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Economic and Monetary Affairs

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DIRECTORATE GENERAL FOR INTERNAL POLICIES
POLICY DEPARTMENT A: ECONOMIC AND SCIENTIFIC POLICY

Discrimination of migrant workers at the workplace

NOTE

Abstract

Non-discrimination is a prerequisite in order to effectively guarantee the right of free movement of workers. Although EU legislation is in place, statistics indicate that migrant workers (EU nationals and non-EU nationals) are being discriminated against in the EU labour market. This note, produced at the request of the Committee on Employment and Social Affairs, discusses the legal framework protecting migrant workers against discrimination. It presents a summary of the impact of the economic crisis on migrant employment. It takes a closer look at the types of discrimination foreign-born workers may face in the workplace before summarising current opinion as to whether action is warranted to prevent migrant employment discrimination in the EU, and providing some best-practice examples.

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LIST OF ABBREVIATIONS

CJEU	Court of Justice of the European Union
ECtHR	European Court of Human Rights
ENAR	European Network Against Racism
ENFMW	European Network on Free Movement of Workers within the European Union
EP	European Parliament
ETUI	European Trade Union Institute
EU2	Cyprus and Malta
EU8	Czech Republic, Estonia, Latvia, Lithuania, Hungary, Poland, Slovenia and Slovakia
EU10	Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and Slovakia
FRA	European Union Agency for Fundamental Rights
ILO	International Labour Organization
LFS	Labour Force Survey
MIPEX	Migrant Integration Policy Index
OECD	The Organisation for Economic Co-operation and Development
TFEU	Treaty of the Functioning of the European Union

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EXECUTIVE SUMMARY

This note on “Discrimination of migrant workers at the workplace” presents an overview of discrimination that migrant workers face in the EU labour market and summarises results of various existing studies on the subject. First of all it outlines, the legal framework protecting migrant workers against discrimination; secondly, it illustrates the development of migrant employment since 2008, specifically focussing on the economic crisis, and thirdly, it provides an overview of discrimination of migrant workers during the employment “life-cycle”. Finally, the note presents current opinions as to whether action is warranted to guarantee equal treatment of migrants at the workplace.

Generally, we observed a shortage of evidence relating to direct discrimination faced by migrant workers which in itself is an issue that many believe should be addressed.

The legal framework protecting migrant workers against discrimination

EU legal framework provides greater protection from discrimination on the grounds of nationality to intra-EU migrant worker than to third-country national workers.

All EU nationals have a right to equal treatment/non-discrimination with regard to employment in the EU Member States, while only certain types of third-country national migrant workers are protected and only at certain stages in the employment life cycle.

Only three types of third-country national migrant workers (family members of EU nationals, EEA nationals and long-term residents in a EU Member State) have a right to equal treatment during the full employment life cycle while other types (those eligible under the Single Permit Directive, researchers and highly qualified workers) only enjoy this right for parts of the employment life cycle.

Weakness EU anti-discrimination legislation

EU anti-discrimination legislation (i.e. measures currently based on Article 19 TFEU) does not specifically include nationality as a ground for discrimination, but prohibits discrimination on the grounds of race, sex, age and gender. As a consequence, nationality is not explicitly included as a prohibited ground of discrimination in the national law of many Member States.

Scope of workers’ rights to freedom of movement

A review of case law of the CJEU reveals a lack of clarity and inconsistencies with regard to the term “worker”, particularly for rehabilitative employment, part-time workers and people who do chores in return for food, lodging and pocket money. Only migrants that have the EU worker status are protected by the EU’s legislation on freedom of movement, including the principle of non-discrimination.

Transposition and implementation of protective legislation unproven

In response to issues regarding the application of EU legislation on freedom of movement in Member States, a new Directive to promote and enhance mechanisms for the effective implementation of the principle of equal treatment for EU workers and members of their families when exercising their right to free movement was adopted in April 2014. It is still too early to judge the effectiveness of this recent development.

Legal framework in development

The legal framework granting rights to migrant workers in the EU is under continuous development, with four important Directives that were adopted or modernised in recent years. Two further proposals for Directives are currently being discussed which are specifically targeted at non-EU migrant workers, namely intra-corporate transferees and third country nationals moving to an EU Member State for the purposes of research, studies, pupil exchange, remunerated and unremunerated training, voluntary service and au pairing.

Developments in migrant employment since 2008

General agreement exists that migrant workers suffer disproportionately in the labour market during economic crises. However, administrative data on migration flows and surveys about the motivation for migration provide only an indirect indication for migrant employment trends and qualitative data are needed to supplement statistics to understand the role of discrimination in these trends.

Discrimination against migrant workers

Recent data from Eurostat and the Labour Force Survey (LFS) showed that on average, intra-EU migrants had higher employment rates and lower unemployment rates than third country nationals. Surveys based on personal perception indicated there is discrimination against migrant workers at all stages of the employment lifecycle. It is also clear that migrant workers play a role as a labour market buffer in economic cycles and are more vulnerable to layoffs in sectors faring badly during recessions.

Third-country nationals tend to be discriminated against to a greater extent than mobile EU-nationals, as on average they tend to have greater vulnerability (or risk factors) to discrimination and may experience more barriers to the labour market itself (i.e. language barriers, recognition of foreign qualifications).

Hiring

There is mixed evidence for negative discrimination towards migrant workers in the hiring process. A consistent objective finding of discrimination is fewer interview call backs from CVs with a foreign sounding name, which has been observed in several Member States. Cultural barriers to the labour market can contribute to the appearance of discrimination, especially for migrant women.

However, there is also evidence for positive discrimination by employers. In part, this may be due to stereotypes of migrant workers as industrious and productive or having more employable skills. Migrant workers still risk taking employment for which they are overqualified.

Working conditions

The evidence for discrimination against migrant workers with respect to working conditions is mixed, although there are concerns that discrimination in the workplace may be under-reported. Surveys have found that 39% of immigrants/ethnic minorities are unaware of legislation forbidding discrimination in employment and so may not report incidents.

Examples of lower remuneration for migrants than native workers, contractual obligations to work more anti-social hours, exploitation in low-wage sectors, wage gaps not explained by covariates such as age and experience, and payment of subminimum wages all exist.

Survey responses from migrant workers also report subjective experiences of discrimination by colleagues and customers or clients. The evidence available does not, however, always separate discrimination from a failure to achieve a full return on human capital or the importance of language proficiency or fluency.

Layoffs

It is not possible to conclude with any certainty that discrimination is a clear contributor to disproportionate layoffs of migrant workers in the EU. Analysis of unemployment trends does conclude that migrant workers have worse outcomes but discrimination in layoffs is difficult to evidence with limited data (including subjective survey responses) and contextual variables which may explain different outcomes for migrant and native workers.

The ETUI has described migrant workers as acting like a labour market buffer where they are readily hired during growth periods and readily fired during recession. This pattern is not, however, necessarily explained by discrimination. Examples of direct discrimination rather seem to be limited to legislative oversight.

Current opinions as to whether action is warranted to guarantee treatment of migrants at the workplace

Expert sources agree that there is a **need to reform existing EU anti-discrimination law**, including nationality explicitly as a ground for protection from discrimination (which already exists in some EU Member States). A **clear EU legislative definition of the term “worker”**, which can include activities such as rehabilitative employment, part-time workers, child or elderly care, is needed to ensure equal access of **all workers** to their rights and benefits.

Expert opinion calls for additional (financial) **support for national Equality Bodies** providing support to migrant workers seeking redress against discrimination. Further action could include giving Equality Bodies the ability to apply legally binding obligations on companies and employers and thus offer tangible alternatives to costly legal procedures.

Experts have identified a potential **legislative change to overcome direct discrimination** of migrants and to improve recruitment and selection procedures of migrant workers, namely legislation to anonymise CV submission prior to the interview process.

Support to tackle certain disadvantages of migrant workers to facilitate a swift integration process is advocated including making targeted funding available to support activities at Member State level and to make them more readily accessible. Such activities could include outreach projects, integration measures and language course provision.

1. INTRODUCTION

Freedom of movement for workers is one of the four fundamental freedoms on which the Single Market is based. It is one of the core values of the European Union and a fundamental element of EU citizenship. The right to free movement for workers generally permits EU citizens to¹:

- look for a job in another EU country
- work there without needing a work permit
- reside there for that purpose
- stay there even after employment has finished
- enjoy equal treatment with nationals in access to employment, working conditions and all other social and tax advantages.

The last point is a right to equal treatment or a right not to be discriminated against on the grounds of nationality. This right is laid down in Article 18 of the Treaty on the Functioning of the European Union (TFEU): *"Within the scope of the application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on the grounds of nationality shall be prohibited"*. Art. 18 TFEU further suggests that EU Member States adopt rules designed to prohibit such discrimination.

Non-discrimination is a prerequisite in order to effectively guarantee the right of free movement of workers. Without it, Member States could allow migrants in their country while still giving a preferential treatment to their own nationals, i.e. discriminate against non-nationals. Certain types of third country nationals also have such equal treatment rights in the EU regarding employment.

Although such rules are in place, statistics from the International Labour Organization (ILO) and the Organisation for Economic Cooperation and Development (OECD) indicate that migrant workers are being discriminated against in the EU labour market²³.

Discrimination of migrant workers is of increasing concern to the EU in the context of static and, in some cases, falling growth rates across the region. The foundation of a well-structured economy relies on free movement flows and maximising the labour potential on offer – employing workers best suited to their tasks. However, evidence emerging post-2008 suggests that migrant workers are experiencing disproportionate levels of discrimination in the labour market, even when the data is adjusted to account for differentials in ability^{4 5}. This discrimination is manifest in greater unemployment rates and reduced labour migration rates generally⁶.

The accompanying fall in labour migration levels may be a by-product of increased migrant unemployment or it may be a result of more stringent labour and immigration policies – a political notion that has gained traction in austere conditions. Regardless of causality, it is essential that these trends be examined; only then will it be possible to

¹ European Commission, DG Employment, Free Movement: EU Nationals, website. Available at: <http://ec.europa.eu/social/main.jsp?catId=457>

² See for example: ILO, (2009), "Presentation: The Impact of the Financial Crisis on Migrant Workers".

³ Chaloff, J., Dumont, JC., Liebig, T. (2012), "The Impact of the Economic Crisis on Migration and Labour Market Outcomes of Immigrants in OECD Countries", CESifo DICE Report, 10:1, pp. 39-47.

⁴ ILO, (2009), "Presentation: The Impact of the Financial Crisis on Migrant Workers".

⁵ Arai, M., Vilhelmsson, R. (2001), "Immigrants' and Natives' Unemployment-risk: Productivity Differentials or Discrimination", [Online], Available at: <http://swopec.hhs.se/fiefwp/papers/WP169.pdf>

⁶ Chaloff, J., Dumont, JC., Liebig, T. (2012), "The Impact of the Economic Crisis on Migration and Labour Market Outcomes of Immigrants in OECD Countries", CESifo DICE Report, 10:1, pp. 39-47.

provide informed insight and strategic guidance that adheres to Article 18 TFEU (principle of non-discrimination on the grounds of nationality).

The European Parliament (EP) is involved in these matters through the Committee for Civil Liberties, Justice and Home Affairs (LIBE) and the Committee on Employment and Social Affairs (EMPL). The LIBE Committee is responsible among others for measures concerning the entry and movement of persons, asylum and migration. The EMPL Committee is, among other functions, responsible for:

- employment policy and all aspects of social policy such as working conditions, social security and social protection
- the free movement of workers and pensioners
- all forms of discrimination at the workplace and in the labour market except those based on sex.

For the purpose of this study and following the lead of Eurostat, the following terms and definitions will be used:

- EU citizen: person holding the nationality of an EU Member State⁷
- Intra-EU migrant: EU Member State citizens residing in another EU Member State
- Third country national: a citizen of a country that is not a member of the European Union⁸
- Worker: any person who (i) undertakes genuine and effective work (ii) under the direction of someone else (iii) for which he is paid⁹.

This note will present the discrimination that migrant workers face in the EU labour market and summarises results of various existing studies on the subject. The note is based on existing data and relevant documents of national and international institutions. This study will focus on the discrimination migrant workers face with regard to access to employment, working conditions (including remuneration) and lay off. This note will not consider discrimination with regard to:

- Occupational training and retraining measures;
- Social and tax benefits; and
- Exercising trade union rights.

⁷ Article 20(1) TFEU

⁸ Eurofound, dictionary, website. Available at:

<http://www.eurofound.europa.eu/areas/industrialrelations/dictionary/definitions/thirdcountrynationals.htm>

⁹ Corresponds to the narrow definition of worker in the EU, see Lawrie-Blum, Case C-66/85

2. THE LEGAL FRAMEWORK PROTECTING MIGRANT WORKERS AGAINST DISCRIMINATION IN THE EU

KEY FINDINGS

- Intra-EU migrant workers are protected from discrimination in employment on the basis of nationality under EU law on the free movement of persons/workers. No restrictions, such as quantitative limits or discriminatory recruitment criteria, can be placed on the recruitment of nationals of other EU countries. Once hired, an EU national working in another EU country must be treated in exactly the same way as colleagues who are nationals of that country.
- However, nationality is not explicitly included as a prohibited ground of discrimination in the national law of many Member States, because of the way EU non-discrimination law and EU law on the free movement of persons are understood and implemented. As a result, there are severe gaps between Member States in terms of granting the right of equal treatment on the grounds of nationality. Legal protection works best in countries with robust non-discrimination principles in national law that view nationality as grounds similar to race.
- Challenges still seem to exist around the timely transposition and correct application of EU legislation on free movement between Member States, which protects migrant workers from nationality-based discrimination. In order to enhance the effective implementation of the principle of equal treatment for EU workers, the recently (April 2014) adopted Directive on measures facilitating the exercise of rights conferred on workers foresees that Member States will need to take more proactive measures and that assisting organisations representing EU migrant workers will be established.
- The EU legal framework provides stronger protection from nationality-based discrimination to intra-EU migrant workers compared with foreign-born workers. Only certain types of foreign born workers are protected and only at certain stages of the employment life cycle (such as working conditions rather than social benefits or access to employment).
- The legal framework granting rights to third-country migrant workers in the EU is under development, with two Directives currently being discussed on conditions of entry and residence of non-EU nationals in the framework of intra-corporate transfers as well as for the purpose of research, studies, exchanges, training, voluntary service and au pairing.

This section will outline the legal framework in place protecting migrant workers against (nationality-based) discrimination in the EU Member States, looking first at the legal framework protecting intra-EU migrant workers, followed by the legal framework protecting foreign born (i.e. non-EU) workers.

2.1. Legal framework protecting migrant EU citizens in the EU

The following section will discuss the legal framework protecting intra-EU migrants, i.e. EU nationals that are residing and employed (or seeking employment) in another Member State, looking at primary law (treaties establishing the EU), secondary law (such as Directives and Regulations), including its implementation and recent developments, and supplementary law (case law of the Court of Justice of the European Union or CJEU).

2.1.1. EU Treaties (primary legislation)

The principle of protecting intra-EU migrants from discrimination is covered through two different areas of EU Law: (1) EU law on the freedom of movement and (2) EU anti-discrimination law.

The right to **freedom of movement for workers** was first established by the Treaty of Paris establishing the European Coal and Steel Community (1951)¹⁰ for workers in these industries. This right was expanded to all workers within the European Economic Community by the Treaty of Rome (1957)¹¹.

The right of free movement for workers is now codified in Article 45 of the Treaty on the Functioning of the European Union (TFEU). This right is also included in Article 15(2) of the Charter of Fundamental Rights of the European Union (hereafter the Charter)¹², which states that every citizen of the Union has the freedom to seek employment, to work, to exercise the right of establishment and to provide services in any Member State.

The treaties provide for a **right to equal treatment or non-discrimination based on nationality**. The principle of non-discrimination on the basis of nationality is laid down in Article 18 TFEU more generally and in relation to employment in Article 45(2) TFEU, the latter stating: "Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment".

Thus, any EU citizen has the same right to work in another EU Member State as nationals of that Member State, under the same conditions and without having to apply for a work permit. No restrictions, such as quantitative limits or discriminatory recruitment criteria, can be placed on the recruitment of nationals of other EU countries. Once hired, an EU national working in another EU country must be treated in exactly the same way as colleagues who are nationals of that country regarding working conditions (for example, pay, dismissal and reinstatement) and access to training; they have the same social advantages, tax benefits and access to housing as nationals of that country¹³.

Article 45 TFEU implies the abolition of any discrimination (direct or indirect) based on nationality in the exercise of these rights as well as of any unjustified obstacle which impedes the exercise of the right to free movement¹⁴. An obstacle that is justified is, for example, the requirement of certain language skills¹⁵.

¹⁰ Treaty establishing the European Coal and Steel Community, ECSC Treaty, 1951.

¹¹ Treaty establishing the European Economic Community, EEC Treaty, 1957.

