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Presentation by Bjarney Friðriksdóttir

Status, access and rights as mechanisms of inclusion and exclusion of third-country nationals in European Union law on labour migration

Introduction

From 2009-2014, the European Union (EU) adopted five Directives addressing labour migration of third-country nationals under its sectoral policy on management of labour migration into the EU. The five Directives concern highly qualified workers[1], irregularly resident migrants in employment[2], seasonal workers[3], intra-corporate transferees[4] and a general framework for third-country nationals working in an EU Member State[5]. In these five Directives which comprise the main body of EU law on labour migration, access to territory, access to the labour market, the right to equal treatment and the right to family reunification is granted to third-country nationals to a different extent based on the group a migrant worker is defined as belonging to.

In this presentation I will outline how the statuses, access and rights granted to migrants on the basis of this 'grouping' into types work as mechanisms of inclusion and exclusion of third-country nationals who migrate to the EU for labour purposes. I will start with a very short discussion on why the sectoral approach was adopted by the EU, secondly address how access to territory and the labour market, the right to equal treatment and the right to family reunification are constructed in each of the Directives. Finally I will discuss EU law on labour migration in the context of the principle of non-discrimination provided for by international and European human rights law and international labour standards in order to divulge the effect of the various statuses granted to the different groups of third-country nationals under the EU's sectoral approach to labour migration, on the right to equal treatment and the right to family reunification.

The sectoral approach in EU policy on labour migration – a brief account

In 1999 after the coming into force of the Amsterdam Treaty and the EU gaining competences on legislating on immigration and asylum, the European Commission initiated policy discussions to identify the common priorities of EU Member States in these fields. In the following years

[1]Directive 2009/50/EC, on the conditions for entry and residence of third-country nationals for the purposes of highly qualified employment.
[2]Directive 2009/52/EC providing for minimum standards and measures against employers of illegally staying third-country nationals.
[3]Directive 2014/36/EU on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers.
[4]Directive 2014/66/EU on the conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer.
[5]Directive 2011/98/EU on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State.

several measures were adopted on immigration and asylum[6] but although the policy plans for adopting measures on immigration included instruments on labour migration only two Directives addressing students and researchers were adopted.[7] An agreement was not reached by the Council to consider in detail a proposal from the Commission introduced in 2001 for a horizontal Directive addressing the admission of labour migrants. As a result of that, discussions were conducted from 2001 to 2005 between the Commission, the Member States and stakeholders on the appropriate policy approach to address common EU measures on labour migration. The outcome of these discussions was a Policy plan on legal migration introduced in 2005. It provided for the blue print for a sectoral approach to labour migration which was the only approach the Council was prepared to follow. The reluctance of the Member States to agree on the horizontal approach was perhaps best explained by Bertozzi in that they did not agree on a 'one size fits all' approach. Most likely, as Wiesbrock argues, because the "comprehensive approach and the absence of a distinction between highly and semi- or low-skilled migrants," of the proposed Directive differed "from the labour market oriented labour migration policies of the Member States."[8]

I include in this discussion the Employers Sanctions Directive while it is the only EU instrument that directly addressed irregularly present migrants in employment. At the time that the policy for common EU measures on labour migration was being developed the Commission estimated that the number of this group of migrants within the EU was between 4.5 - 9 million persons and although the EU always addressed irregular labour migration separately from regular labour migration in its policy dialogues, addressing "illegal migration" was considered as covering the "missing link" of a comprehensive immigration and asylum policy.[9]

Objectives of the Directives

To contextualise the way access to territory and the labour market and the right to equal treatment and family reunification are constructed in the five Directives it is important to briefly address the different objectives set forth for each of the Directives. Firstly, the situation the Blue Card Directive addressing highly qualified workers, was introduced to address was an identified 'needs' scenario of EU labour markets with regard to economic immigration in general and in particular the finding that the EU as a whole seemed "not to be considered attractive by highly qualified professionals in a context of very high international competition."[10] EU enterprises were identified as "confronted with increasing vacancy rates, especially for highly skilled workers" where patterns of employment showed greater employment growth in high education

[6]Those include Directive 2003/86/EC on the right to family reunification, Directive 2003/109/EC concerning the status of third-country nationals who are long-term residents, Directive 2003/9/EC laying down minimum standards for the reception of asylum seekers[6] and Directive 2004/83/EC on minimum standards for the qualification and status of third-country nationals as stateless persons, as refugees or as persons who otherwise need international protection.[6]

[7]Those were Directive 2004/114/EC on the conditions of admission of third-country nationals for the purposes of studies, pupil exchange, unremunerated training or voluntary service and Directive 2005/71/EC on a specific procedure for admitting third-country national researchers. On 17 November 2015, a political agreement was reached on a Directive amending and recasting these two Directives with a Directive on the conditions of entry and residence of third-country nationals for purposes of research, studies, pupil exchange, remunerated and unremunerated training, voluntary services and au pairing. At the time of writing this its adoption is awaited.

[8]Wiesbrock, A. 2010. *Legal Migration to the European Union*. Leiden Boston: Martinus Nijhoff Publishers, 146.

[9]Communication from the Commission to the Council and the European Parliament, On a Common Policy on Illegal Immigration, COM(2001) 672, 15 November 2001, 3.

[10]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, 23 October 2007, 3.

sectors for which attraction of labour migrants was deemed as important to 'compensate' demographic trends within the EU.[11] In relation to that, "the attraction and better utilization of highly qualified resources from third countries will remain a crucial challenge for the EU development perspective."[12] To achieve the overall objectives identified for the Directive, the Commission proposed to "create a common fast-track and flexible procedures 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."[13]

As regards the Employers Sanctions Directive, its objective is to sanction employers of irregularly resident third-country nationals who work, in order to tackle irregular migration into the EU. This approach was chosen while the availability of work is considered a major pull factor and the main reason for irregular entry. Directly related to that assumption, the aim of the Directive is firstly to reduce the pull factor "by targeting the employment of third-country nationals who are illegally staying in the EU." Secondly, by building on existing measures in the Member States, "to ensure that all Member States introduce similar penalties for employers of such third-country nationals and enforce them effectively."[14] Referring to the fact that the subject matter of the proposal is linked to labour and social policy, the Commission provided a clarification in the explanatory memorandum to the proposal, that it "is concerned with immigration policy, not with labour or social policy." Additionally, that according to the proposal, "it is the employer who will be sanctioned, not the illegally employed third-country national," however, the Returns Directive would, as a general rule, "require Member States to issue a return decision to third-country nationals staying illegally."[15] The overall objective of the proposal is stated to be "to contribute to reducing illegal immigration," and the specific objectives are "to reduce employment of illegally staying third-country nationals, to create a level playing field for EU employers and to contribute to reduced exploitation of illegally staying third-country nationals.[16]

