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# Employment and Social Security Rights of Third-Country Labour Migrants under EU law: an Incomplete Patchwork of Legal Protection <sup>1</sup>

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## ***Abstract***

Labour migration within the European Union (EU) as well as from outside the EU has evolved significantly. There are more temporary forms of labour migration, such as seasonal work, temporary migration of both high- and low-skilled workers and temporary posting by employers. This evolution has led to an increasing vulnerability of labour migrants' rights. In particular, the employment and social rights of these migrants are subject to legal disputes as well as to political discussions. The latter resulted in the adoption of legal instruments meant to guarantee some rights to labour migrants, but which in some cases rather increased their vulnerability. This article explores the issues of employment and social protection of third-country migrant workers in legal instruments of the EU. It starts with an examination of a number of EU directives dealing specifically with labour migration from third countries such as the Blue Card Directive 2009/50, the Employers' Sanctions Directive 2009/52, the Single Permit Directive 2011/98, the Seasonal Workers Directive 2014/36 and the Intra-corporate Transferees Directive 2014/66 (part 2). This part also explores the interaction between these instruments as well as their shortcomings. Next, this article focuses on international agreements concluded by the EU with third countries. A large number of these agreements contain provisions which, directly or indirectly, regulate the employment and social security rights of nationals of the third States involved (part 3). Further, it will comment on the issue of (the absence of) social security coordination between the systems of the Member States and those of third countries (part 4). Finally, it draws some conclusions and pleads for a better enforcement of the rights already guaranteed and for a more prominent role for the protection of human rights (part 5).

## **Keywords**

Labour migration – Employment and social security rights – European Union legal instruments

### **1. Introduction**

In the past decade, labour migration within the European Union (EU) as well as from outside the EU has evolved significantly. There are more temporary forms of labour migration, such as seasonal work, temporary migration of both high- and low-skilled workers and temporary posting by employers.<sup>2</sup> This evolution has led to an increasing vulnerability of labour migrants'

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<sup>1</sup> Earlier versions of this article were presented at the ILERA conference in Cape Town (September 2015) and the ReMarkLab conference in Stockholm (May 2016). I would like to thank the participants of these conferences for their comments on these versions. Thanks also go to the anonymous reviewers of this journal for their valuable comments and suggestions.

<sup>2</sup> See, *inter alia*, the following studies of the European Migration Network which are based on detailed national reports (available at [www.emn.europa.eu](http://www.emn.europa.eu)): *Satisfying Labour Demand through Migration*, 2011, 109 p.;

rights. In particular, the employment and social rights of these migrants are subject to political discussions and legal disputes. Sub-standard protection in these areas is often considered to lead to ‘social dumping’ of workers and ‘unfair competition’ between employers. Non-compliance with existing standards may even lead to forms of labour exploitation.<sup>3</sup> Or as Taran has pointed out: ‘A minimal or non-existent application of rights would contribute to ensuring that migrant labour remains cheap, docile, temporary, and easily removable when not needed.’<sup>4</sup> In this context, the ILO recently reminded us that the debate on labour migration should be rights-based and ‘grounded in universal values of equal treatment and non-discrimination ... as the best way of ensuring that migration is not misused for the purpose of undercutting existing terms and conditions of work’.<sup>5</sup>

This article explores the legal issues of employment and social protection in the various relevant legal instruments of the EU, and more specifically a number of legal instruments regulating labour migration of third-country workers into the EU. The most important question in this respect is to what extent these labour migrants can invoke the same employment and social rights in the host State as the host State’s own employees. As regards social security rights, there is also the question whether these labour migrants can take certain rights with them when they return to their country of origin.

The article starts with an examination of EU legal instruments regarding labour migration from third countries (part 2). Over the past decade the EU has adopted a number of directives specifically meant to promote and regulate labour migration from third countries to the European Union. Some were agreed with a view to making the EU more attractive for labour migration from outside the EU. Others were meant to (partially) harmonize rights and/or procedures in order to create a level playing field between the Member States. This part examines the provisions in these legal instruments relating to employment and social rights of the migrant workers covered by these instruments. Next, this article examines the provisions in international agreements concluded between the EU and third countries. A large number of these agreements contain provisions which, directly or indirectly, regulate the employment and social security rights of nationals of the third States involved (part 3). Further, it will comment on the issue of social security coordination between the systems of the Member States and those of third countries (part 4). Finally, it draws some conclusions (part 5).

This article does not examine the rights of third-country nationals who migrate between the Member States of the EU. Although the right to free movement for workers within the EU is, in principle, limited to nationals of the Member States (Article 45 TFEU), third-country nationals already residing on the territory of a Member State may in some cases also have the

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*Temporary and Circular Migration: empirical evidence, current policy practice and future options in EU Member States*, 2011, 67 p. and *Attracting Highly Qualified and Qualified Third-Country Nationals*, 2013, 50 p.

<sup>3</sup> See on this issue the following recent reports: European Union Agency for Fundamental Rights, *Severe labour exploitation: workers moving within or into the European Union. States’ obligations and victims’ rights*, Vienna, 2016, 104 p. and Eurofound, *Regulation of labour market intermediaries and the role of social partners in preventing trafficking of labour*, Publication Office of the European Union, Luxembourg, 2016, 53 p. See more specifically on the exploitation of migrant agricultural workers: J. Hunt, ‘Making the CAP fit: Responding to the Exploitation of Migrant Agricultural Workers in the EU’, *International Journal of Comparative Labour Law and Industrial Relations* 30, 2014, pp. 131-152.

<sup>4</sup> P. Taran, ‘The need for a Rights-Based Approach to Migrant Labor’, in R. Cholewinski, P. de Guchteneire and A. Pécoud (eds.), *Migration and Human rights: The United Nations Convention on Migrant Workers’ Rights*, Cambridge, Cambridge University Press, 2009, 151. Compare: J. Fudge, ‘Precarious migrant status and precarious employment: the paradox of international rights for migrant workers’, *Comparative Labour Law and Policy Journal* 34, 2012, pp. 95-131.

<sup>5</sup> ILO, *Fair migration: Setting an ILO agenda*, Geneva, 2014, p. 7. See also ILO, *International labour migration. A rights-based approach*, Geneva, International Labour Office, 2010.

right under EU law or under the law of the Member States to move to another Member State. This is for instance the case for family members of EU nationals<sup>6</sup>, or for third-country nationals who can rely on EU legal instruments allowing such movements.<sup>7</sup> This article will not examine these EU instruments, nor will it analyse EU directives regulating immigration for other purposes than labour, even though some of these instruments also allow the persons concerned to take up employment in the EU and contain provisions regarding their employment and social rights.<sup>8</sup>

## **2. Legal instruments for external labour migration to the EU**

### **2.1. EU labour migration policy**

Since the coming into force of the Amsterdam Treaty in 1999 the EU has obtained certain competences to legislate in the field of migration policy, albeit shared with the Member States. The ambitions of the EU in this respect were laid down in the Tampere Programme of 1999 which acknowledged the need of approximation of national legislation in the field of labour migration to the EU and its Member States.<sup>9</sup> This was done in the context of the economic and demographic developments in which labour migration was seen as a solution to solve economic (labour shortages, the global competition of talents) and demographic problems (aging of population). The European Commission suggested developing a common European policy for the controlled admission of economic migrants, including a gradual introduction of equal treatment with the host States' nationals.<sup>10</sup>

Soon after, the Commission proposed a 'Labour Migration Directive' to regulate labour migration from outside the EU. Its objective was to harmonize admission criteria and national labour migration schemes.<sup>11</sup> However, this far-reaching proposal was rejected by the Member States and eventually withdrawn by the Commission. It was clear that a political consensus on the harmonization or streamlining of labour migration legislation at EU level had not yet been reached. Indeed, Member States appeared to be very reluctant to abandon control on the admission criteria to be used for admitting third-country nationals to their labour market, which they feared would be the case if they accepted common EU criteria. They also did not want to give up control, directly or indirectly, on the number of those labour migrants.

Some years later, in its 2005 Policy Plan on Legal Migration<sup>12</sup>, the Commission announced legislative initiatives for specific categories of labour migrants, in particular highly skilled workers, seasonal workers, intra-corporate transferees and remunerated trainees. It also

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<sup>6</sup> See Directive 2004/38/EC of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (OJ 2004 L 158/77).

<sup>7</sup> Such as Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents (OJ 2004 L 16/44).

<sup>8</sup> Such as Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification (OJ 2003 L 251/12; Art. 14); Directive 2003/109/EC (see previous footnote) (Art. 11); and Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (OJ 2013 L 180/96). See on the latter instrument: F. Weber, 'Labour Market Access for Asylum Seekers and Refugees under the Common European Asylum system', *European Journal of Migration and Law* 18, 2016, pp. 49-63.

<sup>9</sup> Tampere European Council, 15-16 October 1999, Presidency Conclusions, SN 200/99.

<sup>10</sup> European Commission, 'Communication on a Community Immigration Policy', 22 November 2000, COM(2000) 757.

<sup>11</sup> European Commission, 'Proposal for a directive on the conditions of entry and residence of third-country nationals for the purpose of paid employment and self-employed economic activities', 11 July 2001, COM(2001) 386.

<sup>12</sup> European Commission, 'Policy Plan on Legal Migration', 21 December 2005, COM(2005) 669.

announced a framework directive regarding a single permit and the rights of labour migrants, which should underline a rights-based approach of labour migration, in addition to the demand-driven approach of labour migration, inspired by the economic and demographic situation. The proposals the Commission subsequently introduced have led to a series of labour migration directives which will be discussed further in part 2.2. These proposals also included one on the sanctions against employers of illegally staying third-country nationals in the context of the combat against illegal migration, which has also become an issue of EU policy.

In 2007 the Commission developed further ideas on circular labour migration, which included propositions on mobility partnerships with third countries as well as on seasonal workers.<sup>13</sup> However, it appears that the few mobility partnerships that were concluded only allowed for limited mobility, and ‘paid little respect to migrant workers’ rights and aspirations’.<sup>14</sup> In addition, as Schneider and Parussel stated, ‘the appealing idea of circular migration as a modern migration pattern implying multiple wins had politically turned out to be a non-starter’.<sup>15</sup> Yet, as regards the seasonal workers issue the Commission made a formal proposal in 2010, which subsequently led to a directive on this category of workers (see further in point 2.2.5.).