¹² Charter of Fundamental Rights of the European Union [2012]OJ C326/391

¹³ European Commission, DG Employment, Equal Treatment, website. Available at: <http://ec.europa.eu/social/main.jsp?catId=462&langId=en>

¹⁴ Case C-325/08: Judgment of the Court of 16 March 2010, Olympique Lyonnais SASP v Olivier Bernard, Newcastle United FC, ECR 2010, p.I-2177 and COM(2013) 236 final, p. 2.

¹⁵ Job candidates from other EU countries may be required to demonstrate they have the language skills needed for the job, but the level of language knowledge required must be reasonable and necessary for the post. However employers cannot demand only a specific qualification as proof.

However, the right to free movement and to freedom from discrimination as a foreign born worker can be legally restricted or limited in several ways:

- **Public policy, public security and public health:** On the basis of article 45(3) TFEU, the host Member State is entitled to impose limitations on workers if this can be justified on grounds of public policy, public security or public health. However the threshold set by the CJEU for a state to invoke this derogation is substantial.¹⁶
- **Employment in public service:** According to Article 45(4) TFEU the provisions of Article 45 do not apply to employment in the public service¹⁷. However, this derogation has been interpreted in a very restrictive way by the CJEU: only those posts in which the exercise of public authority and the responsibility for safeguarding the general interest of the state is involved may be limited to their own nationals¹⁸.
- **New EU Member States:** during a transitional period, access to employment may be restricted for workers from the EU's new Member States. Up until 31 December 2013, nationals of Bulgaria and Romania could face temporary restrictions¹⁹. Moreover, Croatia acceded to the EU on 1 July 2013, and 13 Member States decided to impose transitional arrangements on Croatian workers²⁰. Croatia has in turn applied restrictions on access to its labour market for nationals of these 13 Member States.

2.1.2. Secondary legislation

The fundamental principle enshrined in the Treaties has been further developed by EU secondary legislation. The main provisions protecting intra-EU migrant workers from nationality-based discrimination can be found within the **free movement of workers legislation**:

- Free Movement of Persons Directive (2004/38/EC)²¹
- Regulation on freedom of movement for workers within the Union ((EU)492/2011)²²

There are also **non-discrimination Directives** in place (Racial Equality Directive and the Employment Equality Directive²³); however, their application to discrimination on the grounds of nationality is expressly excluded. Instead, these Directives protect migrants

¹⁶ For example see *Roland Rutili v Ministre de l'intérieur*, C-36/75, 28 October 1975, *Ministre de l'Intérieur and Aitor Oteiza Olazabal*, C-100/01, 26 November 2002, *Georgios Orfanopoulos and Others and Raffaele Olivieri v Land Baden-Württemberg*, C-482/01 and C-493/01, 29 April 2004.

¹⁷ Article 45(4) TFEU.

¹⁸ *Lawrie-Blum*, Case No C-66/85

¹⁹ Moreover until 30.04.2011 restrictions were allowed to nationals of the Czech Republic, Estonia, Latvia, Lithuania, Hungary, Poland, Slovenia and Slovakia.

²⁰ Namely BE, DE, EL, ES, FR, IT, CY, LU, MT, NL, AT, SI, UK

²¹ Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member State amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC [2004] OJ L 158/77

²² Regulation (EU) No 492/2011 on freedom of movement for workers within the Union [2011] OJ L 141/1

²³ Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin [2000] OJ L180/22 and Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation [2000] OJ L 303/16

against discrimination on other grounds, namely discrimination on the grounds of racial or ethnic origin, religion or belief, disability, age and sexual orientation.

The above mentioned **Free Movement of Persons Directive (2004/38/EC)** assembles the different aspects of the right of movement in one document by repealing several previous Directives and amending Regulation 1612/68 (further described below). The Directive defines the right of free movement for citizens of the European Economic Area (which includes the EU and the three European Free Trade Association members Iceland, Norway and Liechtenstein).

Article 24 of the Directive grants EU nationals residing in a Member State a right of equal treatment with nationals of that Member State, and extends this right to family members who are not EU nationals and who have the right of residence or permanent residence. It does not specify equal treatment with regards to employment, but rather established equal treatment “within the scope of the Treaty”. Moreover, the Directive provides that EU citizens retain the status of workers in certain situations even where they are no longer employed, and therefore qualify for equal treatment²⁴.

The main piece of legislation specifically detailing the rights for intra-EU migrant workers regarding freedom of movement is the **2011 Regulation on freedom of movement for workers within the Union** ((EU)492/2011). The Regulation codified and replaced Regulation (EEC) 1612/68²⁵ and its successive modifications²⁶. Regulation (EEC) 1612/68²⁷ was adopted in 1968, and was the first piece of legislation that provided migrant workers with equal treatment as far as employment and work conditions are concerned (including remuneration, dismissal, reinstatement or re-employment)²⁸. The new regulation on freedom of movement of workers does not differ much from the 1968 regulation in this regard, reiterating the right to equal treatment in several instances:

- Article 2 and 5 grant equality of treatment regarding access to employment²⁹.
- Article 3 renders inapplicable any legislation containing discriminatory provisions.
- Article 7 further specifies that it is prohibited for an intra-EU migrant worker in the territory of a Member State to be treated differently from national workers on the grounds of the migrant’s nationality in respect of any conditions of employment and work, in particular as regards remuneration, dismissal and reinstatement or re-employment (should he/she become unemployed).
- Article 8 extends the right to equal treatment to membership of trade unions: a migrant worker has the right to join a union, to vote and to be eligible for the administration or management posts of a trade union.

²⁴ Article 7(3), Directive 2004/38/EC

²⁵ Regulation (EEC) 1612/68 on freedom of movement for workers within the Community [1968] OJ L 257/2

²⁶ Council Regulation No 312/76 amending the provisions relating to the trade union rights of workers contained in Regulation (EEC) No 1612/68 on freedom of movement for workers within the Community [1976] OJ L 039/2; Regulation (EEC) No 2434/92 of 27 July 1992 amending Part II of Regulation (EEC) No 1612/68 on freedom of movement for workers within the Community [1992] OJ L 245/1; and Article 38(1) of Directive 2004/38/EC.

²⁷ Regulation (EEC) No 1612/68 on freedom of movement for workers within the Community [1968] OJ L 257/2

²⁸ Article 7(1) and (2) of Regulation No 1612/68 provides:

1. A worker who is a national of a Member State may not, in the territory of another Member State, be treated differently from national workers by reason of his nationality in respect of any conditions of employment and work, in particular as regards remuneration, dismissal, and should he become unemployed, reinstatement or re-employment.

2. He shall enjoy the same social and tax advantages as national workers.’

²⁹ Prof. Dr. Ferdinand Wollenschläger, Conference Network of Freedom of Movement, Presentation on The situation of jobseekers under EU Law on Freedom of Movement, 16 November 2012.

- Article 9 grants equality of treatment regarding rights and benefits accorded to national workers in matters of housing.

2.1.3. Implementation of legislation protecting EU migrants

In order for EU citizens in practice to use their right to equal treatment conferred on them under EU law, Member States need to correctly transpose (with regards to Directives) and subsequently correctly apply the EU legislation. The European Commission has found gaps in terms of effectiveness and application of the legislation on the freedom of movement of workers by Member States and private employers³⁰. Within the European Commission, a network of experts has been set up, the **European Network on Free Movement of Workers within the EU** (hereafter ENFMW), to monitor the implementation and application of EU legislation on free movement of workers in Member States and to monitor its interpretation by national courts.

The network's report on the freedom of movement of workers in Europe 2010-2011³¹ advised that there were still diverging approaches with regards to the non-discrimination principle enshrined in Regulation No 1612/68 resulting in an uneven application of the principle.

In its subsequent report (covering 2011-2012)³², the network stated that the greatest source of concern regarding the implementation of rights to free movement for workers was the delivery of equal treatment of migrant workers and national workers, especially regarding working conditions and pay. The network furthermore found that:

- discrimination on the basis of nationality in some cases appeared to be augmented by discrimination on other prohibited grounds;
- direct discrimination on the basis of nationality is generally considered to be very rare (with the exception of the UK);
- According to the occupational health and safety authorities, incidents of discrimination against citizens of the old Member States are rather rare, and most discriminatory situations involve citizens of EU8 and EU2.

In addition, the European Commission found that, although Article 45 of the TFEU and Regulation 492/2011 are directly applicable, EU citizens wanting to move freely from one Member State to another still face numerous obstacles in exercising their rights, partly because public authorities are not complying with EU law (non-conforming legislation or incorrect application). Problems in this regard include³³:

- different conditions are applied for recruitment of EU nationals;
- nationality conditions for access to posts which are not covered by the exception in Article 45(4) TFEU;
- introduction of nationality quotas for EU citizens (e.g. in the field of sport at professional level);

³⁰ DG Employment, Proposal for an initiative on enforcement of rights of EU migrant workers and members of their families in relation to the fundamental principle of free movement of workers, June 2011. Available at: http://ec.europa.eu/smart-regulation/impact/planned_ia/docs/2012_empl_005_freedom_of_movement_of_workers_en.pdf

³¹ Annual European Report on the Free Movement of Workers in Europe in 2010-2011, January 2012.

³² European Commission (2013), European Report on free movement of workers in Europe in 2011-2012. <http://ec.europa.eu/social/keyDocuments.jsp?type=0&policyArea=25&subCategory=475&country=0&year=0&advSearchKey=consolidated+report&mode=advancedSubmit&langId=en>

³³ Proposal for a Directive on measures facilitating the exercise of rights conferred on workers in the context of freedom of movement for workers, COM/2013/0236 final - 2013/0124 (COD), p. 4.

- different working conditions for EU nationals (remuneration, career prospects, grade, etc.);
- access to social advantages made subject to conditions which are more easily met by nationals than by EU citizens (e.g. a residence condition);
- professional qualifications and experience acquired in other Member States are not taken into account or they are taken into account in a different way than those obtained in the host Member State for the purpose of access to employment (e.g. additional points are awarded to the latter);
- residence conditions required by national legislation for access to study grants for EU migrant workers and members of their families despite well-established case law of the CJEU in this area;
- discrimination against frontier workers.

The application of the **Freedom of Movement Directive** was most recently evaluated in December 2008, when the European Commission adopted a report³⁴ presenting a comprehensive overview of how the Directive has been transposed into national law and how it is applied in everyday life. The report concluded that the overall transposition of the Directive was rather disappointing. As a follow up to the report the Commission provided Member States with guidance³⁵ for a better transposition and application of the Directive, especially with regard to issues around entry and residence, which type of people are regarded as family members, the restriction on the right to move on the grounds of public policy and security (Chapter VI) and abuse and fraud (Article 35). However, the Commission did not provide guidance on the transposition or application of Article 24 (equal treatment).

The European Parliament also raised its concern on the “poor transposition and implementation of current directives on free movement of workers, especially Directive 2004/38/EC with respect to the right of entry and residence for third-country family members, and cumbersome administrative procedures and additional residence documents (work permits, evidence of satisfactory accommodation) inconsistent with Directive 2004/38/EC”.³⁶ In this regard, the EP called on the European Commission to ensure that Member States implement Directive 2004/38/EC without any discrimination and to continuously and comprehensively monitor the implementation of Directive 2004/38/EC, and where necessary the exercise of its right to initiate infringement procedures against non-compliant Member States.³⁷

2.1.4. Recent developments

In order to promote and enhance mechanisms for the effective implementation of the principle of equal treatment for EU workers (and members of their families) exercising

³⁴ European Commission, report on the application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, COM(2008)840 final.

³⁵ Communication from the Commission to the European Parliament and the Council of 2 July 2009 on guidance for better transposition and application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States [COM(2009) 313 final – Not published in the Official Journal]

³⁶ European Parliament, Report on promoting workers’ mobility within the European Union, 2010/2273(INI), 20 July 2011.

³⁷ European Parliament, Report on promoting workers’ mobility within the European Union, 2010/2273(INI), 20 July 2011.

their right to free movement³⁸, in April 2014 the EU adopted a **new Directive on measures facilitating the exercise of rights conferred on workers** in this context³⁹.

In its Resolution of 25 October 2011 on promoting workers' mobility within the European Union, the European Parliament had already called on the Commission and Member States to take measures in order "to guarantee (...) the correct implementation of the existing legislation on non-discrimination, to take practical measures to enforce the principle of equal treatment of mobile workers (...)"⁴⁰.

According to the explanatory memorandum of the proposal for the Directive⁴¹, the Directive will make it easier to enforce the rights conferred by Regulation (EU)492/2011 on individuals, in particular access to employment (Articles 1 to 6), equal treatment in relation to employment and working conditions (Articles 7 to 9) and the family members of the worker (Article 10). Under this new Directive, Member States need to take more proactive measures, including the establishment of an independent body through which migrant workers can obtain assistance in asserting their right to equal treatment, and to allow such assisting organisations (such as NGOs and trade unions) to represent EU migrant workers in administrative action or in legal proceedings⁴².

Member States now have two years to implement the Directive at national level. Although the new Directive seems to address the issues related to implementation of the legal framework protecting migrant workers as raised in the previous section, only when the implementation deadline has passed will it become apparent whether this piece of legislation will fulfil its aim of bridging the gap between rights and reality and improve enforcement of workers' rights in practice. Moreover, as the European Commission noted itself⁴³, independently of this new legislation, it will be crucial for the European Commission, as guardian of the Treaty, to continue to pursue infringement procedures where necessary against Member States in cases where national law is not in line with the their obligations under EU law.

Another piece of legislation recently adopted to facilitate access to employment specifically for migrant workers is the modernised **Professional Qualifications Directive** (2013/55/EU)⁴⁴. This modernised Directive came after a call of the European Parliament⁴⁵ to the European Commission to strengthen the current legal framework on

³⁸ European Commission (2013), European Report on free movement of workers in Europe in 2011-2012, p.60.

³⁹ European Commission press release, Free movement of workers: Commission welcomes Council adoption of Directive to improve enforcement of workers' rights, Brussels 14 April 2014; and Proposal for a Directive on measures facilitating the exercise of rights conferred on workers in the context of freedom of movement for workers, COM/2013/0236 final - 2013/0124 (COD)

⁴⁰ [http://www.europarl.europa.eu/RegData/seance_pleniere/textes_adoptes/provisoire/2011/10-25/0455/P7_TA-PROV\(2011\)0455_EN.pdf](http://www.europarl.europa.eu/RegData/seance_pleniere/textes_adoptes/provisoire/2011/10-25/0455/P7_TA-PROV(2011)0455_EN.pdf)

⁴¹ Proposal for a Directive on measures facilitating the exercise of rights conferred on workers in the context of freedom of movement for workers, COM/2013/0236 final - 2013/0124 (COD), Explanatory Memorandum, p. 10.

⁴² Jackie Morin, European Commission presentation on Measures facilitating the exercise of rights conferred on workers in the context of freedom of movement for workers. Available at: http://www.eesc.europa.eu/resources/docs/ec_presentation_proposal_of_directive.pdf

⁴³ European Commission press release, Free movement of workers: Commission welcomes Council adoption of Directive to improve enforcement of workers' rights, Brussels 14 April 2014.

⁴⁴ Directive 2013/55/EU amending Directive 2005/36/EC on the recognition of professional qualifications and Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System [2013] OJ L354/132

⁴⁵ European Parliament, Report on promoting workers' mobility within the European Union, 2010/2273(INI), 20 July 2011.

recognition of professional qualifications set out in the 2005 Professional Qualifications Directive 2005/36/EC⁴⁶. The latter aimed at facilitating mobility within the EU by defining a set of rules allowing professionals qualified in one Member State to exercise their profession in another Member State. The process of implementation was slow in all Member States: by the deadline (20 October 2007) no Member State had completed the transposition⁴⁷. Consequently, the Commission initiated infringement proceedings against all 27 Member States in 2007 and 2008⁴⁸. By October 2009, 17 out of the 27 Member States had fully implemented the Directive⁴⁹, and by September 2010 the Directive was fully transposed by all Member States⁵⁰.

The final evaluation report on the Directive concluded that legislation on the recognition of professional qualifications has been effective in facilitating labour mobility within the EU and that in most cases, the recognition of professional qualifications does not constitute an obstacle but rather supports access to the profession in another Member State⁵¹. The modernised Directive extends the current system of automatic recognition of qualifications and regulates the verification of language skills. The deadline for transposition for the modernised Professional Qualifications Directive⁵² is 18 January 2016.

Finally, it should be noted that EU law does not prevent Member States from introducing more favourable conditions under their own national law. For example in Italy, with regard to the transposition of Article 7(3)(c) of Directive 2004/38/EC, an involuntarily unemployed person, after having completed a fixed-term employment contract of less than one year or after having become involuntarily unemployed during the first twelve months, continues to retain the status of worker for one year rather than the minimum six months specified in the Directive⁵³.

