
Establishment and Provision of Services of Third Country Nationals in the EU

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Summary: Even though the discussion on migration has in the last years been overshadowed by its illegal form and concentrated in particular on potential tools to mitigate it, legal migration rightfully remains a crucial consideration for a comprehensive migration policy. Given the significance of services in today's economy, it might be surprising that the focus has been on migration of workers, rather than self-employed persons. In this article, we shall review the current legislation on this matter and explore its potential further developments.

Key words: free movement of people – legal migration – self-employed – third country nationals

1. Introduction

It is clear from the European Agenda on Migration of 2015¹ that “*migration will increasingly be an important way to [...] ensure sustainable growth of the EU economy*” and thus, “*it is important to have in place a clear and rigorous common system, which reflects the EU interest, including by maintaining Europe as an attractive destination for migrants*”.² Third-country nationals (hereinafter referred to as “TCNs”) are thus important for the overall sustainability of EU economy.

To this end, the set of legal migration directives has been extended or modified over the past five years, while some of them are still under review (see below). As a result, the legal migration system, broadly speaking, aims at promoting legal immigration of high-skilled workers, researchers and students. Conversely, the position of self-employed persons and entrepreneurs is covered only marginally.

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¹ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. *A European Agenda on Migration*. COM(2015) 240 final.

² Ibidem, p. 14.

This is striking, given the importance of services to modern economy. Indeed, approximately three quarters of the EU's GDP is created within the services sector³ and the workers constitute only a minority of TCNs legally residing in the EU.⁴ In some Member States, the TCNs constitute a significant proportion of their self-employed, approximately 20 % in the United Kingdom or on Cyprus.⁵ Still, the EU rules on TCN entrepreneurs cover only rudimentarily their free movement within the EU and in particular their possibilities to enter the EU and thus the Internal Market. As the Commission puts it, even though the category of self-employed was to be covered by the legal migration directives in parallel to workers, this approach was abandoned and currently, “[n]o harmonisation rules at EU level [...] exist regarding this category and rules on the issue are national”.⁶ As a result, the Commission's survey revealed that only 36 % of TCN respondents found the EU attractive to start a business, compared to 70 % attractiveness for students and researchers.⁷

This article will proceed as follows. First, we will analyse the current primary and secondary legislation concerning self-employed TCNs, including its amendments under discussion, in two distinct fields: the right to stay within the EU and the right to move freely within the EU (Chapter 2). On the basis of this, we will then discuss the possible ways in which the legislation in both these fields might evolve (Chapters 3 and 4) in order to make the EU more attractive for the highly-qualified self-employed TCNs.

2. The EU Legislation

Legislation concerning the legal status of self-employed TCNs in the EU is surprisingly limited, as will be described below. The primary law in essence only contains a legal basis for the adoption of secondary legislation; the self-employed TCNs are nonetheless hardly ever mentioned by the secondary legislation.

³ EUROSTAT. *National accounts and GDP* [online]. Available at: https://ec.europa.eu/eurostat/statistics-explained/index.php/National_accounts_and_GDP#Gross_value_added_in_the_EU_by_economic_activity (accessed 2. 1. 2020).

⁴ There were 18,7 million holders of valid residence permits in the EU at the end of 2017; only 2.9 million of them were labour migrants. Commission Staff Working Document *Fitness Check on EU Legislation on Legal Migration*. SWD(2019) 1055 final. Part 1/2 (hereinafter referred to as “Fitness Check, Part 1”), p. 16.

⁵ Commission Staff Working Document *Fitness Check on EU Legislation on Legal Migration*. SWD(2019) 1055 final. Part 2/2 (hereinafter referred to as “Fitness Check, Part 2”), p. 169.

⁶ Ibidem, p. 170.

⁷ Fitness Check, Part 1, p. 33.

2.1. Primary Law

According to the Treaty on the Functioning of the European Union (hereinafter referred to as “TFEU”), the EU shall develop a common immigration policy aimed at ensuring the efficient management of migration flows and fair treatment of third-country nationals residing legally in Member States [Article 79 (1) TFEU]; to that end, it may adopt measures on the conditions of entry and residence of TCNs [Article 79 (2) (a) TFEU] and on their rights in a Member State of their residence, including the conditions governing freedom of movement and of residence in other Member States [Article 79 (2) (b) TFEU].

This constitutes a significant development from the previous Treaty on the Economic Community (hereinafter referred to as “TEC”), which only allowed the adoption of measures defining the rights and conditions under which nationals of third countries who are legally resident in a Member State may reside in other Member States [Article 63 (4) TEC]. Even though this development was welcomed by most scholars,⁸ the situation of self-employed TCNs has not much evolved.

