordance with the Single Permit Directive..

Together with the other Directives on regular immigration, the five Directives on labour migration have recently been assessed as part of the Commission's REFIT programme, which has led to a new proposal to improve the Blue Card Directive. However, due to the limited time that has passed since their entry into force, the evaluation of the other Directives remained limited.

[348] Blue Card Directive, Directive 2009/50/EC of 25 May 2009 *OJ L 155, 18.6.2009*, pp. 17–29.
[349] Single Permit Directive, Directive 2011/98/EU, *OJ L 343, 23.12.2011*, pp. 1–9.
[350] Seasonal Workers Directive, Directive 2014/36/EU, *OJ L 94, 28.3.2014*, pp. 375–390.
[351] Intra-Corporate Transfer Directive, Directive 2014/66/EU, *OJ L 157, 27.5.2014*, pp. 1–22.
[352] Students and Researchers Directive, Directive (EU) 2016/801, *OJ L 132, 21.5.2016*, pp. 21–57.
[353] With the exception of the Blue Card Directive, which was adopted prior to the entry into force of the Lisbon Treaty and thus finds its basis in Articles. 63(1)(3)(a) and 63(1)(4) of the Treaty establishing the European Community.

6.4 The five Directives

6.4.1 Single Permit Directive

The Single Permit Directive (Directive 2011/98/EU) establishes a single application procedure for third-country workers and lays down a common set of rights for them, based on equal treatment with nationals of the Member State in which they reside.[354] It applies to all third-country nationals who apply to reside in a Member State in order to work; all those who have been admitted for work; and to third-country nationals who already reside in a Member State with a valid residence permit for other reasons than work.[355] The Directive does not apply to persons who have been admitted as students; persons who are admitted for a period less than six months; and persons who are allowed to work on the basis of a visa rather than a residence permit.[356]

The Directive provides for a single permit covering both the work permit and the authorization to enter and stay in the Member State, which is obtained through a single application procedure. It does not determine whether the application should be submitted by the third-country national or by the employer.[357] In practice, most Member States allow applications by the third-country nationals, and some permit applications from employers as well. Bulgaria and Italy however only accept applications by employers.[358] The Directive determines that any application fees set by the Member States should be proportional, and may be based on the actual services provided by the competent authorities in examining the application and issuing the permit.[359]

The Directive furthermore recognises certain rights. On the most basic level, holders of a single permit are authorised to enter and reside in the Member State; have free access to its full territory; and exercise the work for which the permit was issued.[360] It also entitles holders to 'be informed' about the rights recognised in the Single Permit Directive or in national law.[361] These basic entitlements are followed by an extensive list of socio-economic rights, which are based on the principle of equal treatment with nationals of the Member State.[362] As these rights apply after the moment of entry in the EU Member State, it goes beyond the scope of this paper to discuss the extent of their coverage in detail. However it should be noted that some of the rights may be restricted, such as the right to obtain study grants and loans or the right to social security, or that additional prerequisites may be imposed, such as language proficiency in order to access education.[363]

[354] Art. 1(1), Single Permit Directive.
[355] Ibid., Art. 3(1).
[356] Ibid., Art. 3(3) and (4).
[357] Ibid., Art. 4(1) and (2).
[358] European Commission, Report from the Commission to the European Parliament and the Council, *COM(2019) 160 final*, Brussels, 29 March 2019, p. 4.
[359] Art. 10, Single Permit Directive.
[360] Ibid., Art. 11.
[361] Ibid., Art. 11(d).
[362] Ibid., Art. 12.
[363] Ibid., Art. 12(2).

The Single Permit Directive does not in itself create a ground for admission of third-country national workers, as it is focuses on the procedural standards of applications for the single permit. Nevertheless, it is an important instrument in entry governance, as it aims to reduce the administrative hurdles that aspiring migrants have to take and coordinates the application procedures for labour migrants throughout the EU. By establishing one single permit and a single set of rights – albeit with a margin of discretion for national authorities – it is a step towards the Regulation of labour migration as a whole on the EU-level.

6.4.2 Intra-Corporate Transfer Directive

The Intra-Corporate Transfer Directive (Directive 2014/66/EU) arranges for the possibility of employees a multinational companies working in a third country to be seconded to a position in an EU Member State, for stays up to three years. Targeted employees are managers and specialists, as well as trainees whose maximum duration of stay is one year.[364] Since their transfer is a temporary secondment, transferees should, after their stay in the EU, be offered a position within the same company in a third country.[365] Subsequent transfers to the EU are only possible after the individual has returned to a third country, and after a certain period of time determined by the Member States.[366] The Directive aims to foster intra-EU mobility of Transferees, and has incorporated several provisions to that end, both for short- and long-term stays in another Member State.[367] It also provides for reunification of Transferees and their family members, under more favourable rules than those laid down in the Family Reunification Directive.[368]

6.4.3 Students and Researchers Directive

The Students and Researchers Directive (Directive 2016/801/EU) sets the conditions of entry and residence for stays exceeding three months, for the purpose of research, studies, training or voluntary service. Member States may also include pupil exchange schemes or educational projects in the scope of application.[369] This Directive is a recast version combining two earlier Directives on the entry and residence of students and researchers. One of the main reasons for it being recast was to include remunerated trainees, which were previously not included in any EU legislative act. As a result, the Directive now covers both remunerated and unremunerated stays, with the maximum duration of stay depending on the category of work or study.