The Single Permit Directive was introduced on the basis of the Commission's Policy Plan on Legal Migration, as "a general directive on the rights of third-country workers" that is, a horizontal legislation to cover rights of third-country workers at the EU level. The purpose of it is "to serve as framework for the specific directives" that is the Blue Card, the Seasonal Workers and the Intra-Corporate Transfer Directives, while "no horizontal legislation" would be introduced to cover all groups of labour migrants.[17] In the Commission Staff Working Document

[11]Commission Staff Working Document, Accompanying document to the Proposal for a Council Directive on the conditions for entry and residence of third-country nationals for the purposes of highly qualified employment, Summary of the Impact Assessment, SEC(2007)1382, 23 October 2007, 2 and 3.
[12]Ibid.
[13]Ibid.
[14]Proposal for a Directive of the European Parliament and of the Council providing for sanctions against employers of illegally staying third-country nationals, COM(2007) 249, 16 May 2007, 2.
[15]Ibid., 2.
[16]Commission Staff Working Document, Accompanying document to the Proposal for a Directive of the European Parliament and of the Council providing for sanctions against employers of illegally staying third-country nationals, Summary of the impact assessment, SEC(2007) 604, 15 May 2007, 5.
[17]Commission Staff Working Document accompanying document to the Proposal for a Council Directive on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and a common set of rights for third-country workers legally residing in a Member State, Summary of the Impact Assessment, SEC(2007) 1393, 23 October 2007, 2.

that accompanied the proposal for the Directive, it was provided that the main rationale for it was that in the absence of a general horizontal Union legislation addressing the rights of third country workers, their "rights may vary significantly depending on their nationality and on the Member State in which they stay." This situation was considered to create "legal uncertainty for third-country workers" and put them on an unequal footing with workers whose rights have been explicitly defined.[18]

In the explanatory memorandum to the proposal for the seasonal workers Directive, it is affirmed that the proposal "aims to contribute to the implementation of the EU 2020 Strategy and to effective management of migration flows for the specific category of seasonal temporary migration," that it sets out "fair and transparent rules for entry and residence while, at the same time, it provides for incentives and safeguards to prevent a temporary stay from becoming permanent."[19] From the impact assessment accompanying the proposal for the Directive it emerges that the situation the Directive is put forth to address is firstly, a structural need within EU economies "for seasonal work for which labour from within the EU is expected to become less and less available."[20] Secondly, exploitation and sub-standard working conditions which may threaten the health and safety of seasonal workers, and lastly the "sectors of the economy that are characterised by a strong presence of seasonal workers" that have repeatedly been "identified as the sectors most prone to work undertaken by third-country nationals who are staying illegally."[21] Additionally the need for introducing the Directive was based on that EU Member States had 'rather divergent' rules concerning seasonal work, both in terms of admission schemes and "definitions of seasonal work, criteria for and duration and contents of the work permit, as well as rights granted to seasonal workers."[22] These differences among the Member States had been found to lead to "competition among the Member States for the most attractive conditions," which were seen to "hinder efficient allocation of seasonal workers" as they "may prefer to go where they are easily admitted or are more likely to remain both in a legal (by renewing their permit) or illegal (due to overstaying) situation, instead of where their work is most needed."[23] As regards irregular migration in particular, the Directive was seen as filling a gap in the "absence of meaningful opportunities in the EU for legal migration in the non- and low-skilled sectors," where pressures from irregular migration were deemed to be high.[24] The Directive was set forth to address this by "setting up swift and flexible admission procedures and securing a legal status for seasonal workers" to act as a safeguard against exploitation and also protect EU citizens who are seasonal workers from unfair competition.[25]

The impact assessment accompanying the proposal for the intra-corporate transfer Directive provided that the relevance for the EU to adopt a legislative instrument on intra-corporate transfer was related to the EU's economic competitiveness and considered a tool to "boost the

[18]Ibid., 2-3.
[19]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 purpose of seasonal employment, COM(2010)379, 13 July 2010, 2.
[20]Commission Staff Working Document, Impact Assessment accompanying the 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 purpose of seasonal employment, SEC(2010) 887, 13 July 2010, 8.
[21]Ibid., 9.
[22]Ibid., 10.
[23]Ibid., 11.
[24]Ibid.
[25]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 purpose of seasonal employment, COM(2010)379, 13 July 2010, 3.

competitiveness of the EU economy, and to complement the set of other measures the EU is putting in place to achieve the goals of the EU 2020 strategy."[26] In relation to that it was stated that intra-corporate transferees are "qualified workers whom the EU company crucially needs" and that the "transfers usually concern senior executives needed to supplement resources in a context of skills shortages."[27] Furthermore, that "in recent years, needs for intra-corporate transfers across national borders have increased as a result of the globalization of business and skill shortages with respect to the highly skilled."[28] The impact assessment described intra-corporate transferees as "not only qualified workers," but that one of "their main characteristic is that they meet a demand in situations where there are no alternatives," that "they fill the posts that would otherwise be left vacant, since no substitute could be found to occupy a post requiring such a specific knowledge."[29] Although intra-corporate transferees are considered highly qualified workers, they are by the Commission considered as different from highly qualified workers that fall under the scope of the Blue Card Directive. Intra-corporate transferees are seen as 'temporary workers' that 'meet specific short-term needs', brought into EU territory to "carry out time-limited assignments usually followed by a return to the country where their permanent employer is based." Additionally it is considered of relevance "that according to available data," intra-corporate transferees "are more likely to come from developed countries than from developing countries."[30]

Access to territory and the labour market

Addressing first the four Directives on regular migration, none of them provide for access to territory. Article 79(5) of the TFEU which is a part of the legislative basis for EU law on labour migration provides that Article 79 shall not affect the right of Member States to determine volumes of admission of third-country nationals coming from third countries to their territory in order to seek work, whether employed or self-employed. The four Directives addressing regular labour migration have in their preamble a recital stating that the Directive should be without prejudice to the right of the Member State to determine the volumes of admission of third-country nationals which are covered by the scope of the Directive.[31] All of the Directives also have a provision to the effect that the Directive 'does not affect the right of a Member State to determine the volumes of admission of third-country nationals' and that on that basis an application may be considered either inadmissible or be rejected.[32] Additionally in the equal treatment provisions all four Directives have a clause stating that the right to equal treatment shall be without prejudice to the right of the Member State to withdraw or to refuse to renew the permit issued under the Directive.[33] Here I will give you some examples of how access to territory and to the labour market are constructed for the groups of migrants that fall under the

[26]Commission Staff Working Document, Impact Assessment accompanying the Proposal for a Directive of the European Parliament and of the Council on the conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer, SEC(2010) 884, 15 July 2010, 15.
[27]Ibid., 13.
[28]Ibid., 12.
[29]Ibid., 14.
[30]Ibid.
[31]Recital 8 of preamble to the Blue Card Directive, Recital 6 of preamble to the Single Permit Directive, Recital 10 of preamble to the Seasonal Workers Directive and Recital 23 of Preamble to the Intra-corporate transfer Directive.
[32]Article 6 Blue Card Directive, Article 8 Single Permit Directive, Article 7 Seasonal Workers Directive and Article 6 Intra-corporate transfer Directive
[33]Article 14(3) Blue Card Directive, Article 12(3) Single Permit Directive, Article 23(3) Seasonal Workers Directive and Article 18(3) Intra-corporate transfer Directive

scope of each Directive, that is, the conditions they have to fulfil in order to be granted a permit to enter, reside and work in an EU Member State.