It is also important to note that the Member States retain the right to determine the volumes of admission for economic migration, which can therefore not be fixed or influenced by EU legislation [Article 79 (5) TFEU].

2.2. Secondary Law

To start with, it needs to be observed that the Commission used to have more ambitious plans concerning the legal status of self-employed TCNs. Already under the Amsterdam Treaty, a framework directive on economic migration, covering both employed and self-employed activities,⁹ was proposed, it however failed to attract the then-required unanimous agreement in the Council and was eventually withdrawn in 2005.¹⁰ In 2010, the Commission attempted to consolidate the legal migration legislation again, this time in an ‘immigration code’, in order to “*maximise the positive effects of legal immigration for the benefit of all stakeholders and [...] strengthen the Union’s competitiveness*”;¹¹ however, neither this proposal was adopted.

⁸ See eg. IGLESIAS SANCHEZ, S. Free Movement of Third Country Nationals in the European Union? Main Features, Deficiencies and Challenges of new Mobility Rights in the Area of Freedom, Security and Justice. *European Law Journal*, 2009, vol. 15, no. 6, p. 797.

⁹ Proposal for a Council Directive on the conditions of entry and residence of third-country nationals for the purpose of paid employment and self-employed economic activities. COM(2001) 386 final.

¹⁰ Communication from the Commission to the Council and the European Parliament. *Outcome of the screening of legislative proposals pending before the Legislator*. COM(2005) 462 final.

¹¹ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on *Delivering an area of*

The current EU legal migration framework is thus laid down in several “sectoral” directives, covering different categories of TCNs and regulating different stages of the migration process. As a consequence, these directives are limited in terms of their personal scope and the degree of harmonisation that they ensure. In essence, the directives cover the entry and residence conditions and the rights in different phases of the migration process (material scope) of some categories of TCNs (personal scope). This has led to complex interaction between EU rules, on the one hand, and national rules that cover the remaining categories of TCNs or aspects not harmonised under EU law, on the other.¹²

The objectives of the EU legal migration *acquis* – or rather their importance in the overall narrative on migration – have evolved over the years. While the earlier directives focused on ensuring the integration of TCNs, giving them rights as close as possible to those of EU citizens and enhancing their intra-EU mobility, the focus has gradually shifted towards ensuring efficient management of the flows of migrants that the EU economy “needs”. Specifically, the focus of the most recent directives has mainly been on attracting and retaining certain TCNs (particularly the highly skilled, including students and researchers), in order to enhance the EU’s economic competitiveness and growth.¹³

The legal migration directives currently cover: (i) sectoral directives on highly qualified workers (the Blue Card Directive, hereinafter referred to as “BCD”),¹⁴ intra corporate transferees (hereinafter referred to as “ICTD”),¹⁵ students and researchers (hereinafter referred to as “S&RD”)¹⁶ and seasonal workers (hereinafter referred to a “SWD”),¹⁷ accompanied by (ii) transversal directives (i.e. not aiming at regulating the entry and residence conditions of a particular socio-professional group) on single permit for entry (hereinafter referred to as

freedom, security and justice for Europe’s citizens – Action plan implementing the Stockholm programme. COM(2010) 0171 final.

¹² Fitness Check, Part 1, p. 11.

¹³ Ibidem, p. 27.

¹⁴ Council Directive 2009/50/EC of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment.

¹⁵ Directive 2014/66/EU of the European Parliament and of the Council of 15 May 2014 on the conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer.

¹⁶ Directive (EU) 2016/801 of the European Parliament and of the Council of 11 May 2016 on the conditions of entry and residence of third-country nationals for the purposes of research, studies, training, voluntary service, pupil exchange schemes or educational projects and au pairing.

¹⁷ Directive 2014/36/EU of the European Parliament and of the Council of 26 February 2014 on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers.

“SPD”),¹⁸ family reunification (hereinafter referred to as “FRD”)¹⁹ and the status of long-term residents (hereinafter referred to as “LRD”).²⁰

None of the legal migration directives grants the self-employed admission to the EU in their own right. The LTRD and FRD as well as the BCD, if amended, grant the holders of the relevant permits the right to work in self-employed activities and the S&RD includes this as an option for Member States as regards students; the ICTD and SPD explicitly exclude self-employed workers from their scope.

The relevant provisions concerning self-employed TCNs will be briefly discussed below.