Each of the different categories of persons to whom the Directive applies – researchers[370], students[371], school pupils[372], trainees[373], volunteers[374], and au pairs[375] – face distinct admission criteria, and their residence permits are subject to different rules. The Directive

[364] Preamble, para. 3, para. 17, Intra-Corporate Transfer Directive.
[365] Ibid., Preamble, para. 19.
[366] Ibid., Preamble, para. 17.
[367] Ibid., Preamble, para. 25; Art. 20-22.
[368] Ibid., Art. 19.
[369] Art. 1(a), Students and Researchers Directive.
[370] Ibid., Artt. 8-10.
[371] Ibid., Art. 11.
[372] Ibid., Art. 12.
[373] Ibid., Artt. 13 and 15.
[374] Ibid., Artt. 14 and 15.
[375] Ibid., Art. 16.

provides for different minimum and maximum periods of validity of the residence permits for each category, but does not exclude the possibility of renewal for any of them. As such, it does not set a fixed maximum duration of stay.

Researchers are the only group who, following the Directive, have the right to bring their family members with them.[376] Students and researchers may enter other Member States than the one issuing their permit, and carry out their study or research activities there. Researchers may furthermore bring their family members if they make use of their right to intra-EU mobility.[377]

Job search permits

The majority of third-country nationals coming to the EU for employment purposes, arrive without a contract or job offer. They may have used other channels, such as family reunification, to enter the EU, or were irregular migrants.[1] Job-search permits could form an important port of alternative admission policies, especially considering the difficulty of obtaining a job while still residing abroad.

One of the new features of the recast Students and Researchers Directive is the provision of such 'job-search permits' for students and researchers after graduating or completing their research in one of the Member States.[2] This provision was included to increase the retention of students in the EU. Following the Directive, a job-search permit should have a minimum duration of nine months. Member States can limit eligibility to third-country nationals having a certain level of qualifications.

In 2017, the European Migration Network reported on the availability of job-search permits in the EU.[3] Fourteen Member States had implemented job-search programmes.[4] The maximum duration of stay varied between thirty days (Sweden) and eighteen months (Germany), with most Member States offering permits of up to one year. In some Member States, job-search permits were available with no minimum requirement regarding qualifications, while others required a university-level degree.

[1] OECD and European Union, Recruiting Immigrant Workers: Europe 2016, Paris: OECD Publishing, 2016, p. 63.
[2] Art. 25, Students and Researchers Directive.
[3] European Migration Network, 'Retaining third-country national students in the European Union EMN', EMN Inform, 20 September 2017, p. 10.
[4] Austria, Germany, Estonia, Finland, France, Ireland, Lithuania, Luxembourg, Latvia, the Netherlands, Portugal, Sweden, Slovakia and the United Kingdom.

[376] Ibid., Art. 26.
[377] Ibid., Chapter VI.

6.5 The Blue Card Directive

6.5.1 Context and aim

The Blue Card Directive (Directive 2009/50/EC) was proposed with the aim of creating 'a common fast-track and flexible procedure for the admission of highly qualified third-country immigrants, as well as attractive residence conditions for them and their family members, including certain facilitations for those who would wish to move to a second Member State for highly qualified employment.'[378] The need to create a common admission system for highly qualified workers was illustrated by the fact that the EU was 'the main destination for unskilled to medium-skilled workers from the Maghreb (87% of such immigrants), while 54% of the highly qualified immigrants from these same countries reside in the USA and Canada'.[379] In that context, the Directive aims to 'facilitate the admission of highly qualified workers and their families by establishing a fast-track admission procedure and by granting them equal social and economic rights as nationals of the host member State in a number of areas.'[380]

The Directive sets the conditions of entry and residence for third-country nationals for the purpose of carrying out highly-qualified employment, and creates a special permit for them: the Blue Card. It applies relatively strict admission criteria in terms of the level of qualification required for the position, and its salary. On the other hand, it recognises several benefits such as possibilities for family reunification and visiting or moving to other Member States (intra-EU mobility), a maximum duration of stay of four years, and possibilities for renewing the Blue Card.

6.5.2 Scope

The provisions of the Blue Card Directive apply to third-country nationals who apply to enter one of the EU's Member States in order to carry out 'highly qualified employment'. This type of work is defined as employment of a person who is protected as an employee under national employment law 'and/or in accordance with national practice' in the Member State concerned; carries out work for or under the direction of someone else; is paid; and 'has the required adequate and specific competence'. This competence needs to be proven by 'higher professional qualifications', i.e. higher education of at least three years received at a recognised institute and attested by a diploma or certificate. Alternatively, a minimum of five years professional experience at a higher education level may suffice.[381]

Several categories of third-country nationals are excluded from the Directive's scope, such as family members of EU citizens; long-term residents; beneficiaries of international protection; and those workers that are already covered by other directives, e.g. seasonal workers or researchers.[382] Moreover, Member States are not restricted to the issue of Blue Cards for highly qualified employment; they may also opt for other residence permits under national legislation. However, those permits 'shall not confer the right of residence in other Member

[378] European Commission, Proposal for a Council Directive on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment, COM(2007) 637 final, Brussels, 23 October 2007, p. 2.
[379] Ibid., p. 3.
[380] Preamble, para. 7.
[381] Ibid., Art. 2.
[382] Ibid., Art. 3(2).