In the meantime the Lisbon Treaty, which came into force in 2009, confirmed the EU competences in the field of migration, including labour migration. However, it explicitly acknowledged that these competences ‘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’.<sup>16</sup> Accordingly, the Stockholm Programme adopted in December 2009 called for a flexible migration policy taking account of the situation in every Member State separately.<sup>17</sup> Still, in its Article 79(1) the Lisbon Treaty also underlined that the Union’s immigration policy shall ensure ‘fair treatment of third-country nationals residing legally in Member States’. However, the concept of ‘fair treatment’ differs from that of ‘equal treatment’.

More recently, labour migration has continued to be an issue in policy documents on migration. For instance, in its *Global Approach to Migration and Mobility* (GAMM), the Commission underlined the need for the EU to organize and facilitate legal migration ‘based on the premise to offering employers wider opportunities to find the best individuals’, and ‘offering new employment possibilities for talented people from around the world’.<sup>18</sup> This GAMM is intended to be ‘migrant-centred’ and states that ‘human rights of migrants are a cross-cutting issue’.<sup>19</sup> In its 2014 report on this GAMM the Commission again suggested to make better use of the

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<sup>13</sup> European Commission, ‘On circular migration and mobility partnerships between the European Union and third countries’, 16 May 2007, COM(2007) 248. See further on this issue: J. Fudge, ‘Migration and sustainable Development in the EU: A Case Study of the Seasonal Workers Directive’, *International Journal of Comparative Labour Law and Industrial Relations* 31, 2015, 337-341 and J. Schneider and B. Parussel, ‘Circular Migration between Fact and Fiction’, *European Journal of Migration and Law* 17, 2015, pp. 184-209 and the literature referred to therein.

<sup>14</sup> J. Schneider and B. Parussel, *supra* note 13, p. 192. Seven Mobility Partnerships have been signed so far: with Cape Verde, the Republic of Moldova, Georgia, Armenia, Morocco, Azerbaijan and Tunisia. This article will not comment further on these partnerships.

<sup>15</sup> J. Schneider and B. Parussel, *supra* note 13, p. 208.

<sup>16</sup> Article 79 (5) TFEU. It is also important to note that this new Treaty provision allows the adoption of immigration instruments under the so-called ‘ordinary legislative process’, meaning that the European Parliament and the Council of Ministers have to agree and that the Council decision is subject to a qualified majority instead of unanimity.

<sup>17</sup> OJ 2010 C115/1.

<sup>18</sup> European Commission, ‘The Global Approach to Migration and Mobility’, 18 November 2011, COM(2011)743, p. 12.

<sup>19</sup> *Ibid.* p. 7.

role that migration can play in addressing labour and skill shortages in Europe.<sup>20</sup> However, these more recent policy documents were not followed by proposals for legislative action by the EU, even though the Commission recognized the need for an evaluation of the current legislation on legal migration in order to identify the gaps, improve consistency and assess the impact of the existing legal framework.<sup>21</sup> The Commission only proposed to merge and recast the already existing directives on students and researchers (see further under point 2.2.1.).<sup>22</sup>

It should be clear that not all of these initiatives reflect a coherent and balanced policy on labour migration at EU level. On the contrary, the EU institutions have failed to develop a coordinated labour migration policy of the Member States, the latter having retained the main competence to decide on the conditions as well as on the number of third-country labour migrants they admit to their labour market. The European Union was only fragmentally and gradually able to develop an arsenal of rules of its own in this field, still leaving a lot of leeway for the Member States to implement them.<sup>23</sup>

Nevertheless, over the past decade the EU has adopted a number of legal instruments on labour migration. We will now examine specifically to what extent these EU legal instruments define the room for manoeuvre the Member States have to determine the employment and social security rights of the third-country labour migrants covered by these instruments. We will do this in the chronological order of their adoption. In part 2.2.7 we will draw some comparative conclusions.

## **2.2. Employment and social security rights in the EU directives on labour migration**

### **2.2.1. Students and researchers**

Chronologically, the first directive relevant in this respect, is Directive 2004/114/EC on students and trainees.<sup>24</sup> This directive is not really a labour migration directive since it does not deal directly with access of third-country nationals to the labour market of the Member States. However, it does contain a provision which allows students to be employed in the host Member States outside their study time, subject to a maximum number of hours to be determined by the host State (but not less than 10 hours) (Article 17). Surprisingly, this directive does not contain

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<sup>20</sup> European Commission, 'Report on the implementation of the Global Approach to Migration and Mobility 2012-2013', 21 February 2014, COM(2014)96.

<sup>21</sup> European Commission, 'An open and secure Europe: making it happen', 11 March 2014, COM(2014)154, p. 4.

<sup>22</sup> 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 research, studies, pupil exchange, remunerated and unremunerated training, voluntary service and au pairing (recast), COM(2013) 151 of 25 March 2013.

<sup>23</sup> For a more detailed account of the EU labour migration policy see, *inter alia*: S. Carrera, E. Guild and K. Eisele (eds.), *Rethinking the Attractiveness of EU Labour Immigration Policies*, Brussels, CEPS, 2014; A. Faure Atger, 'Competing Interests in the Europeanisation of Labour Migration Rules', in E. Guild and S. Mantu (eds.), *Constructing and Imagining Labour Migration: Perspectives of Control From Five Continents*, Franham, Ashgate, 2010, pp. 157-174; J. Fudge, *supra* note 13, pp. 333-341; E. Guild, 'Equivocal Claims? Ambivalent Controls? Labour Migration Regimes in the European Union', in E. Guild and S. Mantu (eds.), *Constructing and Imagining Labour Migration: Perspectives of Control From Five Continents*, Franham, Ashgate, 2010, pp. 207-228; S. Guir, 'EU Labour immigration policy: discourses and mobility', *Refugee Survey Quarterly* 32, 2013, pp. 90-111 and P. Herzfeld Olsson, 'The Legal Basis and a Historical Overview', in P. Herzfeld Olsson (ed.), *National Effects of the Implementation of EU Directives on Labour Migration from Third Countries, Bulletin for Comparative Labour Relations*, 91, Alphen aan den Rijn, Wolters Kluwer, 2016, pp. 1-7.

<sup>24</sup> 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 2004 L 375/12).

any provisions as to the employment and social security rights of the students allowed to work in the host State.

The first directive which directly concerns labour migration as such is Directive 2005/71/EC on researchers.<sup>25</sup> It lays down the conditions for the admission of third-country researchers in the Member States. In its Article 12 it also provides for equal treatment with the nationals of the host State as regards working conditions, including pay and dismissal as well as for the social security branches as defined in Regulation 1408/71, now Regulation 883/2004.<sup>26</sup> However, this does not automatically mean that these researchers will be covered by a traditional employment contract or by all branches of social security. This depends on the rights national researchers would have in comparable situations. In some cases researchers do not enter into an employment relationship with a genuine employer (such as universities or research institutes) but only receive a grant to cover their expenses during their research (as for instance some PhD students).

Recently both Directive 2004/114/EC on students and trainees and Directive 2005/71/EC on researchers were merged and recast in the newly adopted Directive (EU) 2016/801.<sup>27</sup> The objective of this directive is to improve the legal framework applicable to these categories of persons and to extend the scope of the currently applicable directives to trainees, au pairs and volunteers.

In its Article 22 this directive contains equal treatment clauses, one for researchers and one for trainees, volunteers and au pairs, the latter categories only as far as they are considered to be in an employment relationship in the Member States concerned. Article 22(1) guarantees researchers equal treatment with nationals of the host Member State as provided for by Articles 12(1) and 12(4) of Directive 2011/98/EU (the so-called Single Permit Directive; see further on this directive in point 2.2.4.). The latter clauses guarantee the right to equal treatment with regard to, *inter alia*, working conditions, including pay and dismissal as well as health and safety at the workplace, the freedom of association and affiliation, membership of a workers' organization and branches of social security, as defined by Regulation 883/2004 (Article 12(1) (a) (b) and (e) of Directive 2011/98/EU). In addition, this right to equal treatment also includes the export of old-age pensions to a third country, but only insofar as this has been provided for nationals of the Member State involved (Article 12(4) of Directive 2011/98/EU). However, Article 22(2)(b) of the new Directive (EU) 2016/801 allows Member States to restrict equal treatment as regards researchers, *inter alia*, by not granting family benefits to researchers who have been granted the right to reside in the territory of the Member States concerned for a period not exceeding six months.<sup>28</sup> Since this exception for a social security benefit is not included in

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<sup>25</sup> Council Directive 2005/71/EC of 12 October 2005 on a specific procedure for admitting third-country nationals for the purpose of scientific research (OJ 2005 L 289/15).

<sup>26</sup> Regulation 883/2004 on the coordination of the social security systems (OJ 2004 L 200/1). Article 3 of Regulation 883/2004 refers to the following branches of social security: sickness benefits; maternity and equivalent paternity benefits; invalidity benefits; old-age benefits; survivors' benefits; benefits in respect of accidents at work and occupational diseases; death grants; unemployment benefits; pre-retirement benefits and family benefits. For a recent overview of this EU coordination system: M. Fuchs and R. Cornelissen (eds.), *EU Social Security Law. A Commentary on EU Regulations 883/2004 and 987/2009*, Baden-Baden, Nomos, 2015, 554 p. and F. Pennings, *European Social Security Law*, Antwerp-Cambridge, Intersentia, 2015, 386 p.

<sup>27</sup> Directive (EU) 2016/801 of the European Parliament and of the Council of 11 May 2016 on the conditions of entry and residence of third-country nationals for the purposes of research, studies, training, voluntary service, pupil exchange schemes or educational projects and au pairing (recast) (OJ 2016 L 132/21). This directive has to be implemented in the national law of the Member States by 24 May 2018 (Article 41).

<sup>28</sup> Article 22(2) also allows restrictions to equal treatment for researchers for study and maintenance grants and loans, for tax benefits linked to members of the family when these do not reside in the territory of the Member State concerned and for access to housing.



the current Article 12 of the Researchers' Directive 2005/71/EC, this new directive means a step backwards compared to the existing legislation.

The new categories of third-country nationals covered by this directive (trainees, volunteers and au pairs) as well as students shall be entitled, when they are considered to be in an employment relationship, to equal treatment with nationals of the host Member State as provided for in Articles 12(1) and 12(4) of the Single Permit Directive 2011/98/EU subject to the restrictions in Article 12(2) of this directive. With regard to social security benefits, the latter limitation means that the restrictions also concern unemployment benefits for those who have been employed in the host Member State for less than six months.