2.1.5. Case law of the Court of Justice of the European Union (supplementary law)

This legislation has been further developed by case law of the Court of Justice of the European Union (CJEU). The majority of the cases are either further defining the scope of the term “migrant worker” for EU nationals (i.e. who are protected by EU legislation), or cases further explaining what behaviour is considered discriminatory under EU law (direct vs indirect discrimination).

A non-exhaustive list of the main cases relating to non-discrimination of migrants workers in the EU is listed below.

⁴⁶ Directive 2005/36/EC on the recognition of professional qualifications; [2005] OJ L 255/22

⁴⁷ Commission Staff Working Document on the transposition and implementation of the Professional Qualifications Directive, SEC(2010) 1292

⁴⁸ Commission Staff Working Document on the transposition and implementation of the Professional Qualifications Directive, SEC(2010) 1292

⁴⁹ Ramboll, Study on recognition of professional qualifications, commissioned by the Internal Market and Consumer Protection Committee (IMCO) of the European Parliament, October 2010

⁵⁰ European Commission DG Internal Market, Evaluation of the Professional Qualifications Directive (Directive 2005/36/EC), Brussels, 5 July 2011

⁵¹ European Commission DG Internal Market, Evaluation of the Professional Qualifications Directive (Directive 2005/36/EC), Brussels, 5 July 2011, p. 89

⁵² Directive 2013/55/EU amending Directive 2005/36/EC on the recognition of professional qualifications

⁵³ European Commission (2013), European Report on free movement of workers in Europe in 2011-2012, p. 10
<http://ec.europa.eu/social/keyDocuments.jsp?type=0&policyArea=25&subCategory=475&country=0&year=0&advSearchKey=consolidated+report&mode=advancedSubmit&langId=en>

Table 1: CJEU case law related to non-discrimination of migrant workers⁵⁴

Case	Main findings
Scope of EU law on free movement of workers	
<i>Definition "Worker"</i>	
Hoekstra (C-75/63) and Levin (C-53/81)	The term 'worker' has a meaning in EU law and cannot be subject to national definitions.
Lemmerz-Werke GmbH and others v High Authority of the European Coal and Steel Community (C-53/63)	The term 'worker' cannot be interpreted restrictively.
Levin (C-53/81) and Kempf (C-139/85).	The rules on the free movement of workers cover only the pursuit of effective and genuine activities. A person working part-time, or earning a very low income, can still be considered as a "worker" for the purposes of EU law. Activities which are regarded as purely marginal and ancillary are excluded.
Lawrie-Blum (C-66/85)	The meaning of the term "worker" is a common EU term across the Member States. Any EU national who: <ul style="list-style-type: none"> - for a period of time; - provides services to another person or company; - under the direction of another person; and - receives remuneration for those services is a worker and thus entitled to full range of EU freedoms and rights. ⁵⁵

⁵⁴ Largely based on cases mentioned on European Commission website. (Available at: <http://ec.europa.eu/social/main.jsp?catId=953&langId=en>).

⁵⁵ <http://ec.europa.eu/social/main.jsp?catId=953&langId=en&intPageId=1221>

Case	Main findings
Bettray v Staatssecretaris van Justitie (C-344/87) and Trojani (C-456/02)	People engaged in work containing an element of rehabilitation - work solely provided as a means of rehabilitation or reintegration of the workers concerned into society - are not "workers", as this cannot be regarded as a real and genuine economic activity. The national court has to examine whether the services performed are regarded as forming part of the normal labour market.
Steven Malcolm Brown v The Secretary of State for Scotland (C-197/86)	Member States cannot unilaterally make the grant of social advantages, as mentioned in Union law, conditional upon the completion of a given period of occupational activity. A national of another Member State who has undertaken university studies in the host State leading to a professional qualification, after having engaged in occupational activity in that State, must be regarded as having kept his/her status as a worker, provided that there is a link between the previous occupational activity and the studies.
The Queen v Immigration Appeal Tribunal, ex parte Antonissen (C-292/89)	Extends the scope of Art. 45 TFEU to include those seeking employment: The free movement of workers includes the right for nationals of Member States to seek employment in another Member State. However, this can be subject to temporal limitation. After six months, the person may be required to leave the Member State, unless he/she provides evidence that he/she is continuing to seek employment and that he/she has genuine a chance of finding employment. ⁵⁶
Raulin v Minister van Onderwijs en Wetenschappen, (C-357/89)	Retention of status of worker, for migrant workers who have involuntarily become unemployed and are obliged by conditions within the labour market to undergo vocational retraining in another field of activity.
M.J.E. Bernini v Minister van Onderwijs en Wetenschappen (C-3/90)	A person engaged in preparatory training in the course of occupational training must be regarded as a worker if the training period is completed under the same conditions of genuine and effective activity as an employed person.
Maria Martínez Sala v Freistaat Bayern, (C-85/96)	Generally speaking, persons who have worked in the host Member State, but who no longer work there, lose the status of worker.
Udo Steymann v Staatssecretaris van Justitie. (C-196/87) and Michel Trojani v Centre public	Benefits in kind are also considered as remuneration. Only voluntary work without any form of remuneration is excluded.

⁵⁶ This principle is now integrated into the Free Movement Directive (Article 14(4)(b))

Case	Main findings
d'aide sociale de Bruxelles (C-456/02)	
Andrea Raccanelli v Max-Planck-Gesellschaft zur Förderung der Wissenschaften eV. (C-94/07)	A researcher preparing a doctoral thesis on the basis of a grant contract, must be regarded as a worker according to Union law, if his/her activities are performed for a certain period of time under the direction of an institute forming part of an organisation operating in the public interest and he/she receives remuneration, in return for those activities.
Equal treatment / Non-discrimination	
<i>Prohibition of discrimination and obstacles to free movement of workers</i>	
Württembergische Milchverwertung-Südmilch AG v Salvatore Ugliola (C-15/69)	The Court confirmed that the free movement of workers requires the abolition of any discrimination based on nationality between workers of the Member States. This concerns employment, remuneration and other conditions of work and employment.
Pieter Marsman v M. Roskamp (C-44/72)	This case concerned the special protection against dismissal in the case of a worker who is more than 50% incapacitated to work as a result of an industrial accident. To obtain this protection, it was required that the worker in question has his/her residence on the territory of the Member State in question. This condition was only required for migrant workers and not for national workers. The Court concluded that this requirement infringed the non-discrimination principle.
Giovanni Maria Sotgiu v Deutsche Bundespost, (C-152/73)	Art 45(2) includes not only direct discrimination based on nationality, but also indirect discrimination which, by the application of other criteria of differentiation, leads in fact to the same result.
Jean Reyners v Belgian State (C-2/74)	The Court ruled on the public service derogation based on the exercise of official authority. The Court held that for the application of this derogation there has to be a direct and specific connection with the exercise of official authority.
John O'Flynn v Adjudication Officer, (C-237/94)	<p>Even if certain criteria are applicable irrespective of nationality, they must be regarded as indirectly discriminatory if there is a risk of migrant workers being placed at a particular disadvantage.</p> <p>The principle of freedom of workers also applies to social allowances. Migrant workers must enjoy those advantages under the same conditions as national workers.</p>

Case	Main findings
Groener v Minister for Education and the City of Dublin Vocational Educational Committee (C-379/87) and Salomone Haim v Kassenzahnärztliche Vereinigung Nordrhein (C-424/97)	Indirect discrimination include language requirements for certain posts that may by definition be more easily satisfied by nationals than by non-nationals.
Josette Pecastaing v Belgian State (C-98/79)	A legal remedy may not be conditional on particular requirements as to form or procedure, which are less favourable than those applicable in proceedings brought against the administration of the Member State by its own nationals.
Bosman (C-415/93) and Rolf Dieter Danner (C-136/00)	EU law on free movement of workers precludes obstacles to the free movement of workers, such as measures that may place at a disadvantage EU nationals seeking to pursue an economic activity under an employment relationship in the territory of another Member State, even where such measures apply irrespective of the nationality of the worker (e.g. high transfer fees for professional football players or tax deductions).
<i>Access to employment</i>	
Meyers v. Adjudication Officer (C-116/94)	Access to employment covers 'not only the conditions obtained before an employment relationships comes into being', but also all those influencing factors that need to be considered before the individual makes a decision of whether or not to accept a job offer, such as the granting of a particular State benefit.
Roman Angonese v Cassa di Risparmio di Bolzano SpA, (C-281/98)	It may be legitimate to require an applicant for a post to have a certain level of linguistic knowledge. The possession of a diploma may constitute a criterion for assessing that knowledge. However, the requirement to provide evidence of his/her linguistic knowledge exclusively by means of one particular diploma, issued in one particular province of a Member State, constitutes discrimination on grounds of nationality.
Isabel Burbaud v Ministère de l'Emploi et de la Solidarité (C-285/01)	A host Member State may not refuse entry to a regulated profession to a national of a Member State who holds the qualifications necessary for exercise of that profession in another Member State, although he/she had not passed the national entrance examination. This would place nationals of other Member States at a disadvantage and would restrain them from exercising their rights, as workers, to the freedom of movement. This obstacle is incompatible with Union law.

Case	Main findings
Brian Francis Collins v Secretary of State for Work and Pensions (C-138/02)	<p>The Court confirmed that a benefit of a financial nature to facilitate access to employment in the labour market of a Member State falls within the scope of prohibition of discrimination on grounds of nationality of the Treaty on the Functioning of the European Union.</p> <p>The Court pointed out that a Member State may grant a job-seeker's allowance dependent upon a requirement, if this requirement is based on objective considerations that are independent of nationality and is proportionate to a legitimate aim. In this case the requirement of a genuine link between the person seeking work and the employment market of that State was acceptable.</p>
<i>Working Conditions and dismissal</i>	
<i>Commission v Italy</i> (Case C-225/85) and Pieter Marsman v M. Rosskamp (C-44/72)	Extends Article 7(1) of the Regulation ⁵⁷ which provides that a migrant worker must enjoy equal treatment as regards remuneration, stability of employment, to also include prospects of promotion and dismissal.
Kalliope Schöning-Kougebetopoulou v. Freie und Hansestadt Hamburg (C-15/96)	Member State administrations must treat previous periods of comparable employment worked by migrant workers in other Member States in the same way as professional experience acquired in their own system for the purpose of determining working conditions (e.g. salary and grade).

⁵⁷ Regulation (EEC) No 1612/68

In a presentation at the Annual Conference of the European Network on Free Movement of Workers, held on 15 November 2012 in Malta, it was argued that there is increasing evidence from jurisprudence that national courts are taking EU workers' rights seriously, such as the growing number of references to the CJEU on workers' rights (other than social security) and the fact that Commission infringement procedures had resulted in successful changes to obstacles in some Member States⁵⁸.

Another expert on EU law argued that traditionally there was almost a mechanical application of the provisions of equal treatment (Art. 45 TFEU and Art. 7 Regulation 492/2011) in case law⁵⁹, meaning that when the Court established that a person was a migrant "worker" as per EU law, the court would grant such persons equal treatment rights with regards to employment. However, according to the expert, recently there has apparently been a tendency not to apply such rights automatically to equal treatment to frontier workers. As instances where an additional "genuine link" of integration has been needed, the expert cited three recent CJEU cases⁶⁰ which concluded that it might not be enough to be a "migrant worker" to be entitled to equal treatment with regards to employment⁶¹.

2.2. Legal framework protecting migrant third country nationals in the EU

In principle, the protection of Art. 18 TFEU and more specifically Art. 45 TFEU applies solely to EU citizens. However, **Article 15(3) of the Charter** entitles third country nationals who are authorised to work in the territories of an EU Member State to equivalent working conditions to those of EU citizens. It must be noted that Article 15(3) does not modify the legal position of third country nationals in terms of access to national labour markets or free movement within the EU.

More specifically, **EU law currently grants equal treatment rights to certain types of migrant third country nationals**, such as family members of EU citizens, long-term residents and third country nationals who derive rights from international agreements between their country of origin and the EU. Some of these rights are limited to equal working conditions, for example, but do not cover equality in access to employment. These and other rights are described in further detail below.

It should be noted that no definition for "worker" for third country nationals is included in any of the Directives mentioned below. Neither has the CJEU provided for a definition for third country nationals. However, this does not prevent the definition of "worker" for EU nationals being applicable indirectly to third country nationals⁶².

⁵⁸ Annual Conference Freedom of Movement of Workers, Free Movement of Workers in the EU: 2012 Increasing divergence among the Member States?, presentation by Elspeth Guild, Malta, 15 November 2012. PowerPoint presentation available at: <http://ec.europa.eu/social/main.jsp?catId=475&langId=en>

⁵⁹ Annual Conference Freedom of Movement of Workers, Notion of the concept of Worker, presentation by H. Verschueren, Vilnius 18 October 2013. PowerPoint presentation available at: <http://ec.europa.eu/social/main.jsp?catId=475&langId=en>

⁶⁰ Geven (C- 213/05) in 2007, the Com vs. NL (C-542/09) in 2012, Caves Krier (C-379/11) in 2012 and Giersch (C-20/12) in 2013.

⁶¹ Annual Conference Freedom of Movement of Workers, Notion of the concept of Worker, presentation by H. Verschueren, Vilnius 18 October 2013. PowerPoint presentation available at: <http://ec.europa.eu/social/main.jsp?catId=475&langId=en>

⁶² Study interview 25.03.2014.

2.2.1. Third country nationals eligible under the Single Permit Directive

The 2011 **Single Permit Directive**⁶³ lays down a common set of rights for third country workers *legally residing* in a Member State, irrespective of the purposes for which they were initially admitted to the territory of that Member State, based on equal treatment with nationals of that Member State⁶⁴. More specifically, it grants certain third country workers equal treatment with the nationals of the State where they reside with regards to working conditions, including pay and dismissal. Equal treatment applies to third country nationals who have been admitted to a Member State:

- for purposes other than work in accordance with Union or national law, who are allowed to work and who hold a residence permit in accordance with Regulation (EC) No 1030/2002⁶⁵
- for the purpose of work in accordance with Union or national law⁶⁶.

Member States may restrict equal treatment for a number of reasons⁶⁷. The deadline for transposition of this Directive was 25 December 2013.

2.2.2. Family members of EU nationals

When an EU national is working in another EU country, his/her non-EU family members also have the right to reside and work in that country. The right to residence for family members who are not nationals of a Member State is laid down in Article 6(2) and Article 7(2) of the **Free Movement Directive (2004/38/EC)** and the right to permanent residence in Article 16 (2) and 18 of this Directive. The related right to work is laid down in Article 23 of the same Directive: "Irrespective of nationality, the family members of a Union citizen who have the right of residence or the right of permanent residence in a Member State shall be entitled to take up employment or self-employment there"⁶⁸.

Family members are defined as⁶⁹:

- The spouse
- The partner with whom an EU citizen has contracted a registered partnership⁷⁰
- The direct descendants who are under the age of 21 or are still dependants
- The direct relatives in the ascending line of all the above mentioned.

In a presentation at the Annual Conference of ENFMW, held on 17 and 18 October 2013 in Vilnius, one of the experts from the ILO argued that there is a continuing tendency to treat third country national family members under the general immigration law rather than as persons with free movement rights under EU law⁷¹.

⁶³ 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 [2011] OJ L 343/1

⁶⁴ Article 1 (b) Directive 2011/98/EU

⁶⁵ Art 3(1) b juncto 12(1)a) Directive 2011/98/EU

⁶⁶ Art 3(1) c juncto 12(1)a) Directive 2011/98/EU

⁶⁷ Article 12 (2) and (3) Single Permit Directive - Directive 2011/98/EU

⁶⁸ Directive 2011/98/EU

⁶⁹ Article 2(2) Directive 2004/38/EC

⁷⁰ Only if the partnership was contracted on the basis of legislation of a Member State and the legislation of the host Member State treats registered partnerships as equivalent to marriage and in accordance with the conditions laid down in the relevant legislation of the host Member State

⁷¹ Annual Conference Freedom of Movement of Workers, Network Annual Report 2012-2013, presentation by Ryszard Cholewinski, Vilnius, 17 October 2013. PowerPoint presentation available at: <http://ec.europa.eu/social/main.jsp?catId=475&langId=en>

2.2.3. Long-term residents

Through **Directive 2003/109**⁷², the EU grants European resident status to non-EU nationals who have legally and continuously resided for a period of five years within the territory of an EU country. Persons who have acquired long-term resident status will enjoy equal treatment with EU nationals as regards, among other entitlements, access to paid and unpaid employment, conditions of employment and working conditions (working hours, health and safety standards, holiday entitlements, remuneration and dismissal). In certain cases, EU countries may restrict equal treatment with nationals with respect to access to employment and to education (e.g. by requiring proof of appropriate language proficiency)⁷³.

The European Commission noted, in a report on the application of Directive 2003/109/EC published in 2011⁷⁴, that the impact of the Directive in many Member States has been weak. It reported many deficiencies in the transposition of the Directive, such as the restrictive interpretation of the scope of the Directive, additional conditions for admission, illegal obstacles to intra-EU mobility and the watering down of the right of equal treatment and protection against expulsion.