States', as is the case with the Blue Card Directive.[383] Lastly, the Directive is without prejudice to more favourable provisions under EU law or under agreements between Member States and third countries,[384] and does not affect the competence of Member States to determine the volumes of admission of labour migrants.[385]

6.5.3 Admission criteria and procedures

In order to obtain a Blue Card, applicants should already have a valid work contract or a 'binding job offer' for highly qualified employment in the Member State concerned, for at least one year.[386] The employment should offer at least 1,5 times the average gross annual salary of that Member State, but the exact threshold is determined through national legislation.[387] In certain professions that have a high need for third-country national workers, Member States may reduce the threshold to 1,2 times the average salary, though this needs to be communicated to the Commission.[388]

The third-country national should furthermore show proof of having the higher professional qualifications that are required for the position, as well as evidence of having (applied for) sickness insurance. [389] If the job position concerns a regulated profession, additional requirements may apply.

Member States decide whether the application should be submitted by the prospective workers themselves, or by the employer.[390] If fees are required for submitting the application, they may not be 'disproportionate or excessive'.[391] The third-country national should await the decision from abroad, unless he is already residing in the Member State on a valid residence permit or long-stay visa, or if national legislation states otherwise.[392] A decision should be taken within 90 days after the application has been submitted.[393]

[383] Ibid., Art. 3(4).
[384] Ibid., Art. 4.
[385] Ibid., Art. 6.
[386] Ibid., Art. 5(1)(a).
[387] Ibid., Art. 5(3).
[388] Ibid., Art. 5(5).
[389] Ibid., Art. 5(1)(c) and (e).
[390] Ibid., Art. 10(1).
[391] Ibid., Art. 19(1).
[392] Ibid., Art. 10(2) and (3).
[393] Ibid., Art. 11(1).

Salary thresholds, fees, and standard validity

In order to fall within the scope of the Blue Card Directive, applicants are required to earn an annual salary representing at least 1.5 the gross national wage, with the exact threshold being determined by the Member States. As a result, the wage needed for a Blue Card varies greatly between Member States, ranging from 8 725 euros (Bulgaria, 2015) to 73 998 euros (Luxembourg, 2018).[1] The same is true for the standard validity, which may be between one and four years. Application fees are not specified in the Directive and as a result vary as well, although they have to be proportional to the actual services provided as stated in the Single Permit Directive.[2]

[1] Martina Baumann et al., 'Highly Skilled Labour Migration in Europe', ifo DICE report 1/2018, *https://www.ifo.de/DocDL/dice-report-2018-1-burmann-et-al.pdf*, March 2018, pp. 42-52, p. 45.
[2] Art. 10, Single Permit Directive.

TABLE: Blue Card standards by Member State

Issuing Member State	Standard validity (months)	Fees (EUR)	Salary threshold (EUR)
Greece	24	300	30 675
Netherlands	48	881	64 385
Poland	24	111	15 446
Spain	12	418	33 908

Source: European Commission, 'EU Immigration Portal. Blue Card', *https://ec.europa.eu/immigration/blue-card_en,* accessed July 2019.

6.5.4 Decisions

Fulfilment of the criteria for admission[394] does not automatically entitle the applicant to a Blue Card, as the grounds for refusal are quite broad.[395] As mentioned, Member States have the right to determine the 'volumes of admission' of third-country nationals seeking employment, and may thus reject applications if they are considered excessive.[396] Applications are also rejected if the person is considered a threat to public policy, security or health.[397] Furthermore, when examining the application or any renewals during the first two years of employment, Member States are free to 'examine the situation of their labour market' and accordingly decide that a vacancy should be subject to national procedures. They may also verify whether it could be filled by a national or an EU citizen, or by a third-country national already residing in that Member State.[398] Furthermore, applications may be rejected in order to prevent *brain drain*, i.e. 'to ensure ethical recruitment in sectors suffering from a lack of qualified workers in the countries of origin'.[399] Lastly, if the applicant has been

[394] Ibid., Art. 5.
[395] Ibid., Art. 8.
[396] Ibid., Art. 8 (3).
[397] Ibid., Art. 5(1)(f).
[398] Ibid., Art. 8(2).
[399] Ibid., Art. 8(4).

sanctioned for undeclared work or illegal employment in the Member State concerned, the Blue Card application may be rejected as well.[400]

Persons who find their application rejected should be notified of this in writing, and can challenge the rejection in accordance with the national legislation of the Member State.[401] If a positive decision is taken however, the applicant is issued with a Blue Card, and should be granted 'every facility to obtain the requisite visas'.[402]

6.5.5 Rights conferred by the Blue Card

The standard validity of the Blue Card is determined by the Member States, but must be between one and four years.[403] A valid Blue Card entitles the holder to enter, re-enter and stay in the Member State concerned.[404] The holder is also entitled to the rights that are described in Title IV of the Directive, concerning labour market access (art. 12), temporary unemployment (art. 13), equal treatment (art. 14), family reunification (art. 15), and obtaining the status of long-term resident (art. 16 and 17).