The Blue Card Directive

The standard validity of the EU Blue Card shall be set by Member States between one to four years, or if the work contract is shorter than one year, the time period of the work contract and additional three months.[34] The Directive sets out criteria for refusal, withdrawal and non-renewal of the permit that contain both obligatory and discretionary provisions.[35] As regards refusal to grant a permit, Member States may apply a labour market test and 'verify' whether the position can be filled by a national, EU citizen, a lawfully resident third-country national or a Union long-term resident.[36] Access to the labour market is restricted for the first two years to employment that meets the criteria for admission set out in the Directive and changes in employer are subject to prior authorisation. After the two years the Member States are free, but not obliged to grant the EU Blue Card holder equal treatment with nationals in access to highly qualified employment.[37] The EU Blue Card holder is permitted a one time period of unemployment of three months without withdrawal of the permit.[38] The Directive foresees the obtaining of a long-term residence status and provides for conditions for intra-EU mobility after the first eighteen months of legal residence.[39] Member States may decide to permit applications for a permit from a person legally present in its territory,[40] but the scope of the Directive explicitly excludes applicants or beneficiaries of national or international protection.[41]

The Single Permit Directive

The Single Permit Directive is a general framework Directive. It can be derived from the scope of the three other Directives on regular migration that address specific groups of labour migrants, that the Single Permit Directive extends to third-country nationals other than those that fall under the specialised Directives and those that are explicitly excluded from its scope. The Single Permit Directive does not regulate access to territory or access to the labour market, national law in each Member State does. The Directive only provides that once an applicant has fulfilled the conditions of national law he/she should be granted the single permit. The Directive does not prescribe any minimum or maximum length of time for the duration of the single permit. The permit is issued in accordance with national law, and the length of time determined by national law of each Member State. The Directive does not, unlike the other three, provide for any criteria regarding renewal or withdrawal of the permit, these are also regulated by national law. As regards access to the labour market, once the permit has been granted the holder has the right to exercise the specific employment activity authorised under the single permit in accordance with national law.[42] There are no time limits on this restriction in the Directive, it is therefore regulated by national law and the restrictions on labour market access are likely to vary in accordance to that. The scope of the Directive includes third-country nationals that have been

[34]Article 7(2) Blue Card Directive
[35]Article 9 Blue Card Directive
[36]Article 8(2) Blue Card Directive
[37]Article 12(1) and (2) Blue Card Directive
[38]Article 13(1) Blue Card Directive.
[39]Articles 16, 17 and 18 Blue Card Directive
[40]Article 10(3) Blue Card Directive
[41]Article 3(2)(a),(b) and (c) Blue Card Directive
[42]Article 11(c) Single Permit Directive

admitted for other purposes and are allowed to work,[43] but explicitly excludes applicants and beneficiaries of national and international protection.[44] The provision on scope provides that Member States may decide that Chapter II of the Directive, which addresses the single application procedure and the single permit, does not apply to those third-country nationals who have been admitted for the purpose of study and those authorised to work in the Member State for six months or less.[45] This entails that Member States can give third-country nationals permits to work within their territory for a period not exceeding six months without using the Single Permit Directive as a framework.

The Seasonal Workers Directive

The scope of the Seasonal Workers Directive solely extends to third-country nationals who reside outside the territory of the Member States.[46] That is, only those who are residing outside EU Member States can apply to be admitted as a seasonal worker. Seasonal workers are obliged to keep their residence in a third-country while 'staying' in an EU Member State for work.[47] It provides that the maximum length of stay of a person granted seasonal workers authorisation shall be determined by Member States and that the duration of the authorisation shall be between five to nine months in any twelve months period. At the end of the duration of the authorisation, the seasonal worker is obliged to leave the territory of the Member State unless he/she has been granted a residence permit for other purposes.[48] Authorisations can also be granted for stays not exceeding 90 days, and those can be in the form of a short-stay visa or a visa and a work permit.[49] As regards access to the labour market, the authorisations are granted on the basis of an employment contract or a job offer and therefore bound to a specific employer.[50] Member States are obliged, if the conditions are fulfilled to grant a seasonal worker one extension of his/her stay with the same employer, and have the discretion to grant additional extensions of stay with the same employer and to grant an authorisation to extend stay for work for another employer, but all on the condition that the maximum time period is not surpassed.[51] Member States are obliged to facilitate re-entry of third-country nationals who have been granted authorisation for seasonal work before, but only once within five years from when the first authorisation was granted. Included in the measures are the issuing of several seasonal workers authorisations in one administrative act.[52] The Directive provides for some obligatory but mostly discretionary provisions regarding rejection, extension and renewal of the authorisation which include provisions referring to verification of whether the vacancy can be filled by a national, Union Citizens or third-country nationals legally resident in the Member State.[53]

[43]Article 3(1)(b) Single Permit Directive
[44]Article 3(2)(f),(g) and (h) Single Permit Directive
[45]Article 3(3) Single Permit Directive
[46]Article 2(1) Seasonal Workers Directive
[47]Article 3(b) Seasonal Workers Directive
[48]Article 14(1) Seasonal Workers Directive
[49]Article 12(a) and (b) Seasonal Workers Directive
[50]Article 6(1)(a) Seasonal Workers Directive
[51]Article 15(1),(2), (3) and (4) of Seasonal Workers Directive
[52]Article 16(1) and 2(b) Seasonal Workers Directive
[53]Articles 8(3) and 15(6) Seasonal Workers Directive

The Intra-Corporate Transfer Directive

The Intra-Corporate Transfer Directive only permits applications from third-country nationals who are resident outside EU territory.[54] The duration of the intra-corporate transfer permit shall be at least one year or the duration of the contract, whichever is shorter and can be extended to a maximum of three years for managers and specialists and one year for trainee employees.[55] After this maximum period of three or one years, the respective holder shall leave the territory of the Member State unless he/she is granted a residence permit on another basis.[56] The Directive provides for the possibility to grant, upon application, the same person another permit of the same maximum duration, the only requirement is that the Member State may require a period of maximum six months between the end of one transfer and the beginning of the next.[57] What is noteworthy is that there is no minimum period provided, in fact the applicant for a new permit could only be required to stay away for the time period it takes to consider the application, and there is no maximum given for numbers of renewals of a permit for the same person. On the basis of the permit, the holder has the right to exercise the specific employment activity authorised under the permit.[58] The Directive provides for the possibility of both short-term and long-term intra-EU mobility to work in one or several other Member States working for the same undertaking or group of undertakings that the intra-corporate transfer permit was issued for.[59]