2.2.4. Researchers

Article 12(b) of **Council Directive 2005/71/EC**⁷⁵ **on a specific procedure for admitting third country nationals for the purposes of scientific research**, grants equality of treatment to third country nationals in working conditions, including pay and dismissal.

The European Commission concluded, in a report on the application of Directive 2005/71/EC, published in 2011⁷⁶, that Member States have transposed most of the key elements of the Directive. However, it also reported that 17 countries made use of general anti-discrimination laws that prohibit discrimination on grounds such as sex and racial or ethnic origin, in order to implement the equal treatment provision of the Directive⁷⁷. It is questionable whether this would fully meet the requirements under the Directive.

2.2.5. Highly qualified workers

The **EU Blue Card Directive**⁷⁸ simplifies admission procedures for highly-skilled workers from outside the EU with a work contract or binding job offer in a Member State. It further allows these highly-skilled third country nationals to work in the sector concerned and enjoy equal treatment with nationals as regards working conditions, social security, pensions, recognition of diplomas, education and vocational training.

The deadline for transposition of this Directive was set as 19th June 2011. The Commission has only just started monitoring the number of third country nationals to whom an EU Blue

⁷² Council Directive 2003/109/EC concerning the status of third-country nationals who are long-term residents [2003] OJ L 16/44

⁷³ EU summaries of EU legislation, Status of non-EU nationals who are long-term residents, website. Available at: http://europa.eu/legislation_summaries/justice_freedom_security/free_movement_of_persons_asylum_immigration/l23034_en.htm

⁷⁴ European Commission, report on the application of Directive 2003/109/EC concerning the status of third-country nationals who are long-term residents, Brussels, 28.9.2011, COM(2011) 585 final

⁷⁵ Council Directive 2005/71/EC on a specific procedure for admitting third-country nationals for the purpose of scientific research [2005] OJ L 289/15

⁷⁶ European Commission, report on the application of Directive 2005/71/EC on a specific procedure for admitting third-country nationals for the purposes of scientific research, Brussels, 20.12.2011, COM(2011) 901 final

⁷⁷ European Commission, report on the application of Directive 2005/71/EC on a specific procedure for admitting third-country nationals for the purposes of scientific research, Brussels, 20.12.2011, COM(2011) 901 final, p. 7

⁷⁸ Council Directive 2009/50/EC on the conditions of entry and residence of third country nationals for the purposes of highly qualified employment [2009] OJ L 155/17

Card has been issued, renewed, withdrawn or refused (from 2013) and will report on the application of the Directive from 2014⁷⁹. From the data available to date, it appears that, in 2012, most EU Blue Cards were granted in Germany, Luxembourg, Austria and the Czech Republic⁸⁰.

2.2.6. Nationals of countries that have an agreement with the EU

Free movement of workers also applies to nationals of non-EU countries that have concluded an agreement with the EU which covers employment and equal treatment. CJEU case law has shown that third country nationals are no less equal than EU nationals if a non-discrimination provision in an association or cooperation agreement can be relied upon⁸¹.

The table below gives an overview of the bilateral agreements between EU Member States and third countries providing a right of equal treatment related to employment:

⁷⁹ http://europa.eu/legislation_summaries/internal_market/living_and_working_in_the_internal_market/l14573_en.htm

⁸⁰ <http://emn.intrasoft-intl.com/Newsletter/previewNews.do?id=22>

⁸¹ Bosman case (C-415/93), Kolpak case (C-438/00), Simutenkov (C-265/03), Kahveci case (C-152/08), Olympique Lyonnais case (C-325/08)

Table 2: Agreements providing a right of equal treatment related to employment

Third Country	Legal Basis	Scope / Conditions
EEA (Iceland, Liechtenstein and Norway)	EEA Agreement	The Directive 2004/38/EC has been incorporated into the EEA Agreement (Decision of the EEA Joint Committee N° 158/2007 of 7 December 2007.) EEA citizens have the right of free movement and residence across the European Economic Area, as long as they are not an undue burden on the country of residence and have comprehensive health insurance. This right also extends to close family members that are not EEA citizens. After five years, the right of residence becomes permanent, which means it no longer depends on any precondition.
Switzerland	Agreement between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other, on the free movement of persons [OJ L 114 of 30.4.2002]. ⁸²	The host State must accord foreign nationals the same living, employment and working conditions as those accorded to nationals. The Agreement provides protection against discrimination based on nationality. On 9 February 2014 Switzerland voted in favour of a referendum amending the country's constitution and obliging the government to set quotas for foreign citizens seeking to take up residence (and thus employment) in Switzerland. The Swiss government now has three years to do so. By doing so, Switzerland is breaching its freedom of movement agreement with the EU.
Turkey	Ankara Agreement ⁸³	Turkish nationals working legally in an EU country are also entitled to the same working conditions as the nationals of that country and receive some additional rights regarding access to employment depending on the amount of year's legal employment in the EU country.
Russia	Partnership and Cooperation Agreement (PCA) between EU and Russia ⁸⁴	Includes non-discrimination provision based on nationality with regards to working conditions, remuneration and dismissal.
Algeria, Morocco, Tunisia	Maghreb Agreements	Equal working conditions
Central and Eastern European Countries	CEEC Agreements	Equal working conditions

⁸² Decision 2002/309/EC, Euratom Decision of the Council, and of the Commission as regards the Agreement on Scientific and Technological Cooperation on the conclusion of seven Agreements with the Swiss Confederation [2002] OJ L 114/1

⁸³ Agreement establishing an Association between the European Economic Community and Turkey (Ankara, 12 September 1963) [1973] OJ 1973 C113/1 ("Ankara Association Agreement")

⁸⁴ Decision 97/800/EC on the conclusion of the Partnership and Cooperation Agreement between the European Communities and their Member States, of the one part, and the Russian Federation, of the other part [1997] OJ L 327/1

Third Country	Legal Basis	Scope / Conditions
(Albania, the former Yugoslav Republic of Macedonia, Montenegro)		
Andorra, San Marino	PCA with EU ⁸⁵	Equal working conditions

⁸⁵ European Commission, DG Employment, non-EU Nationals, website. Available at: <http://ec.europa.eu/social/main.jsp?catId=470>

2.2.7. Recent developments

The EU has recently adopted and is in the process of adopting new legislation affecting third country migrant workers.

In February 2014, the **Directive on conditions of entry and residence of seasonal workers from non-EU countries** was adopted⁸⁶. Under this Directive, seasonal workers will enjoy equal treatment with EU nationals in terms of employment, including the minimum working age, and working conditions (including pay and dismissal, working hours, leave and holidays), as well as health and safety requirements at the workplace. Because of the temporary nature of the stay of seasonal workers, Member States will not be obliged to apply equal treatment on unemployment and family benefits and will have the possibility of limiting equal treatment on tax benefits and on education and vocational training. Once implemented, seasonal workers will be able to enter the EU faster when there is a demand for their work, through a fast-track procedure and a single residence/work permit simplifying the rules currently applicable in EU States.

In addition, the Commission has proposed new EU legislation in two areas:

Conditions of entry and residence of non-EU nationals in the framework of an intra-corporate transfer⁸⁷: The proposed Directive would establish a common set of rules and requirements for companies outside the EU, and would improve access to global talent to meet staffing needs for managers, specialists and graduate trainees of EU companies. Under this Directive Intra-corporate transferees will also benefit from the same working conditions as posted workers whose employer is established within EU territory. The EMPL committee report is tabled for plenary adoption in April 2014.

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: The proposed Directive would repeal and replace existing Directives 2004/114/EC and 2005/71/EC. The Directive sets out obligatory provisions for the admission of non-EU national students; however, Member States remain free to apply these provision to school pupils, volunteers and unremunerated trainees. Under the Directive, students (having met certain conditions) are entitled to a residence permit and enjoy certain rights with regard to employment to cover part of the cost of their studies and move between different Member States to pursue their studies. The EP has adopted this position in first reading in February 2014; the amended proposal is currently being considered in Council.

Overall the protection from discrimination provided by EU law to third country nationals seems to be weaker than the protection to EU nationals. Although EU law is clear in granting third country nationals equal treatment in terms of working conditions, this is less clear in terms of social benefits, such as child benefits⁸⁸. There is no equal treatment with regards to access to employment (with the exception of Norway, Iceland and Liechtenstein under an EEA Agreement and with respect to asylum seekers) as EU law does not grant third country workers a right to freedom of movement within the EU.

⁸⁶ Directive 2014/36 on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers [2014] OJ L 094/375 28.03.2014, p. 0375

⁸⁷ Proposal for a Directive of the European Parliament and of the Council on the conditions of entry and residence of third-country nationals in the framework of an intra-corporate transferee, COM(2010) 378 final

⁸⁸ Study interview 25.03.2014

3. DEVELOPMENT OF MIGRANT EMPLOYMENT SINCE 2008

KEY FINDINGS

- Migration trends in the EU since 2008 have partially reflected changes in employment conditions in Member States. Generally speaking, Member States with relatively fewer employment opportunities have seen reduced inflows of migrants and vice-versa.
- However, migration flows have not always perfectly reflected differential employment opportunities between countries; migration is not only motivated by employment, but can be representative of economic differentials between countries.
- Different employment outcomes exist between native and foreign-born workers. As a result of the economic crisis, rates of employment have fallen and rates of unemployment have risen more steeply for foreign-born workers than native born workers (with a few exceptions), and mobile EU nationals have experienced better employment outcomes than third country nationals. Economic inequalities for migrants often take the form of lower employment participation, concentration in low skill sectors and lower incomes generally.

This chapter covers migration trends for mobile EU nationals and third country national migrants in the EU-27 countries from 2008-2012 who are included in statistical tables. Information regarding the motivation for migration is also available, but only for 2008. Employment, unemployment and self-employment rates between 2009 and 2011 are displayed with comparisons between mobile EU nationals and third country nationals.

3.1. Introduction and overview of migration and trends

The following section presents available statistical information on migration flows. The data is taken predominantly from **Eurostat** which collects data on an annual basis from the national statistical authorities of the EU Member States. Although methods for data collection vary and may use population registers, work permits, sample surveys or estimation methods, the data remains a useful resource as it is relatively consistent and complete.

In addition to administrative data about the flow of migration, data on **employment was also consulted**. The **Labour Force Survey (LFS)**, an annual survey of employment circumstances, was described by Eurostat⁸⁹ as a methodologically sound and reliable source of information as its collection has legal quality requirements, the precision of its estimates is well defined and it has a large sample size of approximately 1.5 million people, ensuring that the analysis is robust. However, these data sources do not provide direct examples of discrimination and are typically interpreted as giving a proxy measure.

To understand migrant employment in the EU, **migration trends offer insight as a proxy for changes in migrant employment**. Between 2008 and 2012, the number of foreign nationals in (the then) EU-27 countries increased by 3.8m (2.1m mobile EU nationals, 1.7m third country nationals). This represented a **0.8% increase in foreign nationals compared to the total population**. The table below shows a breakdown of migration in each Member States, in the EU-15 countries and the EU-27 region as a whole.

⁸⁹ Study interview 06.03.2014

Table 3: Population change for Foreign, Mobile European Union and Third country Nationals in the EU27, 2008-2012. Percentage values are accurate to 1 decimal place⁹⁰

Country	Foreign Nationals		Mobile EU Nationals		Third-country nationals	
	Change in population	Change compared to total population (%)	Change in population	Change compared to total population (%)	Change in population	Change compared to total population (%)
Belgium	256517	2.0%	119150	0.8%	137367	1.1%
Bulgaria	15105	0.2%	4431	0.1%	10674	0.2%
Czech Republic	75342	0.7%	19740	0.2%	55602	0.5%
Denmark	60408	1.0%	41721	0.7%	18687	0.3%
Germany	154359	0.2%	286705	0.4%	-132346	-0.1%
Estonia	-22263	-1.4%	6097	0.5%	-28360	-1.9%
Ireland	-10106	-0.6%	-15426	-0.6%	5320	0.0%
Greece	68989	0.6%	-7146	-0.1%	76135	0.6%
Spain	-26065	-0.4%	-23354	-0.2%	-2711	-0.2%
France	148481	0.1%	63354	0.1%	85127	0.1%
Italy	1427594	2.2%	515712	0.8%	911882	1.4%
Cyprus	52759	4.8%	27029	2.3%	25730	2.5%
Latvia	-82600	-2.0%	-1193	0.0%	-81407	-2.0%
Lithuania	-20085	-0.5%	297	0.0%	-20382	-0.5%
Luxembourg	23981	1.2%	21663	1.3%	2318	0.0%
Hungary	30994	0.3%	27063	0.3%	3931	0.0%
Malta	4842	1.1%	3986	0.9%	856	0.2%
Netherlands	97682	0.5%	97883	0.6%	-201	-0.1%
Austria	124097	1.3%	92991	1.1%	31106	0.3%

⁹⁰ Source: Eurostat, 'Population by sex, age group and citizenship,'
http://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=migr_pop1ctz&lang=en

Country	Foreign Nationals		Mobile EU Nationals		Third-country nationals	
	Change in population	Change compared to total population (%)	Change in population	Change compared to total population (%)	Change in population	Change compared to total population (%)
Poland	8406	0.0%	-6607	0.0%	15013	0.0%
Portugal	-7222	0.0%	-7861	-0.1%	639	0.0%
Romania	10731	0.1%	1043	0.0%	9688	0.0%
Slovenia	16934	0.8%	1966	0.1%	14968	0.7%
Slovakia	383191	7.1%	28098	0.5%	355093	6.6%
Finland	50425	0.9%	21066	0.4%	29359	0.5%
Sweden	130612	1.2%	35058	0.3%	95554	0.9%
United Kingdom	806231	1.1%	729328	1.1%	76903	0.0%
EU-15	3305983	0.8%	1970844	0.4%	1335139	0.3%
EU-27	3779339	0.8%	2082794	0.4%	1696545	0.4%

The table illustrates that trends in migration from 2008-2012 are far from homogenous across the Member States. **Migration flows can be representative of economic differentials between countries**, and there is recent evidence that this may be the case. Countries with adverse employment environments such as Ireland, Spain, and Portugal saw net decreases in mobile EU nationals, whereas countries less affected by the economic crisis, such as Germany, Austria and the UK, saw net increases in mobile EU nationals. The migration trends for third country nationals differ from these trends as their entry to EU Member States is determined by national policy approaches⁹¹.

General migration trends cannot completely explain migrant employment, since the **motivation to migrate is not always driven by employment**. The table below shows motivations for migration for 17 European countries in 2008:

⁹¹ Chaloff et al (2012) The impact of the economic crisis on migration and labour market outcomes of immigrants in OECD countries

Table 4: Percentage distribution of main reason for migration⁹²

Country of birth	Family reason	Education reason	Other reason	Job (job prior to migrating)	Job (no job prior to migrating)
Belgium	46%	7%	15%	12%	12%
Germany	44%	6%	15%	13%	8%
Ireland	24%	8%	15%	17%	33%
Greece	21%	2%	8%	5%	57%
Spain	30%	3%	10%	11%	46%
France	48%	14%	9%	7%	19%
Italy	34%	3%	3%	14%	46%
Cyprus	27%	6%	8%	31%	22%
Lithuania	33%	0%	37%	22%	0%
Luxembourg	38%	1%	14%	35%	9%
Netherlands	49%	8%	14%	8%	8%
Austria	39%	9%	6%	9%	24%
Portugal	39%	4%	14%	8%	33%
Sweden	46%	4%	11%	9%	5%
United Kingdom	31%	19%	12%	15%	17%
Norway	53%	6%	11%	6%	7%
Switzerland	35%	6%	14%	26%	14%

The Motivation to migrate is not systematically recorded by Eurostat; as a result, the information above (Table 4) is limited to a single year and does not distinguish mobile EU citizens from third country nationals. Nevertheless, it shows how migration trends do not perfectly match migrant employment. For instance, "Family reason" accounted for 53% of migration from Norway, 49% of migration from the Netherlands and 48% of migration from France in 2008. In addition, there is further evidence of economic differentials as a motivation for migration, as **countries with adverse employment environments were characterised by migration for employment with no job prior to migrating (speculative migration)** and vice-versa.

⁹² Eurostat: LFS (2008) Labour market situation of migrants

3.2. Effects of the economic crisis

Administrative data on migration flows and surveys about motivation for migration provide only an indirect indication of migrant employment during the economic crisis (2008 onwards). Eurostat has noted that **migration trends are not perfectly responsive to the business cycle**⁹³ as migration for employment only partially explains numbers migrating (Table 4).

This section examines employment and unemployment of migrants, distinguishing between mobile EU citizens and third country nationals where possible. In addition to statistical information available from Eurostat, further reports are available on employment of migrants since 2008. In agreement with our own research, a recent report from the **OECD**⁹⁴ was cited as an authoritative study in this area⁹⁵.