Regarding labour market rights, in their first two years of residence as Blue Card holders, third-country nationals are only allowed to carry out employment in line with the conditions for admission.[405] During this period, the holder can only switch employer after receiving authorisation from the competent authorities of the Member State.[406] Even then, certain restrictions on access to employment may remain.[407] If the holder becomes unemployed, he is allowed to seek other employment, but the restrictions on labour market access may apply.[408] Unemployment can only be used as ground to withdraw a Blue Card once it lasts longer than three months, or if it occurs multiple times during the Blue Card's period of validity.[409]

Blue Card holders have the right to family reunification under more favourable provisions than those laid down in the Family Reunification Directive (2003/86/EC).[410] No minimum period of residence applies to Blue Card holders wanting to sponsor an application, and whether they have reasonable prospects of obtaining the right to permanent residence is irrelevant.[411] Integration requirements for the family members may only be enforced after a positive decision has been taken.[412] Family members should receive their residence permit within six months of the date of application, as opposed to the nine months as determined in the Family Reunification Directive.[413] And lastly, they may accumulate periods of residence in

[400] Ibid., Art. 8(5).
[401] Ibid., Art. 11(3).
[402] Ibid., Art. 7(1), para. 2.
[403] Ibid., Art. 7(2).
[404] Ibid., Art. 7(4)(a).
[405] Ibid., Art. 12(1).
[406] Ibid., Art. 12(2).
[407] Ibid., Art. 12(3) and (4).
[408] Ibid., Art. 12(2); Art. 13(2).
[409] Ibid., Art. 13(1).
[410] Ibid., Art. 15(1),.
[411] Ibid., Art. 15(2).
[412] Ibid., Art. 15(3),.
[413] Ibid., Art. 15(4); Art. 5(4) para. 1, Family Reunification Directive.

different EU Member States in order to qualify for an autonomous residence permit or for the status of long-term resident.[414]

Lastly, one of the elements that sets the Blue Card apart from other residence permits such as the Seasonal Workers permit or national work permits, is the right to reside in EU Member States other than the one issuing the initial Blue Card. The Blue Card holder may move to another Member State to take up employment, together with his family members.[415] However, this is only authorised after having residing in the first Member State for at least eighteen months.[416] Within one month of entering the second Member State, the third-country national has to apply for a new Blue Card, and show fulfilment of the admission conditions.[417] The application may again be refused based on the 'volumes of admission' rule.[418]

6.5.6 Criticism and REFIT assessment

The Blue Card Directive has received extensive criticism for being ineffective. One of the weak points commonly identified is that 'the directive leaves significant room for manoeuvre in terms of implementation with derogations that hinder harmonization and allow Member States to run the EU scheme parallel to national admission systems for the highly qualified.'[419] Another weaknesses is considered to be the high salary threshold, which is thought exclude small companies from using this admission route, and which are based on a national average salary rather than the specific salary of the sector or occupation concerned. Furthermore, it has been argued that the maximum duration of the Blue Card should be expanded in order to respond to long-term employment needs, and that it should provide greater access to intra-EU mobility. And lastly, the definition of 'highly qualified' is considered too rigid and not in line with the actual positions that are hard to fill.[420]

On the other hand, it is noted that the Blue Card Directive obligates Member States to fit their national legislation in the EU framework, in doing so granting the Commission 'the power to oversee and coordinate Member States' approaches to aspects of their approach to labour migration'.[421] It may thus 'represent the thin edge of a harmonization wedge, with further measures gradually rolled out over the coming decade'.[422]This initially appeared to be the case when in 2014 a review of the Blue Card Directive was initiated by the Commission. A new legislative proposal was indeed submitted in 2016, but failed to gain support from the Council and the review process is now considered 'on hold'.[423]

[414] Ibid., Art. 15(7) and (8).
[415] Art. 18 and 19.
[416] Art. 18(1).
[417] Art. 18(2).
[418] Art. 18(7).
[419] Andrew Geddes and A. Niemann, 'Introduction: conceptualising EU policy on labour migration', *Cambridge Review of International Affairs,* No. 4 (2015), pp. 523-535, citing Caviedes 2010.
[420] Sona Kalantaryan and Ivan Martín, 'Reforming the EU Blue Card as a Labour Migration Policy Tool?', MPC Policy Brief 2015/08, 2015.
[421] Geddes and Niemann 2015, p. 531.
[422] Christina Boswell and Andrew Geddes, *Migration and Mobility in the European Union,* Basingstoke: Palgrave-Macmillan, 2011, as cited by Geddes and Niemann, 2015, p. 351.
[423] Council of the European Union, 'Legislative Train Schedule. Towards a new policy on migration. JD – Revision of the Blue Card Directive', *https://www.consilium.europa.eu/en/press/press-releases/2017/07/26/blue-card/*, accessed July 2019.

The proposal aimed to remove 'intrinsic weaknesses such as restrictive admission conditions and very limited facilitation for intra-EU mobility.'[424] In short, it would open up the scope to beneficiaries of international protection, and make the admission requirements more flexible, while still being targeted only at highly-qualified workers. It would also increase the rights recognised in the Directive, including for intra-EU mobility. Furthermore, Member States would be obligated to discontinue "parallel national schemes", admission programmes that overlap with the scope of the Blue Card Directive but that do not lead to a Blue Card.[425] Lastly, it would introduce simplified procedures for 'recognised employers' which would speed up the application process.[426]

Parallel national schemes

A common point of critique regarding the Blue Card Directive is that its application is undermined due to the possibility of Member States implementing parallel national schemes, admitting highly-qualified workers under different rules than those specified in the Directive.[1] Indeed, all EU Member States have rules in place for the admission of highly skilled workers, which have been largely unaffected by the Blue Card Directive.[2] The following table compares the 2017 statistics on residence permits for highly skilled workers (excluding Blue Card holders) and the admission of Blue Card holders.

