



MIGNEX Background Paper

An examination of the legislative framework and policy instruments in the EU migration and asylum law

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MIGNEX

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An examination of the legislative framework and policy instruments in the EU migration and asylum law

Today, migration and asylum are now prominent, if not central, topics at both national and EU levels. Since the Tampere Conclusions, the EU has been gravitating towards a common migration and asylum policy to manage migration flows in its territory.

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A patchwork of EU legislations and policies, each applying to different categories of third-country nationals, has been created as the framework for legal migration to the EU.

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The EU considers an effective policy on irregular migration and return as the cornerstone of EU migration and asylum policy.

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Considered as a corollary of an area without internal frontiers, the Common European Asylum System was created with the idea that asylum standards of Member States needed harmonisation in the EU.

1. Introduction

1.1. Context and purpose of the paper

Migration is an integral part of human history with a substantial impact on European societies. Migration was not among the initial policy fields to be addressed in the European integration project due to the general perception that they are situated in the internal matters of the Member States; however, it did not take long for migration and asylum to move up the policy agenda

of the European Union (EU). At the same time, the EU's geopolitical context has constantly evolved, and the EU continues to face various socioeconomic and demographic challenges, causing labour and skills shortages. Therefore, migration and asylum are now a prominent, if not central, topic at both national and EU levels.

Remarkably, the EU witnessed a rapid increase in irregular migration flows and asylum applications during the large arrivals of irregular migrants in 2015, and the ongoing COVID-19 pandemic has restrained human mobility within the EU and entries to the Schengen area. More recently, the Russian invasion of Ukraine has caused millions to flee their homes and cross the borders of neighbouring EU Member States and beyond. While migratory pressures will inevitably continue in the years to come, so do the legislative and policy responses towards those pressures at the EU level.

This MIGNEX Background Paper examines the overall legislative framework and policy instruments in the EU migration and asylum law. As a descriptive study, it identifies and articulates the relevant policies and resulting rules on legal migration, asylum, visas and border controls, as well as irregular migration and the return of those who have no right to stay in the EU. To this end, the policy documents are specified and put into context through an analysis of the EU legislative framework on migration and asylum.

1.2. Scope of the paper

The EU's overall policy framework on migration and asylum is established under Title V, Chapter 2 of the Treaty on the Functioning of the European Union (TFEU).¹ On the basis of Title V, the EU sets common rules on the entry and residence of third-country nationals (TCNs) into the EU for different purposes and different lengths of time, as well as common checks at the external borders of the EU.

Table 1 provides a summary of the situations covered under the main policy areas that form the overall policy framework under Title V of the TFEU.

Short-stay visas and border checks	Legal migration	Asylum	Irregular migration and return
<i>Article 77 TFEU</i>	<i>Article 79(2)(a) and (b) TFEU</i>	<i>Article 78 TFEU</i>	<i>Article 79(2)(c) TFEU</i>

¹ Consolidated version of the Treaty on the Functioning of the European Union [2008] OJ C 115/47 (TFEU).

<ul style="list-style-type: none"> - Conditions and procedures for entry and stay for short-term periods (90 days within a period of 180 days), including the issuance of short-stay (Schengen) visas. - Harmonised rules on external border controls. 	<ul style="list-style-type: none"> - Conditions and procedures for entry and stay for long-term periods, and for different reasons (work, study, research, family reunification). 	<ul style="list-style-type: none"> - Conditions and procedures for obtaining refugee and subsidiary protection status, temporary protection and standards of reception. - Criteria for determining which Member State is responsible for asylum applications. 	<ul style="list-style-type: none"> - Measures to prevent and combat irregular migration, unauthorised residence and trafficking. - Conditions and procedures for removal and repatriation of TCNs without authorisation to stay in the EU.
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Table 1. Main policy areas under Title V TFEU

Source: https://ec.europa.eu/home-affairs/system/files/2019-03/swd_2019-1055-staff-working-part1.pdf

Within this context, the scope of this Background Paper covers the EU legislation and policy with regards to short-stay visas and border checks under Article 77 TFEU, legal migration under Article 79(2)(a) and (b) TFEU, asylum under Article 78 TFEU, and irregular migration and return under Article 79(2)(c) TFEU.

2. Legal migration to the EU

2.1. The establishment of a common legal migration policy

The need for a harmonised EU framework on legal migration emerged at the end of the 1990s after the abolition of internal border controls within the EU and the establishment of the Schengen area.² This was because, under this setting, the removal of the internal borders led to the need for minimum standards as to the entry and/or residence procedures for TCNs. Indeed, while the entry into force of the Maastricht Treaty in November 1993 formalised the intergovernmental cooperation in the area of migration and asylum under its ‘third pillar’ of justice and home affairs, the Treaty of Amsterdam marked ‘the most important step in the direction of a European migration policy’.³ After the Treaty of Amsterdam entered into force in May 1999, the EU’s legal migration policy was identified in the first multi-annual programme of the EU’s Area of Freedom, Security and Justice concluded on

² European Commission, Commission Staff Working Document Fitness Check on EU Legislation on legal migration, SWD(2019) 1055 final, p. 3.

³ Hildegard Schneider, ‘Towards a European Migration Policy: from Maastricht to Amsterdam, from Tampere to the Hague’ in Hildegard Schneider, *Migration, Integration and Citizenship: A Challenge for Europe’s Future, Volume 2* (Forum Maastricht 2005) 23.

15–16 October 1999 in Tampere, Finland.⁴ The Tampere Conclusions declared the creation of an ‘area of freedom, security and justice’ and the development of a ‘common EU asylum and migration policy’. Specifically, it highlighted that the EU has to ‘ensure fair treatment of TCNs who reside legally on the territory of its Member States’ and develop ‘a more vigorous integration policy aiming at granting them rights and obligations comparable to those of EU citizens’.⁵ The need for the ‘approximation of national legislations on the conditions for admission and residence of TCNs’ was also acknowledged, in accordance with ‘a shared assessment of the economic and demographic developments within the Union’.⁶

Yet, this active progress was interrupted after the terrorist attacks in the United States (US) on 11 September 2001.⁷ Following the Greek presidency to the Council of the EU in 2003, based on the policy underlined in Tampere, the Commission proposed a directive on the conditions of entry and residence for the purpose of paid employment and self-employment activities, which would have covered ‘the conditions of entry and/or residence and the rights of all TCNs in the EU’ with a horizontal approach.⁸ Yet, the proposal did not find consensus among Member States and was withdrawn because some Member States “expressed concern about having ‘more Europe’ in these nationally sensitive fields”.⁹ Notwithstanding this, rival national interests did not stall the institutional journey of the EU legal migration policies.¹⁰ Following this failed attempt, the publication of a Green Paper in 2004 addressed the added value as well as the appropriate forms of rules governing the admission and residence of TCNs in the field of employment.¹¹

Since then, the Commission has moved towards the implementation of what has been called in the academic literature as ‘partitioning strategy’, namely ‘dividing its original horizontal approach into several proposals covering

⁴ European Council, Presidency Conclusions, Tampere European Council 15 and 16 October 1999, SN 200/99.

⁵ *Ibid.*, para. 18.

⁶ *Ibid.*, para. 20.

⁷ See: Hildegard Schneider, ‘Towards a European Migration Policy: from Maastricht to Amsterdam, from Tampere to the Hague’ in Hildegard Schneider, *Migration, Integration and Citizenship: A Challenge for Europe’s Future, Volume 2* (Forum Maastricht 2005) 25.

⁸ European Commission, Proposal for a Council Directive on the conditions of entry and residence for the purpose of paid employment and self-employment activities, COM(2001) 386 final.

⁹ Sergio Carrera et al., ‘Labour Immigration Policy in the EU: A Renewed Agenda for Europe 2020’, (5 April 2011) CEPS Policy Brief No. 240 [3] <<https://www.ceps.eu/download/publication/?id=7014&pdf=PB%20No%20240%20Carrera%20et%20al%20on%20EU%20Labour%20Policy%20edited.pdf>> accessed 7 November 2021.

¹⁰ See also: Dora Kostakopoulou, ‘EU Legal Migration Templates and Cognitive Ruptures: Ways Forward in Research and Policy-Making’, in Sergio Carrera et al. (eds), *Pathways towards Legal Migration into the EU: Reappraising Concepts, Trajectories and Policies* (Centre for European Policy Studies) 177.

¹¹ European Commission, Green Paper on an EU approach to managing economic migration, COM(2004) 811 final. See also: Sergio Carrera et al., ‘The Cost of Non-Europe in the Area of Legal Migration’, CEPS Paper in Liberty and Security in Europe No. 2019-01, 10.

different categories of TCNs'.¹² The EU's policy to this end was echoed in the 2005 Policy Plan on Legal Migration.¹³ In this Policy Plan, the Commission presented two packages of proposals. The first one, in 2007, covered highly qualified workers and a single permit for TCNs to reside and work in the EU, and the second one, in 2010, included seasonal workers and intra-corporate transferees (ICTs).¹⁴ Since then, the EU has adopted several sectoral EU directives covering the conditions for admission and residence, and the rights, of TCNs in the EU. As a result, a 'patchwork' of several EU legislative acts and instruments, each applying to different categories of TCNs have been created as the legal framework of the legal migration to the EU.¹⁵

2.2. An Overview of the Legal Migration instruments

The following four EU directives on legal migration provide common rules and standards for the admission and residence of specific categories of TCNs in the EU: Directive (EU) 2021/1883 on the entry and residence of TCNs for highly qualified employment (hereinafter 'EU Blue Card Directive'), Directive 2014/66/EU on the entry and residence of TCNs for intra-corporate transfer (hereinafter 'Intra-Corporate Transferees Directive'), Directive 2014/36/EU on the entry and stay of TCNs as seasonal workers (hereinafter 'Seasonal Workers Directive'), and Directive (EU) 2016/801 on the entry and residence of TCNs for research or studies (hereinafter 'Students and Researchers Directive'). While Directive 2011/98/EU (hereinafter 'Single Permit Directive') does not provide for first entry admission conditions, it is part of the legal migration framework in the sense of laying down common rights for residence permit holders for work and provisions for their application procedure. Furthermore, Directive 2003/109/EC on the status of TCNs who are long-term residents (hereinafter 'Long-term Residence Directive') and Directive 2003/86/EC on the right to family reunification (hereinafter 'Family Reunification Directive') provide clauses of direct relevance for work-related rights and conditions. The Family Reunification Directive provides a legal entry for the family members of certain TCNs and defines rights of family members and the rules for the sponsors. The Long-Term Residents Directive, on the other hand, allows TCNs who have legally and continuously resided in a Member State for five years to be able to obtain EU long-term resident status and to enjoy rights equivalent to those of EU citizens. That being said, the next sections delve into the creation of these instruments and the policies followed in their creation.

¹² Andrew Geddes and Arne Niemann, 'Introduction: Conceptualising EU policy on labour migration', (2015) 28(4) *Cambridge Review of International Affairs* 523–535. See also: Sergio Carrera et al. (eds), *Pathways towards Legal Migration into the EU: Reappraising Concepts, Trajectories and Policies* (Centre for European Policy Studies) 185.

¹³ European Commission, Communication from the Commission: Policy Plan on Legal Migration, COM(2005) 669.

¹⁴ *Ibid.*, 13–14.

¹⁵ See: Herwig Verschueren, 'Employment and Social Security Rights of Third Country Labour Migrants under EU Law: An Incomplete Patchwork of Legal Protection' (2016) 18(4) *European Journal of Migration and Law* 373.

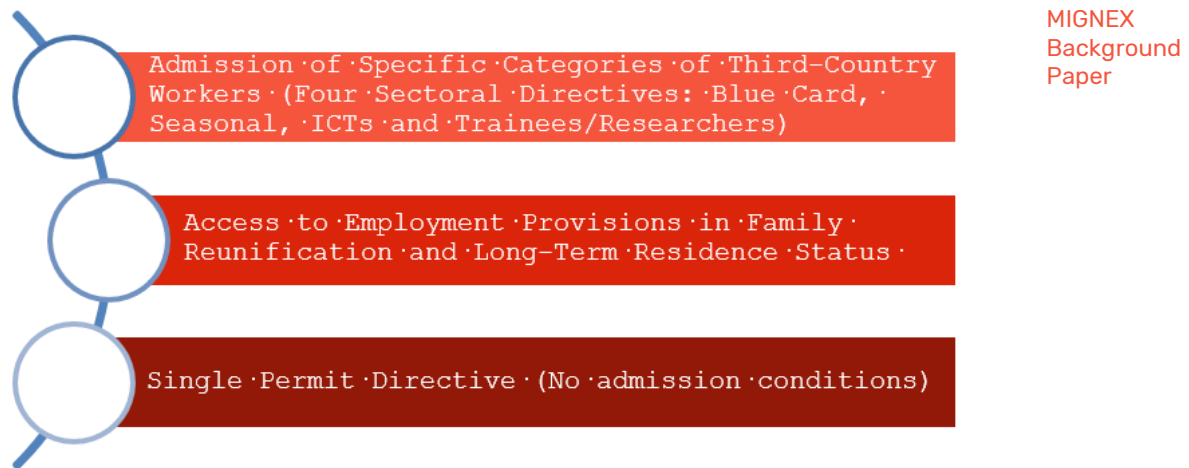


Figure 1 Classification of the EU legal migration instruments

Source:

[https://www.europarl.europa.eu/RegData/etudes/STUD/2019/631736/EPRS_STU\(2019\)631736_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2019/631736/EPRS_STU(2019)631736_EN.pdf)

2.2.1. The EU Blue Card Directive

In the 2004 Hague Programme, the Commission was asked to table a policy plan on legal migration ‘including admission procedures, capable of responding promptly to fluctuating demands for migrant labour in the labour market’.¹⁶ Following this, in line with the 2005 Policy Plan on Legal Migration, the Commission presented its proposal for a Directive on the conditions for entry and residence of TCNs for highly qualified employment on 23 October 2007.¹⁷ After the Parliament put forward some amendments to the proposal and following Council negotiations, an amended version of the proposal was published on 21 October 2008. Its adoption eventually took place on 25 May 2009 after a difficult negotiation process.¹⁸

The EU Blue Card Directive aims to determine the conditions for entry and residence of highly skilled TCNs and their family members as well as to define the free movement rights of TCNs falling under the Directive.¹⁹ It applies to TCNs pursuing highly qualified employment which is defined as genuine and effective work under the direction of someone else for which a person is paid and for which adequate and specific competence is required.²⁰

In its 2014 Political Guidelines, one of the priorities of the Juncker Commission was to promote a new European policy on legal migration and review the Blue Card Directive with a view to address ‘specific skills

¹⁶ European Council, The Hague Programme: Strengthening Freedom, Security and Justice in the European Union, 2005/C 53/01, section 1.4.

¹⁷ European Commission, Proposal for a Council Directive on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment, COM(2007) 637 final.

¹⁸ Council Directive 2009/50/EC of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment [2009] OJ L 155/17.

¹⁹ *Ibid.*, Article 1.

²⁰ *Ibid.*, Article 2(1)(b).

shortages and better cope with demographic challenges’, and ‘the unsatisfactory state implementation of the Directive’.²¹ Besides, the Commission’s report in 2014 further emphasised the flaws in the state implementation, in particular ‘the low level of coherence as well as the limited set of rights and barriers to intra-EU mobility’.²² Therefore, after a Commission Communication highlighted its intention to propose changes to the EU Blue Card Directive to strengthen this as the single EU-wide scheme for highly skilled workers,²³ the European Agenda on Migration announced a review of the Blue Card Directive.²⁴ Following a four-months-long public consultation on the Directive and the EU’s labour migration policies,²⁵ the Commission presented a new legislative proposal on 17 June 2016.²⁶ Some improvements in the proposal included less stringent admissions criteria, better family reunification conditions, facilitated mobility, and the abolishment of parallel national schemes.²⁷ Yet, during the trilogue negotiations, the first of which took place on 12 September 2017,²⁸ it became clear that the Council and the Parliament embraced differing approaches.

Following the elections to the European Parliament in 2019 and the Commission’s Pact on Migration and Asylum in September 2020, negotiations resumed. Consequently, the Council and Parliament reached an agreement

²¹ ‘Political Guidelines for the next European Commission, A New Start for Europe: My Agenda for Jobs, Growth, Fairness and Democratic Change’ <https://ec.europa.eu/info/sites/default/files/juncker-political-guidelines-speech_en.pdf> accessed 14 December 2021. See also: European Parliament, ‘Legislative Train: Revision of the Blue Card Directive’

<<https://www.europarl.europa.eu/legislative-train/theme-towards-a-new-policy-on-migration/file-jd-revision-of-the-blue-card-directive>> accessed 2 January 2022.

²² 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, COM(2014) 287 final, p. 10.

²³ European Commission, Communication From The Commission To The European Parliament And The Council Towards A Reform Of The Common European Asylum System And Enhancing Legal Avenues To Europe, COM(2016) 197 final, p. 17.

²⁴ European Commission, Communication From The Commission To The European Parliament, The Council, The European Economic And Social Committee And The Committee Of The Regions A European Agenda On Migration, COM(2015) 240 final, p.15.

²⁵ European Commission, ‘Public consultation on the EU Blue Card and the EU’s labour migration policies’ <https://ec.europa.eu/home-affairs/pages/consultation/public-consultation-eu-blue-card-and-eus-labour-migration-policies_en> accessed 19 December 2021.

²⁶ European Commission, Proposal for Directive on the conditions of entry and residence of third-country nationals for the purposes of highly skilled employment, COM(2016) 378.

²⁷ European Parliament, ‘Legislative Train: Revision of the Blue Card Directive’ <<https://www.europarl.europa.eu/legislative-train/theme-towards-a-new-policy-on-migration/file-jd-revision-of-the-blue-card-directive>> accessed 2 January 2022.

²⁸ Council of the European Union, ‘Proposal for a Directive of the European Parliament and of the Council on the conditions of entry and residence of third-country nationals for the purposes of highly skilled employment (First reading)-State of play and guidance for further work’, 15699/17, para. 4.

on a draft directive on 17 March 2021.²⁹ On 15 September 2021, the text was approved by the Parliament during the plenary session,³⁰ and Directive (EU) 2021/1883 on entry and residence of TCNs for highly qualified employment was adopted on 20 October 2021.³¹

2.2.2. Intra-corporate Transferees Directive

As specified previously, the 2005 Policy Plan on Legal Migration provided for the adoption of a proposal for a directive on ICTs between 2007 and 2009. Following the Stockholm Programme of 10 and 11 December 2009 in which the European Council invited the Commission and Council of the EU to implement the 2005 Policy Plan on Legal Migration,³² the Commission introduced its proposal for a directive on ICTs in July 2010.³³ After lengthy negotiations, a compromise was achieved between the Council and Parliament on the text of the proposal.³⁴ Following this, Directive 2014/66/EU on ICTs was adopted on 13 May 2014.³⁵

The Directive covers TCNs who reside outside the EU and are employed outside the EU by international corporations, and it allows for the admission of such workers to a Member State in the framework of an intra-corporate transfer as managers, specialists or trainee employees.³⁶ Therefore, it lays down the conditions for entry and residence in a Member State and the rights of TCNs and their families in the framework of an intra-corporate

²⁹ Council of the European Union, 'Legal migration: Council presidency and European Parliament reach provisional agreement on scheme to attract highly qualified workers-Press Release' (17 May 2021) (<https://www.consilium.europa.eu/en/press/press-releases/2021/05/17/legal-migration-council-presidency-and-european-parliament-reach-provisional-agreement-on-scheme-to-attract-highly-qualified-workers/>, accessed 2 February 2022).

³⁰ European Parliament, 'Legislative Train: Revision of the Blue Card Directive' (<https://www.europarl.europa.eu/legislative-train/theme-towards-a-new-policy-on-migration/file-jd-revision-of-the-blue-card-directive>, accessed 2 January 2022).

³¹ Directive (EU) 2021/1883 of the European Parliament and of the Council of 20 October 2021 on the conditions of entry and residence of third-country nationals for the purpose of highly qualified employment, and repealing Council Directive 2009/50/EC [2021] OJ L 382/1.

³² European Council, The Stockholm Programme: An Open and Secure Europe Serving and Protecting Citizens, 2010/C 115/01, section 6.1.3.

³³ European Commission, Proposal for a Directive of the European Parliament and of the Council on conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer, COM(2010) 378 final.

³⁴ See: Agnes Töttös, 'The Intra-Corporate Transferee Directive: Negotiations in the Council' in Paul Minderhoud and Tesseltje de Lange (eds), *The Intra Corporate Transferee Directive: Central Themes, Problem Issues and Implementation in Selected Member States* (Wolf Legal Publishers 2018) 7.

³⁵ 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 [2014] OJ L 157/1.

³⁶ Article 2(1) of the Intra-Corporate Transferees Directive. See also: Elspeth Guild, 'Intra-Corporate Transferees: Between the Directive and the EU's International Obligations' in Paul Minderhoud and Tesseltje de Lange (eds), *The Intra Corporate Transferee Directive: Central Themes, Problem Issues and Implementation in Selected Member States* (Wolf Legal Publishers 2018) 63.

transfer, including the conditions of entry and residence in Member States other than the Member State which first grants such a permit.³⁷ As for the eligibility for an intra-corporate transfer permit, while managers and specialists must have worked for at least three months and up to 12 uninterrupted months for the same undertaking, preceding their transfer, for trainee employees, this period is at least three up to six uninterrupted months.³⁸ Member States retain the right to set the volumes of admission of ICTs who apply to be admitted to their territory.³⁹ The maximum duration of the intra-corporate transfer permit is three years for managers and specialists and one year for trainee employees.⁴⁰

2.2.3. Students and Researchers Directive

As early as 7 October 2002, the Commission put forward a proposal for a Directive on the entry and residence of TCNs for study, vocational training or voluntary service,⁴¹ and Directive 2004/114/EC was adopted on 13 December 2004 after a number of changes to the original proposal.⁴² With the objective to become ‘the most competitive and dynamic knowledge economy in the world’ as underlined by the Lisbon European Council,⁴³ the proposal for a Directive on the admission of TCN researchers was announced by the Commission on 16 March 2004.⁴⁴ Subsequently, Directive 2005/71/EC on the admission of TCN researchers was adopted on 12 October 2005.⁴⁵ However, Directive 2004/114/EC and Directive 2005/71/EC proved to be ineffective and ‘only had a modest impact on attracting more students and researchers to the EU’.⁴⁶

The implementation reports for these Directives have shown various weaknesses of these instruments, including admission procedures and procedural safeguards. While the implementation report on Directive 2004/114/EC pointed out the fact that ‘the Directive’s potential was not being fully exploited and that the level of harmonisation is weak since only a few

³⁷ Ibid., Article 1(a) and (b).

³⁸ Article 5(1)(b) of the Intra-Corporate Transferees Directive.

³⁹ Article 6.

⁴⁰ Article 12(1)

⁴¹ European Commission, Proposal for a Council Directive on the conditions of entry and residence of third-country nationals for the purposes of studies, vocational training or voluntary service, COM(2002) 548 final.