Irregularly resident migrants in employment

The Employers Sanctions Directive does not address access to territory or the labour market for irregularly resident migrants in employment. During the negotiations for the Directive, the suggestions made by the Parliament to give some consideration to the fact that irregular status might be due to lack of administrative efficiency and allow for a time period to amend that, or to permit regularization of irregularly present migrants were rejected. Thus 'illegally staying third-country nationals', when detected are subject to return in accordance with the Returns Directive. This migration management approach towards irregularly present migrants in employment is one of exclusion of those that are classified as "unwanted, unsolicited and undesirable," while having sought alternative access paths onto the labour market in a Member State.[60] This approach has been described as a "totalizing account where undocumented migrants are given a very specific name" that of 'illegally staying third-country nationals'. As they are characterized as not belonging due to lack of authorisation for being present, their ascribed status "is accompanied with instructions to others how to treat them," that is "Employers: do not employ them, States: issue them a return decision."[61] In this context it has to be noted that the Employers Sanctions Directive is seen to "complement" the Seasonal Workers Directive which is described by the

[54]Article 11(2) Intra-Corporate Transfer Directive
[55]Article 13(2) Intra-Corporate Transfer Directive
[56]Article 12(1) Intra-Corporate Transfer Directive
[57]Article 12(2) Intra-Corporate Transfer Directive
[58]Article 17(c) Intra-Corporate Transfer Directive
[59]Articles 20, 21, 22 o Intra-Corporate Transfer Directive
[60]Menz, G. 2009. *The Political Economy of Managed Migration: Nonstate Actors, Europeanization and the Politics of Designing Migration Policies*. Oxford: Oxford University Press, 2.
[61]Gunnelfo, M. with Selberg, N. 2010. Discourse or Merely Noise? Regarding the Disagreement on Undocumented Migrants, *European Journal of Migration and Law* 12, 180.

Commission as "the most recent example of the EU opening channels for low-skilled labour migration, typically in sectors such as agriculture and tourism."[62]

Comparison of the Directive for consistency

The Seasonal Workers Directive and the Intra-Corporate Transfer Directive explicitly state that only third-country nationals residing outside the EU can apply to be admitted under the Directives, whereas the Blue Card Directive explicitly permits applications from those who are resident in the EU and the Single Permit Directive leaves Member States the choice to permit that. Access to territory of EU Blue Card holders and intra-corporate transferees is significantly more generous than for the single permit holders and seasonal workers. There is complete inconsistency in how long each group of migrants can expect to be able to stay and work in the EU and seasonal workers are explicitly excluded from long term stay, as provided above, they are obligated to leave the territory of a Member State at the end of their contract. The two first mentioned groups have the opportunity of intra-EU mobility and the Blue Card Directive provides for the possibility of EU Blue Card holders to obtain long-term residence status. The manner in which access to territory is defined for each groups of migrants creates significant differences in status between those groups. All Directives are consistent as regards to access to the labour market in that they all provide for binding a permit to an employer. The Single Permit and Seasonal Workers Directives do not contain clauses on criteria for rejection, withdrawal or renewal of a permit. The Single Permit Directive differs from the others in that the substantive criteria for admission to territory and the labour market are decided by national law, not EU law.

The right to equal treatment in EU law on labour migration

The material scope of the equal treatment provisions of the four directives on regular migration addressed in this presentation include working conditions and terms of employment, social security, payment of income related statutory pensions, education and vocational training, goods and services, tax benefits and recognition of diplomas, certificates and other professional qualifications. But the material scope is not the same in all of the Directives, for example only single permit holders and seasonal workers are entitled to tax benefits provided that they are resident for tax purposes in the Member State where they are working,[63] and the Directives all derogate from the principle of non-discrimination in their equal treatment clauses and give Member States the discretion to restrict the right to equal treatment in several ways. Furthermore, the extent of the permissible derogations varies between the Directives and in general there is little consistency regarding the principle of equal treatment in EU law on labour migration. The way in which equal treatment to social security is constructed in the Directives is largely similar and they have in common that they all exclude equal treatment to family benefits to some extent. The manner in which the right to equal treatment as concerns unemployment benefits is determined varies between the Directives, they are excluded completely for seasonal workers and although the right to equal treatment as regards unemployment is not restricted in the Blue Card Directive, EU Blue Card holders can only be unemployed for three months before their permit is revoked. For single permit holders however, unemployment benefits cannot be restricted for third-country nationals who have been in employment. During the negotiations for

[62]Communication from the Commission to the European Parliament and the Council on the application of Directive 2009/52/EC of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third country nationals, COM(2014) 286, 22 May 2014, 2.
[63]Article 12(1)(f) Single Permit Directive and Article 23(1)(i) Seasonal Workers Directive.

the Single Permit Directive, this issue was discussed with respect to the fact that social insurance contributions paid at work lead to an entitlement to receive unemployment benefits, which are rights that have been found by the European Court of Human Rights (ECtHR) to be protected by Article 1 of Protocol 1 of the ECHR.[64] Interestingly, this fact was not brought up during the negotiations for the Seasonal Workers Directive which permits Member States to exclude unemployment benefits from the branches of social security, without taking into account that seasonal workers are likely to be obligated to pay contributions in this regard. All four Directives grant equal treatment on freedom of association and membership in organisations representing workers and employers, as well as recognition of diplomas and professional qualifications which is to be granted in accordance with the relevant national procedures. All but the Intra-Corporate Transfer Directive grant equal treatment with nationals concerning terms and conditions of employment, while it stipulates that intra-corporate transferees shall enjoy at least equal treatment with persons covered by Directive 96/71/EC, the Posted Workers Directive, in accordance with Article 3 of the Directive in the Member State where the work is carried out. The Posted Workers Directive has been interpreted by the Court of Justice of the European Union as only requiring employers to observe "a nucleus of mandatory rules for minimum protection in the Member State"[65] where the work of the intra-corporate transferee is carried out.

The principle of non-discrimination – the human rights and labour law framework relevant to EU law on labour migration

The human rights and labour law frameworks relevant to EU law on labour migration provides the human rights parameters concerning equal treatment of nationals and non-nationals as well as international labour law standards and instruments specifically addressing the rights of migrant workers. This framework can be used to assess the degree to which EU law on labour migration adheres to the relevant standards.