[1] Martina Belmonte, 'The EU Blue Card Directive: Is there a need for a more comprehensive approach?', Policy Brief, Institute for European Studies, 2015.
[2] OECD and European Union, *Recruiting Immigrant Workers: Europe 2016*, Paris: OECD Publishing, 2016, p. 66.

TABLE: National high-skilled employment and Blue Card regimes, 2017

Issuing Member State	Highly-skilled workers	Blue Cards
EU28	39 700	24 310
Greece	7	0
The Netherlands	13 432	58
Poland	Not available	471
Spain	3 780	28

Source: Eurostat, 'First permits issued for remunerated activities by reason, length of validity and citizenship, [migr_resocc], last update 22 July 2019'; Idem, 'EU Blue Cards by type of decision, occupation and citizenship [migr_resbc1], last update 9 July 2019'.

[424] European Commission, Proposal for a Directive of the European Parliament and of the Council on the conditions of entry and residence of third-country nationals for the purposes of highly skilled employment, *COM(2016) 378 final,* Brussels, 7 June 2016, p. 2.
[425] Ibid., p. 10.
[426] Council of the European Union, 'Legal migration: Council agrees mandate on new rules to make the EU attractive for highly qualified workers,' press release, 26 July 2017, *https://www.consilium.europa.eu/en/press/press-releases/2017/07/26/blue-card/,* accessed July 2019.

6.6 Seasonal Workers Directive

6.6.1 Context and aim

The Seasonal Workers Directive (Directive 2014/36/EU) was the first EU instrument that touched on the conditions for admission of seasonal workers since the adoption in 1994 of a Council Resolution 'on limitations on admission for third-country nationals to the territory of the Member States for employment'[427] The Directive was proposed to meet the 'structural need for seasonal work for which labour from within the EU is expected to become less and less available', as well as to fight 'exploitation and sub-standard working conditions' and to prevent seasonal work from being carried out by irregular migrants.[428] As such, it is targeted at 'low-skilled and low-qualified workers', especially in sectors such as agriculture, horticulture and tourism.

The Directive provides the definition of 'seasonal work' and sets the conditions of entry and stay for third-country nationals who come to carry out seasonal work in one of the Member States. It furthermore defines their rights, in particular socio-economic rights and based on the principle of equal treatment. The Seasonal Workers Directive can be considered the opposite of the Blue Card Directive, as it targets low-skilled and low-wage employment, sets a short duration of stay – at maximum nine months – and does not recognise any right to family reunification or intra-EU mobility. It is however aimed at preventing exploitation and abuse of seasonal workers by their employers, a specific goal that is not featured as explicitly in the other labour immigration Directives.

6.6.2 Scope

The Seasonal Workers Directive only applies to third-country nationals who reside outside of the EU and who want to carry out seasonal work in one of the Member States, and to current seasonal workers who want to extend their stay.[429] The Directive requires applicants to retain their principal place of residence in the third country, while working on one or more fixed-term contracts in an EU Member State. Their work has to be 'an activity dependent on the seasons'[430] during which 'required labour levels are significantly above those necessary for usually ongoing operations'. [431] The Directive includes two sets of rules, distinguishing between third-country nationals who will carry out seasonal work for less than three months, and seasonal workers whose labour activity exceeds that period.[432]

[427] Council of the European Union, Council Resolution of 20 June 1994 on limitations on admission of third-country nationals to the territory of the Member States for employment, *OJ C 274, 19.9.1996*, p. 3–6.
[428] European Commission, Proposal for a Directive of the European Parliament and of the Council on the conditions of entry and residence of third-country nationals for the purposes of seasonal employment, *COM(2010) 379 final,* Brussels, 13 July 2010, p. 2-3.
[429] Art. 2(1); Art. 15.
[430] Ibid., Art. 3(b).
[431] Ibid., Art. 3(c).
[432] Ibid., Art. 5 and 6.

6.6.3 Admission criteria and procedures

Member States may decide whether the application should be filed by the seasonal worker or by their employer in the Member State.[433]Applicants are required to submit a valid work contract; evidence of coverage by sickness insurance; and evidence that the seasonal worker will have adequate accommodation, possibly provided by the employer.[434] Member States are furthermore required to verify that the seasonal worker will not have to rely on social assistance, but it is not specified what this verification entails.[435]

If seasonal workers intend to stay longer than 90 days, they should hold a valid travel document. They should not present a threat to public policy, public security or public health, nor should they present a risk of irregular migration or overstaying the visa.[436] These requirements are not explicitly listed for applicants planning to stay less than three months, as these are covered by the Visa Code.[437]