⁴² Council Directive 2004/114/EC of 13 December 2004 on the conditions of admission of third-country nationals for the purposes of studies [2004] OJ L 375/12. See: Anja Wiesbrock, *Legal Migration to the European Union* (Brill | Nijhoff 2010) 212.

⁴³ European Council, Presidency Conclusions, Lisbon European Council 23 And 24 March 2000, para. 5.

⁴⁴ European Commission, Proposal for a Council Directive on a specific procedure for admitting third-country nationals for purposes of scientific research, COM(2004) 178 final.

⁴⁵ Council Directive 2005/71/EC of 12 October 2005 on a specific procedure for admitting third-country nationals for the purpose of scientific research [2005] OJ L 289/15.

⁴⁶ Steve Peers, ‘The new Directive on immigration of students and researchers: a small step or a big leap forward?’ (EU Law Analysis, 23 November 2015) (<http://eulawanalysis.blogspot.com/search?q=researchers+directive>, accessed 20 January 2022).

provisions are legally binding and contain specific obligations’,⁴⁷ the implementation report on Directive 2005/71/EC highlighted the lack of clarity concerning researchers’ rights and some definitions such as researcher, research organisation as well as the legal quality and format of hosting agreements.⁴⁸ Thus, the proposal for a directive on the entry and residence of TCNs for research and studies was put forward by the Commission on 25 March 2013.⁴⁹ A political agreement was reached between Parliament and Council after six trilogue meetings on 17 November 2015.⁵⁰ Consequently, Directive (EU) 2016/80 was adopted on 11 May 2016 and entered into force the day after its publication in the Official Journal of the EU on 21 May 2016.⁵¹

2.2.4. The Seasonal Workers Directive

As mentioned above, the 2005 Policy Plan on Legal Migration provided the adoption of a proposal for a directive on the entry and residence of seasonal workers between 2007 and 2009. The European Pact on Immigration and Asylum, approved by the European Council on 15 and 16 October 2008, expressed the commitment for a consistent policy in dealing with the challenges and opportunities of migration.⁵² The European Council also reiterated this commitment in the Stockholm Programme.⁵³ Therefore, the proposal was made by the Commission for a directive on the entry and stay of TCNs for seasonal work on 13 July 2010.⁵⁴ In this proposal, the Commission stated its focal point as setting out ‘fair and transparent rules on entry and

⁴⁷ European Commission, Report from the Commission to the European Parliament and the Council on the application of Directive 2004/114/EC on the conditions of admission of third country nationals for the purposes of studies, pupil exchange, unremunerated training or voluntary service, COM(2011) 587 final, p.10.

⁴⁸ European Commission, Report From the Commission to the Council and the European Parliament on the application of Directive 2005/71/EC on a specific procedure for admitting third country nationals for the purposes of scientific research, COM(2011) 901 final, p. 9–10.

⁴⁹ European Commission, Proposal for a Directive of the European Parliament and of the Council on the conditions of entry and residence of third-country nationals for the purposes of research, studies, pupil exchange, remunerated and unremunerated training, voluntary service and au pairing, COM(2013) 151 final.

⁵⁰ European Parliament, Legislative Train: Directive on Students and Researchers, (<https://www.europarl.europa.eu/legislative-train/theme-towards-a-new-policy-on-migration/file-directive-on-students-and-researchers>, accessed 15 February 2022).

⁵¹ 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 [2016] OJ L 132/21.

⁵² European Council, Presidency Conclusions, Brussels European Council 15 And 16 October 2008, 14368/08. See: Asylum Population Council, ‘The European Pact on Immigration on the Control of Illegal Immigration’ (2008) 34(4) Population and Development Review 805.

⁵³ European Council, The Stockholm Programme: An Open and Secure Europe Serving and Protecting Citizens, 2010/C 115/01, section 6.1.3.

⁵⁴ European Commission, Proposal for a Directive of the European Parliament and of the Council on the conditions of entry and residence of third-country nationals for the purposes of seasonal employment, COM(2010) 379 final.

residence for seasonal temporary migration while providing for incentives and safeguards to prevent a temporary stay from becoming permanent'.⁵⁵

The proposal was followed by a long and difficult negotiation period of three and a half years, during which the proposal was changed drastically. This was mainly due to the fact that the discussion took place during a period of economic crisis in some of the Member States, and an increased scepticism to migration.⁵⁶ Following this, Directive 2014/36/EU was adopted on 26 February 2014,⁵⁷ before the Parliament elections in May 2014. Thus, the Directive on Seasonal Workers came to fruition nine years after the Commission announced its plans regarding the entry and stay of TCNs for seasonal work.⁵⁸

The Directive regulates matters related to the entry and stay of TCNs to carry out an activity dependent on the passing of the seasons and defines the rights of seasonal workers.⁵⁹ Therefore, it applies to TCNs who reside outside the territory of the Member States and who apply or have already been admitted to a Member State for seasonal work. In this sense, it does not apply to TCNs who at the time of application reside in a Member State, except the cases of extension of stay or renewal of the authorisation.⁶⁰

2.2.5. The Single Permit Directive

In the 2005 Policy Plan on Legal Migration, the Commission aimed at introducing a general framework for a fair and rights-based approach to labour migration.⁶¹ Therefore, on 23 October 2007, the Commission proposed a directive which did not pertain to admission conditions.⁶² Instead, as stated in the proposal, it focused on a common set of rights to be granted to all TCNs already legally residing in a Member State as well as a single permit issued in single application procedures.⁶³ Even though the text was proposed by the

⁵⁵ Ibid., p. 2.

⁵⁶ See: Margarite Helena Zoetewij, 'The Seasonal Workers Directive: Another Vicious Circle?' in Conny Rijken and Tesseltje de Lange, *Towards a Decent Labour Market for Low-Waged Migrant Workers* (Amsterdam University Press 2018) 131.

⁵⁷ 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 [2014] OJ L 94/375 (hereinafter Seasonal Workers Directive).

⁵⁸ Margarite Helena Zoetewij, 'The Seasonal Workers Directive: '... but some are more equal than others'', (2017) 8(1) *European Labour Law Journal*, 31.

⁵⁹ Article 1 of the Seasonal Workers Directive.

⁶⁰ Ibid., Article 2.

⁶¹ European Commission, *Communication from the Commission: Policy Plan on Legal Migration*, COM(2005) 669, p. 5.

⁶² European Commission, *Proposal for a Council Directive on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State*, COM(2007) 638 final.

⁶³ Ibid., p. 3.

Commission on October 2007, Directive 2011/98/EU was not adopted until 13 December 2011.⁶⁴

The Single Permit Directive establishes common EU rules for a single application procedure to issue a single permit for TCNs to reside for the purpose of work in a Member States, and sets out the rights to be enjoyed by the TCNs who are granted such a permit.⁶⁵ Moreover, it provides for equal treatment rules between the TCN workers and nationals of a Member States.⁶⁶ In this sense, the Directive is regarded as a ‘framework’ or ‘horizontal’ directive in that it covers TCNs who are also admitted to a Member State according to national migration law on various national schemes.⁶⁷ At this point, it is also worth mentioning that ICTs, EU long-term residence status holders and seasonal workers are excluded from the scope of the Directive.⁶⁸

On 29 March 2019, the Commission prepared a report on the implementation of the Single Permit Directive.⁶⁹ This report revealed certain shortcomings in the transposition of the Directive including restrictive interpretation of equal treatment provisions in some Member States, and the lack of information among TCNs about the possibility of obtaining a single permit and the rights attached to it.⁷⁰ Subsequently, the Commission fitness check conducted in the same year noted various inconsistencies and gaps in the application of the Directive among Member States, such as varying rules on admission conditions and the length of admission procedures.⁷¹ Thus, announced in the New Pact on Migration and Asylum,⁷² the Commission published an inception impact assessment on the revision of the Single Permit Directive in December 2020.⁷³ Even though the Commission Work Programme 2021

⁶⁴ 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 [2011] OJ L 343/1 (hereinafter Single Permit Directive).

⁶⁵ Article 1(a) and (b), Article 3(1) of the Single Permit Directive.

⁶⁶ *Ibid.*, Article 12(1).

⁶⁷ European Parliament, ‘Legislative Train: Revision of Directive 2011/98/EU on the Single Permit’ (<https://www.europarl.europa.eu/legislative-train/theme-promoting-our-european-way-of-life/file-revision-of-single-permit-directive/09-2021>, accessed 2 April 2022).

⁶⁸ Article 3(2) of the Single Permit Directive.

⁶⁹ European Commission, Report from the Commission to the European Parliament and the Council on Directive 2011/98/EU on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State, COM(2019) 160 final.

⁷⁰ *Ibid.*, p. 12.

⁷¹ European Commission, Commission Staff Working Document Fitness Check on EU Legislation on legal migration, SWD(2019) 1055 final, p. 20.

⁷² European Commission, Communication From the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on a New Pact on Migration and Asylum, COM(2020) 609 final, p. 26.

⁷³ European Commission, ‘Single work & residence permit for non-EU nationals’ <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12760-Single-work-&-residence-permit-for-non-EU-nationals_en, accessed 15 March 2022.

announced the publication of a revised Directive on the single permit in the third quarter of 2021, it was postponed to April 2022. In its Resolution of November 2021, the European Parliament welcomed the Commission's planned review of the Single Permit Directive and made various recommendations for the expected proposal amending the Single Permit Directive.⁷⁴ Consequently, the Commission presented its proposal for a directive on a single application procedure for single permits for TCNs to reside and work in Member States.⁷⁵ The proposal aims to make the application procedure more effective by streamlining the procedure and reducing its overall duration, and includes new requirements to ensure the equal treatment of TCNs as compared to EU citizens and improve their protection from labour exploitation.⁷⁶

2.2.6. The Long-Term Residence Directive

As the second initiative after the Treaty of Amsterdam introduced the competence to legislate in the field of migration, the Commission proposed a directive concerning the status of TCNs who are long-term residents on 13 March 2001.⁷⁷ Following two and a half years of deliberations between the co-legislators, Directive 2003/109 was adopted on 25 November 2003.⁷⁸ This directive lays down the terms for granting and withdrawing long-term resident status for legally residing TCNs, as well as the rights and terms of residence resulting from this status, including free movement and residence rights in Member States other than the one conferring the status.⁷⁹ As mentioned in the Preamble of the Directive, its aim is to constitute a genuine instrument for the integration of long-term residents into the society in which they live.⁸⁰

The implementation report of the Commission in 2011 indicated that there are many deficiencies in the transposition of the Directive including restrictive interpretation of the Directive's scope, additional conditions for admission, and illegal obstacles to intra-EU mobility.⁸¹ Following this report,

⁷⁴ See: Hannah Ahamad Madatali, 'Single permit for third-country nationals to reside and work in the EU Directive 2011/98/EU', (EPRS, April 2022) <[https://www.europarl.europa.eu/RegData/etudes/BRIE/2022/699506/EPRS_BRI\(2022\)699506_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2022/699506/EPRS_BRI(2022)699506_EN.pdf)> accessed 1 April 2022.

⁷⁵ European Commission, Proposal for a Directive of the European Parliament and of the Council 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 (recast), COM(2022) 655 final.

⁷⁶ *Ibid.*, p. 1–2.

⁷⁷ European Commission, Proposal for a Council Directive concerning the status of third-country nationals who are long-term residents, COM(2001) 127 final. See: Anja Wiesbrock, *Legal Migration to the European Union* (Brill | Nijhoff 2010) 207.

⁷⁸ Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents [2004] OJ L 16/44 (hereinafter Long-term Residence Directive).

⁷⁹ Article 1 of the Long-term Residence Directive.

⁸⁰ *Ibid.*, Recital 12.

⁸¹ European Commission, Report from the Commission to the European Parliament and the Council on the application of Directive 2003/109/EC concerning the status of third-country nationals who are long-term residents, COM(2011) 585 final, p. 10.

on 11 May 2011, the Long-term Residence Directive was amended to cover those who qualify for international protection, such as refugees or stateless persons.⁸² Yet, a second report published by the Commission on 29 March 2019 found that, despite some improvements in the implementation of the Directive since 2011, some outstanding issues persist including the limited implementation of the mobility provisions.⁸³

After the 2019 Fitness Check conducted by the Commission on EU legislation on legal migration also identified specific issues relating to the Directive,⁸⁴ the Commission announced an inception impact assessment on a proposal for the revision of the Directive.⁸⁵ Later, in its New Pact on Migration and Asylum, the Commission announced a revision of the Directive, focusing on strengthening the rights of long-term residents to move and work in other Member States.⁸⁶ The Parliament also emphasised the need to provide an effective right to intra-EU mobility with the revision of the Directive in its Resolution dated November 2021. The revised proposal was expected to be published in the third quarter of 2021, as announced in the Commission Work Programme 2021.⁸⁷

On 27 April 2022, the Commission presented the proposal for a directive on the status of TCNs who are long-term residents.⁸⁸ To create a more effective, coherent and fair system, the proposal aims to facilitate the acquisition of EU long-term resident status by allowing the cumulation of residence periods in different Member States, counting all periods of legal residence such as students and beneficiaries of temporary protection except short-term visas. It also reinforces the rights of long-term residents and their family members, including the rights to move and work in other Member States, to improve labour market effectiveness across the EU and address skills shortages.⁸⁹

⁸² See: Directive 2011/51/EU of the European Parliament and of the Council of 11 May 2011 amending Council Directive 2003/109/EC to extend its scope to beneficiaries of international protection [2011] OJ L 132/1, Article 1(1) and (2).

⁸³ European Commission, Report from the Commission to the European Parliament and the Council on the implementation of Directive 2003/109/EC concerning the status of third-country nationals who are long-term residents, COM(2019) 161 final, p. 9.

⁸⁴ European Commission, Commission Staff Working Document Executive Summary of the Fitness Check on EU Legislation on legal migration, SWD(2019) 1056 final, p. 2.

⁸⁵ Hannah Ahamad Madatali, 'Rights of third-country nationals who are long-term residents in the EU Directive 2003/109/EC' (EPRS, April 2022) 6 <[https://www.europarl.europa.eu/RegData/etudes/BRIE/2022/699469/EPRS_BRI\(2022\)6_99469_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2022/699469/EPRS_BRI(2022)6_99469_EN.pdf)> accessed 5 April 2022.

⁸⁶ European Commission, Communication From the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on a New Pact on Migration and Asylum, COM(2020) 609 final, p. 26.

⁸⁷ European Commission, Annexes to the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Commission Work Programme 2021: A Union of vitality in a world of fragility, COM(2020) 690 final, p. 14.

⁸⁸ European Commission, Proposal for a Directive of the European Parliament and of the Council concerning the status of third-country nationals who are long-term residents (recast), COM(2022) 650 final.

⁸⁹ Ibid., p. 2.

2.2.7. Family Reunification Directive

Concerning the family reunification of TCNs, the first step towards harmonisation took place at the European Council of Vienna in December 1998, which regarded the common rules on family reunion among measures to be taken within five years.⁹⁰ Following the entry into force of the Amsterdam Treaty, the Commission presented the initial draft of its proposal for a directive on the right to family reunification on 1 December 1999.⁹¹ After a period of three years of negotiations,⁹² the Directive was formally adopted by the Council on 22 September 2003.⁹³ As stated in the preamble, the Directive reflects the objectives of the Tampere meetings in that it is adopted ‘with a view to ensure a fair treatment and vigorous integration policy aiming at granting rights and obligations to the TCNs comparable to EU citizens’.⁹⁴ The Directive enshrines the right to family reunification of TCNs lawfully residing in the EU.⁹⁵ It sets out, *inter alia*, the requirements for exercising the right to family reunification,⁹⁶ the rights of family members⁹⁷ and the rules for sponsors.⁹⁸

The first implementation report of the Directive was published by the Commission on 8 October 2008, which revealed some cross-cutting issues of incorrect transposition or application of the Directive concerning visa facilitation, the best interest of the child, and more favourable provisions for refugees.⁹⁹ Subsequently, the Commission launched a Green Paper on the future of the family reunification regime, which resulted in the decision based on a public consultation not to review the Directive, but instead to fully implement it.¹⁰⁰ To this end, the Commission adopted a Communication to provide guidance to Member States on how to apply the Directive

⁹⁰ This was done by adoption of the Vienna Action plan by the Vienna European Council. See: Hildegard Schneider and Anja Wiesbrock, ‘The Council Directive on Family Reunification: Establishing Proper Rights for Third Country Nationals’, in Hildegard Schneider, *Migration, Integration and Citizenship: A Challenge for Europe’s Future, Volume 2* (Forum Maastricht 2005) 36.

⁹¹ European Commission, Proposal for a Council Directive on the right to family reunification, COM(1999) 638 final.

⁹² For a concise history of the negotiations: Kees Groenendijk et al., *The Family Reunification Directive in EU Member States: The First Year of Implementation* (Wolf Legal Publishers 2007) 2–3.

⁹³ Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification [2003] OJ L 251/12 (hereinafter Family Reunification Directive).

⁹⁴ Recital 3 of the Family Reunification Directive.

⁹⁵ Article 1 of the Family Reunification Directive.

⁹⁶ Article 6, 7 and 8 of the Family Reunification Directive.

⁹⁷ Article 14 of the Family Reunification Directive.

⁹⁸ Article 2 of the Family Reunification Directive.

⁹⁹ European Commission, Report from the Commission to the European Parliament and the Council on the Application of Directive 2003/86/EC on the Right to Family Reunification, COM(2008) 610 final, p. 14.

¹⁰⁰ ECRE, ‘European Commission publishes guidance for Member States to guarantee right to family reunification’, (4 April 2014) <<https://ecre.org/european-commission-publishes-guidance-for-member-states-to-guarantee-right-to-family-reunification/>> accessed 10 January 2022.

2003/86/EC on the right to family reunification.¹⁰¹ This guidance addressed some issues that were raised during the public consultation during the Green Paper, such as the length of procedures,¹⁰² the interpretation of dependency,¹⁰³ the visa requirements,¹⁰⁴ and the best interest of the child.¹⁰⁵ Yet, in the second implementation report of the Commission dated 29 March 2019, the Commission noted that the core issues highlighted in the first implementation report and during the public consultation for the Green Paper still remain a challenge for some Member States.¹⁰⁶

3. Irregular migration and return

3.1. The establishment of a common policy on irregular migration and return

As is the case with the majority of EU migration and asylum law, the entry into force of the Treaty of Amsterdam on 1 May 1999 marks the first time the EU was given an explicit legal basis to adopt measures concerning irregular migration as set out in Article 63(3)(b) EC.¹⁰⁷ In November 2001, the Commission produced its first Communication on a common policy on illegal immigration.¹⁰⁸ In this Communication, the Commission listed six policy areas of action to prevent illegal immigration, which it considered as ‘the missing link of’ the comprehensive immigration and asylum policy described in Tampere.¹⁰⁹ These were: visa policy, infrastructure for information exchange, cooperation and coordination, border management, police cooperation, aliens law and criminal law, and return and readmission policy. Moreover, as envisaged in the same Communication, a Green Paper on a Community Return Policy on illegal Residents was prepared by the Commission on 10 April 2002.¹¹⁰ The Green Paper regarded the issue of return as ‘an integral part of a comprehensive community immigration and asylum policy’,¹¹¹ and it highlighted the need for the establishment of common standards relating to all phases of return as well as a number of

¹⁰¹ European Commission, Communication from the Commission to the European Parliament and the Council on guidance for application of Directive 2003/86/EC on the right to family reunification, COM(2014) 210 final.

¹⁰² Ibid., p. 10 and 17.

¹⁰³ Ibid., p. 6.

¹⁰⁴ Ibid., p. 19.

¹⁰⁵ Ibid., p. 25.

¹⁰⁶ European Commission, Report from the Commission to the European Parliament and the Council on the implementation of Directive 2003/86/EC on the right to family reunification, COM(2019) 162 final, p. 16.

¹⁰⁷ See now: Article 79(2)(c) of the TFEU.

¹⁰⁸ European Commission, Communication from the Commission to the Council and the European Parliament on a Common Policy on Illegal Immigration, COM(2001) 672 final.

¹⁰⁹ Ibid., p. 3.

¹¹⁰ European Commission, Green Paper on a Community Return Policy on Illegal Residents, COM(2002) 175 final.

¹¹¹ Ibid., p. 6.

components to be included in the legislative proposal on minimum standards for return procedures.¹¹²

The importance of the fight against illegal immigration was also emphasised in many Council Conclusions during this period, including Seville and Laeken European Councils. On 14 October 2002, the Commission issued its Communication on a community return policy on illegal residents, in which it set out a comprehensive plan on common minimum standards to ensure efficient return policies.¹¹³ Based on this Communication, the Council of the EU adopted its Return Action Programme in which it called for an enhanced practical cooperation among Member States, common minimum standards for return, and intensified cooperation with third countries.¹¹⁴

Later, in the 2004 Hague Programme, the European Council invited the Council and the Commission to improve the common capability for the fight against illegal immigration in the policy areas including external border controls, return and partnership with third countries.¹¹⁵ With the entry into force of the Lisbon Treaty, the former Article 63(3)(b) EC concerning illegal migration became Article 79(2)(c) of the TFEU, which now refers to ‘unauthorised’ rather than ‘illegal’ presence and also includes ‘removal’. Following this, the 2009 Stockholm Programme endorsed the established policy on irregular migration and return, and reiterated the implementation of the newly adopted instruments without calling for further legislation.¹¹⁶ Since then, as will be seen with the legislative and policy instruments below, the approach of the EU institutions has been that an effective policy on irregular migration and return constitutes the cornerstone of EU migration and asylum policy.

3.2. An overview of the irregular migration and return instruments

The EU’s legal framework for tackling irregular migration is composed of two main instruments, which were adopted at the same time and are referred to as the ‘Facilitators Package’. These are Directive 2002/90/EC defining the facilitation of unauthorised entry, transit and residence, and Council Framework Decision 2002/946/JHA on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence (hereinafter the ‘Facilitators Package’). In addition to this, other relevant legal instruments include Directive 2001/51/EC laying down the obligations of carriers transporting foreign nationals to Member States and

¹¹² Ibid., p. 11.

¹¹³ European Commission, Communication from the Commission to the Council and the European Parliament on a Community Return Policy on Illegal Residents, COM(2002) 564.

¹¹⁴ Council of the European Union, Proposal for a Return Action Program, 14673/02, p. 5.

¹¹⁵ European Council, The Hague Programme: Strengthening Freedom, Security and Justice in the European Union, 2005/C 53/01, point 1.6.

¹¹⁶ European Council, The Stockholm Programme: An Open and Secure Europe Serving and Protecting Citizens, 2010/C 115/01, section 6.1.6. See: Steve Peers, *EU Justice and Home Affairs Law: Volume I: EU Immigration and Asylum Law* (Oxford University Press 2016) 450.

the penalties in cases where carriers fail to meet their control obligations, Directive 2009/52/EC providing for minimum standards on sanctions and measures against employers of illegally staying TCNs, and Directive 2011/36/EU on preventing and combating trafficking in human beings.