Recent data from Eurostat and the Labour Force Survey (LFS)⁹⁶ show differences for EU27 workers in employment and unemployment according to country of birth. Between 2007 and 2012, **native born persons in the EU27 had better employment and unemployment outcomes than foreign nationals and mobile EU nationals fared better than third country nationals**. The largest difference was between natives and third country nationals. Employment rates of third country nationals fell by 6% compared with 1% for natives and unemployment of third country nationals rose by 8.6% compared with 3.1% for natives. Related statistics are displayed below in Tables 5 and 6.

Table 5: Employment rates (%) of native born persons, mobile EU nationals, third country nationals and foreign born persons⁹⁷ (EU27 average)⁹⁸

	2007	2008	2009	2010	2011	2012	Change 2007-2012
Native born	65.5	66.0	64.8	64.4	64.5	64.5	-1.0
Mobile EU national	69.3	68.8	66.9	66.6	66.5	66.0	-3.3
Third Country National	63.1	63.4	59.6	58.9	58.1	57.1	-6.0
Foreign Born ⁹⁹	63.7	64.3	62.0	61.9	62.0	61.6	-2.1

⁹³ Study interview 06.03.2014

⁹⁴ Chaloff et al (2012) The impact of the economic crisis on migration and labour market outcomes of immigrants in OECD countries

⁹⁵ Study interview with FRA 07.03.2014

⁹⁶ http://epp.eurostat.ec.europa.eu/portal/page/portal/employment_social_policy_equality/migrant_integration/indicators

⁹⁷ Combined total of mobile EU nationals and third country nationals

⁹⁸ Source: Eurostat, Labour Force Survey

⁹⁹ Combined total of mobile EU nationals and third country nationals

Table 6: Unemployment rates (%) of native born persons, mobile EU nationals, third country nationals and foreign born persons (EU27 average)¹⁰⁰

	2007	2008	2009	2010	2011	2012	Change 2007-2012
Native born	6.8	6.6	8.4	9.1	9.1	9.9	3.1
Mobile EU national	7.3	7.9	11.2	11.9	12.3	13.4	6.1
Third Country National	11.1	11.7	16.5	17.4	18.2	19.7	8.6
Foreign Born	11.1	11.0	14.4	14.7	14.8	15.6	4.5

Whilst migration trends and motivations to migrate can be taken as a proxy for developments in migrant employment in a geographical sense, they do not perfectly inform the current status or situation of migrants in employment. Findings from the Labour Force Survey provide a more precise indication of trends in employment and unemployment according to country of birth, but alone they can only be taken as an indirect indicator of discrimination against migrants in the labour market (if at all).

Apart from the previously mentioned OECD report¹⁰¹ there is also anecdotal evidence suggesting that **migrants may have fared differently to indigenous EU populations during the economic crisis**, although the available evidence does not always provide a link between inequalities and economic crisis, but simply makes the assumption of the link.

For example, a sociological analysis in Estonia found non-Estonians were more likely than Estonians to be unemployed, in lower level positions, have lower job security and have a larger discrepancy between educational attainment and job requirements pre-crisis¹⁰². In 2009, a small survey of 200 clerical and manual workers in Milan found inequality between migrants and non-migrants despite equivalence in qualifications and other criteria¹⁰³. An assessment of recent Accession 8 (A8) migrants¹⁰⁴ in 2009 found Polish immigrants in the UK were employed in very low paying jobs despite relatively high levels of education¹⁰⁵. This trend in inequality was also noted during the previous economic period (2003-2008) by FRA. They reported lower employment participation, concentration in low skill sectors, higher unemployment and lower incomes generally¹⁰⁶.

¹⁰⁰ Source: Eurostat, Labour Force Survey

¹⁰¹ Chaloff et al (2012) The impact of the economic crisis on migration and labour market outcomes of immigrants in OECD countries

¹⁰² K. Kasesaru, A. Trumm A. (2008) 'The Socio-economic Situation of Non-Estonians', in: M. Heidmets (ed.) Estonian Human Development Report 2007, Tallinn, pp. 34-35. The sociological analysis was based on official statistical data from previous years

¹⁰³ Z. Dazzi (2009) 'I lavoratori immigrati pagati il 20 % in meno', in La Repubblica. Available at <http://ricerca.repubblica.it/repubblica/archivio/repubblica/2009/06/17/lavoratori-immigrati-pagati-il-20-in.html> (Accessed 13.03.2014)

¹⁰⁴ <http://www.migrationobservatory.ox.ac.uk/glossary/term/47>

¹⁰⁵ Drinkwater, S., Eade, J., & Garapich, M. (2009). Poles apart? EU enlargement and the labour market outcomes of immigrants in the United Kingdom. *International Migration*, 47(1), 161-190.

¹⁰⁶ FRA (2010d), Chapter 2: Migrants, minorities and employment: Exclusion and discrimination in the 27 Member States of the European Union. Update 2003-2008

In addition to economic inequalities at national level, there is also evidence of differential outcomes for migrants following the economic crisis at EU27 level. **Unemployment rates among foreign-born individuals increased faster than among the native-born in all EU countries from 2008-2010, except in the UK¹⁰⁷**, and quotas on third country national migrants were reduced in many Member States from 2008-2010. Both contributed to more limited migrant access to more developed European labour markets¹⁰⁸.

The employment situation for migrants across the EU at face value appears to be worse than for non-migrants. However, there are a number of contextual considerations to explain the differences. One of the key issues is the **concentration of migrants in sectors which are vulnerable to the business cycle**, such as agriculture, wholesale, construction and hotels/restaurants¹⁰⁹. Migrant workers are also highly concentrated in the public sector, and budget cuts following economic recession have led to reduced employment in this sector¹¹⁰. Native workers by comparison are more often found in stable sectors of employment¹¹¹. The result is that **migrants tend to be in a favourable position to gain employment during a period of economic stability and growth, but more vulnerable during recession**. The ETUI described migrant workers as acting like a labour market buffer¹¹². As an illustration, between 1997 and 2006, 71% of employment growth in the UK and 40% in Austria, Denmark, Italy and Spain were accounted for by foreign-born migrants¹¹³.

Economic inequalities can be perpetuated by the nature of migration itself. Reasons for migrant over-qualification can be uncertainty in length of stay, problems with skill transferability and language barriers¹¹⁴. Other variables such as **nepotism and social networks** (from which nationals benefit disproportionately) can also contribute to economic inequalities for migrants but these factors are indirect or structural rather than representing direct discrimination. The employment environment in the EU has changed dramatically for migrants and natives alike from a favourable position to a more adverse one¹¹⁵. However, mobile EU nationals have been in a better position than third country nationals who saw quota reductions across the majority of Member States (such as the UK¹¹⁶), whilst mobile EU nationals experience no such restraints and can respond more readily to the supply and demand characteristics of the labour market.

¹⁰⁷ Chaloff, Dumont & Liebig (2012) The impact of the economic crisis on migration and labour market outcomes of immigrants in OECD countries

¹⁰⁸ Chaloff, Dumont & Liebig (2012) The impact of the economic crisis on migration and labour market outcomes of immigrants in OECD countries

¹⁰⁹ OECD (2009) International migration and the economic crisis: understanding the links and shaping policy responses

¹¹⁰ ENAR 2012/2013 Racism and discrimination in employment in Europe: Shadow Report

¹¹¹ Dustmann et al (2009) Employment, wages, and the economic cycle: differences between immigrants and natives, IZA Discussion Papers, No: 4432. <http://ftp.iza.org/dp4432.pdf> (Accessed 13.03.14)

¹¹² Study interview 28.02.2014

¹¹³ OECD (2009) International migration and the economic crisis: understanding the links and shaping policy responses

¹¹⁴ Drinkwater, S., Eade, J., & Garapich, M. (2009). Poles apart? EU enlargement and the labour market outcomes of immigrants in the United Kingdom. International Migration, 47(1), 161-190

¹¹⁵ http://epp.eurostat.ec.europa.eu/statistics_explained/index.php/Unemployment_statistics

¹¹⁶ http://www.conservatives.com/Policy/Where_we_stand/Immigration.aspx

4. DISCRIMINATION THROUGHOUT THE LIFECYCLE OF MIGRANT EMPLOYMENT

KEY FINDINGS

- Migrants are often concentrated in sectors vulnerable to the business cycle and those affected by budget cuts following an economic recession, whereas native workers are more often found in stable sectors of employment.
- The risks of discriminating against migrant workers vary not only between Member States, but also between business sectors, some of which might not be subject to regular employment law, with a high risk of low remuneration and exploitation. In addition, some subsets of migrant workers are found to be particularly vulnerable to discrimination, such as low-skilled female third country nationals.
- Fear of employer sanctions due to employees making complaints or taking sick leave are more general risk factors for discrimination of migrants, as is the risk of exploitation by employers in the informal economy. However, many of the risk factors for discrimination are not exclusive to migrant workers and are also present for native workers, albeit to a lesser extent.
- Migrant workers play a role as a labour market buffer in economic cycles: they are more readily hired in periods of growth but more vulnerable to layoffs during periods of recession. This is partially explained by the nature of migrant employment which tends to be concentrated in sectors which are highly sensitive to the economic cycle.
- Evidence from numerous different sources and data types reveals discrimination against migrant workers at all stages of the employment lifecycle. Evidence for discrimination during hiring and while in work tends to be more abundant and of better quality than discrimination against migrant workers in layoffs, as this is often taken as a proxy for other indirect measures of discrimination. Disentangling direct and indirect discrimination in layoffs is very difficult as a result.
- In addition, there is also evidence for positive discrimination towards migrant workers, who as a self-selected minority sometimes create a reputation for being industrious and ambitious.
- There are multiple European-wide studies evidencing discrimination in the workplace itself and some national studies also link workplace discrimination with the economic crisis; however, this effect appears to have diminished compared with previous economic crises. The literature also frequently highlights that low skilled migrant workers are particularly vulnerable to workplace discrimination.

The following section provides a typology of discrimination as understood in the context of this note, addresses evidence of discrimination against migrants within the EU and presents a preliminary analysis of risk factors for discrimination¹¹⁷. The section then explores

¹¹⁷ Research included numerous sources of information. A complete list of sources can be found appended to this report. Literature was reviewed from overarching European institutions such as the International Labour Organisation (ILO), The European Union Fundamental Rights Agency (FRA), Eurostat, the European Trade Union Institute (ETUI) and the European Network Against Racism (ENAR). Academic and grey literature was

discrimination against migrants prior to and during the economic crisis in three aspects of the employment lifecycle. The first aspect is the **hiring process** with a focus on the behaviour of employers and how they may discriminate against migrant applicants. The second aspect is **working conditions** whilst in employment, where discrimination may be through colleagues (at various levels of seniority), clients or customers, the physical environment or differential treatment (such as lower remuneration or longer working hours). The third and final aspect is **layoffs** with a focus on whether migrant status contributes to the probability of being fired.

The section reviews primary and secondary data sources, including academic publications (reviews and single studies), surveys (local, national and international), longitudinal data sets (national and international) and reviews from European institutions.

4.1. Typology of discrimination

There are numerous definitions of discrimination (direct and indirect), which will be described in further detail below.

4.1.1. Direct discrimination

EU non-discrimination legislation¹¹⁸ and CJEU case law define the concept of direct discrimination as the situation where one person is treated less favourably than another person is, has been or would be treated in a comparable situation, on any of the protected grounds.¹¹⁹ According to FRA, direct discrimination occurs when (1) an individual is treated unfavourably, (2) by comparison to how others, who are in a similar situation, have been or would be treated, (3) and the reason for this is a particular characteristic they hold, which falls under a 'protected ground'¹²⁰. The European Court of Human Rights uses the formulation that there must be a 'difference in the treatment of persons in analogous, or relevantly similar, situations', which is 'based on an identifiable characteristic'¹²¹. Eurofound defines discrimination as "different treatment of individuals or groups based on arbitrary ascriptive or acquired criteria"¹²².

Thus, at the heart of **direct discrimination lies the different treatment to which an individual is subject**. Direct discrimination is best evidenced by unfavourable treatment (such as receiving a lower pay) when assessed against a comparator (someone performing a similar task for the same employer) and finally showing a causal link between the less favourable treatment and the protected ground (nationality)¹²³.

also searched. To complement the desk research, a small number of expert interviews were conducted with senior representatives working at FRA, ENAR, ETUI and Eurostat.

¹¹⁸ Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin [2000] OJ L 180/22 and Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation [2000] OJ L 303/16

¹¹⁹ Although the non-discrimination Directives do not include nationality as a protected ground (rather it prohibits discrimination in the context of employment on the grounds of racial/ethnic origin, religion or belief, disability, age or sexual orientation), CJEU case law has used similar criteria for identifying indirect and direct discrimination with regards to nationality. See, for example, Giovanni Maria Sotgiu v Deutsche Bundespost, (C-152/73) and John O'Flynn v Adjudication Officer, (C-237/94).

¹²⁰ FRA, Handbook on European non-discrimination law, 2010.

¹²¹ ECtHR, Carson and Others v. UK [GC] (No. 42184/05), 16 March 2010; para. 61; ECtHR, D.H. and Others v. the Czech Republic [GC] (No. 57325/00), 13 November 2007, para. 175; ECtHR, Burden v. UK [GC] (No. 13378/05), 29 April 2008, para. 60.

¹²² <http://www.eurofound.europa.eu/areas/industrialrelations/dictionary/definitions/discrimination.htm>

¹²³ FRA, Handbook on European non-discrimination law, 2010, pp. 22-29.

4.1.2. Indirect discrimination

EU non-discrimination legislation¹²⁴ and CJEU case law define the concept of indirect discrimination as the situation where an apparently neutral provision, criterion or practice would put persons having a particular religion or belief, a particular disability, a particular age, or a particular sexual orientation at a particular disadvantage compared with other persons.¹²⁵ According to FRA, indirect discrimination occurs when (1) a neutral rule, criterion or practice (2) affects a group defined by a 'protected ground' in a significantly more negative way, (3) by comparison with others in a similar situation¹²⁶. The ECtHR defines indirect discrimination as 'disproportionately prejudicial effects of a general policy or measure which, though couched in neutral terms, discriminates against a group'¹²⁷.

Thus, for indirect discrimination, **it is not the treatment that differs but rather the effects of that treatment** and these effects are different for people with different characteristics. In order to substantiate indirect discrimination, firstly a neutral rule, criterion or practice is needed which is applied to everyone (such as different pay for part-time workers); secondly, this rule, criterion or practice must be shown to disadvantage a 'protected group' (migrant workers); and, thirdly, these effects must be compared with a comparator group to show that the effect of the particular rule, criterion or practice is considerably more negative than those experienced by others in a similar situation.¹²⁸

More specific examples of discrimination across the employment lifecycle (hiring, working and layoffs) are required to understand how the indirect statistical indicators, MIPEX index scores for anti-discrimination and risk factors for discrimination may translate into actual incidents of discrimination in the workplace. This is especially important given evidence that **many migrants (39%) are not aware of the existence of legislation forbidding discrimination in job applications** and may fail to report it as a result¹²⁹.

4.2. Evidence of discrimination

Although there are anecdotal suggestions of discrimination against migrants leading to inequalities and changes in migration trends, this information alone can provide only an indirect indicator of discrimination against migrant workers. As stated above, non-discrimination on the basis of nationality of migrant workers is a fundamental aspect of EU freedom of movement legislation¹³⁰, so understanding differences in discrimination rates at Member State level is extremely important. The Migrant Integration Policy Index (MIPEX) measures migrant integration in Member States in social and civic terms and gives a general overview on various measures of international integration. This anti-discrimination index is based on the extent of coverage of definitions and concepts, fields of application,

¹²⁴ Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin [2000] OJ L 180/22 and Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation [2000] OJ L 303/16

¹²⁵ Although the non-discrimination Directives do not include nationality as a ground for protection (rather it prohibits discrimination in the context of employment on the grounds of racial/ethnic origin, religion or belief, disability, age or sexual orientation), CJEU case law has used similar criteria for identifying indirect and direct discrimination with regards to nationality. See, for example, Giovanni Maria Sotgiu v Deutsche Bundespost, (C-152/73) and John O'Flynn v Adjudication Officer, (C-237/94).

¹²⁶ FRA, Handbook on European non-discrimination law, 2010.

¹²⁷ CtHR, D.H. and Others v. the Czech Republic [GC] (No. 57325/00), 13 November 2007, para. 184; ECtHR, Opuz v. Turkey (No. 33401/02), 9 June 2009, para. 183; ECtHR, Zarb Adami v. Malta (No. 17209/02), 20 June 2006, para. 80.