Applications may be rejected for the same reasons as specified in the Blue Card Directive, with the explicit addition that Member States should reject applications if the employer has been sanctioned for undeclared work, illegal employment, or the violation of obligations under the Seasonal Workers Directive; or when there is no actual economic activity taking place.[438] An application for seasonal work may furthermore be rejected if the third-country national concerned has previously violated the conditions of his stay as a seasonal worker,[439] or if the employer has recently abolished a full-time position with the purpose of hiring a seasonal worker instead.[440]

6.6.4 Decisions

Seasonal workers who will stay less than three month are issued a short-stay visa and/or a work permit with an indication that it is for the purpose of seasonal work.[441] National authorities may set the maximum duration of stay for seasonal workers between five and nine months within a twelve-month period.[442] Seasonal workers are required to leave the territory of the Member States after this period, although the Directive does not exclude the possibility of a subsequent residence permit to be issued for other reasons than seasonal work.[443] If their stay will exceed 90 days, seasonal workers are issued a D-type visa for the purpose of seasonal work and/or a seasonal worker permit.[444] Whatever document they receive, the seasonal worker will be authorised to enter and stay in the territory of the issuing Member State; have free access to its entire territory; and to exercise the work activity specified in the application.[445]

[433] Ibid., Art. 12(3).
[434] Ibid., Art. 5(1) and 6(1).
[435] Ibid., Art. 5(3) and 6(3).
[436] Ibid., Art. 6(4), (5) and (7).
[437] Ibid., Art. 8(6).
[438] Ibid., Art. 8(2).
[439] Ibid., Art. 8(4)(c).
[440] Ibid., Art. 8(4)(b).
[441] Ibid., Art. 12(1).
[442] Ibid., Art. 14.
[443] Ibid., Art. 14(1).
[444] Ibid., Art. 12(2).
[445] Ibid., Art. 22.

If seasonal workers comply with the conditions of their stay and return to their country of residence afterwards, Member States are obligated to facilitate their re-entry (if so desired) in subsequent years.[446] It is specified what such 'facilitation' may look like: reducing the number of documents that should be submitted with the application; issuing several permits for seasonal work in advance; providing applicants with an accelerated procedure and giving them priority with respect to other applicants.[447]

6.6.5 Rights conferred by the Seasonal Workers Permit

As authorisations for seasonal work are only valid for at most nine months, the Directive does not contain rules regarding long-term residence, nor does it provide the option of family reunification. Instead, the rights recognised in the Seasonal Workers Directive are limited to recognising the principle of equal treatment with nationals of the Member States regarding certain socio-economic topics that largely overlap with those listed in the Blue Card Directive, although the Seasonal Workers Directive grants Member States a larger margin of discretion regarding the restriction of that right.[448]

Lastly, the Directive aims to prevent exploitation and abuse at the workplace and contains several provisions to that end. First of all, seasonal workers have the right to switch employers and/or extend their stay at least once, without exceeding the maximum duration of nine months. However, rules regarding further extensions or contract changes are determined at the national level.[449] The Directive also places certain obligations on the employers, for example with regards to the accommodation of the seasonal workers[450], and obligates Member States to impose sanctions on employers who violate the rules set out in the Directive.[451] In order to prevent abuses and sanction infringements, Member States are required to provide for monitoring, assessment and inspections of the workplace and the worker's accommodation,[452] as well as install complaint mechanisms through which seasonal workers may express their grievance.[453]

6.6.6 Criticism and REFIT assessment

The Seasonal Workers Directive has been included in the REFIT check on the EU's 'legal migration' Directives, though the extent of the evaluation has been limited because of the recent date of adoption and limited experience with the Directive's implementation.[454] While the deadline for transposition of the Seasonal Workers Directive was 30 September 2016, twenty Member States had failed to implement the Directive or to communicate this to the Commission by that date, and were faced with infringement proceedings. As of 2019, all Member States except Belgium had transposed the Directive.[455]

[446] Ibid., Art. 16(1).
[447] Ibid., Art. 16(2).
[448] Compare Art. 23(2), Seasonal Workers Directive and Art. 14(2), Blue Card Directive.
[449] Art. 15, Seasonal Workers Directive.
[450] Ibid., Art. 20(2).
[451] Ibid., Art. 17(1).
[452] Ibid., Art. 24.
[453] Ibid., Art. 25.
[454] European Commission, Commission Staff Working Document, Fitness Check on EU Legislation on legal migration, SWD(2019) 1055 final, Brussels, 29 March 2019, p. 20.
[455] Ibid., p. 20.

Fudge and Herzfeld Olsson (2014) argue that the Seasonal Workers Directive meets the Commission's goal of harmonizing admission for seasonal workers, by creating common admission criteria and an exclusive admission route.[456] Indeed, in this entry regime Member States are prevented from applying parallel national schemes. However, they may 'adopt or retain more favourable provisions for third-country nationals'[457], thus allowing Member States to give priority to citizens of specific countries.[458] The authors also find that, despite weaknesses such as basing the migrant's residence permit on their contract with a specific employer, which can lead to abusive situations, the Directive follows a 'robust equal treatment approach'.[459]

Zoeteweij-Turhan (2017) agrees that that 'the introduction of the principle of equal treatment is a leap forward',[460] but is otherwise critical of the rights granted by the Directive, in part because of the large margin of discretion granted to the Member States. Moreover, the principle of equal treatment in itself is problematized in the context of hard-to-fill jobs because 'if there are no national workers with whom a comparison can be made, then what will be the practical content of the right to equal treatment of seasonal workers?'[461] Lastly, the author argues that the Directive's lack of provisions for family reunification could form an obstacle for female migrants in particular.[462]

[456] Fudge and Herzfeld Olsson, 2014, p. 463.
[457] Art. 4, Seasonal Workers Directive.
[458] Fudge and Herzfeld Olsson, 2014, p. 450.
[459] Ibid., 2014, p. 465.
[460] Margarite Helena Zoeteweij-Turhan, 'The Seasonal Workers Directive: '...but some are more equal than others',' *European Labour Law Journal,* no. (1) 2017, pp. 28-44, p. 44.
[461] Ibid.
[462] Ibid.