As for the return of TCNs who have no legal right to stay in the EU, Directive 2008/115/EC on common standards and procedures for returning illegally staying TCNs (hereinafter the 'Return Directive') was adopted. Also, Council Directive 2001/40/EC on mutual recognition of decisions on the expulsion of TCNs and Council Decision 2004/573/CE on the organisation of joint flights for removals are of particular relevance for the return of irregular TCNs.

3.2.1. The Facilitators Package

Following the Tampere Conclusions which urged the adoption of legislation foreseeing severe sanctions against trafficking in human beings,¹¹⁷ Council Directive 2002/90/EC and Council Framework Decision 2002/946/JHA were adopted on 28 November 2002.¹¹⁸ The general objective of the Facilitators Package is to 'fight against the aiding of irregular migration by penalising the aiding of unauthorised transit, entry and residence in the EU'.¹¹⁹ As mentioned in the recitals of Directive 2002/90/EC, the connection between the two instruments is 'to provide a definition of the facilitation of illegal immigration and to render the implementation of Framework Decision 2002/946/JHA more effective in order to prevent that offence'.¹²⁰ To this end, under Article 1(1) of the Directive, any person who intentionally helps a TCN to enter, transit or, in case conducted for financial gain, reside in the EU in breach of immigration law, must be sanctioned. The Framework Decision criminalises such conduct,¹²¹ and sets out custodial sentences in certain cases with a maximum sentence of not less than eight years.¹²² However, Article 1(2) of the Directive provides for the possibility of deciding not to impose sanctions for facilitation of unauthorised entry and transit, when carried out for humanitarian assistance purposes.

The Facilitators Package is closely connected to the United Nations (UN) Protocol against the smuggling of migrants by land, sea and air, supplementing the UN Convention against Transnational Organized Crime.¹²³

¹¹⁷ European Council, Presidency Conclusions, Tampere European Council 15 and 16 October 1999, SN 200/99, para. 23.

¹¹⁸ Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence [2002] OJ L 328/17 and Council Framework Decision of 28 November 2002 on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence [2002] OJ L 328/1.

¹¹⁹ European Commission, Commission Staff Working Document Refit Evaluation of the EU legal framework against facilitation of unauthorised entry, transit and residence: the Facilitators Package (Directive 2002/90/EC and Framework Decision 2002/946/JHA), SWD(2017) 117 final, p. 5.

¹²⁰ Recital 4 of the Directive 2002/90/EC.

¹²¹ Article 1(1) of the Directive 2002/90/EC.

¹²² Article 1(3) of the Directive 2002/90/EC.

¹²³ The Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime, (2000) 2241 unts 507.

The protocol was approved by the EU in 2006.¹²⁴ Yet, the package was criticised by the EU Fundamental Rights Agency in its first thematic report in March 2014. The matter of concern was the potentially far-reaching scope of criminalisation of persons engaging with migrants in an irregular situation. It was pointed out that this approach does not only harm the migrants themselves, but also those who support them, such as providers of humanitarian or legal assistance, in particular those facilitating stay as a non-profit act.¹²⁵

In the Commission's European Agenda on Migration dated 13 May 2015, reducing incentives for irregular migration was one of the agenda points and the emphasis was on the need for improving the existing EU legal framework to tackle migrant smuggling, *inter alia*, the Facilitators Package, and monitoring of the implementation of the Return Directive.¹²⁶ The Commission also announced an action plan on smuggling by May 2015.¹²⁷ Moreover, the European Agenda on Security, adopted by the Commission on 28 April 2015, emphasised the cooperation against the smuggling of migrants inside the EU in organised crime networks.¹²⁸ Following these developments, the Commission announced revisions in the Facilitators Package in its Action Plan Against Migrant Smuggling (2015–2020), which aimed to avoid the risks of criminalisation of those who provide humanitarian assistance to migrants.¹²⁹ Yet, this did not materialise into an actual proposal. Indeed, the Commission concluded in its REFIT Evaluation of the Package that there is no sufficient evidence for the need for a revision of the Facilitators Package at that point in time, despite the fact that a main area for improvement was identified as the perceived risk of criminalisation of humanitarian assistance.¹³⁰ As a follow-up to this, in July 2018, the European Parliament

¹²⁴ See: Council Decisions 2006/616/EC [2006] OJ L 262/24 and Council Decision 2006/617/EC [2006] OJ L 262/34.

¹²⁵ EU Agency for Fundamental Rights, 'Criminalisation of migrants in an irregular situation and of persons engaging with them' (27 March 2014) [16] <https://fra.europa.eu/sites/default/files/fra_uploads/fra-2014-criminalisation-of-migrants-1_en.pdf> accessed 14 October 2021.

¹²⁶ European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A European Agenda on Migration, COM(2015) 240 final, p. 9–10. See for more details: Sergio Carrera and Elspeth Guild, 'Addressing Irregular Migration, Facilitation and Human Trafficking. The EU's Approach' in Sergio Carrera and Elspeth Guild (eds), *Irregular Migration, Trafficking and Smuggling of Human Beings. Policy Dilemmas in the EU* (Centre for European Policy Studies 2016), p. 1–9.

¹²⁷ *Ibid.*

¹²⁸ European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: The European Agenda on Security, COM(2015) 185, p. 18. See also: European Parliament, 'Legislative Train: European Agenda on Security' <<https://www.europarl.europa.eu/legislative-train/theme-a-new-push-for-european-democracy/package-european-agenda-on-security>> accessed 3 March 2022.

¹²⁹ European Commission, Communication From The Commission To The European Parliament, The Council, The European Economic And Social Committee And The Committee Of The Regions, EU Action Plan against migrant smuggling (2015-2020), COM(2015) 285, p. 3.

¹³⁰ European Commission, Commission Staff Working Document Refit Evaluation of the EU legal framework against facilitation of unauthorised entry, transit and

adopted a Resolution on guidelines for Member States to prevent humanitarian assistance from being criminalised. This Resolution urged the Commission ‘to adopt guidelines for Member States specifying which forms of facilitation should not be criminalised to ensure clarity and uniformity in the implementation of the current *acquis*’.¹³¹

Yet, police investigations and judicial prosecutions against individuals for reasons related to the offence of facilitation have increased perpetually in the EU since 2015.¹³² The report of the EU Fundamental Rights Agency in July 2020 further revealed the seriousness of this issue by indicating some criminal proceedings against crew members and shipmasters of non-governmental organisations (NGOs) operating search and rescue missions in the Mediterranean.¹³³ Against this backdrop, on 23 September 2020, the Commission presented its Guidance on the implementation of EU rules on definition and prevention of the facilitation of unauthorised entry, transit and residence as part of the New Pact on Migration and Asylum.¹³⁴ The Guidance clarified that humanitarian assistance mandated by law can never be criminalised and the criminalisation of search and rescue operations at sea amounts to a breach of international law, and therefore is not permitted by EU law.¹³⁵ Also, as a policy recommendation, it invited Member States to allow for the exclusion of humanitarian assistance from criminalisation by distinguishing it from activities that aim to facilitate irregular entry or transit.¹³⁶

As signalled in the New Pact on Migration, the Commission recently presented its renewed EU action plan against migrant smuggling (2021–2025) on 29 September 2021.¹³⁷ In this action plan, emphasising its competence to launch infringement procedures in case of breaches of EU law, the Commission states that it will report on the implementation of the Facilitators Package, including on the implementation of the 2020 Guidance

residence: the Facilitators Package (Directive 2002/90/EC and Framework Decision 2002/946/JHA), SWD(2017) 117 final, p. 35.

¹³¹ European Parliament, Resolution of 5 July 2018 on guidelines for Member States to prevent humanitarian assistance from being criminalised, 2018/2769(RSP).

¹³² See for details: European Commission, Communication from the Commission: Commission Guidance on the implementation of EU rules on definition and prevention of the facilitation of unauthorised entry, transit and residence [2020] OJ C 323/01, p. 2.

¹³³ EU Agency for fundamental Rights, ‘June 2020 update - NGO ships involved in search and rescue in the Mediterranean and legal proceedings against them’ (19 June 2020) <<https://fra.europa.eu/en/publication/2020/2020-update-ngos-sar-activities#TabPubOverview0>> accessed 8 September 2021.

¹³⁴ European Commission, Communication from the Commission: Commission Guidance on the implementation of EU rules on definition and prevention of the facilitation of unauthorised entry, transit and residence [2020] OJ C 323/01.

¹³⁵ *Ibid.*, p.6.

¹³⁶ *Ibid.*

¹³⁷ European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A renewed EU action plan against migrant smuggling (2021–2025), COM(2021) 591 final.

cited above, in 2023. Then, depending on the results of this report, the Commission will propose to revise the legal framework if necessary.¹³⁸

3.2.2. Return Directive

The Hague Programme called for the establishment of common standards for persons to be returned in a humane manner and respecting fundamental rights and dignity, and asked for the submission of a Commission proposal in early 2005.¹³⁹ Following this, the Directive 2008/115/EC on common standards and procedures in Member States for returning illegally staying TCNs was adopted on 16 December 2008.¹⁴⁰ Proposed by the Commission on 1 September 2005,¹⁴¹ it took the EU legislator three years to agree on the text of the Return Directive since the negotiations were intricate and difficult.¹⁴² Accompanying the proposal, the Commission's impact assessment also specified that Member States' legislation on returning TCNs differed widely, and that mutual trust could not be fostered without harmonisation in the area.¹⁴³

The first evaluation of the Return Directive by the Commission was made in 2013.¹⁴⁴ This evaluation concluded that the Return Directive had a meaningful impact on the harmonisation of rules as well as practices related to return policy in Europe,¹⁴⁵ in particular on the convergence of maximum detention periods,¹⁴⁶ practice regarding voluntary departure,¹⁴⁷ and change in return monitoring of the Member States.¹⁴⁸ Yet, in some other areas, *inter alia*, postponement of removal of a TCN in specific circumstances and procedural safeguards, it was found that the Return Directive either did not have much influence or some issues remained regarding their practical

¹³⁸ *Ibid.*, p. 18.

¹³⁹ European Council, The Hague Programme: Strengthening Freedom, Security and Justice in the European Union, 2005/C 53/01, section 1.6.4.

¹⁴⁰ Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals [2008] OJ L 348/98.

¹⁴¹ European Commission, Proposal for a Directive of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals, COM(2005) 391 final.

¹⁴² See for details of the negotiations: Kris Pollet, 'The Negotiations on the Returns Directive: Challenges, Outcomes and Lessons learned from an NGO perspective' in Karin Zwaan, *The Returns Directive. Central themes, problem issues, and implementation in selected Member States* (Wolf Legal Publishers 2011) 25–29.

¹⁴³ European Commission, Commission Staff Working Document: Annex to the Proposal for a European Parliament and Council Directive on common standards on procedures in Member States for returning illegally staying third country nationals, Impact Assessment, SEC(2005) 1057, p. 4. See also: Steve Peers et al., *EU Immigration and Asylum Law (Text and Commentary): Second Revised Edition* (Brill 2012) 487.

¹⁴⁴ European Commission – DG Home Affairs, 'Evaluation on the application of the Return Directive (2008/115/EC)' (22 October 2013) [18] <<https://op.europa.eu/en/publication-detail/-/publication/2d7caada-14ed-448a-a3d2-4a0c54272043>> 28 November 2021.

¹⁴⁵ *Ibid.*, p. 176.

¹⁴⁶ *Ibid.*, p. 180.

¹⁴⁷ *Ibid.*, p. 189.

¹⁴⁸ *Ibid.*, p. 194.

application.¹⁴⁹ Following this, in 2014, the Commission reported on the EU return policy and provided an implementation report on the impact of the Return Directive, in which it identified the remaining issues as, *inter alia*, EU-wide effect of entry bans, definition of risk of absconding, criteria for prolonging the period of voluntary departure, rules to be respected when removing by air, forced return monitoring, criteria for imposing detention, as well as detention conditions.¹⁵⁰

While the Commission has not presented any evaluations concerning the Return Directive since 2013, it was in response to the increasing number of irregular migrants arriving in the EU in 2015 that the Commission adopted the European Agenda on Migration.¹⁵¹ In this Agenda, the Commission urged Member States to apply the Return Directive and emphasised its monitoring efforts for the implementation of the Directive. Moreover, it highlighted the importance of helping third countries in readmissions and returns and enhancing the role of FRONTEX.¹⁵² It also decided to adopt a Return Handbook supporting Member States with best practice and recommendations, which was published in October 2015.¹⁵³

Considering the limited impact of the Action Plan on Return presented by the Commission on 9 September 2015, the Commission launched A Renewed Action Plan on Return on 2 March 2017.¹⁵⁴ Accordingly, the Return Handbook would be updated by the Commission and a number of focused actions were emphasised to enable Member States and the EU to improve return rates.¹⁵⁵ In the context of this Plan, the Commission also adopted a Recommendation concerning the use of the Return Directive to achieve more effective return procedures.¹⁵⁶ Notably, depending on the implementation of this Recommendation and the desire to take further actions to substantially increase the return rates, the Commission also stated that it would be ready to launch a revision of the Return Directive.¹⁵⁷

Following the Conclusions of the Council dated 28 June 2018 in which it welcomed the Commission's intention to make a legislative proposal to this

¹⁴⁹ *Ibid.*, p. 198–99.

¹⁵⁰ European Commission, Communication from the Commission to the Council and the European Parliament on EU Return Policy, COM(2014) 199 final, p. 12–13.

¹⁵¹ European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A European Agenda On Migration, COM(2015) 240 final.

¹⁵² *Ibid.*, p. 10.

¹⁵³ See: European Commission, Commission Recommendation of 1.10.2015 establishing a common "Return Handbook" to be used by Member States' competent authorities when carrying out return related tasks, C(2015) 6250 final.

¹⁵⁴ European Commission, Communication from the Commission to the European Parliament and the Council on a More Effective Return Policy in the European Union: A Renewed Action Plan, COM(2017) 200, p. 2.

¹⁵⁵ *Ibid.*, p. 13.

¹⁵⁶ European Commission, Commission Recommendation of 7.3.2017 on making returns more effective when implementing the Directive 2008/115/EC of the European Parliament and of the Council Commission recommendation, COM(2017) 1600 final.

¹⁵⁷ European Commission, Communication from the Commission to the European Parliament and the Council on a More Effective Return Policy in the European Union: A Renewed Action Plan, COM(2017) 200, p. 4.

end,¹⁵⁸ the Commission published a recast proposal for the Return Directive in September 2018.¹⁵⁹ Yet, the proposal was not accompanied by an impact assessment.¹⁶⁰ Therefore, a substitute impact assessment was carried out by the Parliament on the proposal, which concluded, *inter alia*, that there is no clear evidence that the Commission proposal would lead to more effective returns of irregular migrants.¹⁶¹

While the failure of the Commission to carry out an evaluation of the implementation of the Directive attracted criticisms from the Parliament's Committee on Civil Liberties, Justice and Home Affairs (the LIBE Committee), this resulted in an own-initiative implementation assessment launched in December 2019 by the Parliament.¹⁶² In this assessment, some protection gaps and shortcomings were identified in return decisions, enforcement of return decisions, entry bans and detention conditions.¹⁶³ As an outcome and based on this assessment, the Parliament adopted the Resolution on the implementation of the Return Directive (2008/115/EC) on 17 December 2020, in which it pointed out the importance of fair, swift and effective procedures for the return of TCNs with respect for human rights, and reiterated some points of concern regarding return decisions, voluntary detention, procedural safeguards, entry bans, and detention and risk of absconding.¹⁶⁴

Making returns more effective and increasing the return rate were also among the prioritised policies in the New Pact on Migration and Asylum.¹⁶⁵ Some of the reforms in the EU policy on returns include the introduction of a procedure at the border comprising pre-entry screening, an asylum

¹⁵⁸ European Council, Conclusions of the European Council of 28 June 2018, EUCO 9/18, para. 10.

¹⁵⁹ European Commission, Proposal for a Directive of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals (recast), COM(2018) 634 final.

¹⁶⁰ See: Izabella Majcher, 'The implementation of the EU Return Directive: The European Parliament aligns the EU expulsion policy with recommendations of UN human rights expert mechanisms', (EU Law Analysis, 18 January 2021) <<http://eulawanalysis.blogspot.com/2021/01/the-implementation-of-eu-return.html>> accessed 20 November 2021.

¹⁶¹ European Parliamentary Research Service, 'The proposed Return Directive (recast): Substitute Impact Assessment', (February 2019) [18] <[https://www.europarl.europa.eu/RegData/etudes/STUD/2019/631727/EPRS_STU\(2019\)631727_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2019/631727/EPRS_STU(2019)631727_EN.pdf)> accessed 21 December 2021.

¹⁶² European Parliamentary Research Service, 'The Return Directive 2008/115/EC: European Implementation Assessment', (June 2020) [18–19] <[https://www.europarl.europa.eu/RegData/etudes/STUD/2020/642840/EPRS_STU\(2020\)642840_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2020/642840/EPRS_STU(2020)642840_EN.pdf)> accessed 21 November 2021.

¹⁶³ See also: Galina Cornelisse and Madalina Moraru, 'Judicial dialogue about the Return Directive: Which role for courts in an era of executive governance?' (EU Migration Law Blog, 1 September 2020) <<https://eumigrationlawblog.eu/judicial-dialogue-about-the-return-directive-which-role-for-courts-in-an-era-of-executive-governance/>> accessed 5 January 2022.

¹⁶⁴ European Parliament, Resolution of 17 December 2020 on the implementation of the Return Directive, 2019/2208(INI).

¹⁶⁵ European Commission, Communication from the commission to the European Parliament, the European Economic and Social Committee and the Committee of the Regions on a New Pact on Migration and Asylum, COM(2020) 609 final.

procedure and a swift return procedure,¹⁶⁶ appointment of an EU Return Coordinator to increase coordination among domestic processes,¹⁶⁷ assisted voluntary return and reintegration,¹⁶⁸ and return sponsorships as a way of solidarity among the Member States.¹⁶⁹ Concerning voluntary returns, the Commission published a strategy on voluntary return and reintegration on 27 April 2021,¹⁷⁰ in which the Commission promotes voluntary return and reintegration as an integral part of a common EU system for returns.¹⁷¹ In this sense, the aim of the strategy is to develop a more coherent and coordinated approach among Member States.¹⁷²

4. Short-stay visas and border checks

4.1. Towards the creation of a common policy on visas and external border checks

The introduction of the free movement of persons within the EU and the removal of internal borders have initiated ‘a gradual transfer of limited powers in the area of external border management of the EU’.¹⁷³ It also brought about the need for a common policy on short-term visas so that a

¹⁶⁶ See: European Commission, Proposal for a Regulation of the European Parliament and of the Council introducing a screening of third-country nationals at the external borders and amending Regulations (EC) No 767/2008, (EU) 2017/2226, (EU) 2018/1240 and (EU) 2019/817, COM(2020) 612 final, 2020/0278 (COD); European Commission amended proposal for a Regulation of the European Parliament and of the Council establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU, COM(2020) 611 final, 2016/0224 (COD).

¹⁶⁷ European Commission, Communication from the commission to the European Parliament, the European Economic and Social Committee and the Committee of the Regions on a New Pact on Migration and Asylum, COM(2020) 609 final, p. 8.

¹⁶⁸ Ibid., p. 9.

¹⁶⁹ See: European Commission, Proposal for a Regulation of the European Parliament and of the Council on asylum and migration management and amending Council Directive (EC) 2003/109, and the proposed Regulation (EU) XXX/XXX [Asylum and Migration Fund] COM(2020) 610 final. See also: Madalina Moraru, ‘The new design of the EU’s return system under the Pact on Asylum and Migration’ (EU Migration Law Blog 14 January 2021) <<https://eumigrationlawblog.eu/the-new-design-of-the-eus-return-system-under-the-pact-on-asylum-and-migration/>> accessed 25 January 2021.

¹⁷⁰ European Commission, Communication from the Commission to the European Parliament and the Council: the EU strategy on voluntary return and reintegration, COM(2021) 120 final.

¹⁷¹ Ibid., p. 2. See also: Madalina Moraru, ‘The Future Architecture of the EU’s Return System Following the Pact on Asylum and Migration: Added Value and Shortcomings’ in Daniel Thym and Odysseus Academic Network (eds), *Reforming the Common European Asylum System: Opportunities, Pitfalls, and Downsides of the Commission Proposals for a New Pact on Migration and Asylum* (NOMOS 2022) 194–204.

¹⁷² Ibid.

¹⁷³ Ferruccio Pastore, ‘Visa, borders, immigration: Formation, structure, and current evolution of the EU Entry control system’ in Neil Walker (eds), *Europe’s Area of Freedom, Security and Justice* (Oxford University Press 2004), p. 94–98. See also: Melanie Fink, *Frontex and Human Rights: Responsibility in ‘Multi-Actor Situations’ under the ECHR and EU Public Liability Law* (Oxford University Press 2019), p. 23.

visa issued in one Member State would allow travel to other Member States, while strengthening internal security in the same vein.

‘Prompted by the resolve to achieve the abolition of checks at the common borders on the movement of nationals of the Member States of the European Communities’,¹⁷⁴ the Schengen Agreement was signed on 14 June 1985. Measures of the Agreement in the short run also included the Parties approximating their visa policies.¹⁷⁵ Five years later, on 19 June 1990, the 1990 Schengen Implementing Convention was signed for the concrete implementation of the Schengen Agreement.¹⁷⁶ This Convention essentially specified the complementary measures stated in Article 17 of the Schengen Agreement,¹⁷⁷ and covered issues such as the abolition of internal border controls,¹⁷⁸ strengthening external border controls,¹⁷⁹ procedures for issuing a uniform visa,¹⁸⁰ operation of a single database to prevent public order and national security threats known as the Schengen Information System (SIS).¹⁸¹ The Schengen Convention was followed by the adoption of a number of measures implementing the Convention concerning both visas and border controls by the Executive Committee established by the Convention.

Following the Convention, the Schengen Area experienced an expansion, as on 27 November 1990 Italy, on 25 June 1991 Portugal and Spain, and on 6 November 1992, Greece joined the area.¹⁸² Consequently, on 26 March 1995, controls at the internal borders of the seven Schengen member countries were abolished.¹⁸³ Gradually, the Schengen area saw additional parties joining and it is now an area comprising 26 European countries, also including some non-EU countries.¹⁸⁴

¹⁷⁴ Agreement between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders of 14 June 1985, OJ L 239 (hereinafter Schengen Agreement), recital 4.

¹⁷⁵ Schengen Agreement, Article 7.

¹⁷⁶ Convention Implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany, and the French Republic on the gradual abolition of checks at their common borders, [2000] OJ L 239/13 (hereinafter CISA).

¹⁷⁷ The CISA, recital 5.

¹⁷⁸ The CISA, Article 2.

¹⁷⁹ The CISA, Article 3–4.

¹⁸⁰ The CISA, Article 9–18.

¹⁸¹ The CISA, Title IV.

¹⁸² Schengen Visa Info, ‘Schengen Agreement’ <<https://www.schengenvisainfo.com/schengen-agreement/>> accessed 4 January 2022.