Given that Directive 2004/114/EC on students lacks an equal treatment provision as regards employment and social protection and that some new categories of persons are now covered by the new directive, it will, despite its restrictions, improve the employment and social protection of the third-country nationals involved.

### **2.2.2. Highly qualified workers**

In the context of the increasing global competition for talent, the so-called 'EU Blue Card' Directive 2009/50/EC was adopted.<sup>29</sup> This directive is intended to facilitate the admission and mobility of highly qualified migrants and their family members by harmonizing, to a certain extent, entry and residence conditions throughout the EU and by providing a legal status and a set of rights. Those admitted on the basis of this directive obtain the so-called 'EU Bleu Card'.<sup>30</sup> Since the objective of this directive is to attract as many highly talented people as possible for the European labour market, it comes as no surprise that under this directive these persons enjoy a wide range of rights, including the right to be treated equally with the nationals of the Member States that issued the 'Blue Card'. This equal treatment is explicitly guaranteed in Article 14 for all employment conditions, including the freedom to join workers organizations, as well as for the branches of social security as defined in Regulation 1408/71 (now Regulation 883/2004). Moreover, this directive provides for equal treatment with nationals of the host Member State as regards the portability of statutory old-age pensions when moving to a third country (Article 14(1)(f)). This means that the Member States are obliged to (continue to) pay pensions to the former 'EU Blue Card' holders when they move to a third country. This is the first provision in an EU directive that provides such an obligation, which also applies if there is no bilateral social security agreement between the countries involved. The only condition is that the Member State concerned exports its pensions for its own nationals, since this is a purely equal treatment clause.

Article 14 of this directive contains exceptions to the right to equal treatment as regards study and maintenance grants and loans as well as the access to housing (Article 14(2)), but not as regards employment and social security rights. However, Article 14(3) states that the right to equal treatment as laid down in paragraph 1 of the Article shall be without prejudice to the right of the Member State to withdraw or to refuse to renew the EU Bleu Card in accordance with

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<sup>29</sup> Council Directive 2009/50/EC of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purpose of highly qualified employment (OJ 2009 L 155/17).

<sup>30</sup> The term 'EU Blue Card' is in fact misleading since in practice Member States issue a 'national' 'EU Bleu Card' which allows the holder only access to the labour market of that Member State. However, the holders of such a 'national' 'EU Blue Card' have, under certain conditions, the right to move to another Member State for the purpose of highly qualified employment and to obtain there another 'national' 'EU Blue Card' (Article 18). The implementation of this Directive so far by the Member State did not prove to be successful: European Commission, *Communication on the implementation of Directive 2009/50/EC on the conditions of entry and residence of third-country nationals for the purpose of highly qualified employment*, 22 May 2014, COM(2014) 287. See also: F. Weber, *supra* note 8, pp. 41-47.

Article 9. The latter provision allows Member States to withdraw or refuse to renew this card whenever the holder thereof does not have sufficient resources to maintain him/herself and, where applicable, the members of his/her family, without having recourse to the social assistance system of the Member State concerned. These provisions imply that recourse to the social assistance system of the host State may lead to the loss of the right to work and stay there.

### 2.2.3. Illegally staying third-country nationals

Directive 2009/52/EC deals with sanctions and measures against employers of illegally staying third-country workers.<sup>31</sup> In the first place, this directive prohibits the employment of illegally staying third-country nationals and lays down minimum common standards and measures, including criminal and administrative sanctions, to be applied in the Member States against employers who infringe that prohibition. It seeks to make the employment of irregular workers less attractive, employment which is characterized by low wages, poor working conditions and even exploitation and the lack of payment of social security contributions.

Therefore the directive also contains some provisions on the employment and social security rights of these workers. Article 6 concerns back payments to be made by employers. The directive provides that the Member States shall ensure that the employer of illegally staying third-country nationals ‘*shall be liable to pay any outstanding remuneration to the illegally employed third-country national, an amount equal to any taxes and social security contributions that the employer would have paid had the third-country national been legally employed ... and any cost arising from sending back payments to the country to which the third-country national has returned or has been returned*’.<sup>32</sup> Furthermore, the Member States must make available to these workers effective procedures to claim these rights from the employers, including the possibility for a national authority to institute procedures on behalf of the workers, even if they are no longer present in the State. In addition, Member States shall provide that an employment relationship of at least three months duration be presumed and they must ensure that these workers also receive these back payments in cases in which these workers have returned to their home State. Member States may even provide that residence permits of limited duration are extended until the third-country national has received all of these back payments. Furthermore, Article 8 provides that Member States shall ensure that the contractor of whom the employer is a direct subcontractor may, in addition to or in place of the employer, be liable to pay the back payments. This obligation must even be extended to any intermediate subcontractor who knew that the employing subcontractor employed illegally staying third-country nationals.

However, it is surprising that this directive does not contain an equal treatment clause guaranteeing the workers involved equal treatment as regards employment and social security rights with the nationals of the host Member State. Therefore the extent of the employment or social security rights such workers have in a Member State fully depends on the domestic legislation of each of the Member States, most of which have adopted very different approaches in this respect. Moreover, it appears that in practice the Member States are mainly interested in

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<sup>31</sup> Directive 2009/52/EC of the European Parliament and of the Council of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals (OJ 2009 L 168/24).

<sup>32</sup> Still, the directive does not provide for any guarantee that these workers, for whom social security contributions are paid, will be entitled to the benefits arising from these contributions. See for the same criticism: S. Mc Kay, ‘Transnational aspects of undeclared work and the role of EU legislation’, *European Labour Law Journal* 5, 2014, p. 123.

the return of irregular immigrants to their host State. In addition, an expulsion measure could very well jeopardize their employment and social security rights.<sup>33</sup>

#### 2.2.4. Single Permit Directive

Of particular importance for employment and social security rights of labour migrants is the so-called ‘Single Permit’ Directive 2011/98/EU.<sup>34</sup> This directive does not create a right for third-country national workers to enter a Member State for the purpose of employment. It only introduces a single application procedure and single permit for both stay and access to employment on the territory of the host State. But it also guarantees a set of rights for third-country national workers legally admitted to the Member States.<sup>35</sup>

The directive has a broad scope, which is defined in its Article 3. It does not only include third-country national workers who apply to reside in a Member State for the purpose of work and those who have been admitted for reasons of work, but also third-country national workers who have been admitted for other reasons but are permitted to work in a Member State, in accordance with Union or national law. However, a number of categories are excluded from the scope of the directive, such as third-country family members of EU citizens, posted workers, intra-corporate transferees (see further), seasonal workers (see further), au pairs, asylum seekers, third-country nationals enjoying temporary or international protection, persons who are long-term residents in accordance with Directive 2003/109/EC and self-employed workers. These exclusions exemplify the still persisting fragmented approach of the EU to labour immigration. Most of these categories of third-country nationals are covered by other specific directives, some of which are discussed in this article. However, workers posted by an employer who is established in a third country are not covered by any other directives. Indeed Directive 96/71/EC on the posting of workers only applies to posting within the EU.<sup>36</sup> Undocumented third-country nationals are not covered either.<sup>37</sup>

The Single Permit Directive 2011/98/EU contains an elaborate provision on the right to equal treatment (Article 12).<sup>38</sup> It stipulates that third-country workers, who are covered by this directive, shall enjoy equal treatment with nationals of the Member State where they reside with regard to employment conditions (including freedom of association and affiliation and

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<sup>33</sup> See, *inter alia*, E. Dewhurst, ‘The Right of Irregular Immigrants to Outstanding Remuneration under the EU sanctions Directive: Rethinking Domestic Labour Policy in a Globalised World’, *European Journal of Migration and Law* 13, 2011, pp. 389-410.

<sup>34</sup> Directive 2011/98/EU of the European Parliament and of the Council of 13 December 2011 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 (OJ 2011 L 343/1).

<sup>35</sup> For a detailed analysis of the various aspects of the directive, see the contributions in: P. Minderhoud and T. Strik (eds.), *The Single Permit Directive: Central Themes and Problem Issues*, Oisterwijk, Wolf Legal Publishers, 2015. See also: A. Beduschi, ‘An Empty Shell? The Protection of Social Rights of Third-Country Workers in the EU after the Single Permit Directive’, *European Journal of Migration and Law* 17, 2015, pp. 210-238.

<sup>36</sup> Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services (OJ 1997 L 18/1).

<sup>37</sup> See also recital 21 of Directive 2011/98/EU. Therefore this directive does not offer any legal protection to the most vulnerable category of third-country labour migrants. See in the same vein: J. Hunt, *supra* note 2, pp. 138-139.

<sup>38</sup> This provision was the subject of long-lasting and difficult negotiations at the level of the EU legislature (Council and European Parliament), mostly because Member States wanted to avoid additional costs: G. Brinkman, ‘Opinion of Germany on the Single Permit Proposal’, *European Journal of Migration and Law* 14, 2012, pp. 351-366. See also A. Beduschi, *supra* note 35 and K. Groenendijk, ‘Equal Treatment of Workers from Third Countries: The Added Value of the Single Permit Directive’, in P. Minderhoud and T. Strik (eds.), *The Single Permit Directive: Central Themes and Problem Issues*, Oisterwijk, Wolf Legal Publishers, 2015, p. 31.

membership of an organization representing workers) as well as for branches of social security, as defined in Regulation 883/2004.

However, Member States may restrict equal treatment by limiting social security rights (see Article 12(2)(b)). Indeed, Member States may limit equal treatment for these rights for those third-country workers who are no longer in employment after having been employed for less than six months. This would put those who become unemployed soon after their entry into the labour market of the host State in a highly vulnerable position, since this provision would allow Member States to refuse unemployment benefits and other social security benefits, such as family benefits or sickness benefits, to these workers. It would even jeopardize their right to remain in that country. Family benefits may also be refused to third-country workers who have only been authorized to work for a period not exceeding six months, to third-country nationals who have been admitted for the purpose of study, or who are allowed to work on the basis of a visa. Moreover, recital 24 states that this directive does not grant rights in situations which lie outside the scope of Union law, such as in the case of family members residing in a third country. This means that under this directive Member States are not obliged to grant family benefits for members of the family who are not residing in a Member State.