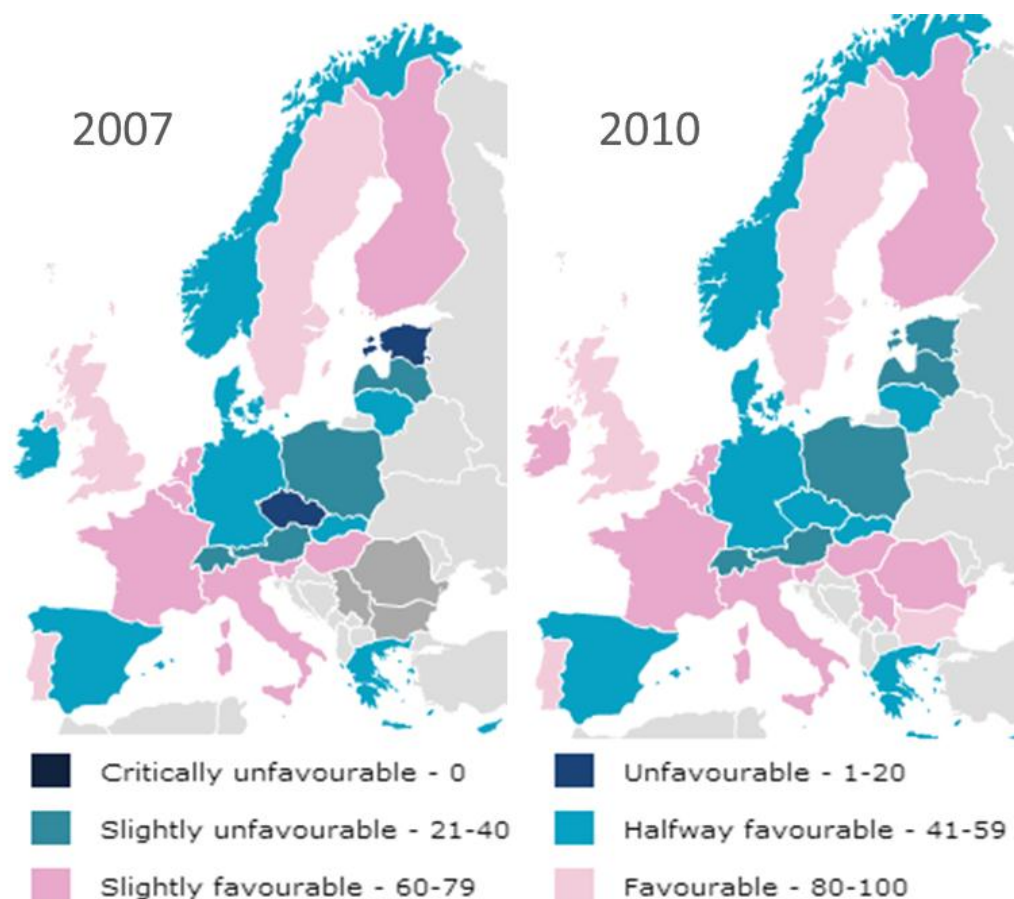
¹²⁸ FRA, Handbook on European non-discrimination law, 2010, pp. 29-31.

¹²⁹ FRA (2009) EU-MIDIS European Union Minorities and Discrimination Survey

¹³⁰ Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin [2000] OJ L 180/22 and Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation [2000] OJ L 303/16

enforcement mechanisms and equality policies. The map below shows anti-discrimination scores for each Member State in 2007 and 2010.

Map 1: MIPEX anti-discrimination scores in the EU in 2007 and 2010



Source: www.mipex.eu

The MIPEX map shows the extent of variance in social and civic anti-discrimination application across the EU, with scores ranging from 18 (Estonia, 2007) to 88 (Sweden 2007, 2010). Whilst this is not wholly positive, an interesting aside is that **all Member States either matched or improved on their anti-discrimination scores between 2007 and 2010** suggesting improvement over time. Given the variance in these scores, the risk of discrimination against migrants can therefore be assumed to vary between Member States. Discrimination risk varies not only between Member States, but also between different groups of migrants and according to business sector.

4.3. Vulnerable Migrant Groups

The risk of discrimination for migrant workers in the EU varies according to certain criteria or risk factors. This section examines how the risk of discrimination varies according to sector of employment, gender and ethnicity, employment skills, nature of employment contract, 'visibility' of ethnicity and socio-economic status. It is especially important to understand these (sometimes multiple) vulnerabilities to discrimination in periods of economic crisis as it may exacerbate existing challenges to labour market access. This section will illustrate multiple discrimination.

4.3.1. Sectors

Migrant workers tend to be disproportionately employed in sectors most affected by the business cycle as they have relatively precarious working arrangements¹³¹. **Female migrants are disproportionately represented in domestic care**, a labour market which is often not subject to regular employment law, with high risks of low remuneration and exploitation. For instance, in the UK, au pairs (often female migrants) do not have access to the national minimum wage. In Eastern Europe, 45% of domestic employees are excluded from the scope of labour laws¹³². Discrimination risk varies greatly according to these contextual variables. The risks for a highly skilled male migrant executive are unlikely to be the same as a low skilled female migrant au pair. Female migrants are therefore sometimes at risk of double or triple discrimination (age, gender and/or ethnicity)¹³³.

4.3.2. Gender and Ethnicity

One of the difficulties in assessing discrimination risk for female migrants is a result of the lack of research on female migrants in the context of employment. Research on female migrants has focused on other (more traditional) issues such as family planning¹³⁴. Nevertheless, there is **some evidence of double discrimination risk in a variety of contexts**.

Female mobile EU nationals and third country nationals tend to be more overqualified for their positions than male EU-migrants¹³⁵. This difference is also observed as a double wage gap¹³⁶. Furthermore, **third country national female migrants have been found to be the least well integrated migrant group**¹³⁷. While these observations of inequalities are not themselves examples of discrimination, they serve to illustrate differences in outcomes and potential risks for migrant workers; in particular the different vulnerabilities or risks to which different migrant subsets are exposed. The large scale FRA survey of 23,500 immigrants/ethnic minorities in the EU27 countries found that 'visible' minorities (who look visually different) feel discriminated against more frequently and that women experienced more gender discrimination than men¹³⁸. Discrimination (based on perceived or indirect indicators) is observed to vary according to a number of variables. There is evidence for multiple discrimination risk according to gender, migrant status (intra-EU or third country national), being a 'visible' ethnic minority and even socio-economic status¹³⁹. **Therefore, describing discrimination risk is not straightforward as contextual variables interact**. For instance, the 'visibility' of a migrant's ethnicity will vary according to the skin, hair and eye colours of the native population. However, there is some consensus on the extent of vulnerability where migrant status and gender is concerned; third country nationals tend to be exposed to more risk than intra-EU migrants and females are exposed to more risk than males.

¹³¹ OECD (2009) International migration and the economic crisis: understanding the links and shaping policy responses

¹³² ILO (2013) Domestic workers across the world: Global and regional statistics and the extent of legal protection

¹³³ Eurostat (2011) Migrants in Europe

¹³⁴ Curran & Saguy. 2001. "Migration and Cultural Change: A Role for Gender and Social Networks." Journal of International Women's Studies 2(3):54–77.

¹³⁵ Eurostat (2011) Migrants in Europe

¹³⁶ Ruwanpura (2008) Multiple identities, multiple-discrimination: a critical review, Feminist Economics, 14(3), 77–105

¹³⁷ Gallotti & Mertens (2013) Promoting integration for migrant domestic workers in Europe: A synthesis of Belgium, France, Italy and Spain

¹³⁸ FRA (2011) EU MIDIS: Data in Focus Report: Multiple Discrimination

¹³⁹ FRA (2011) EU MIDIS: Data in Focus Report: Multiple Discrimination

4.3.3. Low-skilled workers

As illustrated above, migrants can be exposed to risks of discrimination on one or more grounds based on their own demographic characteristics. There are also risk factors to which migrant workers are exposed in a more general sense. A pre-crisis publication by FRA (2005) found that migrants were disproportionately grouped in the lowest occupational categories in the labour market within a restricted number of sectors (potentially as a result of discrimination) and that these workers rarely made formal complaints for fear of sanctions by employers¹⁴⁰. In addition, the **current understanding of discrimination from formal complaints also underestimates the frequency of discrimination as most cases remain unreported**. Some migrant workers may therefore be at risk of discrimination without protection.

Fear of employer sanctions also reveals itself in other ways for migrant workers. An example of its manifestation is by observing rates of presenteeism. Research from Spain¹⁴¹ found sickness presenteeism (i.e. attending work whilst sick) was higher among foreign born workers (and was negatively correlated with period of residence in Spain). The behavioural patterns of migrant workers help to illustrate how precarious employment, low salary and poor ease of access to social benefits could contribute to worse health outcomes for migrant workers. However, in this instance, the lowest income Spanish cohort actually showed higher presenteeism than the average immigrant worker who had been in the country less than two years. The **risk of discrimination** in this case may not be limited only to migrant workers, but also **to workers who have difficulty demanding labour rights or have poor knowledge of social protection**. Therefore, the risk of discrimination here could be attributed to the typical characteristics of migrant employment rather than migrant status alone.

Another facet of discrimination faced by migrant workers is the risk of exploitation by employers in the informal economy. There is extensive research and evidence well summarised in a review by FRA¹⁴² which explains the problem in the context of irregular migrants and the regularisation process. The common sectors in the informal economy (in which regular migrants are also over-represented¹⁴³) typically offer employment which has low profitability, (often) sub minimal wages, is least rewarding and physically the most strenuous. FRA reports that **in these sectors there is a risk that forced labour and coercion can often follow**¹⁴⁴. Again, the risk is likely to be higher for women as they are over-represented in this sector¹⁴⁵.

The remainder of this chapter examines discrimination against migrant workers more closely within the context of three stages of the employment lifecycle, namely hiring, working conditions and layoffs.

4.4. Hiring

OECD predictions are that the economic crisis is likely to have had a significant impact on labour migration policies, including in the EU Member States. The magnitude of the impact is expected to vary between countries, depending on the extent of labour curbing policies, labour culture and the legislative framework in place. The OECD recognises that "some

¹⁴⁰ FRA (2005) Racism and Xenophobia in the EU Member States: Annual report 2005

¹⁴¹ EWCO (2011) Sick immigrant workers more likely to go to work, Accessed 28.02.2014: <http://www.eurofound.europa.eu/ewco/2011/06/ES11060111.htm>

¹⁴² FRA (2012) Regularisations - an instrument to reduce vulnerability, social exclusion and exploitation of migrants in an irregular situation in employment?

¹⁴³ ENAR (2009) The social and employment dimensions of the EU's Lisbon strategy for growth and jobs

¹⁴⁴ FRA (2012) Regularisations - an instrument to reduce vulnerability, social exclusion and exploitation of migrants in an irregular situation in employment?

¹⁴⁵ UNRISD (2010) "Gender Inequalities at Home and in the Market." Assignment: Chapter 4, pp. 5-33

countries are thus better equipped than others to adjust their labour migration to short-term economic shocks”¹⁴⁶. The OECD has also observed that, in **countries where the crisis started sooner, there are larger increases in unemployment rates and decreases in employment rates of immigrants** both in absolute and relative terms compared with native born persons¹⁴⁷.

This is in line with FRA’s observational studies (concluded in 2008) which find that minorities and migrants tend to experience lower employment rates than non-migrants¹⁴⁸. This finding can be taken as a proxy for discrimination in hiring (especially in studies which control for other relevant criteria^{149 150}), but does not differentiate as to whether this is direct or indirect discrimination.

4.4.1. Structural barriers to employment (indirect discrimination)

It is widely recognised in the current literature that female migrants tend to perform worse than male migrants in the labour market¹⁵¹, and this is partially attributed to discrimination by employers on grounds of migrant status or gender. In addition to higher rates of unemployment, a 2008 study found that **migrant women also have lower labour force participation rates which were partially attributed to lower access to work-life balance arrangements and/or childcare**¹⁵². This may be partially explained by cultural barriers which act as a structural or indirect barrier to the hiring process.

Furthermore, migrants can experience discrimination in a less explicit or direct way. A recent report from ENAR¹⁵³ found that **a lack of social networks can be a hindrance in cases where recruitment is informal and not advertised outside of friends and relatives of existing employees**, restricting access to employment opportunities. A failure to recognise foreign qualifications and an emphasis on having a grasp of the native language can also pose indirect structural barriers for migrants entering the labour market. The same report found that these structural problems have recently been exacerbated by budget cuts to integration measures and language courses, examples of what is described as administrative discrimination.¹⁵⁴ Therefore, these additional instances can be classified as indirect discrimination for migrant workers.

4.4.2. Direct discrimination

In the context of the hiring stage of employment, migrants can experience direct negative and positive discrimination. There are numerous current studies (from France, Germany and from the FRA) indicating negative discrimination towards migrant workers. This often takes a direct form revealed by practical experiments in which job applications are sent using Curricula Vitae (CVs) which are identical in all but name, using either foreign-sounding or native-sounding names. Native-name CVs have been found to yield an

¹⁴⁶ OECD (2009) Chapter 1 International Migration and the Economic Crisis: Understanding the Links and Shaping Policy Responses

¹⁴⁷ OECD (2009) Chapter 1 International Migration and the Economic Crisis: Understanding the Links and Shaping Policy Responses

¹⁴⁸ FRA (2010d), Chapter 2: Migrants, minorities and employment: Exclusion and discrimination in the 27 Member States of the European Union. Update 2003-2008.

¹⁴⁹ Kaas, L., & Manger, C. (2012) Ethnic discrimination in Germany's labour market: a field experiment. German Economic Review, 13(1), 1-20

¹⁵⁰ E. Cediey & F. Foroni (2008) Discrimination in access to employment on grounds of foreign origin in France A national survey of discrimination based on the testing methodology of the International Labour Office

¹⁵¹ Ruwanpura (2008) Multiple identities, multiple-discrimination: a critical review, Feminist Economics, 14(3), 77-105

¹⁵² <http://www.eurofound.europa.eu/ewco/2008/11/EU0811029I.htm>

¹⁵³ ENAR 2012/2013 Racism and discrimination in employment in Europe: Shadow Report

¹⁵⁴ ENAR 2012/2013 Racism and discrimination in employment in Europe: Shadow Report

interview more often than foreign-name CVs in Germany¹⁵⁵, Belgium, France (sector dependent)¹⁵⁶, Ireland and the Netherlands¹⁵⁷. However, in the German experiment, the researchers found that this example of direct discrimination disappeared when the CV was accompanied by references. Negative discrimination has also been found through surveys of migrant workers (studies from Spain¹⁵⁸, England¹⁵⁹ and by the FRA¹⁶⁰).

The OECD stated that “delaying or cutting back on integration measures during an economic downturn may have negative long-term implications for integration of immigrants and social cohesion”¹⁶¹ and therefore recommended that OECD countries should:

- maintain, if not strengthen, their migrant labour integration programmes
- reinforce their efforts to fight discrimination
- ensure that active labour market policies reach new entrants into the labour market, including recent immigrants, and workers displaced from declining industries¹⁶².

Despite evidence that direct discrimination can contribute towards reduced hiring opportunities, there are also instances in the EU where migrant workers receive **direct positive discrimination at point of hiring**. As a typically self-selected minority, migrant workers can create a reputation for being industrious and ambitious, a reputation which is corroborated by economic evaluations of tax contributions or evaluations of the ‘business case’ for immigration¹⁶³. A report from the UK using employer surveys and case studies found employers reporting favourably about hiring migrant workers. They also found evidence of overt favouring of migrant workers, with employers expecting a greater pay off¹⁶⁴. In addition, some sectors are poorly regulated (i.e. construction in the UK), which facilitates migrants’ access into this sector. **Discrimination with regard to migrant workers can be positive, and in this case may actually improve hiring opportunities.**

4.5. Working conditions

There are multiple studies evidencing discrimination in the workplace itself and some national studies linking workplace discrimination with the economic crisis (UK and case studies in Denmark, Finland, Germany, Poland, Portugal and Romania). The literature also frequently highlights that low skilled (migrant) workers are more vulnerable to workplace discrimination.