¹⁸³ Helen Oosterom-Staples, ‘Has Europeanization Silenced Criticism on Intergovernmental External Border Cooperation?’ in Elspeth Guild and Paul Minderhoud, *The First Decade of EU Migration and Asylum Law* (Brill | Nijhoff 2011) 95.

¹⁸⁴ Of the 27 MS, 22 of them participate in the Schengen Area while Ireland maintains an opt-out. Further, the four member states of the European Free Trade Association (EFTA); Iceland, Liechtenstein, Norway, and Switzerland have signed agreements in association with the Schengen Agreement. See: Schengen Visa Info, ‘Schengen Area Countries’ <<https://www.schengenvisainfo.com/schengen-visa-countries-list/>> accessed 1 October 2021.

With the entry into force of the Maastricht Treaty in 1992, visa policy was the first component of the field of borders, asylum and immigration to enter the Community law. Article 100c vested powers in the Council to adopt a list of countries whose nationals required a visa to enter the territory of the Member States and to establish a uniform format.¹⁸⁵ Article 100c EC was used for the first time for the adoption of a Visa List Regulation and Regulation 1683/95 laying down a uniform format for visa, the latter being still valid today.¹⁸⁶ The Regulation brought uniformity in short-term and transit visas as well as airport transit visas.¹⁸⁷ As for the external border checks, rules on the crossing of external borders and the exercise of controls thereon was included in the third pillar powers of the EU and listed in Article K.1(2) of the Maastricht Treaty.

With the integration of the Schengen *acquis* into EU law through the Treaty of Amsterdam on 1 May 1999,¹⁸⁸ the EU legal framework incorporated a vast number of provisions on short-term visas and border controls. While the 1998 Vienna Action Plan¹⁸⁹ and the 1999 Tampere Conclusions¹⁹⁰ implied that the objectives of Article 62 and 63(3)(b) of the EC were largely realised with the *communitarisation* of the Schengen *acquis*, the unfolding events of 11 September 2001 in the US and in Madrid on 11 March 2004 changed things drastically. Together with the risk of diverging practices due to the lack of uniform standards in the Schengen area and the approaching Eastern enlargement, the concerns for security deficits at the common external frontiers increased.¹⁹¹ This constituted the main motivation for the European Council, meeting in Laeken, to call upon the Council of the EU and the Commission to examine ‘the conditions for the creation of a mechanism or common services to control external borders and to take steps to set up a common visa identification system and to examine the possibility of setting up common consular offices’.¹⁹² Subsequently, the Commission prepared its Communication on 7 May 2002, which mentioned the establishment of a common corpus of legislation for the external borders for the first time.¹⁹³ Following this, the 2004 Hague Programme called for a number of detailed

¹⁸⁵ Treaty on the European Union (Treaty of Maastricht).

¹⁸⁶ Council Regulation (EC) 1683/ 95 laying down a uniform format for visas [1995] OJ L 164/1.

¹⁸⁷ *Ibid.*, Article 1.

¹⁸⁸ Protocol integrating the Schengen *acquis* into the framework of the European Union [1997] OJ C 340/96. The *acquis* consisted of the Schengen Agreement and the Schengen Convention, the various Acts of Accession and Association Agreements, the measures implementing the Convention taken by the Schengen Executive Committee, and the acts adopted by other organs in accordance with implementing powers delegated by the Executive Committee.

¹⁸⁹ Action Plan of the Council and the Commission on how best to implement the provisions of the Treaty of Amsterdam on an AFSJ, JHA Council, 3 December 1998, [1999] OJ C 19/ 1, para. 26.

¹⁹⁰ See: European Council, Presidency Conclusions, Tampere European Council 15 and 16 October 1999, SN 200/99, para 25.

¹⁹¹ Violeta Moreno-Lax, *Accessing Asylum in Europe: Extraterritorial Border Controls and Refugee Rights under EU Law* (Oxford University Press 2017) 28.

¹⁹² European Council, Presidency Conclusions, Laeken European Council 14 and 15 December 2001, SN 300/1/01/REV1, para. 42.

¹⁹³ European Commission, Towards Integrated Management of the External Borders of the Member States of the European Union, COM(2002) 233 final.

measures concerning border checks and visa policy.¹⁹⁴ To this end, a number of important legislative measures were proposed starting in 2003, as is seen in the next section.

Since the entry into force of the Treaty of Lisbon on 1 December 2009, short-stay visa policy as well as the external borders are subject to Article 77 of the TFEU. This Article, *inter alia*, extended the competence on visas with a ‘common policy on visas and other short-stay residence permit’, and added the objective of introducing gradually ‘an integrated management system for external borders’.

4.2. An overview of the short-stay visas and border checks instruments

The EU’s Schengen external borders *acquis* includes the following legislative instruments; Regulation (EU) 2016/399 on the rules governing the movement of persons across borders (hereinafter ‘Schengen Borders Code’), Regulation (EU) 2019/1896 on the European Border and Coast Guard (hereinafter ‘FRONTEX Regulation’), Regulation 1931/2006 laying down rules on local border traffic at the external land borders (hereinafter ‘Local Border Traffic Regulation’), Regulations (EU) 2018/1862, 2018/1861, and 2018/1860 on the SIS (hereinafter ‘SIS Regulations’), Regulation (EU) 2017/2226 establishing an Entry/Exit System (hereinafter ‘EES Regulation’), and Regulation (EU) 2018/1240 establishing a European Travel Information and Authorisation System (hereinafter ‘ETIAS Regulation’).

As for the legislative framework for short-stay visas, the set of harmonised rules in the common visa policy consists of Regulation (EC) No 810/2009 establishing a Community Code on Visas (hereinafter the ‘Visa Code’), Regulation 2018/1806 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement (hereinafter the ‘Visa List Regulation’), Regulation 1683/95 laying down a uniform format for visa, and Regulation (EC) No 767/2008 concerning the Visa Information System (hereinafter the ‘VIS Regulation’). Since the EES Regulation, ETIAS Regulation, SIS Regulations, and VIS Regulation are part of a large-scale IT system in the area of freedom, security and justice, those regulations will be examined together as EU Information Systems, which also include Regulation 2019/816 (the European Criminal Records Information System (ECRIS)–TCN Regulation). Finally, the policy framework leading up to the adoption of Regulation (EU) 2019/817 establishing a framework for interoperability between EU information systems in the field of borders and visa, and Regulation (EU) 2019/818 in the field of police and judicial cooperation, asylum and migration will also be analysed.

¹⁹⁴ European Council, The Hague Programme: Strengthening Freedom, Security and Justice in the European Union, 2005/C 53/01, sections 1.7.1. and 1.7.3.

4.2.1. The EU's Schengen external borders *acquis*

4.2.1.1. European Border and Coast Guard Agency (FRONTEX)

The idea of increased coordination regarding control and surveillance at the external borders came into being for its benefit for the implementation of the common rules on controlling those borders. Already in the Tampere Conclusions, the need to protect the external borders and to ensure consistent control to stop illegal immigration were explicitly mentioned by the Council.¹⁹⁵ In the 2001 Laeken Conclusions, the Council asked the Commission and the Council of the EU to 'work out arrangements for cooperation between services responsible for external border control and to examine the conditions in which a mechanism or common services to control external borders could be created'.¹⁹⁶ Therefore, the Commission prepared its 2002 Communication titled 'Towards integrated management of the external borders of the Member States of the European Union'.¹⁹⁷

In this Communication, the Commission unveiled its idea to set up an 'external borders practitioners' common unit' tasked with managing operational cooperation at the external borders.¹⁹⁸ On the other hand, while endorsing the creation of the common unit, the Action Plan of the Council of the EU on the External Borders also specified that 'institutional steps could be considered' which 'could include a possible decision on the setting up of a European Corps of Border Guards'.¹⁹⁹ In line with this, in its Communication to the Parliament and the Council of the EU in view of the European Council of Thessaloniki, the Commission pointed out that the common unit has shown structural limits in the coordination of operational cooperation at the external borders and that 'a new institutional arrangement is needed to ensure effective, continuous and fully operational coordination for those activities'.²⁰⁰

Following this, the Council also emphasised the importance of a more structured framework and the necessity to create new institutional frameworks to enhance operational cooperation at the external borders in the 2003 Thessaloniki Conclusions.²⁰¹ Consequently, following the

¹⁹⁵ European Council, Presidency Conclusions, Tampere European Council 15 and 16 October 1999, SN 200/99, para. 3.

¹⁹⁶ European Council, Presidency Conclusions, Laeken European Council 14 and 15 December 2001, SN 300/1/01/REV1, para 42.

¹⁹⁷ Commission, 'Towards Integrated Management of the External Borders of the Member States of the European Union', COM(2002) 233 final.

¹⁹⁸ Ibid., para. 27.

¹⁹⁹ Council of the European Union, Plan for the management of the external borders of the Member States of the European Union, (2002) 10019/02, point 120.

²⁰⁰ European Commission, Communication from the Commission to the European Parliament and the Council in View of the European Council of Thessaloniki on the Development of A Common Policy on Illegal Immigration, Smuggling And Trafficking Of Human Beings, External Borders And The Return Of Illegal Residents, COM(2003) 323 final, p. 7.

²⁰¹ European Council, Presidency Conclusions, Thessaloniki European Council 19–20 June 2003, PE 333.583, points 12 and 14.

Commission's proposal on 11 November 2003,²⁰² the Regulation 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States (hereinafter '2004 Regulation') was adopted on 26 October 2004.²⁰³ The Agency's tasks in the 2004 Regulation consisted of only some modest supporting and coordinating activities.²⁰⁴ Yet, successive legislative amendments as well as new Regulations have drastically increased the tasks and powers of FRONTEX. After the first amendments to the 2004 Regulation which was adopted in 2007,²⁰⁵ another amendment in 2011 further strengthened FRONTEX's operational tasks following the entry into force of the Lisbon Treaty.²⁰⁶

In 2015, the external borders witnessed extraordinary pressures which put a severe strain on the Schengen area. Therefore, in the Agenda on Migration dated 13 May 2015, the European Commission announced a proposal for a Regulation establishing a European Border and Coast Guard (hereinafter 'EBCG'),²⁰⁷ which was to be put into action at the EU's external borders with the highest pressure.²⁰⁸ The proposal made its way through the legislative procedure swiftly and Regulation (EU) 2016/1624 entered into force on 6 October 2016,²⁰⁹ through which the tasks of the Agency were considerably enhanced.

Only two years after the establishment of the EBCG, the Commission introduced another proposal for a new Regulation during the State of the

²⁰² European Commission, Proposal for a Council Regulation establishing a European Agency for the Management of Operational Co-operation at the External Borders, COM(2003) 687 final/2.

²⁰³ Council Regulation (EC) No 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union [2004] L 349/1.

²⁰⁴ Article 2(1) of the 2004 Regulation.

²⁰⁵ Regulation (EC) No 863/2007 of 11 July 2007 establishing a mechanism for the creation of Rapid Border Intervention Teams and amending Council Regulation (EC) No 2007/2004 as regards that mechanism and regulating the tasks and powers of guest officers [2007] L 199/30.

²⁰⁶ Regulation (EU) No 1168/2011 of the European Parliament and of the Council of 25 October 2011 amending Council Regulation (EC) No 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union [2011] OJ L 304.

²⁰⁷ European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A European Agenda On Migration, COM(2015) 240 final, p. 17.

²⁰⁸ European Parliament, 'Legislative Train: Towards a New Policy on Migration' <<https://www.europarl.europa.eu/legislative-train/api/stages/report/current/theme/towards-a-new-policy-on-migration/file/2nd-emergency-relocation-scheme>> accessed 1 April 2022.

²⁰⁹ Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard and amending Regulation (EU) 2016/399 of the European Parliament and of the Council and repealing Regulation (EC) No 863/2007 of the European Parliament and of the Council, Council Regulation (EC) No 2007/2004 and Council Decision 2005/267/EC [2016] OJ L 251.

Union address by Commission President Juncker on 12 September 2018.²¹⁰ The aim of the proposal was to upgrade the EBCG for a fully integrated EU border management system,²¹¹ which was also endorsed by the Council in its June 2018 Conclusions.²¹² The proposal was reached within six months before the European Parliament elections in May 2019.²¹³ Remarkably, Regulation (EU) 2019/1896 established a ‘Standing Corps of operational EU staff’ with executive powers and their own equipment as part of the Agency.²¹⁴ Overall, while the operational capacity and the powers of FRONTEX in its joint operations have grown steadily since its establishment in 2004, this has peaked with the 2019 Regulation. Yet, human rights implications of FRONTEX’s increasing mandate have recently come to light with the accusations against FRONTEX for being involved in pushbacks of migrants and failure to rescue persons in distress at sea in the Mediterranean.²¹⁵ Notwithstanding, the New Pact on Migration and Asylum further reinforced FRONTEX’s mandate by reiterating its leading role in returns and appointing a dedicated Deputy Executive Director.²¹⁶

4.2.1.2. Schengen Borders Code

With the *communautarisation* of the Schengen *acquis* in the EU legal order, the establishment of a common corpus of legislation was one of the fundamental components of the common policy on the management of the external borders, as the Commission specified in its Communication titled ‘Towards integrated management of the external borders of the Member States of the European Union’ on 7 May 2002.²¹⁷ To this end, in this

²¹⁰ European Commission, Proposal for a Regulation of the European Parliament and of the Council on the European Border and Coast Guard and repealing Council Joint Action no 98/700/JHA, Regulation (EU) no 1052/2013 of the European Parliament and of the Council and Regulation (EU) no 2016/1624 of the European Parliament and of the Council, COM(2018) 631 final.

²¹¹ European Communication, Communication from the Commission to the European Parliament, the European Council and the Council: A new, modern Multiannual Financial Framework for a European Union that delivers efficiently on its priorities post-2020, COM(2018) 98 final, p. 6.

²¹² European Council, Conclusions of the European Council meeting (28 June 2018), EUCO 9/18, para. 10.

²¹³ See: Mariana Gkliati, ‘The new European Border and Coast Guard: Do increased powers come with enhanced accountability?’ (EU Law Analysis, 17 April 2019) <<http://eulawanalysis.blogspot.com/2019/04/the-new-european-border-and-coast-guard.html>> accessed 3 October 2021.

²¹⁴ Regulation (EU) 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624 [2019] OJ L 295, article 54.

²¹⁵ See also: Elspeth Guild, ‘The Frontex Push-Back Controversy: Lessons on Oversight (Part I)’, (EU Immigration and Asylum Law and Policy, 19 April 2021) <<https://eumigrationlawblog.eu/the-frontex-push-back-controversy-lessons-on-oversight-part-i/>> accessed 2 April 2022.

²¹⁶ European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and The Committee of the Regions on a New Pact on Migration and Asylum, COM(2020) 609 final, p. 8.

²¹⁷ European Commission, Communication from the Commission to the Council and the European Parliament Towards Integrated Management of the External Borders of the Member States of The European Union, COM(2002) 233 final, p. 12.

Communication, the Commission announced the proposal for a regulation recasting the Common Manual's provisions and clarifying their legal status, as well as for a Regulation on local border traffic.²¹⁸ The common corpus was also mentioned in the Council's 'Plan for the management of the external borders of the Member States of the European Union' on 13 June 2002,²¹⁹ endorsed by the Seville European Council on 21–22 June 2002,²²⁰ and by the Thessaloniki European Council on 19–20 June 2003.²²¹

However, diverting from its original objective, instead of merely recasting the Common Manual, the Commission presented its proposal for a regulation for a Community Code on the rules governing the movement of persons across borders on 26 May 2004,²²² which aimed to provide a legal framework for the management of the external borders, including the rules for checks at the Schengen external borders.²²³ Consequently, Regulation (EC) No 562/2006 was adopted on 15 March 2006,²²⁴ and the rules concerning the abolition of internal border controls stemmed from this Regulation. This Code replaced the relevant provisions of the Schengen Convention, the Common Manual, and two of the three Executive Committee Decisions.²²⁵

Following a Commission report on the application of the internal borders rules of the Schengen Borders Code, three specific issues of concern were identified: the difficulties reported with systematic checks in some border zones, obstacles to traffic at road crossing points, and untimely notification of the reintroduction of border controls.²²⁶ Also, due to the concerns about the effectiveness of those rules after the Arab Spring in 2011,²²⁷ the Schengen Borders Code was amended in 2013.²²⁸ Yet, the events unfolding in 2015, most notably the unprecedented arrival of irregular migrants in the EU and the resulting security threats challenged the effectiveness of the border

²¹⁸ Ibid.

²¹⁹ European Council, Plan for the management of the external borders of the Member States of the European Union, 10019/02, p. 26.

²²⁰ European Council, Presidency Conclusions, Seville European Council 21–22 June 2002, DOC02/03.

²²¹ European Council, Presidency Conclusions, Thessaloniki European Council 19–20 June 2003, PE 333.583.

²²² European Commission, Proposal for a Council Regulation establishing a Community Code on the rules governing the movement of persons across borders, COM(2004) 391 final.

²²³ Ibid., p. 8.

²²⁴ Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders [2006] OJ L 105/1.

²²⁵ Ibid., Article 39(1), (2)(a) and (b). See also: Steve Peers, *EU Justice and Home Affairs Law: Volume I: EU Immigration and Asylum Law* (Oxford University Press 2016) 106.

²²⁶ European Commission, Report from the Commission to the European Parliament and the Council on the application of Title III (Internal Borders) of Regulation (EC) No 562/2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code), COM(2010) 554 final.

²²⁷ Steve Peers, *EU Justice and Home Affairs Law: Volume I: EU Immigration and Asylum Law* (Oxford University Press 2016) 106.

²²⁸ Regulation (EU) No 1051/2013 of the European Parliament and of the Council of 22 October 2013 amending Regulation (EC) No 562/2006 in order to provide for common rules on the temporary reintroduction of border control at internal borders in exceptional circumstances [2013] OJ L 295/1.

management strategies in the Schengen area.²²⁹ Therefore, on 20 January 2015, the Commission proposed to codify the entire Code,²³⁰ which led to the codification of Regulation (EC) 2016/399 concerning a Union Code on the rules governing the movement of persons across borders.²³¹ It establishes, *inter alia*, that checks at internal borders are abolished,²³² and can only be reintroduced in exceptional situations, as a measure of last resort.²³³ This Regulation has also been amended several times, the last time being with Regulation (EU) 2019/817 on interoperability between EU information systems in the field of borders and visa.²³⁴

However, the difficulties experienced in managing the Schengen area continued, in particular after the outbreak of the COVID-19 pandemic. Starting from the mid-March 2020, almost all Member States and other Schengen countries derogated from the Schengen controls-free internal borders and put entry bans from the Member States affected by the pandemic, with limited exceptions in relation to ‘essential travels’.²³⁵ The Commission stated in its New Pact on Migration and Asylum that pressures on the Schengen area have been caused by ‘gaps and loopholes and by diverging national asylum, reception and return systems’.²³⁶ In its 2021 Work Programme, citing the current health crisis and the exposed need for the EU’s crisis preparedness and better management of cross-border pressures,²³⁷ the Commission determined the revision of the Schengen

²²⁹ Hannah Ahamad Madatali, ‘Schengen Borders Code Revision of Regulation (EU) 2016/399’ (EPRS, March 2021) [3] <[https://www.europarl.europa.eu/RegData/etudes/BRIE/2021/662622/EPRS_BRI\(2021\)662622_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2021/662622/EPRS_BRI(2021)662622_EN.pdf)> accessed 7 February 2022.

²³⁰ European Commission, Proposal for a Regulation of the European Parliament and of the Council on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code), COM(2015) 8 final.

²³¹ Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders [2016] OJ L 77/1 (hereinafter Schengen Borders Code).

²³² Article 1 of the Schengen Borders Code.

²³³ Article 25–35 of the Schengen Borders Code.

²³⁴ Regulation (EU) 2019/817 of the European Parliament and of the Council of 20 May 2019 on establishing a framework for interoperability between EU information systems in the field of borders and visa and amending Regulations (EC) No 767/2008, (EU) 2016/399, (EU) 2017/2226, (EU) 2018/1240, (EU) 2018/1726 and (EU) 2018/1861 of the European Parliament and of the Council and Council Decisions 2004/512/EC and 2008/633/JHA [2019] OJ L 135/27.

²³⁵ Marco Stefan and Ngo Chun Luk, ‘Limitations on Human Mobility in Response to COVID-19: A preliminary mapping and assessment of national and EU policy measures, their sanctioning frameworks, implementation tools and enforcement practices’ (CEPS No. 2021-02, December 2021) [22] <https://www.ceps.eu/wp-content/uploads/2021/12/LSE2021-02_Limitations-on-Human-Mobility.pdf> accessed 2 January 2022.

²³⁶ European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on a New Pact on Migration and Asylum, COM(2020) 609 final, p. 14.

²³⁷ European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Commission Work Programme 2021: A Union of vitality in a world of fragility, COM(2020) 690 final, p. 6.

Borders Code as one of the policy objectives for the second quarter of 2021.²³⁸ To this end, the Commission presented its Communication on a new strategy for a fully functioning and resilient Schengen area, which put its emphasis on three key elements: a modern and effective management of the EU external borders, measures for reinforcing Schengen internally and complementary measures, and increased preparedness and enhanced governance to foster trust.²³⁹

To this end, the proposal amending the Schengen Borders Code was proposed by the Commission on 14 December 2021, alongside a proposal for a Regulation addressing situations of instrumentalisation in the field of migration and asylum.²⁴⁰ Among others, the proposal aims to establish a new and uniform mechanism in case of a threat to public health, address the instrumentalisation of migrants by a third country, increase the use of alternative measures instead of border controls, and apply mitigating measures if such controls are inevitable.²⁴¹ Some specific measures featured in the proposal include restricted access to the border crossing points, more surveillance in the case of instrumentalisation of migrants and a new procedure for transferring persons apprehended at the internal borders to another Member State.²⁴²

4.2.1.3. The Local Border Traffic Regulation

As mentioned previously, the need to develop rules within the Community legal framework on local border traffic at the external borders was first included in the Commission Communication ‘Towards an integrated management of the external borders of the Member States of the European Union’.²⁴³ The Plan for the management of the external borders of the Member States of the EU, which was approved by the Council on 13 June 2002 and endorsed by the Seville European Council on 21 and 22 June, emphasised the adoption of such common measures with a view to

²³⁸ European Commission, Annexes to the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Commission Work Programme 2021, COM(2020) 690 final.

²³⁹ European Commission, Communication from the Commission to the European Parliament and the Council: A strategy towards a fully functioning and resilient Schengen area, COM(2021) 277 final, p. 4.

²⁴⁰ European Commission, Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) 2016/399 on a Union Code on the rules governing the movement of persons across borders, COM(2021) 891; European Commission, Proposal for a Regulation of the European Parliament and of the Council addressing situations of instrumentalisation in the field of migration and asylum, COM(2021) 890.

²⁴¹ Ibid., p. 6–9.

²⁴² See also: ECRE, ‘ECRE Comments on the Commission Proposal For a Regulation Amending Regulation (EU) 2016/399 on a Union Code on the Rules Governing the Movement of Persons Across Borders’ (7 March 2022) [4] <<https://ecre.org/wp-content/uploads/2022/03/ECRE-Comments-SBC.pdf>> accessed 15 March 2022.