In contrast, regarding the export of benefits, Article 12(4) guarantees the payment of statutory old-age, invalidity and death pensions to third-country workers moving to a third country as well as to their survivors residing in a third country, however only insofar as this is provided for on behalf of nationals of the Member State involved and at the same rate applied to them. Given the fact that it also applies in situations where there is no bilateral social security agreement between the States involved this is a very important provision.<sup>39</sup>

In principle this directive guarantees equal treatment regarding employment and social rights for a broad category of migrant workers coming from third countries, and therefore means an important step forwards. However, it also contains a number of restrictions, more specifically for social security rights, which ‘were seen as a powerful bargaining chip for the adoption of the Directive’.<sup>40</sup> Still, a ‘*more favourable conditions clause*’ in Article 13 explicitly states that the directive shall apply without prejudice to more favourable provisions of other directives or other EU legal instruments such as agreements with third countries.<sup>41</sup> The directive also allows Member States to adopt or maintain provisions that are more favourable to the persons to whom it applies (Article 13(2)). However, since this directive does not apply to a large number of categories of third-country nationals<sup>42</sup>, these categories of workers cannot rely on the equal treatment provisions of Article 12. This is not a problem for those workers who can rely on more favourable conditions in other EU, national or international legal instruments. However, the rights guaranteed in these instruments are not always as favourable as the ones guaranteed in the Single Permit Directive.<sup>43</sup> With regard to third-country nationals who are long-term residents in accordance with Directive 2003/109/EC, this even leads to a paradoxical situation. By excluding them from the scope of the Single Permit Directive, this category of third-country nationals could receive less protection with regard to social security rights than workers who can rely on Article 12 of Directive 2011/98/EU. Indeed, Directive 2003/109/EC allows in its

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<sup>39</sup> See further in the issue of exportability of pensions under point 4.

<sup>40</sup> A. Beduschi, *supra* note 35, p. 220. See also this author’s analysis of restrictions in the directive to other rights, such as the right to housing and educational and vocational training.

<sup>41</sup> See more on these agreements in point 3.

<sup>42</sup> See Article 3 (2). This list includes third-country family members of EU citizens, posted workers, intra-corporate transferees, seasonal workers, au pairs, asylum seekers, third-country nationals enjoying temporary or international protection, persons who are long-term residents in accordance with Directive 2003/109/EC and self-employed workers

<sup>43</sup> See for instance the rights guaranteed in the Seasonal Workers Directive, discussed further under point 2.2.5.

Article 11(4) Member States to limit equal treatment in respect of social assistance and social protection to core benefits.<sup>44</sup> This possibility is worded in a broader manner than the limits allowed under Article 12 (2)(b) of the Single Permit Directive. Moreover, contrary to what is provided for in Article 12(4) of the Single Permit Directive, the Long-Term Residence Directive does not contain any provisions on the right to export certain benefits to a third country. Hence, the exclusion from the scope of the Single Permit Directive 2011/98/EU of these long-term residents results in a weaker legal protection of this category of workers, compared to the protection third-country national workers would normally have under the Single Permit Directive.

### 2.2.5. Seasonal workers

In 2014 the EU adopted two additional labour migration instruments applicable for specific categories of migrants. The first is Directive 2014/36/EU on seasonal workers.<sup>45</sup> This directive determines the conditions of entry, stay and access to the labour market for a limited period for third-country seasonal workers in the EU Member States and defines their rights. It provides for a simplified and uniform procedure for the admission of seasonal workers from third countries. It seeks to respond to the needs of Member States for temporary and seasonal low-skilled workers in sectors like agriculture and tourism, and to ensure decent working and living conditions for these seasonal workers. It is also designed to promote circular migration of these workers, so as to avoid that these workers become permanent residents in the EU, but at the same time it allows them to come back several years in a row to perform seasonal work. However, the obligations for the Member States regarding the latter point are rather weakly formulated in the directive so that there could be some doubt as to the attainability of this objective.

It also intends to secure a legal status and decent working and living conditions for seasonal workers.<sup>46</sup> This directive introduces a '*controlled admission system which requires workers to have a job to go to, as well as means to support themselves before admission*'.<sup>47</sup> Indeed, for seasonal workers staying no longer than 90 days, Member States shall require that the seasonal worker will have no recourse to their social assistance system (Article 5(3)) and for those staying more than 90 days Member States shall require that the seasonal worker will have sufficient resources during his or her stay to maintain him/herself without having recourse to their social assistance system (Article 6(3)). These provisions imply that seasonal workers do not have access to the social assistance systems of the host State.

Still, as regards employment and social security rights this directive also contains an equal treatment clause (Article 23). It guarantees the seasonal worker admitted to the host Member State under this directive equal treatment with nationals of this State with regard to all terms of employment, the right to strike and take industrial action as well as freedom of association. It also provides for equality of treatment with nationals of the host country regarding back

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<sup>44</sup> Recital 12 to this directive states that '*with regard to social assistance, the possibility of limiting the benefits for long-term residents to core benefits is to be understood in the sense that this notion covers at least minimum income support, assistance in case of illness, pregnancy, parental assistance and long-term care*'. See for a strict application of these limits: Case C-571/10, *Kamberaj*.

<sup>45</sup> 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 (OJ 2014 L 94/375).

<sup>46</sup> For a more detailed analysis of this directive see, *inter alia*: J. Fudge and P. Herzfeld Olsson, 'The EU Seasonal Workers Directive: When Immigration Controls Meet Labour Rights', *European Journal of Migration and Law* 16, 2014, 439-466. For a critical assessment see also: M. Gromilova, 'Can the EU Seasonal Workers' Directive Alleviate the Pending Crisis of Climate-Induced Displacement?', *European Labour Law Journal* 6, 2015, pp. 293-320.

<sup>47</sup> J. Hunt, *supra* note 3, pp. 142-143.

payments concerning any outstanding remuneration to be made by the employers to the third-country national. This equal treatment provision of the finally adopted directive is much stronger than the one originally proposed by the European Commission.<sup>48</sup>

Equal treatment for the branches of social security, as defined in Regulation 883/2004 is also provided for. However, as far as social security is concerned Article 23(2)(i) allows Member States to restrict equal treatment for social security by excluding family benefits and unemployment benefits, meaning that Member States may deny seasonal workers entitlement to these benefits even if they meet the conditions imposed on the nationals of the Member States with regard to these benefits and even if they themselves or their employer paid contributions for the financing of these benefits. This provision clearly highlights the circular migration aspect of this directive: the seasonal workers are not supposed to remain in the host Member State after having finished the seasonal work, or to be joined by their family members. Their presence on the territory of the host Member State is by definition temporary. This follows clearly from the definition of 'seasonal worker' in Article 3(b) of the directive which says that this worker '*retains his or her principal place of residence in a third country*'. It is unclear whether this would further deprive seasonal workers of the entitlement to social benefits, including health care. Indeed, not having their principal place of residence in the host State could mean that these persons will not have access to social benefits which under the national legislation of the host Member State are only available to persons who have their main residence on its territory.

Further integration into the society of the host State is clearly not what this directive aims at. In addition, the circular aspect of this type of labour migration is underlined by the provision in the final paragraph of Article 23(1) which guarantees the payment of statutory pensions to seasonal workers moving to a third country as well as their survivors residing in a third country, provided the export to the third country involved is also guaranteed to the nationals of the Member State in question. As in the Single Permit Directive 2011/98/EU, such equal treatment does not depend on the existence of an agreement with the third country involved. However, in contrast to Article 12(4) of the Single Permit Directive, Article 23(1) of the Seasonal Workers Directive does not mention invalidity and death pensions. Since the Single Permit Directive excludes seasonal workers from its scope (see Article 3(2)(e)), this means a restriction of the rights of these category of workers in this respect. It is unclear why the European legislator excluded invalidity and death pensions from this equal treatment provision

Furthermore, the directive pays special attention to control measures and implementation of rights. Article 24 obliges Member States to provide for measures to prevent possible abuses and to punish infringements of the directive, by including a system of monitoring, assessment and inspection. In addition, Article 25 obliges Member States to ensure that there are effective mechanisms through which seasonal workers may lodge complaints against their employers, either directly or through third parties that have a legitimate interest in ensuring compliance with this directive (such as trade unions and NGOs). These third parties must also be allowed to engage, either on behalf or in support of a seasonal worker, in any administrative or civil proceedings. It also states that the Member States shall make sure that seasonal workers have the same access as other workers to protective measures against dismissal or other adverse treatment by the employer as a reaction to a complaint. Moreover, pursuant to Article 9 Member

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<sup>48</sup> Indeed, the Commission's original proposal did not provide for equal treatment for working conditions but only referred to the national law of the Member States. This was heavily criticized by, *inter alia*, the ILO and NGOs, and modified in the legislative process into an obligation for the Member States to ensure equal treatment for all employment rights. See on this discussion: J. Fudge and P. Herzfeld Olsson, *supra* note 46, p. 457-459 and p. 464-466 and J. Hunt, *supra* note 3, pp. 142-143.

States may withdraw the authorization for the purpose of seasonal work when the employer has failed to meet his legal obligations regarding social security, labour rights, working conditions or terms of employment or when the employer has not fulfilled his obligations as laid down in the employment contract. In case of withdrawal of the authorization the Member States shall ensure that the employer shall be liable to pay compensation to the seasonal worker (Article 17(2)).

### 2.2.6. Intra-corporate transferees

The second new directive adopted in 2014 is Directive 2014/66/EU on the so-called intra-corporate transferees (ICTs).<sup>49</sup> This directive has a very specific scope since it concerns temporary assignments by companies of highly skilled third-country nationals, in particular managers, specialists or trainee employees, to subsidiaries in the EU.<sup>50</sup> It aims at facilitating such transfers by setting up harmonized conditions for admission, residence and work, including speedy application procedures.

This directive also contains a provision on the right to equal treatment of these workers, but in a rather conditional way. As far as employment conditions are concerned, Article 18(1) provides that ICTs admitted under this directive shall enjoy at least equal treatment with persons covered by Directive 96/71/EC<sup>51</sup> with regard to the terms and conditions of employment in accordance with Article 3 of this directive in the Member State where the work is carried out. Under this Posting of Workers Directive workers posted within the EU must be granted equal treatment with the workers of the host State only in the following matters: maximum work periods and minimum rest periods; minimum number of paid annual holidays; minimum wages; conditions for the posting of employees, in particular by temporary employment agencies; health, safety and hygiene in the workplace; protective measures for special groups of employees (pregnant women, youngsters); provisions regarding equal treatment and non-discrimination. However, Article 18(1) of Directive 2014/66/EU states explicitly that it applies without prejudice to point (b) of its Article 5 (4) on the basis of which the Member States shall require that the remuneration granted to the third-country nationals during the entire intra-corporate transfer is not less favourable than the remuneration granted to nationals occupying comparable positions of the Member State where the work is carried out. Therefore, the ICTs must not only be granted the minimum wages applicable in accordance with Directive 96/71/EC, but the real wage that nationals of the host Member State receive for comparable positions. It appears that these provisions of Directive 2014/66/EU with respect to equal treatment regarding employment conditions are quite ambiguously formulated. Anyway, compared to the equal treatment provisions in the other above discussed directive, it is clear that ICTs shall not be treated fully equally with workers of the host State in comparable situations.