Seasonal workers in Poland

Between 2014 and 2017, the annual number of residence permits for work purposes issued by the Polish government has risen with more than 100 000 each year, from 206 279 (2014) to 596 916 (2017). The majority are seasonal workers, 525 385 in 2017.[1] Considering that the Directive was transposed only in 2017, it cannot be considered responsible for the large increase since 2012.[2]

Rather, the increase is generally attributed to an economic boom, paired with a rise of immigration from Poland's eastern neighbours, who are subject to a so-called 'simplified procedure.[3] This admission system took effect in 2006, allowing citizens of several neighbouring and the later Eastern Partnership countries – Armenia, Belarus, Georgia, Moldavia, Russia and Ukraine – to work for six months in a twelve-month period.[4]

Under the new rules following the transposition of the Seasonal Workers Directive, third-country nationals can work for up to nine months as seasonal workers in the agriculture, horticulture and tourism sectors. However, nationals of the countries listed above can receive an authorisation to stay as a seasonal worker without the need for a labour market test, and may work in any sector for up to six months in one year.[5] As such, the simplified procedure remains active, but is brought under the umbrella of the Seasonal Workers Directive. However, it should be noted that according to the Commission, it is unclear whether the permits currently reported by Polish authorities as seasonal workers permits adequately reflect the definition of seasonal work as determined in the Directive.[6]

[1] Eurostat, 'First permits by reason, length of validity and citizenship [migr_resfirst], last update 9 July 2019', accessed July 2019.
[2] European Commission, Fitness Check on EU Legislation on legal migration, *SWD(2019) 1055 final*, Annex. 9.1, Brussels, 29 March 2019, p. 369.
[3] Maciej Duszczyk and Kamil Matuszczyk, 'The Employment of Foreigners in Poland and the Labour Market Situation', *Central and Eastern European Migration Review',* No. 2 (2018), pp. 53-68.
[4] Ágnes Töttős, 'The Past, the Present and the Future of the Seasonal Workers Directive,' *Pécs Journal of International and European law,* (2014)*,* pp. 45-60, p. 57-58
[5] OECD, *International Migration Outlook 2018*, Paris: OECD Publishing, 2018; Min. Rodziny, Pracy i Polityki Społecznej, 'Rozporządzenie Ministra Rodziny, Pracy i Polityki Społecznej z dnia 8 grudnia 2017 r. w sprawie państw, do których obywateli stosuje się niektóre przepisy dotyczące zezwolenia na pracę sezonową oraz przepisy dotyczące oświadczenia o powierzeniu wykonywania pracy cudzoziemcowi', *Dziennik Ustaw, 2017/2349,* 15 December 2017.
[6] European Commission, 2019, p. 65.

6.7 National frameworks on labour migration

As mentioned, the labour immigration Directives do not 'affect the right of a Member State to determine, in accordance with Article 79(5) TFEU, the volumes of admission' of third-country nationals seeking entry for employment purposes.[463] This right is commonly interpreted as 'allowing Member States to establish national quota and to be able – on that basis –to refuse admission even if all other requirements of the Directive are met.'[464] In addition, the Directives allow Member States to study the situation of their labour markets and to carry out 'labour market tests' before granting work permits to third-country nationals. These elements significantly limit the admission framework of the EU, as it is clear that Member States remain control over the decision who may enter for work purposes. Moreover, third-country nationals who are not directly covered by one of the Directives are subject to national rules.

National legal frameworks governing labour migration are first and foremost informed by national labour regulations. They determine which job descriptions, work conditions, salaries and recruitment practices are permitted. Secondly, Member States may decide on numerical limits, i.e. the 'volumes of admission' competence emphasised in every EU Directive on labour immigration. Hiring practices, including the admission of third-country nationals, can be eased if an occupation is listed as a hard-to-fill position. The criteria used for compiling such lists are not regulated on the EU-level. Lastly, the most common instrument used to determine whether a third-country national may be hired for a position, is the 'labour market test'. In some Member States, labour market tests may be considered fulfilled if a certain amount of time has elapsed since a vacancy was published, without having found a suitable national candidate. Others put the burden of proof on the employers, who have to justify why they prefer to hire a third-country national over other available workers.[465]

Most Member States reserve an important role for trade unions and employers' associations in determining labour shortages or shaping labour market tests, as well as monitoring these procedures. Other important stakeholders are ministries and state agencies, other multi-partite organisations and institutions, and labour market and migration experts. The involvement of stakeholders sometimes occurs on an ad-hoc basis, while some Member States have created consultative structures for this purpose.[466]

[463] See for example art. 6, Students and Researchers Directive.
[464] European Commission, Commission Staff Working Document, Fitness Check on EU Legislation on legal migration, SWD(2019) 1055 final, Brussels, 29 March 2019, p. 54.
[465] OECD and European Union, *Recruiting Immigrant Workers: Europe 2016*, Paris: OECD Publishing, 2016, p. 62-66.
[466] European Migration Network, 'Determining labour shortages and the need for labour migration from third countries in the EU. Synthesis Report for the EMN Focussed Study 2015', 2015, *https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/networks/european_migration_network/reports/docs/emn-studies/emn_labour_shortages_synthesis__final.pdf*.