²⁴³ European Commission, Communication from the Commission to the Council and the European Parliament Towards Integrated Management of the External Borders of the Member States of the European Union, COM(2002) 233 final, p. 13.

enlargement of the Union.²⁴⁴ Therefore, the Commission submitted the proposal for a regulation on local border traffic.²⁴⁵

Following this, Regulation 1931/2006 laying down rules on local border traffic at the external land borders was adopted on 20 December 2006.²⁴⁶ This Regulation was amended on 13 December 2011 to include the Kaliningrad oblast and some Polish administrative districts in the eligible border area of the Regulation.²⁴⁷ The Regulation also constitutes a derogation from the Schengen Borders Code for border residents, aiming to prevent the imposition of the Schengen border controls from disrupting local border economies.²⁴⁸ To this end, nationals of neighbouring non-EU countries can be eligible for a Local Border Traffic permit, which allows them to cross the external borders.²⁴⁹ Also, those border residents can be allowed an uninterrupted stay of up to three months in the border area.²⁵⁰

In its implementation report of the Regulation dated 24 July 2009, the Commission emphasised that the Regulation strikes a right balance between facilitating personal contacts in the border area and maintaining a high level of security.²⁵¹ Likewise, the second implementation report also indicated that the countries concerned consider the local border traffic regime useful for increasing cross-border trade and social exchange, and that it is working well in practice.²⁵²

4.2.2. Common short-stay visa rules

4.2.2.1. The Visa List Regulation

The power to adopt a visa list for ‘the third countries whose nationals must be in possession of a visa when crossing the external borders of the Member

²⁴⁴ Council of the European Union, Plan for the management of the external borders of the Member States of the European Union, 10019/02, para. 112.

²⁴⁵ European Commission, Proposal for a Regulation of the European Parliament and of the Council Laying Down Rules on Local Border Traffic at the External Land Borders of the Member States and Amending the Schengen Convention and the Common Consular Instructions, COM(2005) 56 final.

²⁴⁶ Regulation (EC) No 1931/2006 laying down rules on local border traffic at the external land borders of the Member States and amending the provisions of the Schengen Convention, OJ 2006, L405/1.

²⁴⁷ Regulation (EU) No 1342/2011 of the European Parliament and of the Council of 13 December 2011 amending Regulation (EC) No 1931/2006 as regards the inclusion of the Kaliningrad oblast and certain Polish administrative districts in the eligible border area [2011] OJ L 347/41, article 1.

²⁴⁸ Recital 3 of the Regulation.

²⁴⁹ Article 7.

²⁵⁰ Article 5.

²⁵¹ European Commission, Report from the Commission to the European Parliament and the Council on the implementation and functioning of the local border traffic regime introduced by Regulation (EC) No 1931/2006 of the European Parliament and of the Council laying down rules on local border traffic at the external land borders of the Member States, COM(2009) 383 final, p. 9.

²⁵² European Commission, Communication from the Commission to the European Parliament and the Council: Second report on the implementation and functioning of the local border traffic regime set up by Regulation No 1931/2006, COM(2011) 47 final, p. 8.

States' was originally specified in Article 100c of the EC Treaty following the Maastricht Treaty. With the entry into force of the Amsterdam Treaty, the Community gained powers to adopt common rules on visas, 'including the list of third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement'.²⁵³ Therefore, the Amsterdam Treaty expressly gave not only the power to adopt a visa 'black-list', but also a visa 'white-list'.²⁵⁴ To this end, Regulation 539/2001 was adopted, which provided for 'full harmonisation of the list of third countries whose nationals do or do not need a visa for the crossing of Member States' external borders'.²⁵⁵ This Regulation was subject to amendments many times, in particular before the entry into force of the Lisbon Treaty, after the Eastern enlargement of the Union. Therefore, on 14 November 2018, 'in the interests of clarity and rationality',²⁵⁶ Regulation 2018/1806 was adopted and, as a result, Regulation (EC) No 539/2001 was repealed.²⁵⁷ The new Regulation has also been amended as a consequence of the United Kingdom's withdrawal from the Union.²⁵⁸

4.2.2.2. The Visa Code

In order to meet the objectives of the 2004 Hague Programme, in particular to further develop the common visa policy,²⁵⁹ and reinforce the coherence of the common visa policy on the issuance of short-stay visas, transit visas and airport transit visas, the Commission presented its proposal for a Regulation establishing a Code on Visas on 28 July 2006.²⁶⁰ Following this proposal, Regulation (EC) No 810/2009 was adopted on 13 July 2009.²⁶¹ The Visa Code establishes the procedures and conditions for issuing visas for intended stays in the territory of Member States not exceeding 90 days in any 180-day period.²⁶² Visa in this sense means an authorisation issued with a view to an

²⁵³ Article 62 EC of the Treaty of Amsterdam.

²⁵⁴ Steve Peers et al., *EU Immigration and Asylum Law (Text and Commentary): Second Revised Edition* (Brill 2012) 224.

²⁵⁵ Council Regulation (EC) No 539/2001 of 15 March 2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement [2001] OJ L 81/1, recital 12.

²⁵⁶ Regulation (EU) 2018/1806 of the European Parliament and of the Council of 14 November 2018 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement [2018] OJ L 303/39, recital 1.

²⁵⁷ *Ibid.*, Article 14.

²⁵⁸ Regulation (EU) 2019/592 of the European Parliament and of the Council of 10 April 2019 amending Regulation (EU) 2018/1806 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement, as regards the withdrawal of the United Kingdom from the Union [2019] OJ L 103 I/1.

²⁵⁹ European Council, *The Hague Programme: Strengthening Freedom, Security and Justice in the European Union*, 2005/C 53/01, section 1.7.3.

²⁶⁰ European Commission, *Proposal for a Regulation of the European Parliament and of the Council establishing a Community Code on Visas*, COM(2006) 403 final/2.

²⁶¹ Regulation (EC) 810/ 2009 establishing a Community Code on Visas [2009] OJ L 243/1 (hereinafter Visa Code).

²⁶² Article 1(1) of the Visa Code.

intended stay in the territory of the Member State or transit through the Member State(s).²⁶³ Through the Visa Code, EU countries have harmonised conditions and procedures for issuing short-stay visas.

As of its adoption, the Visa Code repealed almost all the previous Schengen and Community measures regulating the conditions for issuing Schengen visas.²⁶⁴ Also, the Code was subject to two amendments, first to clarify the rules on transit through international areas of airports on 15 February 2012,²⁶⁵ and second, among other things, to redefine the validity of visas to be consistent with other EU legislation adopted after the Code on 26 June 2013.²⁶⁶

In line with the evaluation requirement after two years of the Code's application,²⁶⁷ the Commission presented its evaluation in a report titled 'A Smarter Visa Policy for Economic Growth'.²⁶⁸ On the basis of this report, the Commission adopted a proposal for a recast of the Visa Code on 1 April 2014. Yet, due to the slow negotiation process and greater security and migratory challenges in the meantime, the Commission withdrew its proposal in its work programme for 2018 titled 'An agenda for a more united, stronger and more democratic Europe'.²⁶⁹ In the same programme, the Commission stated that it would make proposals in 2018 to revise the Visa Code.²⁷⁰ Therefore, on 13 March 2018, the Commission presented a proposal amending Regulation (EC) No 810/2009 establishing a Community Code on Visas.²⁷¹ The final version of the agreement, Regulation (EU) 2019/1155, was adopted on 20 June 2019.²⁷² This Regulation provides faster procedures for travellers by allowing

²⁶³ Article 2(2)(a) and (b) of the Visa Code.

²⁶⁴ Article 56 of the Visa Code. See: Steve Peers, *EU Justice and Home Affairs Law: Volume I: EU Immigration and Asylum Law* (Oxford University Press 2016) 197.

²⁶⁵ Regulation (EU) No 154/2012 of the European Parliament and of the Council of 15 February 2012 amending Regulation (EC) No 810/2009 establishing a Community Code on Visas [2012] OJ L 58/3.

²⁶⁶ Regulation (EU) No 610/2013 of the European Parliament and of the Council of 26 June 2013 amending Regulation (EC) No 562/2006 of the European Parliament and of the Council establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code), the Convention implementing the Schengen Agreement, Council Regulations (EC) No 1683/95 and (EC) No 539/2001 and Regulations (EC) No 767/2008 and (EC) No 810/2009 of the European Parliament and of the Council [2013] OJ L 182/1. See also: Steve Peers, *EU Justice and Home Affairs Law: Volume I: EU Immigration and Asylum Law* (Oxford University Press 2016) 197.

²⁶⁷ Article 57(1) of the the Visa Code.

²⁶⁸ European Commission, Report from the Commission to the European Parliament and the Council: A smarter visa policy for economic growth, COM(2014) 165 final.

²⁶⁹ European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Commission Work Programme 2018 An agenda for a more united, stronger and more democratic Europe, COM(2017) 650 final, p. 9.

²⁷⁰ *Ibid.*

²⁷¹ European Commission, Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 810/2009 establishing a Community Code on Visas, COM(2018) 252 final.

²⁷² Regulation (EU) 2019/1155 of the European Parliament and of the Council of 20 June 2019 amending Regulation (EC) No 810/2009 establishing a Community Code on Visas [2019] OJ L 188/25 (hereinafter Visa Code).

for applications to be lodged up to six months and no later than 15 days.²⁷³ Also, it employs a new mechanism for using visa processing to improve cooperation with third countries on readmissions.²⁷⁴

4.2.3. EU information systems

4.2.3.1. The Schengen information system

The creation of the SIS dates back to the 1990 Schengen Convention, which provided the basic legal provisions governing the System.²⁷⁵ The SIS is a common information system for both border management and law enforcement to obtain information related to alerts on persons and objects through an automatic query procedure.²⁷⁶

The information concerns persons wanted for arrest, police investigation or criminal proceedings, or those denied access to the Schengen area.²⁷⁷ It also contains information on stolen or missing vehicles, weapons, identity documents and bank checks.²⁷⁸ Searches via the SIS can result in a positive response or ‘hit’, which specifies the action to be taken against people or objects.

In order to make sure that the new Member States apply the Schengen *acquis* and to enlarge the use of the SIS in more categories of data such as biometrics,²⁷⁹ Regulation 1987/2006 on the establishment, operation and use of the second-generation Schengen Information System (hereinafter ‘SIS II’) was adopted on 20 December 2006.²⁸⁰ A parallel measure in this regard concerns a third-pillar decision on the use of the system for policing and criminal law purposes.²⁸¹ After the Council decided that the relevant technical requirements had been satisfied, the SIS II was finally put into operation as of 9 April 2013.²⁸²

Following this, the Commission made various references to the SIS II in its communications, considering the impact of increased irregular migration

²⁷³ Article 1(7) of the Visa Code.

²⁷⁴ *Ibid.*, Article 1(19).

²⁷⁵ It established the System through its Articles 92–119 (Title IV) of the CISA.

²⁷⁶ European Commission, Proposal for a Regulation of the European Parliament and of the Council on the establishment, operation and use of the second generation Schengen information system (SIS II), COM(2005) 236 final/2, p. 3.

²⁷⁷ See: Article 95–97 of the CISA.

²⁷⁸ See: Article 99 and 100 of the CISA.

²⁷⁹ European Commission, Proposal for a Regulation of the European Parliament and of the Council on the establishment, operation and use of the second generation Schengen information system (SIS II), COM(2005) 236 final/2, p. 2.

²⁸⁰ Regulation (EC) No 1987/2006 of the European Parliament and of the Council of 20 December 2006 on the establishment, operation and use of the second-generation Schengen Information System (SIS II) [2006] OJ L 381/4.

²⁸¹ Council Decision 2007/533/JHA of 12 June 2007 on the establishment, operation and use of the second-generation Schengen Information System (SIS II) [2007] OJ L 205/63.

²⁸² EU-LISA, Report on the technical functioning of Central SIS II and the Communication Infrastructure, including the security thereof and the bilateral and multilateral exchange of supplementary information between Member States, (June 2015) <<https://www.statewatch.org/media/documents/news/2015/jul/eu-sis-II-technical-report-2015.pdf>> accessed 21 February 2022.

and security threats on EU external borders.²⁸³ In its Communications, including the Communication of 6 April 2016 on Stronger and Smarter Information Systems for Borders and Security,²⁸⁴ the Commission gave signals for the revision of the legal basis of the SIS II with a view to improve existing information systems to enhance security and strengthen the external borders.²⁸⁵ To this end, the Commission carried out a detailed evaluation of SIS in December 2016.²⁸⁶ While the evaluation concluded that SIS II is highly effective as it achieves significant operational and technical success, it has also identified a series of recommendations and areas where improvements can be made.²⁸⁷ Therefore, on 21 December 2016, the Commission presented three legislative proposals to reinforce the SIS II in the fight against terrorism and cross-border crime.²⁸⁸ These proposals covered ‘the use of the SIS for border management, police and judicial cooperation in criminal matters, and the return of illegally staying TCNs’.²⁸⁹

The revision of the SIS legal framework encompassing three different legal acts – namely Regulation (EU) 2018/1862 (the SIS Regulation), Regulation (EU) 2018/1861 (hereinafter the ‘SIS Border Checks Regulation’) and Regulation (EU) 2018/1860 (hereinafter the ‘SIS Returns Regulation’) entered into force on 28 December 2019.²⁹⁰ The main changes in the System include sharing of

²⁸³ European Parliament, ‘Legislative Train: Revision of the Schengen Information System in the Field of Border Checks’ (20 November 2019) <<https://www.europarl.europa.eu/legislative-train/theme-area-of-justice-and-fundamental-rights/file-jd-revision-of-sis-ii-for-border-checks>> accessed 17 March 2022.

²⁸⁴ European Commission, Communication from the Commission to the European Parliament and the Council: Stronger and Smarter Information Systems for Borders and Security, COM(2016) 205 final.

²⁸⁵ Ibid., p. 7.

²⁸⁶ European Commission, Commission Staff Working Document Accompanying the document Report from the Commission to the European Parliament and the Council on the evaluation of the second generation Schengen Information System (SIS II) in accordance with Articles 24 (5), 43 (3) and 50 (5) of Regulation (EC) No 1987/2006 and Articles 59 (3) and 66 (5) of Decision 2007/533/JHA, SWD(2016) 450 final.

²⁸⁷ Ibid., p. 73.

²⁸⁸ European Parliament, ‘Legislative Train: Revision of the Schengen Information System in the Field of Border Checks’ (20 November 2019) <<https://www.europarl.europa.eu/legislative-train/theme-area-of-justice-and-fundamental-rights/file-jd-revision-of-sis-ii-for-border-checks>> accessed 17 March 2022.

²⁸⁹ European Commission, Proposal for a Regulation of the European Parliament and of the Council on the establishment, operation and use of the Schengen Information System (SIS) in the field of police cooperation and judicial cooperation in criminal matters, amending Regulation (EU) No 515/2014 and repealing Regulation (EC) No 1986/2006, Council Decision 2007/533/JHA and Commission Decision 2010/261/EU, COM(2016) 883 final, p. 2.

²⁹⁰ Regulation (EU) 2018/1862 of the European Parliament and of the Council of 28 November 2018 on the establishment, operation and use of the Schengen Information System (SIS) in the field of police cooperation and judicial cooperation in criminal matters, amending and repealing Council Decision 2007/533/JHA, and repealing Regulation (EC) No 1986/2006 of the European Parliament and of the Council and Commission Decision 2010/261/EU [2018] OJ L 312/56; Regulation (EU) 2018/1861 of the European Parliament and of the Council of 28 November 2018 on the

new categories of alerts and more data; extended biometrics including palm prints and DNA; more information shared on terrorism-related activities; and the inclusion of the return decisions and entry bans in the System.²⁹¹

4.2.3.2. The Visa Information System

In line with the Laeken, Seville, Thessaloniki and Brussels Conclusions,²⁹² the VIS was established with Council Decision 2004/512/EC as a system for the exchange of short-stay visa data between Member States.²⁹³ The Decision defines the architecture of the VIS,²⁹⁴ and gives the Commission the mandate to develop the VIS at a technical level.²⁹⁵ Based on this, the Commission carried out an extended impact assessment to evaluate the social and economic impacts of action in this field,²⁹⁶ together with the proposal for a Regulation concerning the VIS.²⁹⁷ As the establishment of the VIS required the elaboration of a legal framework defining its purpose, functionalities and responsibilities,²⁹⁸ the VIS Regulation was adopted on 9 July 2008. Moreover, ‘with a view to realise the Council’s aim to give Member States’ authorities and Europol the access to the VIS in the fight against terrorism’,²⁹⁹ Council Decision 2008/633/JHA was adopted to determine the designated authorities of the Member States and Europol which can use the VIS ‘for the purposes of preventing, detecting and investigating terrorist offences and other serious

establishment, operation and use of the Schengen Information System (SIS) in the field of border checks, and amending the Convention implementing the Schengen Agreement, and amending and repealing Regulation (EC) No 1987/2006 [2018] OJ L 312/14; Regulation (EU) 2018/1860 of the European Parliament and of the Council of 28 November 2018 on the use of the Schengen Information System for the return of illegally staying third-country nationals [2018] OJ L 312/1.

²⁹¹ European Commission, ‘Schengen Information System’

<https://ec.europa.eu/home-affairs/policies/schengen-borders-and-visa/schengen-information-system_en> accessed 1 March 2022.

²⁹² European Commission, Proposal for a Regulation of the European Parliament and of the Council concerning the Visa Information System (VIS) and the exchange of data between Member States on short stay-visas, COM(2004) 835 final.

²⁹³ Council Decision (2004/512/EC) of 8 June 2004 establishing the Visa Information System (VIS) [2004] OJ L 213/5, Article 1(1).

²⁹⁴ *Ibid.*, Article 1.

²⁹⁵ *Ibid.*, Article 2.

²⁹⁶ European Commission, Commission Staff Working Document: Annex to the Proposal for a Regulation to the European Parliament and to the Council concerning the Visa Information System (VIS) and the exchange of data between Member States on short stay-visas: Extended Impact Assessment, SEC(2004) 1628.

²⁹⁷ European Commission, Proposal for a Regulation of the European Parliament and of the Council concerning the Visa Information System (VIS) and the exchange of data between Member States on short stay-visas, COM(2004) 835 final.

²⁹⁸ *Ibid.*, p. 3.

²⁹⁹ Council Decision 2008/633/JHA of 23 June 2008 concerning access for consultation of the Visa Information System (VIS) by designated authorities of Member States and by Europol for the purposes of the prevention, detection and investigation of terrorist offences and of other serious criminal offences [2008] OJ L 218/129, recital 2.

criminal offences'.³⁰⁰ Finally, the Visa Code sets out the rules on the registration of biometric identifiers in the VIS.³⁰¹

Following a data collection phase related to the functioning of the VIS from its entry into operation in September 2011 until December 2015,³⁰² in its REFIT evaluation of the VIS in 2016, the Commission looked into the system's fitness, efficiency, effectiveness and added value for the EU.³⁰³ It concluded that the VIS is fit for purpose and meets its objectives and functions, but recommended the framework be further developed to respond to new challenges in visa, border and security policies.³⁰⁴ The need to strengthen and improve the information system was also pointed out in the Commission Communication 'Stronger and Smarter Information Systems for Borders and Security' on 6 April 2016,³⁰⁵ and in the 2016 Roadmap to enhance information exchange and information management by the Council of the EU³⁰⁶ as well as in its Conclusions on the way forward to improve information exchange and ensure the interoperability of EU information systems on 8 June 2017.³⁰⁷

Then, in its Communication 'Delivery of the European Agenda on Migration' on 27 September 2017,³⁰⁸ later followed by its Work Programme 2018, the Commission announced that it will make the necessary proposals to revise the Visa Code and upgrade the VIS.³⁰⁹ To this end, it presented the proposal 'to upgrade the VIS to prevent evolving security risks and irregular migration to the EU'.³¹⁰ Consequently, two Regulations on the VIS were

³⁰⁰ Ibid., Article 1,

³⁰¹ See: Regulation (EC) No 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas [2009] OJ L 243/1, Article 13.

³⁰² European Commission, Report from the Commission to the European Parliament and the Council on the implementation of Regulation (EC) No 767/2008 of the European Parliament and of the Council establishing the Visa Information System (VIS), the use of fingerprints at external borders and the use of biometrics in the visa application procedure/REFIT Evaluation, COM(2016) 655 final, p. 21.

³⁰³ Ibid.

³⁰⁴ Ibid., p. 47.

³⁰⁵ European Commission, Communication from the Commission to the European Parliament and the Council Stronger and Smarter Information Systems for Borders and Security, COM(2016) 205 final.

³⁰⁶ Council of the EU, Roadmap to enhance information exchange and information management including interoperability solutions in the Justice and Home Affairs area, 7483/17.

³⁰⁷ Council of the EU, Council Conclusions on the way forward to improve information exchange and ensure the interoperability of EU information systems, 10151/17.

³⁰⁸ European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the Delivery of the European Agenda on Migration, COM(2017) 558 final, p. 16.

³⁰⁹ European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Commission Work Programme 2018 An agenda for a more united, stronger and more democratic Europe, COM(2017) 650 final, p. 9.

³¹⁰ European Parliament, 'Legislative Train: New Regulation on the Visa Information System' <[https://www.europarl.europa.eu/legislative-train/theme-towards-a-new-policy-on-migration/file-new-regulation-on-the-visa-information-system-\(vis\)](https://www.europarl.europa.eu/legislative-train/theme-towards-a-new-policy-on-migration/file-new-regulation-on-the-visa-information-system-(vis))> accessed 21 March 2022.

adopted on 7 July 2021: Regulation 2021/1134 which amends the VIS,³¹¹ and Regulation 2021/1133 introducing amendments on the conditions for accessing other EU information systems for the purposes of the VIS.³¹²

4.2.3.3. European Travel Information and Authorisation System

The idea of an ETIAS was introduced for the first time in April 2016 in the Commission Communication ‘Stronger and Smarter Information Systems for Borders and Security’.³¹³ The reason for this was the fact that while it is possible for the law enforcement to obtain information on visa-holders from the VIS for the combating of serious crime and terrorism, no comparable data are available on visa-exempt persons.³¹⁴ In this sense, the measures taken with ETIAS serve the objectives of the European Agenda on Security and the European Agenda on Migration, in particular concerning border management and preventing cross-border crime and terrorism.³¹⁵ Following the reference to ETIAS in the Bratislava Summit,³¹⁶ and after Commission President Juncker’s State of the Union in September 2016 during which the importance of the ETIAS was underlined,³¹⁷ the proposal was presented by the Commission on 16 November 2016.³¹⁸ Consequently, the ETIAS Regulation was adopted on 5 September 2018 and entered into force on 9 October 2018.³¹⁹ ETIAS will be used to introduce a travel authorisation and

³¹¹ Regulation (EU) 2021/1134 of the European Parliament and of the Council of 7 July 2021 amending Regulations (EC) No 767/2008, (EC) No 810/2009, (EU) 2016/399, (EU) 2017/2226, (EU) 2018/1240, (EU) 2018/1860, (EU) 2018/1861, (EU) 2019/817 and (EU) 2019/1896 of the European Parliament and of the Council and repealing Council Decisions 2004/512/EC and 2008/633/JHA, for the purpose of reforming the Visa Information System [2021] OJ L 248/11.