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<sup>49</sup> Directive 2014/66/EU of the European Parliament and of the Council of 15 May 2014 on the conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer (OJ 2014 L 157/1).

<sup>50</sup> 'Intra-corporate transfer' is defined as '*the temporary secondment for occupational or training purposes of a third-country national who, at the time of application for an intra-corporate transferee permit, resides outside the territory of the Member States, from an undertaking established outside the territory of a Member State, and to which the third-country national is bound by a work contract prior to and during the transfer, to an entity belonging to the undertaking or to the same group of undertakings which is established in that Member State, and, where applicable, the mobility between host entities established in one or several second Member States*' (Article 3(b)).

<sup>51</sup> Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services (OJ 1997 L 18/1).

In fact, the provisions of Directive 2014/66/EU leave open to what extent the employment protection of the host State is applicable as well as the question of which law is applicable to the employment relationship. The latter is indeed a matter to be decided by the rules of Private International Law (PIL). Within the EU these rules are harmonized by the so-called Rome I Regulation 593/2008/EC.<sup>52</sup> In the absence of a choice of law the principle is that the employment contract is subject to the law of the country where the employee usually carries out his/her job (or from where he/she usually carries out his/her job<sup>53</sup>), even when he/she is temporarily employed in another country.<sup>54</sup> The employment contract of ICTs who are sent temporarily to a subsidiary in the EU by an employer established in a third country, while maintaining their habitual place of work in that third country, will, on the basis of this PIL Directive 593/2008/EC normally remain subject to the employment law of this third country and not to the employment law of the receiving State.

On the other hand, Article 18(2) of Directive 2014/66/EU provides that ICTs shall enjoy (unconditionally) equal treatment with nationals of the Member State where the work is carried out as regards freedom of association and the branches of social security as defined in Regulation 883/2004. However, for the latter matter the entitlement to equal treatment is made subject to the application of bilateral agreements or the national law of the Member State. This provision means in practice that it is possible that the ICT is not subject at all to the social security legislation of the host Member State, but, by virtue of the law of that Member State or of a bilateral social security agreement concluded by that Member State with a third-country, subject to the social security legislation of another country, and more specifically the country of origin. In addition, Article 18(3) of Directive 2014/66/EU allows Member States to decide that the right to equal treatment with regard to family benefits shall not apply to ICTs who have been authorized to reside and work in the territory of a Member State for a period not exceeding nine months. On the other hand, Article 18 (2)(b) guarantees the export of statutory old-age pensions, invalidity and death pensions to a third country under the same conditions and at the same rates as provided for in national law or in bilateral agreements for the nationals of the Member State concerned when they move to a third country.

### **2.2.7. Some conclusions on the EU labour migration directives**

As regards the set of EU labour migration directives adopted in the past decade we can conclude that these are clearly the result of a sector-by-sector approach, and this failing an overall and common EU labour migration policy and corresponding legal instruments. This is due to the reluctance of the EU Member States to transfer competence in this matter to the EU level on the one hand and to the selectivity in policy priorities on the other. Even with regard to the entitlement to equal treatment in terms of employment and social security rights, these EU instruments lack a common approach and give the Member States room to provide for exceptions.

A common feature of these instruments is the attention paid to guaranteeing equal treatment of migrant workers with nationals of the host States, in particular with regard to employment and social security rights. This right to equal treatment is seen as an important instrument to reduce, as Hertzfeld Olsson states, *'unfair competition emanating from the existing gap, thus serving*

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<sup>52</sup> Regulation (EC) 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) (OJ 2008 L 177/1).

<sup>53</sup> See Art. 8 (2), Rome I Regulation.

<sup>54</sup> Recital 36 to the Rome I Regulation states in this regard: *'As regards individual employment contracts, work carried out in another country should be regarded as temporary if the employee is expected to resume working in the country of origin after carrying out his tasks abroad.'*



as a safeguard for EU citizens by protecting them from cheap labour, at the same time as protecting migrants from exploitation'.<sup>55</sup> However, despite these guarantees for equal treatment as regards employment and social security rights, these directives do not prevent 'Member States from tying a migrant worker's legal status to an ongoing employment relationship with the sponsoring employer, a linkage which makes the migrant worker vulnerable to abuse'.<sup>56</sup>

Generally speaking, they guarantee labour migrants coming from third countries equal treatment with the nationals of the host Member States regarding employment rights and conditions. This corresponds to Article 15(3) EU Charter of Fundamental Rights which states that '*nationals of third countries who are authorized to work in the territories of the Member States are entitled to working conditions equivalent to those of citizens of the Union*', although the term 'equivalent' seems to have a narrower meaning and to be less committing than the term 'equal treatment' used in the above discussed directives.<sup>57</sup> The 'Explanations relating to the Charter'<sup>58</sup> specify that this provision has been based on Article 19(4) of the European Social Charter '*ratified by all the Member States*'. The latter provision requires that the Contracting Parties secure for migrant workers lawfully present within their territories a treatment not less favourable than that of their own nationals with regard to remuneration and other employment and working conditions, trade union membership and the benefits of collective bargaining. The wording of this provision seems to leave less room for manoeuvre than the reference in Article 15(3) of the EU Charter to '*working conditions equivalent to*' (emphasis added). On the other hand, the personal scope of the European Social Charter is limited to nationals of the contracting States who are lawfully present and working regularly in the territory of the host State.<sup>59</sup>

The only major exception to the right to equal treatment for employment rights is the position of the so-called intra-corporate transferees, whose legal position is comparable to that of posted workers who are only entitled to equal treatment in the host State for a limited number of employment rights. Moreover, it appears that the provisions of the analysed directives do not interfere with the Private International Law rules, as laid down in EU Regulation 593/2008 (Rome I). In particular in situations in which the third-country worker carrying out activities on the territory of a EU Member State remains bound by an employment contract with an employer in the home country by which he/she is temporarily seconded in an EU Member State, these rules may very well have as a result that the law applicable to the employment contract is the law of the home country. From a legal point of view the abovementioned equal treatment provisions in EU labour migration directives may not be applicable, for instance in the case of

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<sup>55</sup> P. Hertzfeld Olsson, 'Introduction to the Directives', in P. Hertzfeld Olsson (ed.), *National Effects of the Implementation of EU Directives on Labour Migration from Third Countries*, *Bulletin for Comparative Labour Relations*, 91, Alphen aan den Rijn, Wolters Kluwer, 2016, p. 14.

<sup>56</sup> As stated by J. Fudge and P. Hertzfeld Olsson, *supra* note 46, p. 465 as regards seasonal workers. See also on this issue of dependence and precarity of the status of temporary migrant workers: M. Zou, 'The Legal Construction of Hyper-Dependence and Hyper-Precarity in Migrant Work Relations', *International Journal of Comparative and Industrial Relations* 31, 2015, pp. 141-162.

<sup>57</sup> See also D. Ashiabor, 'Article 15' in S. Peers, T. Hervey, J. Kenner and A. Ward (eds.), *The EU Charter of Fundamental Rights*, Oxford, Hart Publishing, 2014, p. 433.

<sup>58</sup> As published in OJ 2007 C 303/17.

<sup>59</sup> See further on the meaning of the European Social Charter for the rights of migrants: C. O'Cinnéide, 'Migrant Rights under the European Social Charter' in C. Costello and M. Freedland (eds.), *Migrants at Work*, Oxford, Oxford University Press, 2014, 282-302; and in particular on the meaning of Article 19(4): S. Clauwaert, 'The Right of Migrant Workers and their Families to Protection and Assistance. Article 19§4', in N. Bruun, K. Lörcher, I. Schömann, and S. Clauwaert (eds.), *The European Social Charter and the Employment Relation*, Oxford, Hart Publishing, 2016, forthcoming.

posted or seconded workers, including seasonal workers. Moreover, posted workers are even excluded from the protection of some of these directives.<sup>60</sup>

Even more striking are the exceptions concerning the right to equal treatment for social security benefits. In particular for third-country labour migrants who have only worked in an EU Member State for a short period several exceptions to the equal treatment rule are allowed. However, it is doubtful whether the exclusion of the entitlement to benefits, such as family benefits or even unemployment benefits is in line with other European and international instruments on the rights of labour migrants or on human rights in general. As far as the European Convention on Human Rights (ECHR) is concerned, the European Court of Human Rights (ECtHR) has repeatedly found that, in principle, all forms of discrimination on grounds of nationality regarding the right to social security benefits are contrary to the ECHR, unless they are duly justified by ‘*very weighty reasons*’.<sup>61</sup> The European Charter of Fundamental Rights, which is applicable when the implementation of EU law is at stake, contains a general anti-discrimination clause in its Article 21. Pursuant to Article 52(3) of the EU Charter, the interpretation of this clause must be in line with the case law of the ECtHR.<sup>62</sup> ILO Migrant Workers Conventions No 97 and No 143 and the Equal Treatment (Social Security) Convention No 118 also include the right to equal treatment for social security.<sup>63</sup>

The principles of equal treatment and non-discrimination are indeed fundamental to the body of international instruments and are at the centre of the human rights discourse.<sup>64</sup> This would argue for at least a very restrictive interpretation of the possibilities the various directives offer the Member States to provide for exceptions to equal treatment for social benefits of migrants coming from third countries. It also advocates implementation of these possibilities by the Member States only when it is duly justified. Since those restrictions are indeed exceptions to the principle of equal treatment, as enshrined in Article 21(1) of the EU Charter of Fundamental Rights as well, they must be interpreted strictly and in conformity with other principles of EU law or other provisions of the Charter, such as Articles 30 and 31.<sup>65</sup> Otherwise they would deprive the directives of their effectiveness.<sup>66</sup>

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<sup>60</sup> See in particular Article 3(2)(j) of the Blue Card Directive 2009/50/EC (regarding workers posted between EU Member States); Article 3(2)(c) of the Single Permit Directive 2011/98/EU (for all posted worker irrespective of the country from which they are posted); Article 3(a) of the Seasonal Workers Directive 2014/36/EU (regarding workers posted between EU Member States); Article 2(2)(c) of the Intra-corporate Transferees Directive 2014/66/EU (regarding workers posted between EU Member States).