The personal scope of international and European human rights instruments, such as the International Covenants on Civil and Political Rights and Economic, Social and Cultural Rights and the European Convention on Human Rights, includes all those present on the territory of a State. They apply to 'everyone' regardless of nationality and administrative status, unless non-nationals are explicitly excluded from provisions such as those addressing political participation and freedom of movement. The principle of non-discrimination and equality is by many regarded as the single most important feature of human rights law, and it is "based on the belief that differential treatment, due to special features of a person or of a group to which a person belongs, is not in accordance with the principle of equality in rights."[66] The personal scope of the TFEU and the EU Charter of Fundamental Rights includes third-country nationals, unless they are explicitly excluded, as is the case with a few provisions of both. As EU law on labour migration is based on Article 79 TFEU, third-country nationals working in an EU Member State are entitled to equal treatment with nationals according to both the Treaty and the Charter while EU law on labour migration falls within the scope of the TFEU.[67]

[64]Council of the European Union, Note for the Presidency to the Strategic Committee on Immigration, Frontiers and Asylum, 15 July 2010, document number: 12156/10, 4.
[65]Case C-341/05 *Laval* [2007], paragraph 108.
[66]Skogly, S. 1999. Article 2, in *The Universal Declaration of Human Rights*, edited by G. Alfredsson and A. Eide. The Hague, Boston and London: Martinus Nijhoff Publishers, 75.
[67]See discussion in sections 2.3.2.1 and 2.3.2.2.

All fundamental ILO Conventions apply to workers regardless of nationality. The International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families (ICRMW) includes nationality as a prohibited ground of discrimination and that prohibition extends in most respects to both regular and irregular migrant workers. The ICRMW has a divided material scope, limiting some rights, such as regarding social assistance, to regular migrants but provides for a catalogue of rights, including related to terms and conditions of employment, social security and fundamental civil and political rights that shall be guaranteed for irregular migrants. Although the ICRMW has not been ratified by any EU Member State, it is one of the ten United Nations' core human rights instruments and due to that status, has to be regarded as setting the international standards for human rights protection of migrant workers. The personal scope of ILO Convention 97 is limited to regular migrants and it includes nationality as a prohibited ground for discrimination and explicitly calls for equal treatment between national and foreign workers with respect to a host of employment and social security rights. ILO Convention 143 has a twofold focus. Firstly, the protection of the basic rights of irregular migrants and it calls for equal treatment with regard to employment related rights for this group of migrants. Secondly it calls for the adoption of a national policy to promote and guarantee equality of opportunity and treatment for migrant workers in fields including employment, social security, cultural rights and collective freedoms. It is noteworthy that a limited number of EU Member States have ratified these two ILO Conventions[68] addressing migrant workers, they are however regarded as the main standards setting instrument of the ILO as concerns migrant workers and thereby of relevance to EU law on labour migration as all EU Member States are Member States of the ILO, the leading international organisation on labour rights.

With the four Directives on regular migration and the Employers Sanctions Directive, EU law on labour migration has developed standards that are below those provided for in international and European human rights instruments, and instruments specifically addressing the rights of migrant workers, in particular by permitting derogations from the principle of equal treatment between nationals and non-nationals and by not explicitly recognizing the rights of migrants irregularly present in the EU. The areas where the differences in equal treatment between nationals and regularly resident third-country nationals are most pronounced in the Directives under discussion here is as regards equal treatment to education and vocational training, goods and services in particular housing and social security. In its case law on equal treatment to social security benefits, the ECtHR has concluded in the *Gaygusuz* and the *Koua Poirrez* judgments[69] that discrimination based on nationality in relation to social security benefits is prohibited based on Article 14 of the ECHR in conjunction with Article 1 of Protocol No. 1 to the Convention. The ECtHR case law presented in chapter 2, provided that in *Dhahbi v. Italy* the Court found a violation of Article 14 in conjunction with Article 8, while the applicant had been refused a family allowance solely based on his nationality. In *Niedzwiecki v. Germany* and *Okpisz v. Germany* the Court concluded that refusing migrants family benefits on the basis of them not holding a 'stable residence permit' is a violation of Article 14 in conjunction with Article 8. In *Ponomaryovi v. Bulgaria*, however, the Court stated while considering the complaint, that a State

[68]The EU Member States that have ratified ILO Convention 97 are Belgium, Cyprus, Denmark, France, Italy, the Netherlands, Portugal, Slovenia, Spain and the United Kingdom and the EU Member States that have ratified ILO Convention 143 are Cyprus, Italy, Portugal, Slovenia and Sweden.
[69]See section 2.3.1.2.3 above.

may have legitimate reasons for curtailing the use of resource-hungry public services, such as welfare programmes, public benefits and health care, for short-term and illegal immigrants, who as a rule, do not contribute to their funding and that it may in certain circumstances, justifiably differentiate between different categories of aliens residing in its territory. In an assessment of the Blue Card and the Single Permit Directives, Groenendijk has concluded that the "access to social security benefits under the equal treatment clauses" in both of them, are below the level of ILO Convention 97 and ILO Convention 118.[70] The same is accurate for the Seasonal Workers and Intra-Corporate Transfer Directives.

The Directives include a few standards that are analogous to, but incompatible with, the standards provided by the human rights and labour rights framework outlined above. These are the following: The provision of the Blue Card Directive restricting access to the labour market of EU Blue Card holders for two years is incompatible with the European Convention on the legal status of migrant workers[71] which provides for a maximum period of one year of such restrictions. The three months period of unemployment an EU Blue Card holder is granted to look for new employment before his/her permit is withdrawn, is not compatible with the five months period provided by the European Convention on the legal status of migrant workers.[72] Intra-corporate transferees are not entitled to equal treatment with nationals as regards terms and conditions of employment which contravenes ILO Convention 111 which prohibits discrimination based on nationality as regards employment which in the definition of the Convention includes 'terms and conditions of employment.'[73] It could also be found to contravene Article 15(3) of the EUCFR which stipulates that nationals of third countries who are authorised to work in the territories of the Member States are entitled to working conditions equivalent to those of the citizens of the Union. The outcome of that assessment will depend on what is the correct reference group in relation to this provision, citizens who are posted workers in the Member State where the intra-corporate transferee is working, or nationals of the Member State where they are working. The exclusion from equal treatment for intra-corporate transferees in this regard is assessed as "likely to lead to bypassing of the EU labour legislation and national labour protection," and that the "equal treatment of ICTs could be endangered as potentially laws from any sending third country may be applicable to their situation." Consequently, third-country nationals "could be afforded less protection and be subjected to the different forms of exploitation."[74]