³¹² Regulation (EU) 2021/1133 of the European Parliament and of the Council of 7 July 2021 amending Regulations (EU) No 603/2013, (EU) 2016/794, (EU) 2018/1862, (EU) 2019/816 and (EU) 2019/818 as regards the establishment of the conditions for accessing other EU information systems for the purposes of the Visa Information System [2021] OJ L 248/1.

³¹³ European Commission, Communication from the Commission to the European Parliament and the Council: Stronger and Smarter Information Systems for Borders and Security, COM(2016) 205 final.

³¹⁴ Ibid., p. 13.

³¹⁵ European Commission, ‘European Travel Information and Authorisation System (ETIAS)’ <https://ec.europa.eu/home-affairs/policies/schengen-borders-and-visa/smart-borders/european-travel-information-authorisation-system_en> accessed 18 March 2022.

³¹⁶ European Council, ‘Bratislava Summit’, (16 September 2016) <<http://www.consilium.europa.eu/en/press/press-releases/2016/09/16-bratislava-declaration-and-roadmap/>> accessed 7 January 2022.

³¹⁷ Directorate-General for Communication of European Commission, ‘Juncker, J., State of the Union 2016’, (2016) [17] <<https://data.europa.eu/doi/10.2775/729887>> accessed 15 February 2022.

³¹⁸ European Commission, Proposal for a Regulation of the European Parliament and of the Council establishing a European Travel Information and Authorisation System (ETIAS) and amending Regulations (EU) No 515/2014, (EU) 2016/399, (EU) 2016/794 and (EU) 2016/1624, COM(2016) 731 final.

³¹⁹ Regulation (EU) 2018/1240 of the European Parliament and of the Council of 12 September 2018 establishing a European Travel Information and Authorisation System (ETIAS) and amending Regulations (EU) No 1077/2011, (EU) No 515/2014, (EU)

carry out checks on visa-exempt TCNs concerning whether their presence in the territory of Member States would pose a security, illegal immigration or high epidemic risk.³²⁰ ETIAS is currently not in operation and the objective is to have it operational by May 2023.³²¹

4.2.3.4. Entry/Exit System

The need for the establishment of an EES that can electronically register the time, duration of stay and place of entry and exit of TCNs for a short stay to a Member State was first mentioned in the Commission Communication, ‘Preparing the next steps in border management in the European Union’ on 13 February 2008.³²² In its later Communication, ‘An area of freedom, security and justice serving the citizens’, the Commission set the establishment of an electronic system for recording entry to and exit from the territory of Member States as a priority issue.³²³

Following a further Communication on the *status quo* and the options for implementing these plans,³²⁴ the Commission proposed legislation to establish the EES in February 2013.³²⁵ Yet, this proposal did not secure a consensus among the co-legislators.³²⁶ Therefore, a revised proposal on the EES found its place in the new package of proposals presented on 6 April 2016.³²⁷ This proposal was accompanied by a detailed impact assessment prepared by the Commission, which proposed various modifications on the 2013 proposal such as biometrics to be used, the retention of data and access

2016/399, (EU) 2016/1624 and (EU) 2017/2226 [2018] OJ L 236/1 (hereinafter ETIAS Regulation).

³²⁰ Article 1(1) of the ETIAS Regulation.

³²¹ ETIAS.COM, ETIAS Application, <<https://etias.com/etias-application>> accessed 24 January 2022.

³²² European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Preparing the next steps in border management in the European Union, COM(2008) 69, p. 5.

³²³ European Commission, Communication from the Commission to the European Parliament and the Council: An area of freedom, security and justice serving the citizen, COM(2009) 262 final, p. 32.

³²⁴ European Commission, Communication from the Commission to the European Parliament and the Council Smart borders – options and the way ahead, COM(2011) 680 final.

³²⁵ European Commission, Proposal for a Regulation of the European Parliament and of the Council establishing an Entry/Exit System (EES) to register entry and exit data of third country nationals crossing the external borders of the Member States of the European Union, COM(2013) 95.

³²⁶ European Parliament, ‘Legislative Train: Entry/Exit System (2016 Smart Borders Package)’ <[https://www.europarl.europa.eu/legislative-train/theme-towards-a-new-policy-on-migration/file-entryexit-system-\(2016-smart-borders-package\)](https://www.europarl.europa.eu/legislative-train/theme-towards-a-new-policy-on-migration/file-entryexit-system-(2016-smart-borders-package))> accessed 17 December 2021.

³²⁷ European Commission, Proposal for a Regulation of the European Parliament and of the Council establishing an Entry/Exit System (EES) to register entry and exit data and refusal of entry data of third country nationals crossing the external borders of the Member States of the European Union and determining the conditions for access to the EES for law enforcement purposes and amending Regulation (EC) No 767/2008 and Regulation (EU) No 1077/2011, COM(2016) 194 final.

by law enforcement authorities.³²⁸ The revised proposal included in the package aimed to address delays in border checks and the quality of the procedures for border checks for TCNs travelling to the EU.³²⁹ In his letter of intent accompanying his State of the Union Address of 13 September 2017, Commission President Juncker called for a swift adoption by the co-legislators of the EU EES.³³⁰ Consequently, Regulation (EU) 2017/2226 establishing an EES was adopted on 30 November 2017 and entered into force on 29 December 2017.³³¹ The subject matter of the EES Regulation includes the recording and storage of the date, time, and place of entry and exit of TCNs travelling to Member States; alerts in cases where the authorised stay expires; the recording of refusal of entries; and the conditions according to which Member States and Europol may access the EES for the fight against terrorism or other serious crimes.³³² The EES is expected to be operational by the end of May 2023.³³³

4.2.3.5. European Criminal Records Information System

Following the terrorist attacks in Madrid on 11 March 2004, the need for the increased exchange of information on convictions for terrorist offences was specified in the European Council Declaration on Combating Terrorism on 25 and 26 March 2004.³³⁴ The Hague Programme and the Action Plan implementing it also reiterated this.³³⁵ In its Conclusions on 21 and 22 June 2007, the European Council requested the Council ‘to establish a European network through which national criminal records systems become connected’.³³⁶ To this end, the ECRIS was set up by Council Framework

³²⁸ Ibid., p. 1.

³²⁹ Ibid., p. 2.

³³⁰ European Commission, ‘Security Union: Commission welcomes adoption of Entry/Exit System for stronger and smarter EU borders’, (25 October 2017) <https://ec.europa.eu/commission/presscorner/detail/en/STATEMENT_17_4162> accessed 13 November 2021.

³³¹ Regulation (EU) 2017/2226 of the European Parliament and of the Council of 30 November 2017 establishing an Entry/Exit System (EES) to register entry and exit data and refusal of entry data of third-country nationals crossing the external borders of the Member States and determining the conditions for access to the EES for law enforcement purposes, and amending the Convention implementing the Schengen Agreement and Regulations (EC) No 767/2008 and (EU) No 1077/2011 [2017] OJ L 327/20 (hereinafter EES Regulation).

³³² Article 1 of the EES Regulation.

³³³ European Commission, ‘Entry/Exit System (EES)’ <https://ec.europa.eu/home-affairs/policies/schengen-borders-and-visa/smart-borders/entry-exit-system_en> accessed 2 March 2022.

³³⁴ European Council, ‘Declaration on Combating Terrorism’, (25 March 2004) [5] <https://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/79637.pdf> accessed 4 January 2022.

³³⁵ European Council, The Hague Programme: Strengthening Freedom, Security and Justice in the European Union, 2005/C 53/01, p. 1.

³³⁶ European Council, Presidency Conclusions, Brussels European Council 21 and 22 June 2007, 11177/1/07, p. 7.

Decision 2009/315/JHA³³⁷ and Council Decision 2009/316/JHA,³³⁸ which essentially allows for information exchange on previous convictions regarding EU nationals.³³⁹

Yet, the system proved to be ineffective for non-EU nationals convicted in the EU.³⁴⁰ Although it was possible to exchange information on convictions concerning TCNs and stateless persons through ECRIS, there was no mechanism in place to do so efficiently.³⁴¹ Indeed, the Council of the EU also stated that if Member States use ECRIS to its full potential and if the Commission submits a proposal on the extension of ECRIS to also cover TCNs, this would contribute to the criminal justice response to radicalisation leading to terrorism and violent extremism.³⁴² After the European Council also reiterated this in its Conclusions of 17 and 18 December 2015,³⁴³ in line with the European Agenda on Security,³⁴⁴ the Commission submitted its proposal for a directive to upgrade ECRIS on 19 January 2016, amending Council Framework Decision 2009/315/JHA and replacing the Council Decision 2009/316/JHA.³⁴⁵ On 29 June 2017, however, the Commission presented a supplementary legislative proposal for a regulation establishing a centralised system.³⁴⁶ The Commission justified the second proposal with

³³⁷ Council Framework Decision 2009/315/JHA of 26 February 2009 on the organisation and content of the exchange of information extracted from the criminal record between Member States [2009] OJ L 93/23.

³³⁸ Council Decision 2009/316/JHA of 6 April 2009 on the establishment of the European Criminal Records Information System (ECRIS) in application of Article 11 of Framework Decision 2009/315/JHA [2009] OJ L 93/33.

³³⁹ Article 1 of the Council Decision 2009/316/JHA.

³⁴⁰ Council of the European Union, 'Exchanging criminal records: EU agrees a reformed ECRIS system', [9] April 2019)

<<https://www.consilium.europa.eu/en/press/press-releases/2019/04/09/exchanging-criminal-records-eu-agrees-a-reformed-ecris-system/>> accessed 21 March 2022.

³⁴¹ European Commission, Proposal for a Directive of the European Parliament and of the Council amending Council Framework Decision 2009/315/JHA, as regards the exchange of information on third country nationals and as regards the European Criminal Records Information System (ECRIS), and replacing Council Decision 2009/316/JHA, COM(2016) 7 final, p. 3.

³⁴² Council of the EU, Conclusions on Counter-Terrorism of 20 November 2015, 14406/15.

³⁴³ European Council, Conclusions of the European Council meeting of 17 and 18 December 2015, EUCO 28/15.

³⁴⁴ See: European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: The European Agenda on Security, COM(2015) 185 final, p. 8.

³⁴⁵ European Commission, Proposal for a Directive of the European Parliament and of the Council amending Council Framework Decision 2009/315/JHA, as regards the exchange of information on third country nationals and as regards the European Criminal Records Information System (ECRIS), and replacing Council Decision 2009/316/JHA, COM(2016) 7 final.

³⁴⁶ European Commission, Proposal for a Regulation of the European Parliament and of the Council establishing a centralised system for the identification of Member States holding conviction information on third country nationals and stateless persons (TCN) to supplement and support the European Criminal Records Information System (ECRISTCN system) and amending Regulation (EU) No 1077/2011, COM(2017) 344 final.

some developments after the first proposals, namely the rising security concerns after the terrorist attacks in some European cities, the need for centralisation after interoperability, as stated in the Commission Communication ‘Stronger and Smarter Information Systems for Borders and Security’, and the technical problems that a decentralised system proposed in January 2016 could pose.³⁴⁷ Consequently, both the ECRIS-TCN Regulation and the Directive 2019/884 were adopted on 17 April 2019 and entered into force on 11 June 2019.³⁴⁸ The Regulation establishes the ECRIS-TCN, a system for the identification of the Member States holding information on previous convictions of TCNs in Member States.³⁴⁹ In the event of a hit, the central system automatically provides the competent authority with information on the Member States holding criminal records information on the TCN.³⁵⁰ ECRIS-TCN is expected to be operational at the end of 2022.³⁵¹

4.2.3.6. Interoperability regulations

In its Communication titled ‘Stronger and Smarter Information Systems for Borders and Security’ of 6 April 2016, the Commission identified various shortcomings in the existing information systems and databases operating at the EU level.³⁵² These shortcomings included the need for optimisation in the performance of the existing information systems, information gaps in the EU’s architecture of data management, a complex landscape of differently governed information systems at EU level, and the need to establish the interoperability of existing information systems due to the blind spots caused by fragmentation and lack of inter-connectedness.³⁵³ Therefore, the Commission also stated its intention to initiate a process towards the interoperability of information systems and set up an Expert Group to address the shortcomings and the options to achieve interoperability.³⁵⁴

To this end, in June 2016, the Commission set up a high-level expert group on information systems and interoperability, which, in its final report of May 2017, recommended three interoperability solutions: a European search

³⁴⁷ Ibid., p. 3.

³⁴⁸ Regulation (EU) 2019/816 of the European Parliament and of the Council of 17 April 2019 establishing a centralised system for the identification of Member States holding conviction information on third-country nationals and stateless persons (ECRIS-TCN) to supplement the European Criminal Records Information System and amending Regulation (EU) 2018/1726 [2019] OJ L 135/1; Directive (EU) 2019/884 of the European Parliament and of the Council of 17 April 2019 amending Council Framework Decision 2009/315/JHA, as regards the exchange of information on third-country nationals and as regards the European Criminal Records Information System (ECRIS), and replacing Council Decision 2009/316/JHA [2019] OJ L 151/143.

³⁴⁹ Article 1 of the ECRIS-TCN Regulation.

³⁵⁰ Article 7(7) of the ECRIS-TCN Regulation.

³⁵¹ European Commission, ‘European Criminal Records Information System (ECRIS)’, <https://ec.europa.eu/info/law/cross-border-cases/judicial-cooperation/tools-judicial-cooperation/european-criminal-records-information-system-ecris_en> accessed 3 March 2022.

³⁵² European Commission, Communication from the Commission to the European Parliament and the Council: Stronger and Smarter Information Systems for Borders and Security, COM(2016) 205 final.

³⁵³ Ibid., p. 3–4.

³⁵⁴ Ibid., p. 20.

portal, a shared biometric matching service, and a common identity repository.³⁵⁵ After the Council invited the Commission to prepare legislative proposals to improve the interoperability of EU information systems,³⁵⁶ the Commission presented two interoperability legislative proposals on 12 December 2017.³⁵⁷ These proposals were accompanied by an impact assessment study and three feasibility studies on the European search portal, the shared biometric matching service, and the common identity repository.³⁵⁸ Consequently, Regulation (EU) 2019/817 establishing a framework for interoperability between EU information systems in the field of borders and visa,³⁵⁹ and Regulation (EU) 2019/818 in the field of police and judicial cooperation, asylum and migration were adopted on 14 May 2019 and entered into force on 11 June 2019.³⁶⁰

The reason for the adoption of two regulations for interoperability is the difference in their legal basis. While Regulation 2019/817 for interoperability in the field of borders and visa is based on Article 77(2) (a), (b), (d), and (e) of the TFEU, Regulation 2019/818 for interoperability in the field of police and

³⁵⁵ High-level expert group on information systems and interoperability, 'Final Report', (11 May 2017) <<https://www.statewatch.org/media/documents/news/2017/may/eu-com-hleg-info-systems-interoperability-final-report-5-17.pdf>> accessed 9 March 2022; See: European Parliament, 'Interoperability between EU border and security information systems', (14 June 2019) [4]

<[https://www.europarl.europa.eu/thinktank/en/document/EPRS_BRI\(2018\)628267](https://www.europarl.europa.eu/thinktank/en/document/EPRS_BRI(2018)628267)> accessed 9 March 2022.

³⁵⁶ European Council, Conclusions, European Council Meeting 22 and 23 June 2017, EUCO 8/17, p. 2.

³⁵⁷ European Commission, Proposal for a Regulation of the European Parliament and the Council on establishing a framework for interoperability between EU information systems (borders and visa) and amending Council Decision 2004/512/EC, Regulation (EC) No 767/2008, Council Decision 2008/633/JHA, Regulation (EU) 2016/399 and Regulation (EU) 2017/2226, COM(2017) 793 final; European Commission, Proposal for a Regulation of the European Parliament and the Council on establishing a framework for interoperability between EU information systems (police and judicial cooperation, asylum and migration), COM(2017) 794 final.

³⁵⁸ European Commission, Commission Staff Working Document Impact Assessment Accompanying the document Proposal for a Regulation of the European Parliament and the Council on establishing a framework for interoperability between EU information systems (borders and visa) and amending Council Decision 2004/512/EC, Regulation (EC) No 767/2008, Council Decision 2008/633/JHA, Regulation (EU) 2016/399 and Regulation (EU) 2017/2226 and Proposal for a Regulation of the European Parliament and the Council on establishing a framework for interoperability between EU information systems (police and judicial cooperation, asylum and migration), SWD(2017) 474 final.

³⁵⁹ Regulation (EU) 2019/817 of the European Parliament and of the Council of 20 May 2019 on establishing a framework for interoperability between EU information systems in the field of borders and visa and amending Regulations (EC) No 767/2008, (EU) 2016/399, (EU) 2017/2226, (EU) 2018/1240, (EU) 2018/1726 and (EU) 2018/1861 of the European Parliament and of the Council and Council Decisions 2004/512/EC and 2008/633/JHA [2019] OJ L 135/27.

³⁶⁰ Regulation (EU) 2019/818 of the European Parliament and of the Council of 20 May 2019 on establishing a framework for interoperability between EU information systems in the field of police and judicial cooperation, asylum and migration and amending Regulations (EU) 2018/1726, (EU) 2018/1862 and (EU) 2019/816 [2019] OJ L 135/85.

judicial cooperation, asylum and migration is based on Articles 78 (2)(e), 79(2)(c), 82(1)(d), 85(1), 87 (2)(a), and 88(2) of the TFEU.³⁶¹ The aim of the interoperability framework was specified in the Commission proposal as eliminating the blind spots in the fragmented architecture of EU data management for borders and security, where persons can be recorded in different, unconnected databases under different aliases.³⁶²

Thus, these regulations establish a framework to ensure interoperability between the three existing centralised EU information systems for visas, border checks and security (the SIS, VIS and Eurodac), and three centralised systems that are currently under development (the EES, ETIAS and ECRIS-TCN).³⁶³ The framework includes a European search portal, shared biometric matching service, common identity repository and multiple-identity detector.³⁶⁴

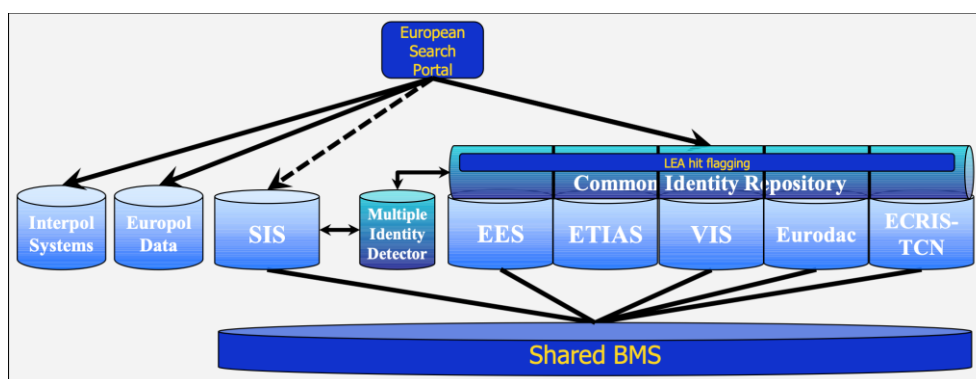


Figure 2. An overview of the EU information systems

Source:
[https://www.europarl.europa.eu/RegData/etudes/BRIE/2018/628267/EPRS_BRI\(2018\)628267_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2018/628267/EPRS_BRI(2018)628267_EN.pdf)

5. Asylum

5.1. Establishment of the Common European Asylum System

Considered as a corollary of an area without internal frontiers, the Common European Asylum System (CEAS) was created with the idea that asylum standards of Member States needed harmonisation at the EU level. This was because a failure to do so would leave ‘an open door to the secondary

³⁶¹ See also: Hartmut Aden, ‘Interoperability Between EU Policing and Migration Databases: Risks for Privacy’ (2020) 26(1) European Public Law 93.

³⁶² European Commission, Proposal for a Regulation of the European Parliament and the Council on establishing a framework for interoperability between EU information systems (borders and visa) and amending Council Decision 2004/512/EC, Regulation (EC) No 767/2008, Council Decision 2008/633/JHA, Regulation (EU) 2016/399 and Regulation (EU) 2017/2226, COM(2017) 793 final, p. 1.

³⁶³ Article 1(1) of the Interoperability Regulations.

³⁶⁴ Article 1(2) of the Interoperability Regulations.

movement of asylum seekers'.³⁶⁵ Secondary movement in this sense refers to 'the onward migration of asylum seekers within the EU from the Member State of first irregular arrival to another Member State for the purpose of seeking international protection'.³⁶⁶ In 1990, the issue of secondary movement was addressed for the first time in the 1990 Dublin Convention which aimed 'to apportion responsibility for asylum applications among the Member States'.³⁶⁷ Following this, the Treaty of Maastricht entered into force on 1 November 1993 and included migration, asylum and, specifically speaking, 'rules governing the crossing by persons of the external borders of the Member States' as 'matters of common interest' under the inter-governmental third pillar, justice and home affairs of the newly founded EU.³⁶⁸ Subsequently, the Dublin Convention entered into force in September 1997, seven years after it was adopted.³⁶⁹

As per the Treaty of Amsterdam, which came into force on 1 May 1999, migration and asylum became an area of supranational EU competence, thereby providing the legal basis for the establishment of the CEAS.³⁷⁰ Consequently, it was the 1999 Tampere Conclusions which were the first to refer to a 'Common European Asylum System'.³⁷¹ The commitments undertaken under the Tampere Programme heralded the beginning of the CEAS and led to the adoption of several EU laws.³⁷² Between 1999 and 2005, six legislative instruments establishing minimum standards for asylum were adopted in line with the Tampere Conclusions. These were the Dublin II Regulation 343/2003/EC replacing the 1990 Dublin Convention, the Eurodac Regulation No 2725/2000, the Temporary Protection Directive 2001/55/EC, the Reception of Asylum Seekers Directive, the Qualification Directive

³⁶⁵ European Asylum Support Office, 'An Introduction to the Common European Asylum System for Courts and Tribunals: A Judicial Analysis' (August 2016), p. 13.

³⁶⁶ See: Anja Radjenovic, 'Secondary movements of asylum-seekers in the EU asylum system', (EPRS October 2017) [2]

<[https://www.europarl.europa.eu/RegData/etudes/BRIE/2017/608728/EPRS_BRI\(2017\)608728_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2017/608728/EPRS_BRI(2017)608728_EN.pdf)> accessed 2 February 2022; The Advisory Committee on Migration Affairs, 'Secondary movements of asylum seekers in the EU: advisory report', submitted to the Minister for Migration of the Netherlands, (November 2019) [3] <<https://www.adviescommissievoorvreemdelingenzaken.nl/binaries/adviescommissievoorvreemdelingenzaken/documenten/publicaties/2019/11/05/increasing-onward-migration-of-asylum-seekers-in-the-eu/Secondary+movements+of+asylum+seekers+in+the+EU+accessible.pdf>> accessed 2 February 2022.