<sup>61</sup> See for instance ECtHR, 19 September 2003, Koua Poirez v. France, no. 40892/98, para. 46 and ECtHR, 18 February 2009, Andajeva v. Latvia, no. 55707/00, para. 87.

<sup>62</sup> See also: A. Beduschi, *supra* note 35, p. 224 and U. Davy, ‘Für Drittstaatsangehörige weniger Gleichheit? Zum eingeschränkten Zugang zu sozialen Rechten für langfristig Aufenthaltsberechtigte im Unionsrecht’, in S. Devetzi and C. Janda (eds.), *Freiheit-Gerechtigkeit-Sozial(es) Recht. Festschrift für Eberhard Eichenhofer*, Baden-Baden, Nomos, 2015, pp. 137-144.

<sup>63</sup> See Article 6(1)(a)(i) of Convention No 97; Articles 9(1), 10 and 12 (g) of Convention No 143 and Article 3 of Convention No 118. However, so far these conventions have only been ratified by a limited number of Member States.

<sup>64</sup> For a more recent and detailed analysis of the relevant international law instruments on the legal position of migrant workers and in particular on non-discrimination clauses (with special focus on the ILO instruments) see: S. Olney and R. Cholewinski, ‘Migrant Workers and the Right to Non-discrimination and Equality’, in C. Costello and M. Freedland (eds.), *Migrants at Work*, Oxford, Oxford University Press, 2014, pp. 259-281.

<sup>65</sup> K. Groenendijk, *supra* note 38, pp. 28-29. Articles 30 and 31 of the Charter guarantee all workers the right to protection against unjustified dismissal and working conditions which respects his/her health, safety and dignity, to limitation of maximum working hours, to daily and weekly rest periods and to an annual period of paid leave.

<sup>66</sup> A. Beduschi, *supra* note 35, p. 227 and K. Groenendijk, *supra* note 38, p. 34. Compare Case C-578/08 *Chakroun*, para 64. See also the recitals in the various directives stating that they respect the fundamental rights and observe the principles recognized by the Charter: recital 31 of the Single Permit Directive, recital 37 of the Sanctions Directive (which explicitly refers to the principle of equality before the law and of non-discrimination), recital 26

Furthermore, these directives do not contain any provisions regarding aggregation of periods of insurance, employment or residence. As a result, third-country migrant workers coming from a non-EU state where they have fulfilled such periods, could not bring these into account in order to obtain the right to benefits for which the national social security legislation of the host Member State requires the fulfilment of such waiting periods. For instance, for the right to an unemployment benefit the legislation of the Member States often requires the worker having paid contributions or having worked for a certain period of time, sometimes more than one year. A third-country national who has worked in that Member State for a period less than the one required for obtaining the right to an unemployment benefit, will not acquire such a benefit, even if a provision in a directive or in national law would guarantee this worker equal treatment, including for unemployment benefits. The same problem could also occur for other benefits, such as invalidity and old-age pensions.

On the positive side we must acknowledge the importance of the provisions in a number of directives, and in particular in the widely applicable Single Permit Directive regarding the export of invalidity and old-age pensions when migrant workers move (back) to a third country. These provisions guarantee them the same rights in this respect as the nationals of the Member States concerned, even if no bilateral social security agreement has been concluded between the countries involved. However, these export clauses do not apply to other benefits, such as sickness benefits in cash or unemployment benefits or even the entitlement to health care. This means that third-country national returning to their home State or another third country risk losing these benefits.

In addition, third-country nationals may also be covered and protected by a large number of other EU directives, for instance in the field of social policy or anti-discrimination policy.<sup>67</sup> They can invoke these directives directly in order to obtain employment or social rights, even if they are not covered by the labour migration directives. This was illustrated quite remarkably in the *Tümer* judgment.<sup>68</sup> In this judgment the ECJ stated that third-country nationals who are not legally resident in the Member State in which they work, can nevertheless be regarded as workers covered by Directive 80/987/EEC on the protection of employees in the event of the insolvency of their employer.<sup>69</sup> Therefore, such a person is not excluded from the protection this directive offers. For the Court, the fact that some directives, such as long-term residence Directive 2003/109/EC, which guarantees equal treatment for third-country nationals in the field of social protection (Article 11), only apply to workers legally resident in the Member State concerned, does not preclude other directives from conferring rights on third-country nationals. The Court found that Directive 80/987/EEC does not exclude not lawfully resident third-country workers from its scope and does not permit Member States to exclude these workers from the protection offered in accordance with this directive. The ECJ explicitly refers to the social objective of this directive, which is to guarantee employees a minimum of protection at EU level in the event of the employer's insolvency through payment of outstanding claims resulting from contracts of employment or employment relationships and relating to pay for a specific period.<sup>70</sup>

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of the Blue Card Directive, recital 61 of the Researchers and Student Directive, recital 52 of the Seasonal Workers Directive (which explicitly refers to Articles 7, 15(3), 17, 27, 28, 31 and 32(2) of the EU Charter) and recital 45 of the Intra-corporate Transferees Directive (which explicitly refers to 'the Social Charters adopted by the Union and the Council of Europe').

<sup>67</sup> K. Groenendijk, *supra* note 38, p. 29.

<sup>68</sup> Case C-311/13, *Tümer*.

<sup>69</sup> Council Directive 80/987/EEC of 20 December 1980 relating to the protection of employees in the event of the insolvency of their employers (OJ 1980 L 283/23).

<sup>70</sup> Case C-311/13, *Tümer*, paras 42 – 44.

This is in line with what the EU Charter of Fundamental Rights confirms as being rights of ‘every worker’, more specifically the right to protection against unjustified dismissal (Article 30), the right to working conditions with respect to their health, safety and dignity (Article 31(1) and the right to limitation of maximum working hours, to daily and weekly rest periods and to an annual period of paid leave (Article 31(2)). Pursuant to Article 51(1) of the Charter, Member States must respect these rights when implementing Union law.<sup>71</sup>

Finally the above analysed directives all contain clauses stating that they apply without prejudice to the right of Member States to adopt or maintain provisions that are more favourable to the persons to whom they apply as well as to more favourable provisions of Union law, including bilateral and multilateral agreements concluded by the Union with third countries and of bilateral or multilateral agreements concluded between Member States and third countries.<sup>72</sup> Therefore, within the context of this article on the impact of Union law, it is relevant to look at the role of the international agreements concluded by the EU with third countries on the employment and social security rights of third-country migrant workers.

### **3. International agreements concluded by the EU**

Over the past decades the European Union has concluded a large number of agreements with third countries which also may have an impact on the employment and social security rights of third-country labour migrants working in the EU Member States.<sup>73</sup>

#### **3.1. Agreement with Turkey**

The oldest of international agreements of that kind still in force, is the Association Agreement with Turkey which was signed as early as 1963.<sup>74</sup> According to Article 36 of the Additional Protocol of 1970<sup>75</sup>, the freedom of movement for workers between EU Member States and Turkey shall be secured by progressive stages. However, the Court of Justice did not recognize the direct effect of this provision<sup>76</sup> and it was never implemented by other legally binding texts either. Accordingly, a Turkish national's first admission to the territory of a Member State is, as a rule, still governed exclusively by that State's own domestic law.<sup>77</sup> On 19 September 1980 the Association Council adopted Decision 1/80 to implement the agreement. This decision regulates the situation of Turkish workers already integrated into the labour force of a Member

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<sup>71</sup> D. Ashiabor, *supra* note 57, p. 433.

<sup>72</sup> See in particular Article 4 of the Blue Card Directive 2009/50/EC; Article 13 of the Single Permit Directive 2011/98/EU; Article 4 of the Seasonal Workers Directive 2014/36/EU; Article 4 of the Intra-corporate Transferees Directive 2014/66/EU and Article 4 of the Student and Researchers Directive (EU) 2016/801.

<sup>73</sup> This article does not discuss the agreement creating the European Economic Area (between the EU on the one hand and Norway, Iceland and Liechtenstein, on the other) nor the agreement with Switzerland. These agreements provide for the right to free movement of workers between these countries and the EU, and also guarantee equal treatment with regard to employment and social rights, including the implementation of the specific EU social security coordination system. Workers, nationals of these countries, have in principle the same rights as nationals of EU Member States with regard to free movement and equal treatment, and are therefore not really ‘third-country nationals’.

<sup>74</sup> OJ 1963, 3685.

<sup>75</sup> OJ 1972 L293/1.

<sup>76</sup> Case 12/86, *Demirel*.

<sup>77</sup> Case C-37/98, *Savas*, para. 65; Case C-369/01, *Abatay*, para. 65; Case C-187/10, *Unal*, para. 41; and Case C-268/11, *Gülbache*, para. 47.

State. It also contains a provision on equal treatment of these Turkish migrant workers. Article 10 provides that the Member States shall, as regards remuneration and other conditions of work, grant Turkish workers who are duly registered as belonging to their labour force treatment involving no discrimination on the basis of nationality between them and EU workers. The ECJ has recognized the direct effect of this provision.<sup>78</sup>

On 19 September 1980 the EU-Turkish Association Council also adopted Decision 3/80 on the application of the social security schemes of the Member States of the European Communities to Turkish workers and members of their families.<sup>79</sup> However, the Court of Justice ruled that in the absence of any measures to implement Decision 3/80 its legal effect is limited.<sup>80</sup> Still, the Court of Justice recognized the direct effect of the equal treatment provision of Article 3 of Decision 3/80 and of the provision on the export of benefits to Turkey of Article 6.<sup>81</sup> This means that Turkish workers in the EU Member States can claim equal treatment with nationals of the host State as regards social security benefits and that Turkish nationals who acquired rights to social security benefits in a Member State are, in principle, entitled to the export of these benefits when they return to Turkey.<sup>82</sup> It also means that the restrictions allowed under the above discussed labour migration directive to the right to equal treatment, cannot be applied to Turkish workers.