A survey of 5,635 health care students in Denmark found **non-Western immigrant health care workers were at greater risk of being bullied at work than Danish respondents**, including during education and training periods, an example of what could

¹⁵⁵ Kaas, L., & Manger, C. (2012) Ethnic discrimination in Germany's labour market: a field experiment. *German Economic Review*, 13(1), 1-20

¹⁵⁶ E. Cediey & F. Foroni (2008) Discrimination in access to employment on grounds of foreign origin in France A national survey of discrimination based on the testing methodology of the International Labour Office

¹⁵⁷ FRA (2011) Respect for and protection of persons belong to minorities 2008-2010

¹⁵⁸ Agudelo-Suarez et al (2011) The effect of perceived discrimination on the health of immigrant workers in Spain

¹⁵⁹ Cook, Dwyer & Waite (2011) The experiences of accession 8 migrants in England: motivations, work and agency

¹⁶⁰ FRA (2011) Respect for and protection of persons belong to minorities 2008-2010

¹⁶¹ OECD (2009) Chapter 1 International Migration and the Economic Crisis: Understanding the Links and Shaping Policy Responses

¹⁶² OECD (2009) Chapter 1 International Migration and the Economic Crisis: Understanding the Links and Shaping Policy Responses

¹⁶³ ENAR (2013) Hidden talents, wasted talents? The real cost of neglecting the positive contribution of migrants and ethnic minorities

¹⁶⁴ CIPD (2013) The State of Migration: Employing migrant workers

be described as direct discrimination¹⁶⁵. Research documenting specific incidents of discrimination among health care workers in the UK found similar results, giving qualitative descriptions of incidents relating to direct discrimination from both staff and residents towards migrant workers¹⁶⁶. The report also found examples of migrant workers being contracted into anti-social working-hours arrangements, such as requirements to work at the weekend where native workers had time off. Surveys on perceived discrimination in Southern Europe found that immigrants who reported discrimination (direct or indirect) were at significantly higher risk of reporting health problems (which is suggested as a contributor to perpetuating health inequalities for migrants more generally)^{167 168}.

An investigation into the African community in France found **1/3 of the wage gap was not explained by differences in usual covariates such as age and experience**¹⁶⁹. However, there is also evidence that this can sometimes be a failure to capture a full return on human capital (issues with skill transferability) which could be described as indirect rather than direct discrimination¹⁷⁰. Migrants do appear to be at risk of discrimination in the workplace, which can have a negative impact on both health and earnings. Higher levels of discrimination in some Member States may also contribute to changes in patterns of migration, i.e. migrants in the EU are attracted to Member States where discrimination is deemed low. A survey of migrants from Member States joining the EU in 2004¹⁷¹ found that the motivation to migrate to the UK was sometimes to get away from high levels of discrimination experienced in other Member States¹⁷². This highlights the importance of anti-discrimination practices to facilitate immigration and attract migrant workers from other countries where discrimination is more prevalent.

Workplace discrimination is also present in sectors or areas of the labour market which are less well regulated. A trade union report from Slovenia found irregularities relating to work contracts and health and safety in the workplace. **Migrant workers were more likely to be refused a job due to migrant status and, if they were offered a contract, it was more likely to be for a fixed duration**¹⁷³. Reports from Malta found that migrant workers subcontracted to a government institution received lower salaries than Maltese workers, and further anecdotal evidence suggests that poor pay and work standards are commonplace in the Maltese construction sector¹⁷⁴. These are both clear examples of direct discrimination against migrant workers, which show that poor regulation also means that migrants have less opportunity to progress and can be subject to discrimination and poor working conditions once in employment.

¹⁶⁵ Høgh, A., Carneiro, I. G., Giver, H., & Rugulies, R. (2011). Are immigrants in the nursing industry at increased risk of bullying at work? A one-year follow-up study. *Scandinavian journal of psychology*, 52(1), 49-56

¹⁶⁶ Stevens, M., Hussein, S., & Manthorpe, J. (2012). Experiences of racism and discrimination among migrant care workers in England: findings from a mixed-methods research project. *Ethnic and Racial Studies*, 35(2), 259-280

¹⁶⁷ Agudelo-Suárez, A., Ronda-Pérez, E., Gil-González, D., Vives-Cases, C., García, A., Ruiz-Frutos, C & Benavides, F. (2011). The effect of perceived discrimination on the health of immigrant workers in Spain. *BMC public Health*, 11(1), 652

¹⁶⁸ Borrell, C., Muntaner, C., Gil-González, D., Artazcoz, L., Rodríguez-Sanz, M., Rohlf, I. & Álvarez-Dardet, C. (2010). Perceived discrimination and health by gender, social class, and country of birth in a Southern European country. *Preventive medicine*, 50(1), 86-92.

¹⁶⁹ Aeberhardt, R., Fougère, D., Pouget, J., & Rathelot, R. (2010). Wages and employment of French workers with African origin. *Journal of Population Economics*, 23(3), 881-905.

¹⁷⁰ Barrett, A., McGuinness, S., & O'Brien, M. (2012). The immigrant earnings disadvantage across the earnings and skills distributions: the case of immigrants from the EU's new member states. *British Journal of Industrial Relations*, 50(3), 457-481

¹⁷¹ <http://www.migrationobservatory.ox.ac.uk/glossary/term/47>

¹⁷² Cook, J., Dwyer, P., & Waite, L. (2011). The experiences of accession 8 migrants in England: motivations, work and agency. *International Migration*, 49(2), 54-79

¹⁷³ <http://www.eurofound.europa.eu/ewco/2010/11/SI1011021I.htm> 10.03.14

¹⁷⁴ <http://www.eurofound.europa.eu/eiro/2013/10/articles/mt1310029i.htm> 10.03.14

In addition to incidents of worse remuneration and working conditions, **there are also suggestions of insufficient legislative protection for migrant workers.** Rapid labour market expansion in Austria without legislative change has led to an example of a perverse incentive for employers. Companies have been placed in a position where they are incentivised to withhold their payment records (of employees) as doing so incurs a smaller fine than direct evidence of payment of subminimum wages to migrant workers¹⁷⁵. The legislative barrier to payment of subminimum wages was not sufficient to prevent direct discrimination in this case. **Rapid labour market expansion has also presented opportunities for illegal activities outside current legislative frameworks.** A report from the Dutch House of Representatives revealed the emergence of illegal temporary employment agencies which operate below minimum legal standards as prescribed in the Netherlands, where migrants tend to be underpaid and living in overcrowded accommodation for which they are also overcharged¹⁷⁶.

Discrimination against migrant workers in the workplace takes many forms. Survey results from Denmark¹⁷⁷, the UK¹⁷⁸ and Southern Europe¹⁷⁹ give examples of **direct discrimination from colleagues and customers or clients at work**, and have also found links between self-reports of discrimination and worse health outcomes, suggesting that discrimination can have wider impacts on migrants¹⁸⁰. Investigations into wage and skill gaps between migrant and native workers have uncovered an effect of migrant status where existing gaps are not completely explained by differences in covariates such as age and experience¹⁸¹. This difference can then be categorised as indirect discrimination.

Another dimension of discrimination in working conditions is in potential differences for mobile EU citizens from Member States who have joined the EU more recently. Anecdotally, the majority of discrimination cases regarding remuneration and working conditions have recently concerned workers from the EU10¹⁸². A recent European Commission (EC) publication on mobile EU workers found that occupational health and safety authorities discover **less discrimination against citizens of older Member States, while most discriminatory incidents involve citizens from Member States who joined the EU more recently** (particularly those countries joining after 2004)¹⁸³.

It is unclear whether these differences represent discrimination or a failure to capture a full return on human capital; however, **direct and indirect discrimination is likely to explain at least partially the difference in employment outcomes for migrant and native workers.** Sectors in which migrants tend to be concentrated (such as construction) are also found to offer low pay and working standards. Migrants are more likely to accept

¹⁷⁵ <http://www.eurofound.europa.eu/eiro/2012/05/articles/at1205011i.htm> 10.03.14

¹⁷⁶ <http://www.eurofound.europa.eu/eiro/2011/11/articles/nl1111019i.htm> 10.03.14

¹⁷⁷ Høgh, A., Carneiro, I. G., Giver, H., & Rugulies, R. (2011). Are immigrants in the nursing industry at increased risk of bullying at work? A one-year follow-up study. *Scandinavian journal of psychology*, 52(1), 49-56

¹⁷⁸ Stevens, M., Hussein, S., & Manthorpe, J. (2012). Experiences of racism and discrimination among migrant care workers in England: findings from a mixed-methods research project. *Ethnic and Racial Studies*, 35(2), 259-280

¹⁷⁹ Agudelo-Suárez, A., Ronda-Pérez, E., Gil-González, D., Vives-Cases, C., García, A., Ruiz-Frutos, C., ... & Benavides, F. (2011). The effect of perceived discrimination on the health of immigrant workers in Spain. *BMC public health*, 11(1), 652

¹⁸⁰ Borrell, C., Muntaner, C., Gil-González, D., Artazcoz, L., Rodríguez-Sanz, M., Rohlfs, I., ... & Álvarez-Dardet, C. (2010). Perceived discrimination and health by gender, social class, and country of birth in a Southern European country. *Preventive medicine*, 50(1), 86-92.

¹⁸¹ Aeberhardt, R., Fougère, D., Pouget, J., & Rathelot, R. (2010). Wages and employment of French workers with African origin. *Journal of Population Economics*, 23(3), 881-905.

¹⁸² European Network on FMW, in power point presentation given by Ryszard Cholewinski at Annual Conference Free Movement of Workers in Vilnius 17 October 2013.

<http://ec.europa.eu/social/main.jsp?catId=475&langId=en> (Accessed 13.03.14)

¹⁸³ European Commission (2013) European report on the free movement of workers in Europe in 2011-2012

low paid and low skilled work (and poor working conditions and pay) because of language barriers (i.e. they can't speak the native language and so their employment opportunities are limited to very menial jobs). In these situations, **migrant workers become even more vulnerable to all forms of discrimination**. These problems are all exacerbated by legislative frameworks which may not offer adequate protection for migrant workers and, as reported by ENAR¹⁸⁴, which have in some cases been slow to respond to a rapidly changing labour market landscape.

4.6. Layoffs

Historically, economic crises have led to discriminatory layoffs¹⁸⁵ and different outcomes for migrant and native workers have been observed in OECD countries from 2008 to 2010¹⁸⁶. However, since 2010, migrant unemployment has increased more slowly than native unemployment in the EU¹⁸⁷. A report from Sweden found **that migrant workers have been less affected by the 2008 economic crisis compared with the economic crisis affecting Sweden in 1991**, which could suggest reduced direct or indirect discrimination over time (when taken in conjunction with the improved MIPEX scores presented earlier)¹⁸⁸.

Layoff discrimination is confounded by other variables as migrant employment tends to be concentrated in sectors vulnerable to the business cycle and is often characterised by temporary or short-term contracts. Migrants therefore appear to be the first people to be laid off in economic recession. It is difficult to attribute these patterns to discrimination as such rather than the structural aspects of particular sectors within the labour market¹⁸⁹.

The interaction between migrant employment and the business cycle is fundamental in determining outcomes. Periods of prosperity in Austria, Denmark, Italy, Spain and the UK meant that 40-70% of employment growth was foreign born but, conversely, recession or crisis tends to lead to reduced migrant employment¹⁹⁰. **Migrant workers are sometimes described as the first to be hired and the first to be fired**. The cyclical nature of migrant employment makes it very difficult to observe whether direct discrimination is a contributor to layoffs, especially as layoffs for third country national migrants may mean that they return to the country of origin, making them unlikely to become survey respondents on such topics whilst still in the EU.

An alternative way to measure discrimination of migrants in the layoff phase of employment is via access to pensions or unemployment funds. In Slovenia, pre-existing legislation meant migrant workers made mandatory payments toward unemployment insurance but had no right to claim unemployment benefit, a situation which has only recently been remedied and is an example of direct discrimination¹⁹¹.

Gender differences have been observed in migrant employment outcomes, also known as the added worker effect. Female migrants have been taking employment in health and

¹⁸⁴ Expert interview 03.03.2014

¹⁸⁵ Arai, M., & Vilhelmsson, R. (2004). Unemployment-risk differentials between immigrant and native workers in Sweden. *Industrial relations: a journal of economy and society*, 43(3), 690-698

¹⁸⁶ Chaloff, Dumont & Liebig (2012) The impact of the economic crisis on migration and labour market outcomes of immigrants in OECD countries

¹⁸⁷ OECD (2012) Free movement of workers and labour market adjustment: recent experiences from OECD countries and the European Union

¹⁸⁸ Ekberg (2010) European versus non-European immigrants on the Swedish labour market during recession

¹⁸⁹ OECD (2009) Chapter 1 International Migration and the Economic Crisis: Understanding the Links and Shaping Policy Responses

¹⁹⁰ OECD (2009) International migration and the economic crisis: understanding the links and shaping policy responses

¹⁹¹ <http://www.eurofound.europa.eu/eiro/2011/09/articles/si1109039i.htm> 10.03.14

social care (two recent growth sectors), whilst male migrants have lost employment in the construction, wholesale and agriculture sectors¹⁹².

Disentangling discrimination as a contributor to layoffs for migrant workers is very difficult. Migrant workers are concentrated in sectors sensitive to the business cycle, often with temporary or precarious working agreements and, during an economic crisis, employment rates diminish rapidly in these sectors. In comparison to discrimination in the hiring process or during employment, evidence of discrimination is largely limited to indirect indicators of discrimination and examples of direct discrimination are few.

¹⁹² Chaloff, Dumont & Liebig (2012) The impact of the economic crisis on migration and labour market outcomes of immigrants in OECD countries

5. CURRENT OPINIONS AS TO WHETHER ACTION IS WARRANTED TO GUARANTEE EQUAL TREATMENT OF MIGRANTS AT THE WORKPLACE

KEY FINDINGS

- Many experts see the need for a reform of EU anti-discrimination law so that it includes nationality as a ground for protection from discrimination, or the introduction of freedom of movement legislation covering *all* workers (including third-country nationals), so that migrant and national workers benefit from the same rights in terms of employment.
- Some experts identified a lack of clarity and inconsistencies regarding the definition of the term “worker” under EU law. The unclear interpretation can lead to a situation where certain types of employment, such as rehabilitative employment, part-time workers, child or elderly care, might not fall within the scope of the term, and therefore individuals working in these sectors might lack access to their rights and benefits.
- The majority of migrants and ethnic minorities seem to be unaware of Equality Bodies that exist to counteract discrimination. Current opinions agree that increased funding and financial support would help raising the profile of equality bodies and enable them to provide services for migrant workers, such as language courses and grassroots projects for integration.
- Furthermore, expert sources propose legislative change to improve recruitment and selection procedures, namely through anonymising CV submissions. In addition, improved ethnically disaggregated data collection to combat discrimination is identified as a means to better monitor the status of migrant employment.

This section provides a concluding overview of current opinions as to whether action is warranted to guarantee equal treatment of migrants at the workplace, and includes a number of best practice examples.

5.1. Reform of EU anti-discrimination law

Experts agree that the right to equal treatment on the grounds of nationality is seldom offered the same level of protection and guarantees as the right to equal treatment on other grounds (such as race, sex, age and gender) in the Member States¹⁹³. This has to do with the fact that ‘nationality’ is not explicitly included as a prohibited ground of discrimination in the national law of many Member States.

The reason for this, according to the European Network for Freedom of Movement of Workers (ENFMW), is that, viewed from the perspective of EU law on the freedom of movement, the non-discrimination principle is a *lex generalis*, which in many circumstances can be superseded by more specialised rules, allowing Member States to treat EU migrants differently. From an anti-discrimination law perspective, nationality-based discrimination

¹⁹³ European Network on Free Movement of Workers Thematic report on the application of Regulation 1612/68, January 2011; Study interview 07.03.2014.

appears to be subordinated in many Member States to other prohibited grounds (e.g. race, ethnic origin or sex)¹⁹⁴.

In this regard, an ENFMW report stated that “in those States where the prohibition on nationality-based discrimination is weak, it is because of the way non-discrimination law and EU law of the free movement of persons are understood and implemented”, while “where EU migrants enjoy protection from discrimination, it is thanks to generous national laws that are perceived as going beyond the requirements of EU law”¹⁹⁵.

Instead, EU legislation on the free movement of workers provides migrant workers residing in another Member State with the right to equal treatment compared with nationals of that Member State. However, this legislation is very fragmented with regard to protection of third-country migrant workers; different pieces of legislation protect different situations or types of migrant workers. For example, there is a specific Directive providing the right to equal treatment to family members of EU nationals¹⁹⁶ and another Directive providing this right to long-term residents¹⁹⁷.

The European Network against Racism (ENAR) suggested the **introduction of legislation covering all workers**, so that migrant workers would benefit from the same rights as national workers in terms of employment¹⁹⁸. Other experts **recommended a reform to EU anti-discrimination law – to include nationality explicitly as a prohibited ground for discrimination**. In the context of an ENFMW survey undertaken in 2011¹⁹⁹, experts from 15 Member States stressed that legal reforms were necessary to both EU anti-discrimination law and EU law regarding the free movement of persons. Experts representing the other 13 Member States were divided in their opinion as to what reforms were needed. Suggestions included the following points:

- simplifying the instruments
- more movement towards disconnecting the prohibition on nationality discrimination from the law on free movement of workers
- greater rights to access information about rights in this area
- harmonising the burden of proof for discrimination on the basis of nationality with Directive 2000/43
- incorporation of the prohibition on nationality-based discrimination into domestic law.

Examples for successfully including nationality as a prohibited ground for discrimination already exist in a number of Member States, as presented in the box below.

¹⁹⁴ European Network on Free Movement of Workers, Thematic report on the application of Regulation 1612/68, January 2011, p. 3.