Regular migrants

The Directives addressed in this study are adopted on the legal basis of Article 79 of the TFEU which provides that the common EU policy on labour migration should aim at granting 'fair treatment' to legally resident third-country nationals. The policy plan on legal migration which provides the policy background to the approach the EU chose as regards development of legislation on labour migration, stated that the policy goal with respect to rights was "to offer a

[70]Groenendijk, K. 2013. Social Assistance and Social Security for Lawfully Present Third-Country Nationals: On the Road to Citizenship?, in *Social Benefits and Migration: A Contested Relationship and Policy Challenges in the EU* edited by E. Guild, S. Carrera and K. Eisele. Brussels: Centre for European Policy Studies, 29.
[71]Article 8 of the European Convention on the legal status of migrant workers.
[72]Article 9 of the European Convention on the legal status of migrant workers.
[73]ILO Convention 111, Discrimination Employment and Occupation Convention, Article 1(3).
[74]Brieskova, L. 2014. *The new Directive on intra-corporate transferees: Will it enhance protection of third-country nationals and ensure EU Competitiveness?* Available at: http://eulawanalysis.blogspot.com.es/2014/11/the-new-directive-on-intra-corporate.html (accessed on 5 April 2015)

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."[75] No definition of 'fair treatment' or 'rights based approach' is provided by EU policy documents on labour migration, but the UN Office of the High Commissioner for Human Rights defines a human rights-based approach as "a conceptual framework that is normatively based on international human rights standards and operationally directed to promoting and protecting human rights" which is considered to require that policies and programmes adopted under a human rights-based approach "are anchored in a system of rights and corresponding obligations established by international law."[76] Even though the policy goal of the EU was to grant labour migrants 'fair treatment', EU Member States are, as discussed above, bound by international and European human rights treaties that stipulate that non-nationals are entitled to equal treatment with nationals. Had a human rights based approach been applied when developing EU law on labour migration, compliance with these international and European standards could have been ensured.

One defining feature of EU law on labour migration is that it falls short of providing equal treatment between nationals and third-country nationals and that it creates differential protection as regards equal treatment for third-country nationals based on their status or type, both as concerns possible length of stay and perceived economic value for the EU labour market. It is therefore obviously not human rights-based. With the sectoral approach to labour migration adopted by the EU "the application of the principle of non-discrimination and equality of treatment has been challenged."[77] The differentiation between groups of migrants pertaining to equal treatment is not isolated to labour migrants, it is a feature that permeates all EU Directives on migration. Thus the "higher degree of rights' protection" granted to highly qualified migrants, as opposed to "less-skilled migrant workers," should also be viewed in the context of the most privileged group of third-country nationals, namely those who are family members of EU citizens."[78] There is in fact no consistency in the application of the principle of equal treatment with nationals within EU law on migration, and in no instance is a group of third-country nationals granted equal treatment with nationals of a Member State.

In EU policy documents on labour migration, the goal of granting 'fair treatment' and 'near equal rights' to regularly resident third-country nationals has always been connected to integration of migrants into the society where they reside which is considered to enhance social stability and social cohesion. Carrera and Wiesbrock have maintained that increasingly, "less importance is being ascribed to the nationality connection in the recognition and allocation of citizenship rights and freedoms" to third-country nationals in the EU, and that this "is gradually, and profoundly, transforming 'who' is to be understood as a 'citizen' in the EU."[79] Furthermore, they provided that by approximating the treatment of third-country nationals "to that of nationals of the EU, the Union is fundamentally altering traditional political and legal configurations of

[75]Communication from the Commission, Policy Plan on Legal Migration, COM (2005) 669, 21 December 2005, 5.
[76]United Nations Office of the High Commissioner for Human Rights. 2010. Information Note on Applying Human Rights-Based Approach to Climate Change Negotiations, Policies and Measures, 1. Available at: http://www.ohchr.org/Documents/Issues/ClimateChange/InfoNoteHRBA.pdf (accessed on 6 July 2015)
[77]Cholewinski, R. 2014. Labour Migration, Temporariness and Rights, in *Rethinking the Attractiveness of EU Labour Immigration Policies: Comparative perspectives on the EU, the US, Canada and beyond*, edited by S. Carrera, E. Guild and K. Eisele. Brussels: Centre for European Policy Studies, 25.
[78]Ibid., 26.
[79]Carrera S. and Wiesbrock, A. 2010. Whose European Citizenship in the Stockholm Programme? The Enactment of Citizenship by Third Country Nationals in the EU, *European Journal of Migration and Law* 12, 359.

European citizenship," and thereby "asserting its 'added value' in the citizenship and migration domains, while at the same moment intending to foster some sense of a European identity" among third-country nationals.[80] Considering the newly developed hierarchical system of EU law on labour migration, both in isolation and in comparison to other instruments on migration, status, type and assumed economic contribution of a migrant is still highly relevant as regards 'who' is to be understood as a 'citizen' and it is a system which might "seriously jeopardizes the political goal of establishing a more equal society,"[81] within the European Union.

Irregular migrants

Migrants who are irregularly present in the territory of a State are entitled to protection of their human rights under international and Council of Europe human rights instruments and ILO instruments. The Employers Sanctions Directive does not explicitly recognise the rights of irregular migrants, other than to back pay, and the EU acquis is silent on the rights of irregular migrants. This approach is in fact reminiscent of Cholewinski's observation concerning the ratification of instruments set forth to protect the rights of irregular migrants that "merely build upon and clarify" human rights commitments "to which states are already bound under general international human rights treaty law." In his assessment, the "reluctance of governments to accept explicitly the specific commitments protecting irregular migrants can only raise serious doubts regarding their readiness to protect the fundamental human rights of this vulnerable group."[82] Discussing the 'unstable relationship' between human rights claims of irregular migrants and the State, Noll concludes that while "it is uncontroversial for many that such migrants are generally entitled to human rights by virtue of their humanity, it remains patently unclear how this entitlement relates to the state's power to exclude by virtue of its personal and territorial sovereignty." He finds that this 'instability' not only creates difficulties for migrants, but "confronts us with an aporia in thinking the universality of human rights law." In relation to that, he poses the question of how it can be "that enjoyment of a set of human rights amongst which there are a number of 'immediately applicable' economic and social rights is systematically barred for a group of human beings with a clear and pressing need?" and wonders whether the whole system of human rights law has not failed "its stated universalist purpose if it failed that group?"[83] The lack of explicit recognition of the human rights of irregular migrants appears to be a conscious decision on behalf of the EU. Seeing how there is no EU instrument that directly addresses the human rights of irregular migrants and having regard to the Employers Sanctions Directive, the UN Office of the High Commissioner for Human Rights (UNOHCHR) has recommended, that the EU 'standardize protection afforded to irregular migrant workers,' by adopting a Directive on the rights irregular migrant workers and their families are entitled to, an act that the UNOHCHR sees as possible only "if European States politically and collectively recognize as a principle that irregular migrants are entitled to fundamental human rights."[84]