### 3.2. Agreements with the Maghreb countries

The next series of relevant agreements concluded by the EU, are the Association Agreements with the so-called Maghreb Countries (Morocco, Tunisia and Algeria). Currently applicable are the Euro-Mediterranean Agreements signed in 1995, 1996, and 2002.<sup>83</sup>

These agreements include provisions on the rights of workers who are nationals of these countries. They are entitled to equal treatment with the nationals of the host Member State with regard to working conditions, remuneration and dismissal.<sup>84</sup> They also enjoy equal treatment in the field of social security.<sup>85</sup> <sup>86</sup> Moreover, the provision on social security also determines that the workers in question shall be able to claim export of pensions, including invalidity pensions, when they return to their home country. However, the right to receive family benefits is limited to those members of their families who are resident in the EU. Furthermore, the agreements

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<sup>78</sup> Case C-171/01, *Wählergruppe* and Case C-152/08, *Kahveci*.

<sup>79</sup> OJ 1983 C110/60. For a more detailed analysis of this decision see: P. Minderhoud, 'Decision 3/80 of the EEC-Turkey Association Council: significance and Developments', in D. Thym and M. Zoetewij-Turhan (eds.), *Rights of Third-Country Nationals under EU Association Agreements. Degrees of Free Movement and Citizenship*, Leiden-Boston, Brill – Nijhof, 2015, pp. 169-185 and H. Verschueren, 'Social Security Co-ordination in the Agreements Between the EU and Mediterranean Countries', in D. Pieters and P. Schoukens (eds.), *The Social Security Co-ordination Between the EU and Non-EU Countries*, Antwerpen Intersentia, 2009, pp. 19-55.

<sup>80</sup> Case C-277/04, *Taflan-Met*. On 8 February 1983 the Commission presented a proposal for a Council Regulation implementing Decision 3/80 within the Community (OJ 1983 C110/1), but this decision was never adopted by the Council.

<sup>81</sup> Case C-262/96, *Sürül*; Case C-485/07, *Akdas*; and Case C-171/13, *Demirci*.

<sup>82</sup> Currently the Association Council EU-Turkey is discussing a proposal to replace Decision 3/80 by a new decision. The EU Council of Ministers adopted as early as December 2012 the position to be taken on behalf of the EU within the Association Council (OJ 2012, L 340/19), but so far no agreement has been reached in this Council.

<sup>83</sup> Agreement with Tunisia of 17 July 1995 (OJ 1998 L 97/1); the Agreement with Morocco of 26 February 1996 (OJ 2000 L 70/1) and the Agreement with Algeria of 22 April 2002 (OJ 2005 L 265/1).

<sup>84</sup> Article 64 Agreement with Tunisia; Article 64 Agreement with Morocco and Article 67 Agreement with Algeria.

<sup>85</sup> Article 65 Agreement with Tunisia; Article 65 Agreement with Morocco and Article 68 Agreement with Algeria.

<sup>86</sup> The ECJ has confirmed the direct applicability of these equal treatment provisions. See, *inter alia*, Case C-18/90, *Kziber*; Case C-58/93, *Yousfi*; Case C-126/95, *Hallouzi-Choho*; and Case C-336/05, *Echouikh*. For a more detailed analysis see: H. Verschueren, *supra* note 79.

explicitly provide that these provisions do not apply to nationals of these countries residing or working illegally in the territory of their host State.<sup>87</sup>

These agreements authorize the Association Council to adopt provisions to implement the principles with regard to social security, in particular as regards the coordination between the social security schemes of the EU Member States on the one hand and of the three other countries on the other.<sup>88</sup> For this purpose and on the proposal of the European Commission, the EU Council of Ministers has in the meantime adopted the positions on this issue to be taken by the European Union within the different Association Councils.<sup>89</sup> These Council decisions contain for each of these third countries draft decisions to be negotiated on in the relevant Association Councils. These draft decisions confirm the right to equal treatment for social security benefits as well as the right to export old-age and invalidity benefits. They also propose to set up mechanisms of cooperation, such as for administrative checks and medical examinations. However, they do not contain any further rules on social security coordination, such as the determination of the applicable legislation or rules on aggregation of periods of insurance, payment of contributions or employment for obtaining or calculating social security benefits. But even so, after more than five years, these proposals are still waiting for the final approval of the Association Councils. This means that the social security coordination between the systems of the EU Member States and these third countries continue to be governed by the bilateral social security agreements, if any, concluded between these States.

### 3.3. Partnership and Cooperation Agreements

Apart from these specific agreements, the EU has also concluded a large number of agreements with third countries, such as Partnership Agreements, Partnership and Cooperation Agreements or Stabilization and Association Agreements. Most of these agreements contain provisions on the right to equal treatment with nationals of the host State as regards working conditions, remuneration and dismissal.<sup>90</sup> The ECJ has explicitly recognized the direct effect of such clauses.<sup>91</sup> However, in a series of other agreements the equal treatment clause has been worded in weaker terms, referring to the commitment of the EU Member States to ‘*endeavour to ensure*’ equal treatment as regards working conditions.<sup>92</sup> Such clauses do not seem to qualify for direct effect in line with the case law of the ECJ. Their weak wording may even be inspired by the

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<sup>87</sup> Article 66 Agreement with Tunisia; Article 66 Agreement with Morocco and Article 69 Agreement with Algeria.

<sup>88</sup> Article 67 Agreement with Tunisia; Article 67 Agreement with Morocco and Article 70 Agreement with Algeria.

<sup>89</sup> Decisions of 21 October 2010 (OJ 2010 L 306/8).

<sup>90</sup> See for instance the following agreements and their provisions on equal treatment as regards working conditions: Agreement of 16 December 1991 on Cooperation and Customs Union with San Marino (OJ 2002 L 84/43; Art. 20); Partnership and Cooperation Agreement of 24 June 1994 with Russia (OJ 1997 L 327/1; Art. 23); the Cotonou Partnership Agreement of 23 June 2000 with the members of the African, Caribbean and Pacific Group (the so-called ACS-States, 79 in total) (OJ 2000 L 317/1; Art. 13(3)); Stabilisation and Association Agreement with FYR of Macedonia (OJ 2004 L 84/13; Art. 44); Stabilisation and Association Agreement of 12 June 2006 with Albania (OJ 2009 L 107/166; Art. 46); Stabilisation and Association Agreement of 15 October 2007 with Montenegro (OJ 2010, L 108/3; Art. 49); Stabilisation and Association Agreement of 29 April 2008 with Serbia (OJ 2013 L 278/16; Art. 49); Association Agreement of 21 March 2014 with Ukraine (OJ 2014 L 161/3; Art. 17).

<sup>91</sup> See, *inter alia*, Case C-265/03, *Simutenkov* (on the Agreement with Russia).

<sup>92</sup> See for instance the following agreements and their relevant clauses: Partnership and Cooperation Agreement of 28 November 1994 with Moldova (OJ 1998 L 181/3; Art. 23); Partnership and Cooperation Agreement of 23 January 1995 with Kazakhstan (OJ 1999 L 196/3; Art. 19); Partnership and Cooperation Agreement of 9 February 1995 with the Kyrgyz Republic (OJ 1999 L 196/48; Art. 19); Partnership and Cooperation Agreement of 22 April 1996 with Georgia (OJ 1999 L 205/3; Art. 20); Partnership and Cooperation Agreement of 22 April 1996 with Azerbaijan (OJ 1999 L 246/3; Art. 20); Partnership and Cooperation Agreement of 22 April 1996 with Armenia (OJ 1999 L 239/3; Art. 20); Partnership and Cooperation Agreement of 21 June 1996 with Uzbekistan (OJ 1999 L 229/3; Art. 19); Partnership and Cooperation Agreement of 11 October 2004 with Tadjikistan, (OJ 2009 L 350/3; Art. 17);

latter's broad interpretation of employment rights in other international agreements, which would have caused the Member States to avoid phrasing subsequent agreements in a similarly strong way.<sup>93</sup> Yet, the above analysed directives guarantee equal treatment for working conditions to a large number of third-country nationals legally employed in the EU Member States. Hence, the weaker commitments in these international agreements only to 'endeavour' to ensure equal treatment in this respect, seem to be overruled by more recently adopted EU legislation.

Except for the agreement with San Marino, these agreements do not at all contain a non-discrimination clause with regard to social security benefits. Moreover, only a few of these agreements also provide for a mandate for the relevant Association Councils (created in the context of these agreements) to decide on provisions to coordinate the social security schemes applicable to workers of the third countries involved who are legally employed in an EU Member State. Such coordination measures should, *inter alia*, deal with the aggregation of periods of insurance, employment or residence completed by such workers in the various Member States for the entitlement to benefits such as pensions, medical care and family benefits. Such a decision should also regulate the portability of pensions to these third countries.<sup>94</sup> In the meantime, the EU Council of Ministers has adopted (except for the agreement with Russia) the position to be taken by the European Union within the relevant Councils set up by these agreements.<sup>95</sup> These positions have more or less the same (limited) scope comparable to the ones referred to above for the Maghreb countries. But again, after several years these proposals are still waiting for the final approval of the various Association Councils. So, despite the mandate given in some of these agreements to adopt coordination rules between the social security systems of the Member States and the third countries involved, no such coordination rules have been adopted so far. These provisions '*remain sleeping beauties, waiting to be brought to life with a kiss by further measures of the contracting parties*'.<sup>96</sup>

#### **4. The issue of social security coordination between the systems of the Member States and those of third countries**

In the absence of such rules as agreed between the EU and third countries, the coordination between the social security schemes of the Member States and the schemes of the third countries concerned, remains a matter that is dealt with in bilateral agreements between individual States. Typically, most agreements with third countries contain rules on the determination of the applicable legislation, on equal treatment and on pensions. The pension provisions protect migrants' acquired rights when they leave the national territory and allow payment of pensions in the other territory.<sup>97</sup> In some cases, provision is made for aggregating insurance, employment or residence periods fulfilled in the relevant countries, which allows migrants to fulfil more

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<sup>93</sup> K. Eisele, *The External Dimension of the EU's Migration Policy. Different Legal Positions of Third-Country Nationals in the EU*, Oisterwijk, Wolf Legal Publishers, 2013, pp. 274, 281 and 294-285.

<sup>94</sup> See agreement with San Marino (Art. 21); with Russia (Art. 24); with Albania (Art. 48); with Montenegro (Art. 51); with FYR Macedonia (Art. 46) and also the Euro-Mediterranean Agreement of 20 November 1995 with Israel (OJ 2000 L 147/3; Art. 64).

<sup>95</sup> See Council Decisions of 21 October 2010 (OJ 2010 L 306) for the agreements with Israel and with the FYR Macedonia, and the Decisions of 6 December 2012 (OJ 2012 L 340) for the agreements with San Marino, with Montenegro and with Albania.