2.2.1. Long-Term Residence Directive

The LTRD applies also to self-employed TCNs, as it confers rights on all the TCNs legally residing within the EU.²¹ Generally speaking, the Member States shall grant long-term residency status to TCNs who have resided legally and continuously within its territory for at least five years²² and who have stable and regular resources which are sufficient to maintain themselves and the members of their family, without recourse to the social assistance system of the Member State concerned;²³ such resources may clearly come from self-employed activities.

The long-term residency status guarantees, among others, access to employment and self-employed activities²⁴ and free access to the entire territory of the Member State concerned.²⁵ Conversely, the directive does not regulate the entry into the EU, nor does it grant a right to intra-EU free movement. The latter may be considered especially intriguing, given the fact that the directive claims that the TCNs with long-term residency status shall be granted a set of uniform rights which are as near as possible to those enjoyed by citizens of the European Union.²⁶

Admittedly, the LTRD does provide for a limited possibility for TCNs to be economically active in other Member States. TCNs who have already obtained the long-term residency status in a Member State are entitled to reside in another

¹⁸ Directive 2011/98/EU of the European Parliament and of the Council of 13 December 2011 on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State.

¹⁹ Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification.

²⁰ Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents.

²¹ Art. 3 (1) of the LTRD.

²² Art. 4 (1) of the LTRD.

²³ Art. 5 (1) (a) of the LTRD.

²⁴ Art. 11 (1) (a) of the LTRD.

²⁵ Art. 11 (1) (h) of the LTRD.

²⁶ Recital 2 of the LTRD.

Member State for a period longer than three months if they intend to exercise in there an economic activity in a self-employed capacity.²⁷ In order for the residency to be granted in another Member State, such state may ask the TCN to demonstrate sufficient resources;²⁸ all Member States have chosen to request it.²⁹ Thus, it is in practice feasible for the TCNs to move into another country only in order to expand their enterprise, not to start a new one.

In any case, the statistics show that this right is hardly ever exercised in practice,³⁰ which in effect excludes the possibility of intra-EU mobility for self-employed TCNs on the basis of the LTRD.

This conclusion is also supported by the fact that the LTRD itself is not much employed in practice; for reasons beyond investigation in this article, it is interesting that the vast majority (73 %) of all the cases in which TCNs take recourse to the LTRD take place in Italy, and practically all of them (more than 90 %) in just four Member States: Austria, Czech Republic, Estonia and Italy.³¹ The Commission has summarised three main reasons why the LTRD is practically unused for the purposes of intra-EU mobility: (i) in some cases, the exercise of that right is subject to as many conditions as a new application for a residence permit; (ii) the competent national administrations are not sufficiently familiar with the procedures; (iii) or they find it difficult to cooperate with their counterparts in other Member States.³² No concrete measures to overcome these hurdles have been proposed.

2.2.2. Family Reunification Directive

Similarly to the LTRD, also the FRD applies to all the TCNs legally residing in a Member State,³³ and thus also to self-employed. Apart from providing for the conditions of entry of the family members of TCNs already legally residing within the EU, it also guarantees these family members a right to access to

²⁷ Art. 14 (1) and (2) (a) LTRD.

²⁸ Art. 15 (2) of the LTRD. It is noteworthy that while the Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States only requires “sufficient resources not to become a burden on the social assistance system” in Article 7 (1) (b), the LTRD requires “resources which are sufficient to maintain themselves and the members of their families, without recourse to the social assistance of the Member State concerned”.

²⁹ Report from the Commission to the European Parliament and the Council on the implementation of Directive 2003/109/EC concerning the status of third-country nationals who are long term residents. COM(2019) 161 final, p. 8.

³⁰ Ibidem, p. 7.

³¹ Ibidem, p. 1.

³² Fitness Check, Part1, p. 19.

³³ Art. 3 (1) of the FRD.

self-employed activities.³⁴ This can however hardly be viewed as a route for TCNs to legally enter the EU in order to establish an enterprise. As far as intra-EU mobility is concerned, it is not covered at all by the FRD.

2.2.3. Single Permit Directive

As far as the SPD is concerned, it applies only to workers and expressly excludes self-employed from its scope.³⁵

2.2.4. Sectoral Directives

The S&RD allows students to exercise self-employed economic activity outside their study time and subject to national rules.³⁶ In addition to that, after completion of research or studies, these TCNs are allowed to stay on the territory of the Member State for a period of at least nine months in order to set up a business.³⁷

Similarly, according to a proposed amendment of the BCD,³⁸ the Blue Card holders should be allowed to start a business on the side of their employed activity;³⁹ the same should apply to their family members.⁴⁰ Interestingly, the impact assessment included in the proposal contained a possibility to “*extend the scope of the EU Blue Card from highly skilled employed workers to innovative entrepreneurs*”,⁴¹ this was however not adopted.