[80]Ibid., 342.
[81]Morano-Foadi, S. and de Vries, K. 2012. The equality clauses in the EU Directives on non-discrimination and migration/asylum, in *Integration for Third-Country Nationals in the European Union; The Equality challenge*, edited by S. Morano-Foadi and M. Malena. Cheltenham: Edgar Elgar Publishing, 5.
[82]Cholewinski, R. 2006. Control of Irregular Migration and EU Law and Policy: A Human Rights Deficit, in *EU Immigration and Asylum Law Text and Commentary*, edited by S. Peers and N. Rogers. Leiden and Boston: Martinus Nijhoff Publishers, 904.
[83]Noll, G. 2010. Why Human Rights Fail to Protect Undocumented Migrants, *European Journal of Migration and Law* 12, 243-4.
[84]United Nations Human Rights Office of the High Commissioner. 2011. *Migrant Workers' Rights in Europe*. Brussels: United Nations Human Rights Office of High Commissioner, Europe Regional Office, 21.

The right to family reunification

In EU law the right to family reunification is governed by Directive 2003/86/EC, the purpose of which is stated to be "to determine the conditions for the exercise of the right to family reunification by third country nationals residing lawfully in the territory of the Member State."[85] It is stipulated in the Directive that it shall only apply where the sponsor seeking to have his/her family join him/her has a residence permit valid for one year or more and has "reasonable prospects of obtaining the right of permanent residence."[86]

The right to family reunification is only addressed in two of the Directives under discussion here. Those are the Blue Card and the Intra-Corporate Transfer Directives which grant family reunification with derogations from Directive 2003/86/EC in several important aspects. Firstly, it shall not depend on the EU Blue Card or intra-corporate transfer permit holder having prospect of obtaining permanent residence or having a minimum period of residence.[87] Secondly, integration requirements may not be applied until after family reunification has been granted.[88] Thirdly, the time limit given for granting the permits is shorter, limited to 90 days in the Intra-Corporate Transfer Directive and six months in the Blue Card Directive.[89] Additionally, in the case of the family members of EU Blue Card holders, no time limit shall be applied for their access to the labour market,[90] and the Intra-Corporate Transfer Directive provides for access of family members to the labour market but does not include a time limit.[91] The rationale for the derogations is in both cases that it is "considered necessary to set out an attractive scheme" for this group of workers and that this approach "follows a different logic from the family reunification directive, which is a tool to foster integration of third-country nationals who could reasonably become permanent residents."[92]

The Single Permit Directive is silent on family reunification, there is no reference to it in the Directive. In the explanatory statement with the proposal for the Directive however, it was stated that it does not "touch upon conditions for the exercise of the right to family reunification."[93] It may be assumed that the right to family reunification of single permit holders will be governed by the Family Reunification Directive as implemented by the Member State where they reside. Whereas the Single Permit Directive is a general framework Directive, which is bound to apply to a varied and possibly large group of third-country nationals, it would have been appropriate to at least make a reference to the fact that family reunification of single permit holders is governed by the Family Reunification Directive, while a claim to family reunification cannot be made based on the Single Permit Directive.

[85]Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification, Article 1.
[86]Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification, Article 3(1).
[87]Article 15(2) Blue Card Directive and Article 19(2) Intra-Corporate Transfer Directive.
[88]Article 15(3) Blue Card Directive and Article 19(3) Intra-Corporate Transfer Directive.
[89]Article 15(4) Blue Card Directive and Article 19(4) Intra-Corporate Transfer Directive.
[90]Article 15(6) Blue Card Directive.
[91]Article 19(6) Intra-Corporate Transfer Directive.
[92]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, 23 October 2007,11.
[93]Proposal for a Council Directive on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and a common set of rights for third-country workers legally residing in a Member State, COM(2007) 638, 23 October 2007, 8.

It is stated in the preamble of the Seasonal Workers Directive that the Directive does not provide for family reunification.[94] The rationale for this was based on the approach to seasonal workers as not being residents and only permitted to stay for short periods of time with no prospects of long-term or permanent stay as they are obligated to leave the territory of a Member State when their authorisation for stay expires. Seasonal workers can however stay for a period of nine months out of twelve and there is nothing in the Directive that prevents the permit being renewed several times. There is no obligation for Member States to do so, but there is also no limit on how many times the same seasonal worker can be granted a permit to re-enter a Member State for work. This could result in situations where a seasonal worker, lives and works in a Member State for several years in a row for nine months out of twelve, but has no right to have his/her family join during the periods employed there. The fear of the Seasonal Workers Directive becoming an instrument for "eternal employment of 'seasonal' workers" has been expressed with regard to the fact that the level of rights granted under the Single Permit Directive is more generous than in the Seasonal Workers Directive and that these differences may become "a temptation for employers (and for member state authorities) to give an expansive interpretation of what is defined as seasonal work."[95] The fact that it also explicitly excludes family reunification, taken together with that seasonal workers cannot fulfil the requirements of the Family Reunification Directive while the maximum length of the seasonal permit is nine months, could add to the temptation.

The provisions on family reunification in the Blue Card and the Intra-Corporate Transfer Directives are virtually the same. Family reunification is obviously considered and used in the context of EU law on labour migration as a tool to give favourable treatment to selected groups of labour migrants, as noted by the Commission during the negotiations for the Intra-Corporate Transfer Directive, it was a political choice based on the intention to attract highly qualified third-country nationals.[96] The way family reunification is constructed in the two Directives that address it, and the absence of it in the Single Permit and Seasonal Workers Directives is related to how possible length of stay is constructed for each group and the status ascribed in accordance with that. There is however no consistency between the Directives as regards family reunification because EU Blue Card holders and intra-corporate transferees can be granted family reunification regardless of their length of stay, that is even if they stay for only six months, but seasonal workers cannot although they can spend nine months out of twelve working in a Member State. This could be considered to constitute discrimination, but the most likely factor to be used to counter such an assessment is the fact that seasonal workers are not granted a residence permit in the Member State where they work and are not regarded as a part of future demography of the EU, unlike EU Blue Card holders.