¹⁹⁵ European Network on Free Movement of Workers, Thematic report on the application of Regulation 1612/68, January 2011, p. 3 and 20.

¹⁹⁶ Council Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC [2004] OJ L 158/77

¹⁹⁷ Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents [2003] OJ L16/44

¹⁹⁸ Study interview 03.03.2014

¹⁹⁹ European Network on Free Movement of Workers, Thematic report on the application of Regulation 1612/68, January 2011, p. 19.

Best practice example:

Ireland and Portugal have included robust non-discrimination principles in their respective national laws that **view nationality as a protected ground similar to race**.

The Irish Employment Equality Acts **includes nationality as one of the nine protected grounds for employment discrimination**. Moreover, its Protection of Employees (Part-TimeWork) Act 2001 extends employment protections to posted workers and to others irrespective of their nationality.²⁰⁰ In Portugal, the **principle of equality between foreign nationals staying or residing in Portugal and Portuguese nationals is included in the constitution** (Article 15 and 59). Moreover the Portuguese Labour Code explicitly prohibits direct and indirect discrimination based on nationality in relation to all of the areas EU Regulation 1612/68 covers.²⁰¹

Evidence suggests that, as a result, the **prohibition of discrimination based on nationality is actively respected in these countries**²⁰².

5.2. Clarify the term “worker” under EU law

Looking at EU law, and especially case law of the CJEU, there appears still to be a lack of clarity with and inconsistency in application of the term “worker”.

Most EU labour law legislation leaves the definition of ‘worker’ to the Member State but, in the context of the freedom of movement of workers, the CJEU decided very early in the history of the EU that ‘worker’ was a Community concept.²⁰³ Eurofound noted that a recurring problem was that **the terms ‘worker’ and ‘employee’ were used in different EU Directives without always being defined**²⁰⁴. Moreover, an expert in EU law on migrant workers raised the issue during the Annual Conference of the European Network on Free Movement of Workers (ENFMW) in October 2013, that there is still a level of “patchiness and unclear borderlines” with regards to the term “worker”. Examples where the interpretation of its status is unclear included rehabilitative employment, part-time workers and people that do chores in return for food, lodging and pocket money (such as au-pairs)²⁰⁵. Possessing such EU worker status is of importance for EU nationals, as not being considered a “worker” may have consequences in terms of losing the unconditional right to resign and equal treatment regarding other working conditions, including related rights to social benefits²⁰⁶.

²⁰⁰ European Network on Free Movement of Workers, Thematic report on the application of Regulation 1612/68, January 2011, p. 4.

²⁰¹ European Network on Free Movement of Workers, Thematic report on the application of Regulation 1612/68, January 2011, p. 4.

²⁰² European Network on Free Movement of Workers, Thematic report on the application of Regulation 1612/68, January 2011, p. 3.

²⁰³ (Hoekstra (née Unger) v. Bestuur der Bedrijfsvereniging voor Detailhandel en Ambachten, Case 75/63). See also Eurofound website, Definition of Worker. Available at:

<http://www.eurofound.europa.eu/areas/industrialrelations/dictionary/definitions/worker.htm>

²⁰⁴ Eurofound website, Definition of Worker. Available at:

<http://www.eurofound.europa.eu/areas/industrialrelations/dictionary/definitions/worker.htm>

²⁰⁵ Annual Conference Freedom of Movement of Workers, Notion of the concept of Worker, presentation by H. Verschueren, Vilnius 18 October 2013. PowerPoint presentation available at: <http://ec.europa.eu/social/main.jsp?catId=475&langId=en>

²⁰⁶ Interview representative EU Network on Freedom of Movement of Workers. Also see cases Case C-507/12, Opinion of the Advocate General and Case C22/08.

A similar issue was also addressed by the European Parliament which, in its Resolution on workers' mobility²⁰⁷, underlined that workers moving abroad for jobs, involving child or elderly care, such as babysitters, au-pairs, nannies or nurses, are often employed by private entities such as families or family members. Thus, they often end up working without a contract or illegally, and consequently have no rights and benefits linked to social security, healthcare etc.

Therefore, **it is important to have a clear EU definition of the term "worker", which includes these types of employment.** Further clarification from the CJEU in this regard might be needed.

A definition of 'posted worker' already exists in Council Directive 96/71/EC, which could be reviewed and used as a starting point for a clear EU definition of "worker" in other freedom of movement legislation, taking into account the relevant CJEU case law on this matter²⁰⁸.

Best practice example:

Council Directive 96/71/EC of 16 December 1996 concerning the posting of workers in the framework of the provision of services **includes a definition of (posted) "worker"**, namely 'a person who, for a limited period of time, carries out his or her work in the territory of an EU Member State other than the State in which he or she normally works'.

5.3. Improve access to justice for migrant workers

There are several issues that might restrict migrant workers' access to justice, including migrants' lack of awareness of the possibility of legal redress and legal aid, as well as the costs and time limits for such legal redress.

In a European Union minorities and discrimination survey (EU MIDIS) conducted by FRA in 2009, 80% of migrants and ethnic minorities could not name any bodies which represented persons who had been discriminated against²⁰⁹. In this regard, the European Parliament already encouraged Member States in its Resolution of 2011 to create more effective channels of communication between migrant workers and the corresponding state services, so that workers have full access to information regarding their rights and obligations²¹⁰.

However, while national Equality Bodies exist to counteract discrimination, many of them lack the funding to carry out follow up activities as recent budget cuts have particularly affected their work²¹¹. Therefore, additional support for Equality Bodies is suggested by experts as good practice²¹². **Increased funding and financial support for Equality Bodies could help increase their ability to carry out awareness raising activities and provide services** which are a suitable alternative to the formal judicial process.

Legal costs and time limits can be other significant barriers to legal redress for migrant workers. Migrants who lack financial resources and therefore are not adequately represented may fail to achieve justice. While Equality Bodies issue opinions on complaints,

²⁰⁷ European Parliament, Report on promoting workers' mobility within the European Union, 2010/2273(INI), 20 July 2011.

²⁰⁸ See Table 1 in section 3.1.5.

²⁰⁹ FRA (2009) EU-MIDIS European Union Minorities and Discrimination Survey

²¹⁰ European Parliament, Report on promoting workers' mobility within the European Union, 2010/2273(INI), 20 July 2011.

²¹¹ http://www.pcs.org.uk/en/news_and_events/news_centre/index.cfm/id/37056652-BEF0-4DCC-AB62BED7D4673158

²¹² ENAR 2012-2013 Racism and related discriminatory practices in Employment in Europe

these are usually not legally binding and may not be subject to enforcement. Thus, in addition to increased funding, an **extension of powers of these bodies** would give them the ability to apply legally binding obligations on companies and employers, meaning that they could offer a more tangible alternative to costly formal procedures for migrant workers²¹³.

In this context, the European Commission against Racism and Intolerance (ECRI) has frequently **recommended awareness raising campaigns at national and local level**, such as dissemination of materials detailing national anti-discrimination legislation to employers, employees, trade unions and so forth²¹⁴. ECRI developed a set of guidelines that urge governments to enact and apply laws which afford genuine protection against direct and indirect discrimination. It recommends that **low cost public advice services staffed by specialist advisors as well as, in urgent cases, fast-track procedures leading to interim decisions should be available** to victims of discrimination. In this regard, ECRI advises that time limits for lodging complaints should be reviewed in such a way that they permit complainants time to access the various specialist advice and support they acquire.

Best practice example:

A recent (2012) FRA study²¹⁵ found that several **national Equality Bodies have developed communication strategies on rights under the relevant equality legislation**, which market the existence, character and tasks of their body and how to lodge a complaint. In order to be more visible and to better reach their target audiences, a number of Equality Bodies have:

- targeted potential complainants directly, by **tailoring the information material to the needs of certain groups**, and by providing model cases in order to motivate potential complainants to take action (Austria, Belgium, Bulgaria, Finland, France and Italy);
- conducted general outreach work to **increase their geographical proximity to potential complainants** (Austria, Belgium, Bulgaria, Finland, Italy and the United Kingdom), by cooperating with community organisations;
- networked with and conducted workshops for victim support organisations, NGOs, municipalities and public bodies, lawyers and the police, in order to **raise awareness that some of their clients may have been affected by discrimination** but not have recognised it as such (Austria, Belgium, Bulgaria, Czech Republic and Italy);
- empowered persons to recognise discrimination, by **holding training events for the general population** that may result in participants bringing cases forward.

In **Hungary**, the Equality Body plays a prominent role in discrimination in the field of employment, **and its decisions – as an exception in the EU - are legally binding**²¹⁶. Many of the decisions may also be made public. For example, the Equality Body can fine companies / employers when a clear case of employment discrimination has been identified.

²¹³ FRA (2012) The Racial Equality Directive: application and challenges

²¹⁴ ECRI General Policy Recommendation No.14 on combating racism and racial discrimination in employment

²¹⁵ FRA (2012) Access to justice in cases of discrimination in the EU. Steps to further equality.

²¹⁶ ENAR (2012/2013) Racism and discrimination in employment in Europe: Shadow Report.

5.4. Improve recruitment and selection procedures

Foreign-name CVs have consistently been found to return fewer invitations to interview in a number of EU Member States than native-name CVs^{217 218}. Since this is an example of direct discrimination, a measure which should be considered is **legislation requiring to anonymise CV submission prior to the interview process, in order to remove this potential barrier to the labour market.**

Best practice example:

Following the introduction of anonymous CV submission in France as part of the law on equal opportunities in 2006, the General Confederation of Labour stated that the measure will help people “get over the first hurdle in the employment race”²¹⁹. Numerous national experiments in other EU Member States have since followed this example, and an assessment of anonymous CV submissions suggests²²⁰ that this instrument **has the potential to overcome direct discrimination of migrants**. However, anonymity of CVs shifts the focus towards skills and qualifications, and minority groups often lack equal access to those. However, it could nevertheless make sense to **introduce anonymous job applications in specific sectors**, industries, firms or occupations where the discrimination of migrant workers is high.

5.5. Promote better data-collection on discrimination

While the approach of this note was to focus on discrimination based on nationality, current research is ongoing on discrimination based on ethnicity. Valid recommendations could be taken from this research for collecting better data on migrants. Data concerning discrimination in the workplace on the basis of ethnicity is rare, poorly monitored and infrequently analysed, and nationality is frequently used as a proxy indicator instead²²¹. Within EU law it is acceptable to collect ethnically disaggregated data to combat racism and discrimination in accordance with data protection safeguards; however, the political landscape for this data collection activity is not favourable in many Member States²²². ENAR sees a **role for the European Institutions, including the European Parliament, in this regard in promoting the collection and use of ethnically disaggregated data** at national and European level to better monitor the status of migrant employment²²³. In practice, however, this may be challenging as it may be opposed by political groups and European citizens themselves²²⁴.

²¹⁷ E. Cediey & F. Foroni (2008) Discrimination in access to employment on grounds of foreign origin in France. A national survey of discrimination based on the testing methodology of the International Labour Office

²¹⁸ Kaas, L., & Manger, C. (2012) Ethnic discrimination in Germany's labour market: a field experiment. *German Economic Review*, 13(1), 1-20

²¹⁹ <http://www.eurofound.europa.eu/eiro/2006/06/articles/fr0606019i.htm>

²²⁰ Krause, A. & Rinne, U. & Zimmermann, K. (2012) Anonymous job applications in Europe. *IZA Journal of European Labor Studies*, 1:5

²²¹ ENAR (2012) How EU policies support or hinder the hiring of migrants in Europe: Fourth ENAR Equal@Work Meeting

²²² Simon, P. (2012). Collecting ethnic statistics in Europe: a review. *Ethnic and Racial Studies*, 35(8), 1366-1391.

²²³ ENAR (2012) How EU policies support or hinder the hiring of migrants in Europe: Fourth ENAR Equal@Work Meeting

²²⁴ Simon, P. (2012). Collecting ethnic statistics in Europe: a review. *Ethnic and Racial Studies*, 35(8), 1366-1391.

Best practice example:

In order to monitor equality processes and to encourage the proactive integration of migrants in businesses and government organisations, in 2013 ENAR established a **steering group on equality data collection to map out the most common obstacles to data collection**, building bridges between existing initiatives and laying out advocacy opportunities²²⁵.

In the coming years, ENAR aims to **identify contradictions and obstacles which have been raised to prevent the collection of sensitive data**, while the long-term goal is to advocate that EU institutions adopt a common EU framework for the collection and analysis of reliable comparable data disaggregated by racial or ethnic origin for the purpose of combating discrimination, in accordance with data protection safeguards. This project is supported by the Joseph Rowntree Charitable Trust, the Open Society Foundations and the European Commission - PROGRESS programme²²⁶.

5.6. Support in tackling language disadvantage

In many cases, the pay gap between migrant and native workers is not explained by typical covariates such as age and experience²²⁷. This is partially attributed to language barriers and poor integration of migrants²²⁸. Female third country nationals tend to have the worst employment outcomes²²⁹, are at high risk of discrimination²³⁰ and are also the least well integrated migrant group²³¹. Thus, employment outcomes and the extent of integration appear very much related.

The European Parliament, in its 2011 Resolution on workers' mobility²³², stated that "migrant workers should be able to communicate in one of the official languages of their host Member State in order to enable their integration and to obtain optimal productivity at work", and stated that Member States should have the right to establish linguistic competences for certain professional and technical jobs. In this regard, it suggested that classes in the language of the host Member State should be made available free of charge to migrant workers. However, in the same Resolution, the European Parliament condemned the policies of Member States aimed at limiting the access of EU workers to social security or social services by making it conditional on the requirement to know the language of the host Member State.

In 2013, ENAR, EQUINET and the European Trade Union Confederation agreed that **integration measures, language course provision and outreach projects are vital to improve employment outcomes**, but are also currently poorly funded due to budget

²²⁵ ENAR (2012) How EU policies support or hinder the hiring of migrants in Europe: Fourth ENAR Equal@Work Meeting

²²⁶ ENAR (2012) How EU policies support or hinder the hiring of migrants in Europe: Fourth ENAR Equal@Work Meeting

²²⁷ Aeberhardt, R., Fougère, D., Pouget, J., & Rathelot, R. (2010). Wages and employment of French workers with African origin. *Journal of Population Economics*, 23(3), 881-905.

²²⁸ Drinkwater, S., Eade, J., & Garapich, M. (2009). Poles apart? EU enlargement and the labour market outcomes of immigrants in the United Kingdom. *International Migration*, 47(1), 161-190

²²⁹ Source: Eurostat, Labour Force Survey.

²³⁰ Ruwanpura (2008) Multiple identities, multiple-discrimination: a critical review, *Feminist Economics*, 14(3), 77-105; European Parliament, Report on promoting workers' mobility within the European Union, 2010/2273(INI), 20 July 2011.

²³¹ Gallotti & Mertens (2013) Promoting integration for migrant domestic workers in Europe: A synthesis of Belgium, France, Italy and Spain

²³² <http://www.europarl.europa.eu/sides/getDoc.do?type=REPORT&reference=A7-2011-0258&language=EN>

cuts²³³. Therefore the European Parliament could consider making targeted funding at European level available to support these activities in Member States^{234 235}, or to support the introduction of certain incentives at national level to overcome migrants' language barriers.

Best practice examples:

Without access to any labour market integration measures, training or study grants, migrants face great difficulty in overcoming language and professional barriers. To tackle these issues, incoming immigrants in Sweden need to learn the national language. With support from Sweden's welfare system, an **education centre offers the language courses** necessary for individual assessment, and the faster the candidate learns Swedish and moves through the system, the more money is allotted to the language instructor institute²³⁶.

In the UK, the company *First UK Bus* has been involved in the employment of migrant workers as part of the normal recruitment process for many years. In 2003, the company started investigating in the possibility of recruitment from within the expanding European Union. In May 2004, through various agencies set up for this purpose, *First UK Bus* began deploying drivers from the EU into the UK. As the project evolved, *First UK Bus* took over the recruitment process with a recruitment centre opened up specifically in Warsaw **dealing with interviews, language training, driver assessments and checking of all documents such as references, driving licences, and criminal record checks**. It was felt that taking over and managing the process would ensure fairness and consistency in migrant worker recruitment²³⁷.

²³³ ENAR (2012) How EU policies support or hinder the hiring of migrants in Europe: Fourth ENAR Equal@Work Meeting

²³⁴ ENAR (2012) How EU policies support or hinder the hiring of migrants in Europe: Fourth ENAR Equal@Work Meeting

²³⁵ Eurofound (2008) Equality and diversity in jobs and services for migrants in European cities: Good practice guide

²³⁶ ENAR (2012) How EU policies support or hinder the hiring of migrants in Europe: Fourth ENAR Equal@Work Meeting

²³⁷ <http://www.publications.parliament.uk/pa/ld200708/ldselect/ldconaf/82/82we19.htm>

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