The ICTID expressly excludes the self-employed from its scope,⁴² while the SWD does not mention the self-employed at all.

2.3. Partial Conclusions

None of the legal migration directives grants the self-employed TCNs a possibility to enter the EU in their own right; only to some of them, already legally residing within the EU, they guarantee access to self-employed activities. The self-employed TCNs thus have to rely on national permits to enter the EU. Admittedly, some Member States have recently focused on attracting highly skilled

³⁴ Art. 14 (1) (b) of the FRD.

³⁵ Art. 3 (2) (k) of the FRD.

³⁶ Art. 24 (1) of the S&RD.

³⁷ Art. 25 (1) of the S&RD.

³⁸ Proposal for a Directive of the European Parliament and the Council on the conditions of entry and residence of third-country nationals for the purposes of highly skilled employment. COM(2016) 378 final (hereinafter referred to as “BCD Amendment”).

³⁹ Art 13 (2) of the BCD, as amended.

⁴⁰ Art. 16 (6) of the BCD, as amended.

⁴¹ BCD Amendment, p. 9.

⁴² Art. 2 (2) (d) of the ICTD.

entrepreneurs seeking to set up innovative businesses and start-ups;⁴³ indeed, twelve Member States have specific programmes in place to attract and facilitate the admission of immigrant business owners.⁴⁴

As far as the intra-EU mobility is concerned, the possibility to pursue business activities in other Member States is not covered by the legal migration directives at all, with the burdensome exception of possible request for permit under the LTRD, which is hardly ever used in practice. This means that self-employed TCNs are not allowed to reside outside the Member State that issued their residence permit and that the short-term travel possibilities are limited to up to 90 days in any 180-day period in other Schengen States.⁴⁵ To put it simply, “*the participation of TCNs legally residing in the Member States in the internal market is limited to the side of demand*”,⁴⁶ as their rights are in principal limited to short-time travel, purchase of goods and reception of services.⁴⁷

A specific issue in this area is that self-employed TCNs who are legally residing in a Member State are currently not allowed to provide cross-border services, since no such EU rules have been adopted under Article 56 (2) TFEU, which provides for such a possibility.⁴⁸ Self-employed TCNs are therefore debarred from cross-border activities throughout the internal market.⁴⁹

3. Possible Improvements Concerning Entry of Self-Employed TCNs

It might be argued that the fact that the EU law does not provide any rules concerning the entry of self-employed TCNs may have a negative impact on the EU economy. Indeed, as the Commission observed:

“The absence of regulation of admission and residence conditions at EU level may well have an impact on the EU’s ability to attract and retain (highly skilled) third-country nationals willing to create a business. This appears particularly true when considering business opportunities linked with the new economy in view of the network effects it relies on, impacting also the objective of enhancing

⁴³ Fitness Check, Part 1, p. 33.

⁴⁴ In more detail, see Fitness Check, Part 2, p. 172.

⁴⁵ In detail, see Fitness Check, Part 2, s. 171

⁴⁶ HEDEMANN-ROBINSON, M. Third-Country Nationals, European Union Citizenship and Free Movement of Persons: a Time for Bridges rather than Divisions. *Yearbook of European Law*, 1996, vol. 16, no. 1, p. 321.

⁴⁷ In detail, see IGLESIAS SANCHEZ, S. (*op. cit. sub 8*), p. 793.

⁴⁸ Fitness Check, Part 1, p. 34. Such a proposal was – unsuccessfully – put forward in 1999.

⁴⁹ They may however partly benefit from this freedom by setting up an EU company within the meaning of Article 54 TFEU.

the knowledge economy, and more broadly that of mitigating the consequences of demographic ageing."⁵⁰

If the EU was able to agree on common rules concerning the entry of (at least certain categories of) workers, might it possibly do the same with respect to self-employed? Such calls have indeed been made, in particular from business, fearing that the absence of an EU-wide scheme to attract TCN entrepreneurs (in particular in innovative sectors) might prevent the EU from being seen as a front-runner in the global race to attract talent and new companies.⁵¹

Conversely, other business representatives considered that a range of competing national models is a welcome "incubator" for testing different creative solutions in this fast-evolving field.⁵² Given the fact that the majority of Member States do not support an EU-level initiative for this category of TCNs,⁵³ it is highly unlikely that any relevant legislation would be adopted any time soon.

In our opinion, this approach might be mistaken. If the EU sees itself fit to adopt regulation aimed at attracting certain crucial categories of workers, we can see no compelling reason why the same should not be done with regard to self-employed.

In conclusion, we advocate for a comprehensive inclusion of self-employed TCNs into the legal migration regulation, in a way similar to the workers.