The right to family reunification is not enshrined in any of the international or European human rights treaties but Article 8 of the ECHR recognises the right to respect for family life which is relevant to the case of family reunification. Family reunification is explicitly granted in EU law

[94]Directive 2014/36/EU of the European Parliament and of the Council of 26 February 2014 on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers, Recital 46.
[95]Groenendijk, K. 2014.Which Way Forward with Migration and Employment in the EU, in *Rethinking the Attractiveness of EU Labour Immigration Policies: Comparative perspectives on the EU, the US, Canada and beyond*, edited by S. Carrera, E. Guild and K. Eisele. Brussels: Centre for European Policy Studies, 95.
[96]Council of the European Union, Outcome of Proceedings of Working Party on Migration and Expulsion, 8 May 2008, document number: 8249/08, 32.

on labour migration based on preferential status and treatment to only those migrant workers who fall under the scope of the Blue Card and Intra-Corporate Transfer Directives. This migration management policy decision made based on the identified priority to provide for "attracting conditions for specific categories of immigrants needed in the EU,"[97] and the consequences of its implementation, resonate in the statement that "while the right to family life is established as a universal right, in so far as it is asserted in the ECHR, it is subject to qualifications commonly dictated by a desire to control and limit immigration." In relation to the efforts to control and limit immigration, family reunification is "governed by different rules for different categories of migrants, and there are common deficits in realizing the right and meeting the associated conditions."[98] Whether the approach taken by EU law on labour migration as regards family reunification would be considered discriminatory based on differences in statuses according to type, between migrant groups that are granted it and denied it, remains to be answered. It has however been concluded that the "mere fact that a distinction is made in the framework of migration law, does not exclude the possibility that such a distinction is discriminatory," while in "particular cases, the detrimental effects of a certain policy on a certain group may be disproportional, and thus, discriminatory."[99]

The case of *Hode and Abdi v. The United Kingdom*, bears some similarities to the differences in rights, or lack thereof, granted to EU Blue Card holders and intra-corporate transferees on the one hand and seasonal workers on the other hand. The first two groups are granted family reunification regardless of the length of their stay in an EU Member State, but for seasonal workers family reunification is explicitly excluded due to their limited right to stay. The case concerned differences in treatment between groups of persons with temporary leave to remain in the United Kingdom. UK law granted different rights to family reunification to students and workers with a temporary residence permit and refugees with a temporary residence permit which the complainant maintained was not objectively and reasonably justified while they were in analogous positions. In justifying these differences, the UK maintained that it "faced international competition to attract students and workers," and therefore sought to encourage applications from them to reside in the UK, and explained that "one incentive offered to prospective applicants was the assurance that they could be joined by their spouses."[100] In assessing the case, the ECtHR accepted that "the offering of incentives to certain groups of immigrants may amount to a legitimate aim for the purpose of Article 14 of the Convention," but notes that in the case at hand no justification is put forth for such preferential treatment."[101] The Court did not consider that the difference in treatment between students and the applicant, a refugee, based on the policy of the UK to actively attract students and workers, but not refugees, was objectively and reasonably justified and concluded that there was a violation of Article 14 read together with Article 8.[102] As regards the groups of labour migrants under discussion in this study, the question that remains to be answered is whether the reasons given by the EU for preferential treatment for EU Blue Card holders and intra-corporate transferees is 'objectively

[97]Communication from the Commission, Policy Plan on Legal Migration, COM(2005) 669, 21 December 2005, 5.
[98]Morris, L. 2003. Managing Contradictions: Civic Stratification and Migrants' Rights, *The International Migration Review* 37(1), 86.
[99]Boeles, P., den Heijer, M., Lodder, G. and Wouters, K. 2014. *European Migration Law*. Cambridge-Antwerp-Portland: Intersentia, 239.
[100]ECtHR, *Hode and Abdi v. The United Kingdom* (No. 22341/09), 6 November 2012, paragraph 36.
[101]ECtHR, Hode and Abdi v. The United Kingdom (No. 22341/09), 6 November 2012, paragraph 53.
[102]ECtHR, Hode and Abdi v. The United Kingdom (No. 22341/09), 6 November 2012, paragraphs 54 and 56.

and reasonably' justified in the assessment of the Court. Any such assessment would also have to take into account that the EU considers family reunification as helping "to create sociocultural stability facilitating the integration of third-country nationals in the Member State, which also serves to promote economic and social cohesion, a fundamental Community objective stated in the Treaty."[103]

Conclusions

The Directives on labour migration that I have discussed here were developed on the basis of a sectoral approach to labour migration which has resulted in institutionalizing differentiation between migrants as regards access to territory, access to the labour market and the right to family reunification, and discrimination against migrants compared with nationals which contravenes the human right to equal treatment and prohibition of non-discrimination based on nationality. Additionally, the only EU instrument that directly addresses irregularly present migrants in employment, does not include any references to the human rights of migrants. The differentiation and discrimination constructed by the Directives are based on the group a migrant is classified as belonging to, and in comparative terms, the level of discrimination between the groups increases the less skilled and less economically desirable a group of migrants is considered to be for the development and competitiveness of the EU economy. Through this approach, status has been used as a proxy to discriminate against migrants based on nationality. The outcome of this approach is a system lacking in consistency and legal certainty which is to a large degree due to the many discretionary clauses and references to national law of the Member States in the Directives, in particular in the provisions on access to territory and labour market and the right to equal treatment. The way the right to equal treatment is constructed in the Directives is incompatible with international and European human rights standards and international labour law, which were not generally taken into consideration during the negotiations for the Directives although EU Member States are bound by these standards. By that, the EU has developed legislative instruments on labour migration that set standards below those set at the international and European level.

A major contributing factor to this result is the role that the Member States played by insisting on adopting a sectoral approach to labour migration and in the negotiations of the Directives. Their position was dominant among the negotiation partners and their approach was characterized by the will to restrict access to territory and labour market and equal treatment with nationals further than provided for by the Commission proposals. The adoption of the sectoral approach, which was the only way for the Member States to reach an agreement on common measures on labour migration resulted in destroying equality, which was most likely the purpose of adopting the approach in the first place as the Member States were not interested in adopting standards that applied to all groups and types of migrants as was intended by the horizontal approach. In fact the horizontal approach did not provide for equal treatment between third-country nationals and nationals of the Member States but it did provide for granting the same rights to equal treatment to all migrant workers.

EU law on labour migration constitutes one component of the EU legislative framework on immigration. The system that has been created is hierarchical, ranging from the Long-Term Residents Directive as the most generous and applying to those who have been resident within

[103]Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification, Recital 4 of preamble.

the EU for at least five years, to the Employers Sanctions Directive which does not address the human rights of irregular migrants and calls for the return of migrants that have been employed while irregularly resident without any consideration of administrative or other factors that might have caused them to become irregularly present. The Blue Card Directive comes closest to the Long-Term Residents Directive in granting the right to equal treatment with nationals, then the Single Permit Directive. The Intra-Corporate Transfer Directive, in particular while it does not grant intra-corporate transferees equal treatment with nationals with regard to terms and conditions of employment, and the Seasonal Workers Directive both have such serious short comings that they are easily ranked as providing less rights than the other Directives mentioned above. The fact is that this system has very limited coherence and having regard to the rights set forth by each of the Directives it is only possible to comprehend which rights were included and which ones excluded with reference to the political will of the Member States. The human rights principle of non-discrimination and equal treatment was evidently not used as a parameter.