³⁶⁷ Convention Determining the State Responsible for Examining Applications for Asylum lodged in one of the Member States of the European Communities [1990] OJ C 254.

³⁶⁸ Treaty on the European Union (Treaty of Maastricht), Article K.1.

³⁶⁹ Dersim Yabasun, *The Common European Asylum System: Vulnerable Asylum Applicants* (Wolf Publishers 2019) 89.

³⁷⁰ Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts (Treaty of Amsterdam), Article 63(1) and (2).

³⁷¹ European Council, Presidency Conclusions, Tampere European Council 15 and 16 October 1999, SN 200/99, para. 13.

³⁷² European Commission, Common European Asylum System, <https://ec.europa.eu/home-affairs/policies/migration-and-asylum/common-european-asylum-system_en> accessed 20 February 2022.

2004/83/EC and the Asylum Procedures Directive 2005/85/EC. This legislative framework constituted the first phase of the CEAS.³⁷³

After the completion of the first stage of the CEAS in 2005, it was followed by a second phase of development which, as signalled in the 2004 Hague Programme, changed the emphasis ‘from minimum standards to a common asylum procedure on the basis of a uniform protection status’.³⁷⁴ Following a Green Paper on the review of the CEAS in 2007,³⁷⁵ this phase started with the Policy Plan on Asylum by the Commission on 17 June 2008.³⁷⁶ In the Policy Plan, the Commission identified three trends for future developments in asylum policy. These were the historically low levels of asylum applications in the EU, disparity in asylum adjudication across Member States, and more asylum claims that are granted subsidiary protection or other forms of protection than refugee status as per the 1951 Refugee Convention.³⁷⁷ Following the Plan, a set of new recast legislations was presented by the Commission. The second stage of the CEAS (hereinafter ‘CEAS II’) was accomplished in June 2013, with the exception of the Temporary Protection Directive. The CEAS II consisted of two Regulations and five Directives. Also, two EU Agencies were of particular relevance for its operation, namely the European Asylum Support Office (EASO) and FRONTEX.³⁷⁸

The entry into force of the Treaty of Lisbon on 1 December 2009 led to a new legal basis for developing a common European asylum policy under Article 78(1).³⁷⁹ Following this, the Stockholm Programme was adopted on 2 December 2009,³⁸⁰ which reiterated the objective of the CEAS in ‘establishing a common area of protection and solidarity based on a common asylum procedure’.³⁸¹ Yet, after the unprecedented number of arrivals of refugees and irregular migrants to the EU in 2015 exposed the flaws and implementation gaps in the EU legislative and policy framework on asylum, the Commission tabled various policies and legislative proposals in order to overcome the influx. The arrivals into the EU in 2015–2016 revealed the

³⁷³ Kay Hailbronner and Daniel Thym (eds.), *EU Immigration and Asylum Law. Commentary*, 2nd edition (C.H. Beck/Hart/Nomos 2016), p. 1025.

³⁷⁴ European Council, *The Hague Programme: Strengthening Freedom, Security and Justice in the European Union*, 2005/C 53/01, section 1.2. See also: European Asylum Support Office, ‘An Introduction to the Common European Asylum System for Courts and Tribunals: A Judicial Analysis’ (August 2016) [15]

<<https://euaa.europa.eu/sites/default/files/public/BZ0216138ENN.PDF>> accessed 7 January 2022.

³⁷⁵ European Commission, *Green Paper on the future Common European Asylum System*, COM(2007) 301 final.

³⁷⁶ European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions, Policy Plan on Asylum, An integrated approach to protection across the EU*, COM(2008) 360 final.

³⁷⁷ *Ibid.*, p. 3.

³⁷⁸ European Parliament’s Policy Department for Citizens’ Rights and Constitutional Affairs, *The Implementation of the Common European Asylum System*, (May 2016), p. 18.

³⁷⁹ Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community (Treaty of Lisbon).

³⁸⁰ European Council, *The Stockholm Programme: An Open and Secure Europe Serving and Protecting Citizens*, 2010/C 115/01.

³⁸¹ *Ibid.*, section 6.2.

appalling conditions of first reception, which pushed millions of people in desperate search for protection in the EU territories.³⁸² Among other things, the Commission presented the European Agenda on Migration on 13 May 2015,³⁸³ and the Council adopted a relocation scheme to redistribute 160,000 refugees from Greece and Italy to other EU Member States, followed by several hotspots to implement the temporary relocation scheme.³⁸⁴

Remarkably, following the EU–Turkey Joint Action Plan in October 2015, the Council also adopted the EU–Turkey Statement on 18 March 2016. The main objective was to return irregular migrants crossing from Turkey into Greek islands as from 20 March 2016 back to Turkey.³⁸⁵ Recognising the inefficiency of the CEAS to deal with the influx, the Commission also presented its Communication titled ‘Towards a reform of the Common European Asylum System and enhancing legal avenues to Europe’ to address the structural weaknesses and shortcomings in the design and implementation of the CEAS.³⁸⁶ Following this, the Commission presented a third package of seven pieces of reform proposal on the CEAS.³⁸⁷

The first set of proposals was tabled in May 2016, which included a proposal for a regulation reforming the Dublin system, a proposal for a regulation amending Eurodac, and a proposal for a regulation establishing an EU Asylum Agency. A second reform package was presented in July 2016 and included proposals for a new regulation replacing the Asylum Procedures Directive, a new regulation replacing the Qualification Directive, a proposal recasting the Reception Conditions Directive and, finally, a proposal for a regulation on an EU Resettlement Framework. After the co-legislators reached an agreement on five of those proposals and got into a deadlock on the reform of the Dublin system and the Asylum Procedure Regulation,³⁸⁸ the Commission has proposed amendments to some of them in its New Pact on Migration and Asylum, while it supported the quick adoption of the

³⁸² Elspeth Guild, ‘Negotiating with Third Countries under the New Pact: Carrots and Sticks?’, (EU Immigration and Asylum Law and Policy, 27 November 2020) <<https://eumigrationlawblog.eu/negotiating-with-third-countries-under-the-new-pact-carrots-and-sticks/>> accessed 22 March 2022.

³⁸³ European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A European Agenda on Migration, COM(2015) 240 final.

³⁸⁴ See: Dersim Yabasun, *The Common European Asylum System-Vulnerable Asylum Applicants* (Wolf Publishers 2019) 119.

³⁸⁵ European Council, ‘EU-Turkey statement’, (18 March 2016) <<https://www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/>> accessed 27 December 2021.

³⁸⁶ European Commission, Communication from the Commission to the European Parliament and the Council Towards a Reform of the Common European Asylum System and Enhancing Legal Avenues To Europe, COM(2016) 197 final, p.2.

³⁸⁷ European Commission, ‘Common European Asylum System’, <https://ec.europa.eu/home-affairs/policies/migration-and-asylum/common-european-asylum-system_en> accessed 20 February 2022.

³⁸⁸ See: Kris Pollet, ‘All in vain? The fate of EP positions on asylum reform after the European elections’, (EU Immigration and Asylum Law and Policy 23 May 2019), <<https://eumigrationlawblog.eu/all-in-vain-the-fate-of-ep-positions-on-asylum-reform-after-the-european-elections/>> accessed 9 November 2021.

proposals on which a political agreement was achieved by the co-legislators.³⁸⁹

5.2. Overview of the CEAS legislative instruments

The CEAS instruments examined in this chapter include two Regulations and four Directives. These are Regulation (EU) No 604/2013 determining the Member State responsible for examining an application for international protection (hereinafter ‘Dublin III Regulation’), Regulation (EU) No 603/2013 on the establishment of Eurodac (hereinafter ‘Eurodac Regulation’), Directive 2011/95/EU on standards for the qualification of TCNs as beneficiaries of international protection (hereinafter ‘Qualification Directive’), Directive 2013/32/EU on common procedures for granting and withdrawing international protection (hereinafter ‘Asylum Procedures Directive’), Directive 2013/33/EU on standards for the reception of applicants for international protection (hereinafter ‘Reception Conditions Directive’) and Directive 2001/55/EC on giving temporary protection in the event of a mass influx of displaced persons (hereinafter ‘Temporary Protection Directive’).

CEAS instruments	Date of entry into force
The Temporary Protection Directive, 2001	7 August 2001
The 2011 Qualification Directive (recast)	9 January 2012
The Eurodac Regulation (recast), 2013	19 July 2013
The Dublin III Regulation (recast), 2013	19 July 2013
The 2013 Reception Conditions Directive (recast)	19 July 2013
The Asylum Procedures Directive (recast), 2013	19 July 2013

Table 2. An overview of the CEAS instruments

Source: <https://euaa.europa.eu/sites/default/files/public/BZ0216138ENN.PDF>

5.2.1. The Qualification Directive

Making clear the need to address international protection in an integrated way, the Tampere Conclusions provided that, in the short term, a CEAS should include ‘the approximation of rules on the recognition and content of refugee status as well as subsidiary forms of protection’.³⁹⁰ Following the

³⁸⁹ See: European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on a New Pact on Migration and Asylum, COM(2020) 609 final, p. 10.

³⁹⁰ European Commission, Proposal for a Council Directive on minimum standards for the qualification and status of third country nationals and stateless persons as refugees or as persons who otherwise need international protection, COM(2001) 510 final, recital 4 and 5.

draft directive proposed by the Commission in September 2001,³⁹¹ Directive 2004/83/EC was adopted on 29 April 2004 after intense negotiations.³⁹²

As mentioned earlier, following the 2004 Hague Programme, the Policy Plan on Asylum proposed the completion of the second phase of the CEAS. Therefore, the European Pact on Immigration and Asylum, adopted on 16 October 2008, invited the Commission to present a proposal for establishing a single asylum procedure comprising common guarantees and uniform status.³⁹³ To this end, the Commission presented its proposal for the amendment of the Qualification Directive on 23 October 2009.³⁹⁴ Moreover, the Commission conducted the implementation report of the Directive on 16 June 2010 and identified some issues such as incomplete implementation and deficiencies in the provisions of the Directive.³⁹⁵ Consequently, Directive 2004/83/EC was replaced by Directive 2011/95/EU,³⁹⁶ which was adopted on 13 December 2011. The Directive aimed to ensure better harmonisation and rigorous substantive and procedural standards of protection for the sake of a common asylum procedure and a uniform status, as called upon by the 2004 Hague Programme.³⁹⁷

The purpose of this Directive is specified in Article 1 as 'laying down standards for the qualification of TCNs or stateless persons as beneficiaries of international protection, and for the content of the protection granted'. According to Article 2(b), the beneficiary of international protection means a person who has been granted 'refugee status' or 'subsidiary protection status' as defined in points (e) and (g). In this sense, the Qualification Directive is at the core of the CEAS.

With a view to completing the third CEAS reform, the Commission presented the proposal for a regulation replacing the Qualification Directive on 13 July

³⁹¹ Ibid.

³⁹² Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, [2004] OJ L 304/12. See also: Steve Peers et al., *EU Immigration and Asylum Law (Text and Commentary): Volume 3 EU asylum law* (Brill 2012), p. 66.

³⁹³ Council of the EU, European Pact on Immigration and Asylum, 13440/08, p. 11.

³⁹⁴ European Commission, Proposal for a Directive of the European Parliament and of the Council on minimum standards for the qualification and status of third country nationals or stateless persons as beneficiaries of international protection and the content of the protection granted, COM(2009) 551 final/2.

³⁹⁵ European Commission, Report from the Commission to the European Parliament and the Council on the Application of Directive 2004/83/EC Of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection, COM(2010) 314 final.

³⁹⁶ Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) [2011] OJ L 337/9.

³⁹⁷ European Commission, Proposal for a Directive of the European Parliament and of the Council on minimum standards for the qualification and status of third country nationals or stateless persons as beneficiaries of international protection and the content of the protection granted, COM(2009) 551 final/2, p.3.

2016.³⁹⁸ Yet, since Member States raised a number of issues relating to the proposal during the Justice and Home Affairs Council meetings in October and December 2016, the proposal is currently on hold.³⁹⁹ In the New Pact on Migration and Asylum, the Commission requested the Parliament and the Council to ensure the quick adoption of the Qualification Regulation, for which some provisional political agreements had already been reached.⁴⁰⁰

5.2.2. The Reception Conditions Directive

One of the conclusions at Tampere was that the CEAS should include common minimum conditions for the reception of applicants for asylum.⁴⁰¹ To this end, Directive 2003/9 was adopted on 27 January 2003.⁴⁰² Yet, the Commission Evaluation Report on the Reception Conditions Directive issued on 26 November 2007 pointed out various issues concerning the reception conditions for asylum seekers. According to the report, this was mainly caused by the fact that the Directive provided a wide margin of discretion to Member States.⁴⁰³ As a result, following a proposal by the Commission that reflected the aim of a higher degree of harmonisation as announced in the Policy Plan on Asylum,⁴⁰⁴ Directive 2013/33 laying down standards for the reception of applicants for international protection was adopted on 26 June 2013 as the successor to Directive 2003/9. The Reception Conditions Directive aims to set ‘a dignified standard of living and comparable living conditions

³⁹⁸ European Commission, Proposal for a regulation on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection and for the content of the protection granted and amending Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents, COM(2016) 466 final.

³⁹⁹ European Parliament, ‘Legislative Train: Reform of the Qualification Directive’ <<https://www.europarl.europa.eu/legislative-train/theme-towards-a-new-policy-on-migration/file-jd-reform-of-the-qualification-directive>> accessed 1 March 2022.

⁴⁰⁰ European Commission, Communication From the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on a New Pact on Migration and Asylum, COM(2020) 609 final, p. 3.

⁴⁰¹ European Council, Presidency Conclusions, Tampere European Council 15 and 16 October 1999, SN 200/99, para. 14. See also: European Commission, Proposal for a Council Directive laying down minimum standards on the reception of applicants for asylum in Member States, COM(2001) 181 final, recital 3.

⁴⁰² Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers [2003] OJ L 31/18.

⁴⁰³ European Commission, Report from the Commission to the Council and to the European Parliament on the application of directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers, COM(2007) 745 final, p. 10.

⁴⁰⁴ European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions on the Policy Plan on Asylum: An Integrated Approach to Protection Across the EU, COM(2008) 360 final. See also: European Commission, Proposal for a Directive of the European Parliament and of the Council laying down minimum standards for the reception of asylum seekers, COM(2008) 815 final/2, p. 2.

for applicants of international protection in all Member States’,⁴⁰⁵ in order to limit secondary movements due to varying reception conditions.’⁴⁰⁶ Indeed, Article 1 of the Directive specifies that the purpose of the Directive is to lay down standards for the reception of applicants for international protection by Member States.

In its Communication of 6 April 2016 titled ‘Towards a reform of the Common European Asylum System and enhancing legal avenues to Europe’, the Commission pointed out the inherent weaknesses of the EU asylum system throughout the large-scale arrival of irregular migrants in 2015.⁴⁰⁷ It also highlighted the differing reception conditions that encouraged secondary movement and signalled modifications in the Reception Conditions Directive to this end.⁴⁰⁸ Following this, a proposal on the reform of the Reception Conditions Directive was put forward by the Commission on 13 July 2016.⁴⁰⁹ The co-legislators reached a partial provisional agreement on the recast regulation on 14 June 2018.⁴¹⁰ Subsequently, since the political representatives of Member States could not agree with the text in the Committee of the Permanent Representatives of the Governments of the Member States to the European Union, the Council proposed amendments to the texts.⁴¹¹

In the New Pact on Migration and Asylum, the Commission reiterated its support to the provisional agreements on the Reception Conditions Directive and suggested the adoption of the proposal by the European Parliament and the Council as soon as possible.⁴¹² As stated in the roadmap to implement the New Pact on Migration and Asylum, the Commission expected the adoption of the provisional compromise text in the second quarter of 2021. Yet, mainly due to the fact that Member States at the external borders, including Greece,

⁴⁰⁵ 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 (recast) [2013] OJ L 180/96 (hereinafter Reception conditions Directive), recital 11.

⁴⁰⁶ Recital 12 of the Reception Conditions Directive.

⁴⁰⁷ European Commission, Communication from the Commission to the European Parliament and the Council: Towards A Reform Of The Common European Asylum System And Enhancing Legal Avenues To Europe, COM(2016) 197 final, p. 3.

⁴⁰⁸ Ibid., p. 6.

⁴⁰⁹ European Commission, Proposal for a Directive of the European Parliament and of the Council laying down standards for the reception of applicants for international protection (recast), COM(2016) 465 final.

⁴¹⁰ European Parliament, ‘Legislative Train: Reform of the Reception Conditions Directive’, <<https://www.europarl.europa.eu/legislative-train/theme-towards-a-new-policy-on-migration/file-jd-reform-of-the-reception-conditions-directive>> accessed 2 March 2022.

⁴¹¹ Statewatch, ‘EU: Tracking the Pact: Secret documents on reception conditions and qualification for international protection’ (1 October 2020) <<https://www.statewatch.org/news/2020/october/eu-tracking-the-pact-secret-documents-on-reception-conditions-and-qualification-for-international-protection/>> accessed 2 February 2022.

⁴¹² European Commission, Communication From the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on a New Pact on Migration and Asylum, COM(2020) 609 final, p. 3.

Italy, Malta and Spain insist on considering all CEAS instruments in a package, the proposal has not yet been adopted.⁴¹³

5.2.3. The Dublin III Regulation

In the Tampere Conclusions, the Council also specified that the CEAS should include a clear and workable method for determining the Member State responsible for the examination of an asylum application.⁴¹⁴ While this issue was originally regulated by the Dublin Convention signed in 1990 between the 12 Member States of the European Economic Community, following the Tampere Conclusions, the Dublin Convention was replaced by Regulation No 343/2003/EC (hereinafter the ‘Dublin II Regulation’) adopted on 18 February 2003.⁴¹⁵ This Regulation formed a substantial part of the first phase of the CEAS and was considered the first cornerstone of the CEAS.⁴¹⁶

After the invitation in the 2004 Hague Programme to submit the second-phase instruments for their adoption before 2010, with a view to assess the application of the Dublin II Regulation as was required by the Regulation itself, the Commission prepared a report on 6 June 2007.⁴¹⁷ The report on the evaluation of the Dublin system identified ‘some shortcomings regarding its practical application, international protection offered to applicants affected by the Regulation, as well as the overall effectiveness of the system’.⁴¹⁸ Therefore, the proposal to recast the Dublin II Regulation No 343/2003/EC was submitted by the Commission on 3 December 2008.⁴¹⁹ The overall aim of the proposal was ‘to increase the efficiency of the system and address the needs of applicants for international protection during the determination procedure of the responsible Member State’,⁴²⁰ which was also in line with the Policy Plan on Asylum to address situations of pressured Member States

⁴¹³ See: Lieneke Slingenberg, ‘Political Compromise on a Recast Asylum Reception Conditions Directive: Dignity Without Autonomy?’, (EU Migration Law Blog, 3 March 2021) <<https://eumigrationlawblog.eu/political-compromise-on-a-recast-asylum-reception-conditions-directive-dignity-without-autonomy/>> accessed 22 November 2021.

⁴¹⁴ European Council, Presidency Conclusions, Tampere European Council 15 and 16 October 1999, SN 200/99, para. 14.

⁴¹⁵ Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national [2003] OJ L 50/1.

⁴¹⁶ Martin Wagner, ‘What remains “common” in the “European Asylum System” if Dublin fails?’, (ICMPD 16 April 2018) [1] <<https://www.icmpd.org/file/download/52093/file/What%2520remains%2520common%2520in%2520the%2520European%2520Asylum%2520System%2520if%2520Dublin%2520fails.pdf>> accessed 7 March 2022.

⁴¹⁷ European Commission, Report From The Commission To The European Parliament And The Council on the evaluation of the Dublin system, COM(2007) 299 final.

⁴¹⁸ Ibid., p. 13.

⁴¹⁹ European Commission, Proposal for a Regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person, COM(2008) 820 final.

⁴²⁰ Ibid., p. 2.

and an inadequate level of protection for applicants.⁴²¹ Consequently, the Dublin II Regulation was replaced by Regulation No 604/2013 (hereinafter the ‘Dublin III Regulation’) which was adopted on 26 June 2013.⁴²²

The Dublin III Regulation establishes the criteria for determining the Member State responsible for examining an application for international protection.⁴²³ It applies to applications for international protection by TCNs who apply in the territory of a Member State, including at the border and transit zones. Applications are examined by the Member States based on the criteria that is established by the Dublin III Regulation and indicated the responsible MS.⁴²⁴ Chapter III of the Regulation stipulates the criteria that is applied in the order in which they are set out,⁴²⁵ including minor status and family unity,⁴²⁶ issuance of a residence document or visa,⁴²⁷ and irregular crossings.⁴²⁸

Considering the rising inflow of irregular migrants that the Dublin system was facing in 2015, the Commission tasked itself to evaluate and possibly revise the Dublin III Regulation in its European Agenda on Migration.⁴²⁹ For this reason, the Commission conducted various studies on the external evaluation of the implementation of the Dublin III Regulation and an evaluation report to reform the Dublin system.⁴³⁰ These reports revealed various persisting shortcomings in the system. Thus, in its Communication ‘Towards a reform of the Common European Asylum System and enhancing legal avenues to Europe’, the Commission announced that it would work to reform the current system for determining the Member State responsible for examining asylum applications to achieve more convergence in asylum system and prevent secondary movements.⁴³¹ Following this, on 4 May 2016, the Commission published its proposal to reform the Dublin III Regulation as

⁴²¹ See: European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions on the Policy Plan on Asylum: An Integrated Approach to Protection Across the EU, COM(2008) 360 final, p. 3.

⁴²² Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) [2013] OJ L 180/31 (hereinafter Dublin III Regulation).

⁴²³ Article 1 of the Dublin III Regulation.

⁴²⁴ Article 3(1) of the Dublin III Regulation.

⁴²⁵ Ibid., Article 7(1).

⁴²⁶ Ibid., Article 8–11.

⁴²⁷ Ibid., Article 12.

⁴²⁸ Ibid., Article 13.

⁴²⁹ European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A European Agenda On Migration, COM(2015) 240 final, p. 13–14.

⁴³⁰ See for example: ICF International, ‘Evaluation of the Dublin III Regulation DG Migration and Home Affairs, Final report’ (European Commission) <https://ec.europa.eu/home-affairs/system/files/2020-09/evaluation_of_the_dublin_iii_regulation_en.pdf> accessed 2 March 2022.