<sup>96</sup> G. Vonk, 'Social Security rights of Migrants: Links between the Hemispheres', in P. Arellano Ortiz, M. Olivier and G. Vonk (eds.), *Social Security and Migrant Workers*, Alphen aan den Rijn (NL), Kluwer Law International, 2014, p. 61.

<sup>97</sup> In some cases the amount of the pension paid to persons not residing in the Member State that pays them may be reduced.

easily minimum periods of contribution, employment or residence for the entitlement to benefits in the host State. The principle of equal treatment guarantees migrant workers the same treatment as nationals of the country of work.<sup>98</sup>

However, social security coordination with third countries continues to be subject to very divergent and fragmented coordination rules laid down in a large number (about 350 in total) bilateral agreements between Member States and third countries. In its 2012 Communication, the European Commission identified the problems ensuing from this very fragmented approach, in particular the country-specific nature of these bilateral agreements as well as the limits in their personal and material scope or in the portability of benefits. Consequently, migrants and businesses based in third countries do not only have to deal with very diverse social security systems of the EU States, but are also confronted with distinctive national bilateral agreements when moving into and out of the EU. In addition, the network of bilateral agreements is by no means complete: depending on the third country in question, there may be no bilateral agreement with the relevant EU country. This could amount to a loss of acquired social security rights for persons moving into or out of the EU.<sup>99</sup>

In 2012, the European Commission made an attempt to promote and strengthen cooperation between Member States in this field, so that a less fragmented approach to social security coordination with third countries would be developed.<sup>100</sup> However, it was an unsuccessful initiative. Member States clearly do prefer to maintain their autonomy in this field. Indeed, EU Member States do not seem to be very keen on transferring the competence to conclude such agreements to the EU supranational level, and third countries sometimes prefer to negotiate with every single Member State separately rather than with the EU block as a whole.<sup>101</sup>

Consequently, due to the lack of possibility to aggregate periods of insurance, employment or residence fulfilled in the different countries, many of these workers (and the members of their family) may have to wait for a certain period before becoming entitled to benefits in the host State. In the absence of any guarantee to export benefits, they also may lose entitlement to social security benefits upon returning to their home country, despite the fact that most likely they and their employers have paid contributions for the financing of these benefits. This raises the question as to whether a third-country national who temporarily carries out work in a host Member State should fall entirely within the social security of this State, including the payment of contributions. Obviously, a restricted access to the social security system would be in conflict with the general principle of equal treatment in international and European law as well as with the specific equal treatment provisions in the previously described instruments. Perhaps it would be possible to consider some refunding of the contributions which have been paid but do not lead to rights (or only produce limited rights) once the third-country worker has returned to his/her country of origin. This idea is also expressed in Article 27(2) of the UN Convention on the Protection of the Rights of All Migrant Workers and the Members of Their Family, which states that ‘*Where the applicable legislation does not allow migrant workers and members of*

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<sup>98</sup> See: European Commission, ‘The External Dimension of EU Social Security Coordination’, 30 March 2012, COM(2012) 153, p. 3.

<sup>99</sup> See for further analysis of the content and role of bilateral social security agreements, *inter alia*, G. Strban, ‘The existing bilateral and multilateral social security instruments binding EU-States and non-EU States’, in D. Pieters en P. Schoukens (eds.), *The Social Security Co-ordination Between the EU and Non-EU Countries*, Antwerp, Intersentia, 2009, pp. 83-113; ILO, *Social Security Coordination for non-EU States in South and Eastern Europe: a legal analysis*, Budapest, 2012; S. Klosse, *External aspects of social security coordination*, MISSOC, Brussels, 2013, 30 p.; and W. van Ginneken, ‘Social protection for migrant workers: national and international challenges’, *European Journal of Social Security*, 2013, pp. 214-216.

<sup>100</sup> See *supra* note 98.

<sup>101</sup> G. Vonk, *supra* note 96, pp. 65-66.



*their families a benefit, the States concerned shall examine the possibility of reimbursing interested persons the amount of contributions made by them with respect to that benefit on the basis of the treatment granted to nationals who are in similar circumstances*'.<sup>102</sup>

But the best way to solve this problem of loss of rights is guaranteeing their preservation by means of EU or national legislation or by means of agreements concluded to this end with third countries. This issue has been partially dealt with in some EU labour migration directives which include provisions on the portability of pensions to third countries. It seems that these provisions exclude the possibility of reimbursing the pension contributions already paid upon returning to the home State. However, the question is how realistic it would be for third-country workers who during some period in their working life worked in a EU Member State, to claim pension rights from these Member States once they have reached the retirement age, sometimes many years (or even decades) after their departure.

In the absence of sufficient social security coverage of third-country migrant workers, some sending third countries have meanwhile adopted schemes to protect national citizens living and working abroad, such as the Philippines.<sup>103</sup> But such initiatives, laudable as they are, indirectly confirm the receiving countries' unwillingness to protect labour migrants properly.

## **5. To conclude**

While the European Union has often proclaimed its ambition to develop a common approach to labour migration from third countries, the ambition has only been partly realized. The result of the EU efforts is a very fragmented and uncoordinated framework of policy initiatives and legal instruments to regulate labour migration to the European Union and to deal with the rights and obligations of third-country labour migrants in the Member States.

As regards the employment and social security rights of such workers, EU legal instruments provide for a very divergent and sometimes contradictory set of rules. They ensure, in principle, equal treatment of these workers with the nationals of the host Member State. However, this principle is jeopardized by a number of specific exceptions which the Member States managed to introduce during the negotiating processes. Almost all of the examined legal instruments provide for equal treatment with the nationals of the host Member State with regard to working conditions, including pay. This is not the case for the employment rights of temporary workers, such as inter-corporate transferees. Moreover, the application of EU Private International Law instruments, such as the Posting of Workers Directive and the Rome I Regulation, may well lead to situations in which the law applicable to the employment contract of the third-country worker posted or seconded in an EU Member State, is not the law of the host State, but continues to be, partly or wholly, that of the country of origin.

In the field of social security rights more exceptions to the equal treatment rule are allowed, more specifically for the rights of labour migrants who are only active in a Member State for a short period or whose access to its labour market is limited in time. These exceptions concern in particular family benefits and unemployment benefits. They contribute to the precariousness of the employment conditions of temporary migrant workers and to the vulnerability of these

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<sup>102</sup> See for a similar proposal: Schneider and Parussel, *supra* note 12, pp. 204-205. For an interesting analysis of different systems of refunding contributions paid see: G. Vonk and K. Kapuy, 'Three Approaches to Refunding Social Insurance Contributions to Temporary Migrant Workers: Is There an Attractive Policy Alternative?', *European Journal of Social Security*, 2008, pp. 227-247.

<sup>103</sup> R. Ofreneo and J. Sale, 'Social Security and Migrant Workers in the Philippines: Social Protection for the Country's Economic Protectors', in P. Arellano Ortiz, M. Olivier and G. Vonk (eds.), *Social Security and Migrant Workers*, Alphen aan den Rijn (NL), Kluwer Law International, 2014, pp. 167-186.

workers to abuse and exploitation. They might also not pass the test of fundamental rights instruments such as the European Convention of Human Rights.

In addition, the coordination between the social security schemes of the Member States on the one hand and third countries on the other continue to depend mainly on the existence and the content of bilateral agreements concluded between Member States and third countries. In particular the aggregation of periods of employment, insurance and residence for the purpose of obtaining and maintaining social security benefits in the host State, depends almost entirely on such bilateral agreements.

Apart from the discussion on granting and defining rights, there should also be a debate on the effective access to these rights and the enforcement thereof, especially because non-compliance with these rights can be considered as one of the main sources of exploitation. Indeed, effective enforcement is often difficult because of the dependence of migrant workers, including regarding their immigration status and the right to remain, on the employment relationship with the employer.<sup>104</sup> There are some provisions on enforcement in the Sanctions Directive and the Seasonal Workers Directive, but the absence of effective enforcement provisions in the Single Permit Directive is problematic.<sup>105</sup>

And finally, in this debate a more prominent role should be given to the protection of human rights, as proclaimed by the European Commission in its ‘Global Approach to Migration and Mobility in 2011’.<sup>106</sup> We already mentioned the prohibition of discrimination on grounds of nationality in the European Convention on Human Rights and the EU Charter of Fundamental Rights. Moreover, a number of international instruments such as the ILO Conventions, the UN International Covenant on Economic, Social and Cultural Rights, the UN Migrant Workers Convention<sup>107</sup> and the European Social Charter have non-discrimination as a guiding principle.<sup>108</sup> These instruments should be used more frequently as a basis for political negotiations as well as in legal discussions on the rights of labour migrants, including at the level of the institutions of the European Union.

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<sup>104</sup> J. Fudge, *supra* note 13, p. 345; Hunt, *supra* note 3, pp. 137-138 and M. Zou, *supra* note 56, pp. 148-150.

<sup>105</sup> P. Hertzfeld Olsson, ‘Introduction to the Directives’, *supra* note 56, p. 31.

<sup>106</sup> European Commission, ‘The Global Approach to Migration and Mobility’, 18 November 2011, COM(2011)743, p. 7.

<sup>107</sup> See for a recent account of this poorly ratified instrument: A. Desmond, ‘The Triangle that could Square the Circle? The UN International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, the EU and the Universal Periodic Review’, *European Journal of Migration and Law* 17, 2015, pp. 39-69.

<sup>108</sup> See on this human rights approach, *inter alia*: A. Beduschi, *supra* note 35, p. 224; R. Cholewinski, ‘Labour Migration, Temporariness and Rights’, in: S. Carrera, E. Guild and K. Eisele (eds.), *Rethinking the Attractiveness of EU Labour Immigration Policies*, Brussels, CEPS, 2014, pp. 22-27; J. Fudge, *supra* note 3; K. Hirose, M. Nikac and E. Tamango, *Social Security for Migrant Workers – A Rights-Based Approach*, ILO, 2011; L. Lamarche, ‘Human Rights, Social Security and Migrant Workers’, in P. Arellano Ortiz, M. Olivier and G. Vonk (eds.), *Social Security and Migrant Workers*, Alphen aan den Rijn (NL), Kluwer Law International, 2014, pp. 9-30; M. Olivier, O. Dupper, A. Godvidjee, ‘Enhancing The Protection of Transnational Migrant Workers: a critical Evaluation of Regulatory Techniques’, in *The Transnational Dimension of Labour Relations. A New Order in the Making?*, Giappicchelli, Turin, 2014 and M. Zou, *supra* note 56, pp. 152-157.