6.8 Conclusion

The adoption of the Single Permit Directive and the four labour immigration Directives for specific categories of third-country nationals workers in the period 2009-2016 is an important step towards the coordination of national employment policies in the EU. However, they cannot be regarded as creating a general framework for the admission of labour migrants. This is due in part to the extensive discretionary powers of the member states, which can refuse applications based on national quota. A multifaceted legal framework is furthermore maintained because of salary thresholds that differ between Member States; the use of national priority reviews and labour market tests; and the possibility of continuing parallel schemes under national rules. These policies are shaped by national economic situations, but are also negotiated through employment ministries and agencies, and any stakeholders that they may consult.

A second point to note is the relative absence of legal ways of entry for low-skilled or low-wage labour migrants. For low-skilled migrants who are not seasonal workers, the possibility to take up work in an EU Member State is determined exclusively at the national level. Furthermore, the difference in rights acknowledged by the Blue Card Directive and Seasonal Workers Directive – each at different ends of the salary and skill spectrum – exemplify which workers are 'wanted' and which are not. Nonetheless, the introduction of the right to equal treatment, established in the Single Permit Directive and the accompanying Directives, has been an important contribution to labour immigration policy in the EU.

7. General conclusion

The aim of this report has been to map the relevant EU legislation governing the entry of third-country nationals to the territory of EU Member States, and to identify which institutions are competent to shape entry governance in terms of legislation and in practice.

Governance of entry in the EU is regulated by a complex framework of multiple entry regimes, comprising rules set out at the EU-level and at the national level, as well as international legal principles. This framework is simultaneously decentralised, as each Member State sets their own rules on the admission of third-country nationals for residence, long stays and employment purposes, and centralised, through the harmonisation of short-stay visa conditions and controls at the external borders in directly-binding Regulations, as well as the adoption of minimum standards for regular migration. The structure of this framework is determined by the division of competences in the TFEU, which separates policies on checks on the external borders and the common policy on short-stay visas (Article 77 TFEU) from the development of a common immigration policy (Article 79 TFEU). Member States are always competent to refuse or authorise entry when detecting a threat to public security, policy or health; and to determine the volumes of admission of third-country nationals to their labour markets.

Thus, while we see a high degree of harmonisation in policies on entry checks at the external borders and the issue of short-stay visas, there is a more loose EU legislative framework on immigration policy. The latter grants Member States a high degree of freedom in transposing the rules, within the limits set by EU Directives and international law. This framework has significant gaps, in particular as it mostly excludes low-skilled labour migrants as well as members of the extended family who wish to reunite with persons residing in the EU, which leads us to question whether this framework can be considered realistic in terms of the actual migration flows to the EU. Moreover, while the protection of migrant rights during their stay in the Member States has been emphasised in the Directives on family and labour rights, the idea that the pathways themselves should be 'safe', as called for in the NYD and 2030 Agenda, is not explored in the existing legal framework on regular immigration to the EU.

The SBC and the Visa Code on the other hand constitute a harmonisation of EU rules, though national authorities continue to hold certain discretionary powers, e.g. in determining the required resources for short-stay visitors, and the operational discretion of central authorities, border guards, consular staff and external service providers. This margin of manoeuvre is utilised by Member States to facilitate access to visas to certain groups of third-country nationals whose entry is deemed desirable. Further research should investigate the extent to which this margin of appreciation is used to decrease success rates for third-country nationals seeking entry, and whether the increased role of large-scale information systems in entry governance will lead to a further harmonisation of Member States' practices in this area.

An important development in the EU's entry governance is the introduction of new layers of assessment for persons crossing the external border, by means of new large-scale information systems and the interoperability thereof, including for third-country nationals who are not subject to a visa requirement. This new assessment procedure consists of automatic checks against statistical indicators, and includes cross-checking of data stored in different EU databases that had previously been separated. Moreover, this development increasingly establishes the role of EU border checks and short-stay visa issue as 'migration management' tools, both because of their heightened attention to reducing the 'risk' of irregular migration, and by their inclusion of third-country nationals holding a long-stay visa in accordance with national rules.

Thus, while Member States have a margin of manoeuvre in the whole legal system on entry of third-country nationals, there is a stark contrast between measures adopted on the basis of Article 77 TFEU, which enforce migration management, and the more limited and less binding framework on regular migration pathways adopted in accordance with Article 79 TFEU. Moreover, the design of legal pathways continues to be based on national interests rather than EU needs, and leaves the notion of 'safe' pathways out of consideration. Criticism of this framework has highlighted that the rules are not efficient. And lastly, while the SBC and Visa Code may have harmonised legislation, national authorities continue to hold operational discretion to national authorities. Further research within WP1 will evaluate the divergence between the legal frameworks on entry and entry governance practices.

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