4. Possible Improvements Concerning Intra-EU Movement of Self-Employed TCNs

We have already observed that the intra-EU mobility is quite limited for self-employed TCNs legally residing in a single Member State. From an economic point of view, it is universally agreed that such limitations create inefficiencies.⁵⁴ This topic has so far been addressed mostly from the perspective of TCN workers, not self-employed, but some scholars have already advocated for a general rule allowing for intra-EU mobility of TCNs legally residing in a Member State for some time.⁵⁵

⁵⁰ Fitness Check, Part 2, s. 171.

⁵¹ In detail, see Fitness Check, Part 1, p. 33.

⁵² Ibidem, p. 34.

⁵³ Ibidem.

⁵⁴ See e.g. BOHNING, W. R., WERQUIN, J. *Some Economic, Social and Human Rights Considerations Concerning the Future Status of Third-Country Nationals in the Single European Market*. International Law Organisation, World Employment Programme Research Working Paper MIG WP 46 E, 1990, p. 9: "statutorily imposed restrictions on economically active persons introduce rigidities and inefficiencies".

⁵⁵ See e.g. PASCOUAU, Y. *Intra-EU Mobility of Third-Country Nationals. State of Play and Prospects*. European Policy Centre Discussion Paper, 2013 [online]. Available at: <http://www>.

There are two rationales underlying the broadening of intra-EU mobility rights of self-employed TCNs. The first is the one of principle. As we have observed, the primary law guarantees *fair treatment* to TCNs legally residing in Member States [Article 79 (1) TFEU]; as the exclusion of TCNs from the possibility to freely circulate in the internal market might have a negative impact in their integration into society of “their” Member State,⁵⁶ it might be argued that also TCNs are entitled to free movement within the EU; indeed, some scholars have already argued in favour of such a right.⁵⁷

The second, more pragmatic rationale is connected with EU’s ambition to attract the most qualified people to its markets; in this regard, “*mobility rights are regarded as a “pull” factor, inasmuch as they are considered an asset, which can make the EU more attractive a destination*”.⁵⁸

Even the Commission found out that according to a number of stakeholders, the intra-EU mobility seems to be generally overlooked by national authorities, which instead often require full application procedures.⁵⁹

No legislative action on this topic is however envisaged in the near future. The only (and quiet modest) modification is an improvement in the position of highly qualified workers, who might be able to gain the long-term residency status sooner if the amendment of the BCD is adopted.⁶⁰

5. Conclusions

We have observed that the self-employed TCNs are to a large extent overlooked by the EU legal migration legislation; it does not discuss their rights of entry into the EU and it gives them only a very limited possibility of intra-EU mobility. The former may be contrasted with the position of TCN workers, where the EU

europeanmigrationlaw.eu/documents/Intra-eu_mobility_of_third-country_nationals.pdf (accessed 2. 1. 2020); DELLA TORRE, L., DE LANGE, T. The “importance of staying put”: third country national’s limited intra-EU mobility rights. *Journal of Ethnic and Migration Studies*, 2018, vol. 44, no. 9, p. 1409.

⁵⁶ In that regard, see eg. IGLESIAS-SANCHEZ, S. Free Movement as a Precondition for Integration of Third Country Nationals in the European Union. In: GUILD, E., GROENENDIJK, K., CARRERA, S. (eds.). *Illiberal Liberal States: Immigration, Citizenship and Integration in the EU*. Abingdon: Routledge, 2009.

⁵⁷ IGLESIAS-SANCHEZ, S. (*op. cit. sub 8*), p. 796: “*The level of mobility within the internal borders must reflect the level of harmonisation achieved in the fields of justice and interior ... The deepening in the integration process has to be accompanied by a deepening in the enjoyment of rights and freedoms for all the individuals living under the jurisdiction of a public authority*”.

⁵⁸ Ibidem, p. 799.

⁵⁹ Fitness Check, Part 1, p. 42.

⁶⁰ In more detail, see DELLA TORRE, L., DE LANGE, T. (*op. cit. sub 55*).

has facilitated entry for certain categories of them, while the latter is omitted in case of workers as well.

We believe that the self-employed TCNs deserve more attention. In our opinion, the EU should identify those of them relevant for its economy and create common rules for their entry into its markets, similarly as it has done for highly qualified workers in the BCD.

Concerning the intra-EU mobility rights, we believe that not only the legally residing self-employed as well as workers, but also the EU itself would benefit from rules which would enable them to pursue economic activities in other Member States.

These proposals will probably not be realised in the near future due to political considerations. From an economic point of view, it is however difficult to argue against them.

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