⁴³¹ European Commission, Communication from the Commission to the European Parliament and the Council: Towards a Reform of the Common European Asylum System and Enhancing Legal Avenues to Europe, COM(2016) 197 final, p. 7–8.

part of the package which also includes the proposals for recast of the Eurodac Regulation and for establishing a European Union Agency for Asylum. The aim of the proposal was explained by the Commission as simplifying the system and enhancing its effectiveness, as well as equalising the situations of Member States facing disproportionate pressure.⁴³²

Yet, due to the unfruitful discussions on the adoption of the proposal and the revised migration policy of the EU in 2020,⁴³³ in its New Pact on Migration and Asylum the Commission has withdrawn its proposal to reform the Dublin III Regulation and has proposed to replace the Dublin III Regulation with a new Regulation on Asylum and Migration Management (hereinafter the ‘RAMM proposal’).⁴³⁴ Among other things, the RAMM proposal highlights the lack of a structured solidarity mechanism in the current Dublin regime and in the CEAS in general,⁴³⁵ and provides for a flexible solidarity mechanism to adjust to the different migratory challenges faced by Member States by setting alternative measures through which Member States can choose to contribute.⁴³⁶

5.2.4. The Eurodac Regulation

As mentioned earlier in this paper, the determination of responsibility for assessing asylum applications was originally part of the intergovernmental Schengen Convention, and was later replaced with the Dublin Convention. Regulation (EC) No 2725/2000/EC was adopted on 11 December 2000 with a view to facilitate the implementation of the Dublin Convention and the Regulation started its operations on 15 January 2003. Indeed, to establish the exact identity of applicants for asylum, fingerprint constitutes an important element.⁴³⁷

According to the Commission’s report on the evaluation of the Dublin system in June 2007, there were various identifiable issues related to Eurodac’s

⁴³² European Commission, Proposal for a Regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast), COM(2016) 270 final, p. 3.

⁴³³ European Commission, ‘Country responsible for asylum application (Dublin Regulation)’ <https://ec.europa.eu/home-affairs/policies/migration-and-asylum/common-european-asylum-system/country-responsible-asylum-application_en> accessed 13 February 2022. See for more details: European Parliament’s Policy Department for Citizens’ Rights and Constitutional Affairs, ‘The European Commission’s legislative proposals in the New Pact on Migration and Asylum’, (July 2021) [105] <[https://www.europarl.europa.eu/RegData/etudes/STUD/2021/697130/IPOL_STU\(2021\)697130_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2021/697130/IPOL_STU(2021)697130_EN.pdf)> accessed 13 February 2022.

⁴³⁴ European Commission, Proposal for a Regulation of the European Parliament and of the Council on asylum and migration management and amending Council Directive (EC) 2003/109 and the proposed Regulation (EU) XXX/XXX [Asylum and Migration Fund], COM(2020) 610 final.

⁴³⁵ Ibid., p. 11.

⁴³⁶ Ibid., p. 2.

⁴³⁷ Council Regulation No 2725/2000 of 11 December 2000 concerning the establishment of ‘Eurodac’ for the comparison of fingerprints for the effective application of the Dublin Convention [2000] OJ L 316/1, recital 3–4.

support to facilitate the application of the Dublin system.⁴³⁸ These issues included, but were not limited to, the late transmission of fingerprints, inefficient management of data and lack of clarity as to the authorised national authorities that will have access to Eurodac.⁴³⁹ Therefore, in line with the Policy Plan on Asylum, the Commission proposed to recast the Eurodac Regulation on 3 December 2008.⁴⁴⁰ Following lengthy negotiations, Regulation (EU) No 603/2013 (hereinafter the 'Eurodac Regulation') replaced Regulation No 2725/2000 on 26 June 2013.⁴⁴¹ The Eurodac Regulation aims to facilitate the application of the Dublin III Regulation by setting up the Eurodac system,⁴⁴² which consists of a central system that will operate a computerised central database of fingerprint data, as well as of the electronic means of transmission between Member States and the central system.⁴⁴³ This Regulation also extends the use of Eurodac for allowing access to the database for law enforcement purposes.⁴⁴⁴

Following the growing migratory flows into the EU in 2015, in the European Agenda on Migration, the Commission noted that Member States must also implement fully the rules on taking migrants' fingerprints at the borders.⁴⁴⁵ Thus, the Commission prepared a Staff Working Document to facilitate systematic fingerprinting in May 2015.⁴⁴⁶ Subsequently, the Commission submitted, *inter alia*, a proposal to reinforce the Eurodac on 4 May 2016.⁴⁴⁷

⁴³⁸ European Commission, Report from the Commission to the European Parliament and the Council on the evaluation of the Dublin system, COM(2007) 299 final.

⁴³⁹ European Commission, Proposal for a Regulation of the European Parliament and of the Council concerning the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of Regulation (EC) No [.../...], COM(2008) 825 final, p.3.

⁴⁴⁰ Ibid.

⁴⁴¹ Regulation (EU) No 603/2013 of the European Parliament and of the Council of 26 June 2013 on the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of Regulation (EU) No 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes, and amending Regulation (EU) No 1077/2011 establishing a European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice (recast) [2013] OJ L 180/1 (hereinafter Eurodac Regulation).

⁴⁴² Article 1 of the Eurodac Regulation.

⁴⁴³ Recital 6 of the Eurodac Regulation.

⁴⁴⁴ Article 1(2) of the Eurodac Regulation.

⁴⁴⁵ European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A European Agenda On Migration, COM(2015) 240 final, p.13.

⁴⁴⁶ European Commission, Commission Staff Working Document on Implementation of the Eurodac Regulation as regards the obligation to take fingerprints, SWD(2015) 150 final.

⁴⁴⁷ European Commission, Proposal for a Regulation of the European Parliament and of the Council on the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of [Regulation (EU) No 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an

The signal of this reform was already given in ‘Towards a reform of the Common European Asylum System and enhancing legal avenues to Europe’, in that the Commission stated that Eurodac should be reinforced to reflect changes to the Dublin mechanism.⁴⁴⁸ On 19 June 2018, a provisional agreement was reached on the proposal by the Parliament and Council.⁴⁴⁹ In the meantime, as the reform of the CEAS reached an impasse during negotiations, the Commission pointed out the ‘persistent onward movement and multiple applications for international protection within the EU’.⁴⁵⁰ To this end, in the New Pact on Migration and Asylum, it presented a new legislative package amending and complementing the 2016 proposal for a recast Eurodac regulation.⁴⁵¹

5.2.5. Asylum Procedures Directive

Another short-term measure addressed in the Tampere Conclusions was to establish a fair and efficient asylum procedure in Member States leading to a common asylum procedure in the Community in the long run.⁴⁵² Thus, as the last legislative piece of the first-phase asylum instruments, Council Directive 2005/85/EC on minimum standards on procedures in Member States for granting and withdrawing refugee status was adopted on 1 December 2005 following a lengthy and sensitive negotiation process.⁴⁵³

application for international protection lodged in one of the Member States by a third-country national or a stateless person], for identifying an illegally staying third-country national or stateless person and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes (recast), COM(2016) 272 final.

⁴⁴⁸ European Commission, Communication from the Commission to the European Parliament and the Council: Towards A Reform of The Common European Asylum System and Enhancing Legal Avenues to Europe, COM(2016) 197 final, p. 6.

⁴⁴⁹ European Parliament, ‘Legislative Train: Recast Eurodac Regulation’ <<https://www.europarl.europa.eu/legislative-train/theme-towards-a-new-policy-on-migration/file-jd-recast-eurodac-regulation>> accessed 9 January 2022.

⁴⁵⁰ European Commission, Amended proposal for a Regulation of the European Parliament and of the Council on the establishment of 'Eurodac' for the comparison of biometric data for the effective application of Regulation (EU) XXX/XXX [Regulation on Asylum and Migration Management] and of Regulation (EU) XXX/XXX [Resettlement Regulation], for identifying an illegally staying third-country national or stateless person and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes and amending Regulations (EU) 2018/1240 and (EU) 2019/818, COM(2020) 614 final, p. 1.

⁴⁵¹ Ibid. See: Anita Orav, ‘Recast Eurodac Regulation’, (European Parliamentary Research Service, March 2021) <https://www.europarl.europa.eu/RegData/etudes/BRIE/2016/589808/EPRS_BRI%282016%29589808_EN.pdf> accessed 3 December 2021.

⁴⁵² European Council, Presidency Conclusions, Tampere European Council 15 and 16 October 1999, SN 200/99, para. 14–15.

⁴⁵³ Maria Michelogiannaki, ‘The Negotiations of Directive 2005/85/EC’ in Karin Zwaan (ed.), *The Procedures Directive, Central Themes, Problem Issues and Implementation in Selected Member States* (Nijmegen, Wolf Legal Publishers, 2008), p. 22–23. See also: Marcelle Reneman, *Asylum Procedures and The Right to an Effective Remedy*, (Bloomsbury, 2014), p. 33.

Five years after its adoption, the Commission conducted an evaluation of the application of the 2005 Asylum Procedures Directive.⁴⁵⁴ This report revealed that some optional provisions and derogation clauses in the Directive led to ‘a divergence of implementation across the EU, which prevented the achievement of a level playing field for fair and efficient asylum procedures’.⁴⁵⁵ In the Stockholm Programme, the Council indicated that ‘due regard should be given to fair and effective procedures in ultimately establishing a common procedure and that similar cases should be treated alike and result in the same outcome’.⁴⁵⁶ Consequently, as signalled in its Policy Plan on Asylum, the Commission put forward a proposal to recast the 2005 Asylum Procedures Directive on 21 October 2009.⁴⁵⁷ Yet, after difficult negotiations, an agreement could not be achieved.⁴⁵⁸ Therefore, the Commission amended its original proposal in June 2011,⁴⁵⁹ which was adopted after a series of changes on 26 June 2013.⁴⁶⁰ Again, it was the last instrument to be adopted for the second phase, which was argued to be indicative of the complex and sensitive nature of the issues concerning common asylum procedures.⁴⁶¹

Directive 2013/32/EU (hereinafter the ‘Asylum Procedures Directive’) establishes common procedures for making decisions on international protection in line with the Qualification Directive.⁴⁶² Also, its scope includes all applications for international protection made in the territory, including ‘the border, in transit zones and territorial waters, except for the requests of diplomatic or territorial asylum submitted to the representations of Member States’.⁴⁶³

In its Communication ‘Towards a reform of the Common European Asylum System and enhancing legal avenues to Europe’, the Commission cited the persistent differences in the asylum procedure across the EU.⁴⁶⁴ Therefore, it

⁴⁵⁴ European Commission, Report from the Commission to the European Parliament and the Council on the application of Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, 8 September 2010, COM(2010) 465 final.

⁴⁵⁵ *Ibid.*, p. 15.

⁴⁵⁶ European Council, The Stockholm Programme: An Open and Secure Europe Serving and Protecting Citizens, 2010/C 115/01, section 6.2.2.

⁴⁵⁷ European Commission, Proposal for a Directive of the European Parliament and of the Council on minimum standards on procedures in Member States for granting and withdrawing international protection (Recast), COM(2009) 554.

⁴⁵⁸ Steve Peers et al., *EU Immigration and Asylum Law (Text and Commentary): Volume 3 EU asylum law* (Brill 2012) 211.

⁴⁵⁹ European Commission, Amended proposal for a Directive of the European Parliament and of the Council on common procedures for granting and withdrawing international protection status, COM(2011) 319 final.

⁴⁶⁰ Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast) [2013] OJ L 180/60 (hereinafter Asylum Procedures Directive).

⁴⁶¹ Steve Peers et al., *EU Immigration and Asylum Law (Text and Commentary): Volume 3 EU asylum law* (Brill 2012) 213.

⁴⁶² Article 1 of the Asylum Procedures Directive.

⁴⁶³ Article 3(1) and (2) of the Asylum Procedures Directive.

⁴⁶⁴ See: European Commission, Communication from the Commission to the European Parliament and the Council: Towards A Reform of the Common European Asylum System and Enhancing Legal Avenues to Europe, COM(2016) 197 final, p. 4.

put forward a legislative proposal on the reform of the Asylum Procedures Directive on 13 July 2016.⁴⁶⁵ This proposal could not find general agreement in the Council and the Parliament announced the file to be unfinished.⁴⁶⁶ Following this, in its New Pact on Migration and Asylum, the Commission presented the revised proposal on the asylum procedures as part of the legislative package.⁴⁶⁷ While keeping the overall objectives of the 2016 proposal, the Commission also made some specific changes, especially in terms of putting it into context with the proposal on a Screening Regulation and the recast Return Directive to achieve ‘a seamless link between all stages of the migration process, from arrival to processing asylum requests and, if applicable, return’.⁴⁶⁸

5.2.6. The 2001 Temporary Protection Directive

Following the Kosovo conflict and the resulting humanitarian situation, and recognising the need for a minimum standard of temporary protection to displaced TCNs on the basis of solidarity among Member States in the Tampere Conclusions,⁴⁶⁹ the EU adopted Directive 2001/55/EC (hereinafter the ‘Temporary Protection Directive’) on 20 July 2001.⁴⁷⁰

The Directive refers to temporary protection as ‘a measure that can be introduced in the event of a mass influx of displaced TCNs who are unable to return to their country of origin’.⁴⁷¹ In this regard, mass influx is defined as ‘the arrival of a large number of displaced persons who have come from a specific country or geographical area, whether the arrival was spontaneous or aided’.⁴⁷² According to the Directive, the existence of a mass influx of displaced persons is established by a Council Decision adopted by a qualified majority on a proposal from the Commission, which also examines any request by Member States.⁴⁷³ Rights granted for the beneficiaries of

⁴⁶⁵ European Commission, Proposal for a Regulation of the European Parliament and of the Council establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU, COM(2016) 467 final.

⁴⁶⁶ European Parliament, ‘Legislative Train: Reform of the Asylum Procedures Directive’ <<https://www.europarl.europa.eu/legislative-train/theme-towards-a-new-policy-on-migration/file-jd-reform-of-the-asylum-procedures-directive#>> accessed 17 October 2021.

⁴⁶⁷ European Commission, Amended proposal for a Regulation of the European Parliament and of the Council establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU, COM(2020) 611 final.

⁴⁶⁸ Ibid., p. 12. See also: Sergio Carrera et al., ‘The European Commission’s legislative proposals in the New Pact on Migration and Asylum’, (European Parliament’s Policy Department for Citizens’ Rights and Constitutional Affairs, July 2021) [66] <[https://www.europarl.europa.eu/RegData/etudes/STUD/2021/697130/IPOL_STU\(2021\)697130_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2021/697130/IPOL_STU(2021)697130_EN.pdf)> accessed 13 February 2022.

⁴⁶⁹ European Council, Presidency Conclusions, Tampere European Council 15 and 16 October 1999, SN 200/99, para. 16.

⁴⁷⁰ Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof [2001] OJ L 212/12 (hereinafter Temporary Protection Directive).

⁴⁷¹ Article 1 of the Temporary Protection Directive.

⁴⁷² Ibid., Article 2(d).

⁴⁷³ Ibid., Article 5.

temporary protection include access to employment, housing and suitable accommodation, social welfare and subsistence means, access to education for minors and family reunification.⁴⁷⁴ Importantly, Member States cannot offer a lower set of rights than those provided in the Directive.⁴⁷⁵

Notwithstanding that the Directive's possible utility was highlighted in a number of instances such as during the Arab Spring,⁴⁷⁶ its activation threshold was not deemed to be reached.⁴⁷⁷ In a similar vein, during the large arrivals of irregular migrants in 2015, the Directive was not employed despite the fact that the Parliament had called for its activation.⁴⁷⁸ Yet, after the unprecedented Russian invasion of Ukraine on 24 February 2022, the Directive has been triggered for the first time since its adoption for the people fleeing the war in the Ukraine.

Following the Commission's swift proposal for the activation of the Temporary Protection Directive on 2 March 2022,⁴⁷⁹ the Council Implementing Decision (EU) 2022/382 introducing temporary protection for the mass influx of persons fleeing the Ukraine due to the conflict was unanimously adopted on 4 March 2022,⁴⁸⁰ which entered into force on the same day. Accordingly, the Decision applies to Ukrainians residing in the Ukraine before 24 February 2022, TCNs benefiting from international protection or equivalent in the Ukraine before 24 February 2022, as well as the family members of both categories; and TCNs who were residing in the Ukraine before 24 February 2022 with a valid permanent residence permit and unable to return to their country or region of origin.⁴⁸¹ Member States have the discretion to apply the Decision to other persons.⁴⁸² Moreover, to

⁴⁷⁴ Ibid., Article 12–15.

⁴⁷⁵ Sergio Carrera et al., 'The EU Grants Temporary Protection for People Fleeing War in Ukraine', CEPS Policy Insights No 2022-09, 9–10.

⁴⁷⁶ See: Meltem Ineli-Ciger, 'The Missing Piece in the European Agenda on Migration: The Temporary Protection Directive', (EU Law Analysis, 8 July 2015) <<http://eulawanalysis.blogspot.com/2015/07/the-missing-piece-in-european-agenda-on.html>> accessed 27 October 2021.

⁴⁷⁷ Hanne Beirens et al., Study on the Temporary Protection Directive Final report, (Directorate-General for Migration and Home Affairs, January 2016), p. 13.

⁴⁷⁸ Meltem Ineli-Ciger, 'Time to Activate the Temporary Protection Directive' (2016) 18(1) European Journal of Migration and Law 13. See also: Julija Sardelić, 'From Temporary Protection to Transit Migration: Responses to Refugee Crises along the Western Balkan Route', RSCAS 2017/35, p. 8–9.

⁴⁷⁹ European Commission, Proposal for a Council Implementing Decision establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Council Directive 2001/55/EC of 20 July 2001, and having the effect of introducing temporary protection, COM(2022) 91 final.

⁴⁸⁰ Council Implementing Decision (EU) 2022/382 of 4 March 2022 establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Directive 2001/55/EC, and having the effect of introducing temporary protection [2022] OJ L 71/1 (hereinafter Council Implementing Decision).

⁴⁸¹ Article 2(1) and (2) of the Council Implementing Decision.

⁴⁸² Article 2(3) of the Council Implementing Decision. See also: Article 7 of the Temporary Protection Directive.

explain and clarify the provisions in the Council implementing Decision,⁴⁸³ the Commission also issued Operational Guidelines on 21 March 2022.⁴⁸⁴

As part of the New Pact on Migration and Asylum, another initiative that the Commission announced was the proposal for a Crisis and Force Majeure Regulation.⁴⁸⁵ This proposal seeks to repeal the Temporary Protection Directive 2001/55/EC and introduces immediate protection instead.⁴⁸⁶ The scope of the envisaged immediate protection is narrower than that of the temporary protection in that it covers ‘only exceptional situations’ of mass influx.⁴⁸⁷ While the proposal aims to ensure that the EU has at its disposal specific rules that can address the exceptional situation of crisis in an effective manner, it also includes provisions for crisis situations according to which certain derogations can be made from the proposed Asylum Procedures Regulation.⁴⁸⁸

Conclusion

This paper has provided a bird’s eye view of the legal framework that has been established in the various fields comprising the EU migration and asylum law. Discussed in each chapter, these fields are the four main policy areas that make up the overall policy framework under Title V of the TFEU. Firstly, the paper elucidates that the removal of the internal borders with the Schengen area has been a milestone for the EU migration and asylum policy in many ways. For one thing, the EU embarked on establishing minimum common standards as to the entry and/or residence procedures for TCNs. Due to the unwillingness of Member States to embrace a horizontal approach which would have covered the entry and residence conditions and rights of all TCNs, the EU adopted a patchwork of sectoral EU directives each covering various reasons for the admission and residence of TCNs. In this regard, the paper indicates that the EU’s legislative and policy efforts for legal migration have developed only gradually. Therefore, Member States enjoy considerable room for discretion on migration for legal purposes. Besides, as can be seen

⁴⁸³ European Commission, ‘Temporary Protection’ <https://ec.europa.eu/home-affairs/policies/migration-and-asylum/common-european-asylum-system/temporary-protection_en> accessed 4 April 2022.

⁴⁸⁴ European Commission, Communication from the Commission on Operational guidelines for the implementation of Council implementing Decision 2022/382 establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Directive 2001/55/EC, and having the effect of introducing temporary protection [2022] OJ C 126 I/1.

⁴⁸⁵ European Commission, Proposal for a Regulation of the European Parliament and of the Council addressing situations of crisis and force majeure in the field of migration and asylum, COM(2020) 613 final.

⁴⁸⁶ Ibid., p. 18.

⁴⁸⁷ Ibid., p. 13. See also: Meltem Ineli-Ciger, ‘Immediate Protection in the New Pact on Migration and Asylum: A Viable Substitute for Temporary Protection?’ in Daniel Thym and Odysseus Academic Network (eds), *Reforming the Common European Asylum System: Opportunities, Pitfalls, and Downsides of the Commission Proposals for a New Pact on Migration and Asylum* (NOMOS 2022) 150.

⁴⁸⁸ Ibid., p. 3.

above, legal migration is closely connected with the other fields in the EU migration and asylum policy.

When it comes to irregular migration and return, the EU has aimed to establish effective legislative and policy instruments that can constitute a safety net in the EU migration and asylum policy. Naturally, effective control over the EU territory has been equated to a well functioning system which prevents irregular migration, detects irregular migrants and removes those who do not qualify for international protection when they are detected. Yet, the implementation of this policy has proved to be inherently sensitive to human rights, in particular for refugees and the providers of humanitarian assistance in the context of search and rescue operations at sea. In this sense, the irregular migration and return policy signifies strong links with the CEAS since a policy shift for the former has direct impacts on the latter, namely refugee applications for international protection.

Together with the free movement of persons within the EU, the creation of an area without internal borders with Schengen also resulted in the need to adopt common rules and policy on issuing short-term visas with a view to increase security in the area. After the *communautarisation* of the Schengen *acquis*, a number of provisions on short-term visas and border controls were included in the EU legal order. Yet, this did not slow down the impetus for the creation of common rules and policy on visas, considering the adoption of the Visa Code, the visa waivers granted to third countries, the development of the EU information systems as well as the establishment of a framework for the interoperability of the EU information systems for visas, border checks and security. Also, the EU's increasing involvement in the issues of identifying and controlling migrants in the Schengen area after the removal of the internal borders was followed by the demarcation of the EU's external borders. But the fact that attempts to reach these external borders are accompanied by an increasing number of fatalities on the way has raised the question of to what extent the EU is responsible for the death toll. This is against the backdrop of the expanding powers, mandate and budget of the EU's forefront actor at the external borders, FRONTEX.

Finally, the paper also indicates that the CEAS cannot be evaluated in a vacuum in that its functioning depends on the other Union-level policies on migration and, more importantly, their implementation at the Member State level. Since the Tampere Conclusions, the EU has been working towards establishing a common system for asylum. While its initial phase only consisted of minimum standards which led to various inconsistencies and gaps in its implementation by Member States, the main purpose of the later phases was to harmonise the rules on the determination of the responsible state for asylum applications, reception conditions, asylum procedures, the qualification of applicants and the rights attached thereto. Yet, the unprecedented number of arrivals of refugees and irregular migrants to the EU in 2015 revealed the flaws in the system and jeopardised the system's ability to deal with migratory pressure.

Recently, with Russia's invasion of the Ukraine, the Temporary Protection Directive has been triggered for the first time for persons fleeing the conflict, signalling a paradigm shift from the prevention of secondary movements of asylum seekers to a more flexible approach respecting the choice of the

applicants for international protection. Notwithstanding this, the implications remain to be seen of the use of the temporary protection scheme for the future development of the EU migration and asylum policy and the direction towards which the system will evolve in light of the New Pact on Migration and Asylum.

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