ILERA conference. Cape Town. 7-11 September 2015

Track 6: The Migration Phenomenon: Strategies for the Protection of Migrant Workers

Employment and social rights of non-EU labour migrants under EU law: an incomplete patchwork of legal protection

Paper to be presented by

VERSCHUEREN, Herwig

professor of International and European Employment and Social Law at the University of Antwerp, visiting professor at the Vrije Universiteit Brussels (Belgium)

herwig.verschueren@uantwerpen.be

1. Introduction

In the past decade, labour migration within the European Union (EU) as well as from outside the EU has evolved significantly. There are more temporary forms of labour migration, such as seasonal work, temporary migration of both high- and low-skilled workers and temporary posting by employers.[1] This evolution has led to an increasing vulnerability of labour migrants' rights. In particular, the employment and social rights of these migrants are subject to political discussions and legal disputes. Sub-standard protection in these areas is often considered to lead to 'social dumping' of workers and 'unfair competition' between employers. In this context, the ILO recently reminded us that the debate on labour migration should be rights-based and '*grounded in universal values of equal treatment and non-discrimination …. as the best way of ensuring that migration is not misused for the purpose of undercutting existing terms and conditions of work'*.[2]

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

[1] See, *inter alia*, the following studies of the European Migration Network which are based on detailed national reports (available at www.emn.europa.eu): *Satisfying Labour Demand through Migration*, 2011, 109 p.; *Temporary and Circular Migration: empirical evidence, current policy practice and future options in EU Member States*, 2011, 67 p. and *Attracting Highly Qualified and Qualified Third-Country Nationals*, 2013, 50 p.
[2] ILO, *Fair migration: Setting an ILO agenda*, Geneva, 2014, p. 7. See also ILO, *International labour migration. A rights-based approach*, Geneva, International Labour Office, 2010.

The paper starts with an examination of EU instruments regarding labour migration from non-EU countries ('third countries') (part 2). With a view to making the EU more attractive for labour migrants from outside the EU, over the past decade it has adopted a number of laws specifically meant to promote and regulate labour migration from third countries to the European Union. Next, this paper examines the provisions in international agreements concluded by the EU with third-countries. A large number of these agreements contain provisions which directly or indirectly regulate the employment and social security rights of nationals of the third States involved (part 3). Finally, it draws some conclusions (part 4).

This paper does not examine the rights of third-country nationals who migrate between the Member States of the EU. Although the right to free movement for workers within the EU is in principle limited to nationals of the Member States (see Article 45 Treaty on the Functioning of the European Union - TFEU), third-country nationals already residing on the territory of a Member State may in some cases also have the right under EU law or under the law of the Member States to move to another Member State. This is for instance the case for family members of EU nationals[3], or for third-country nationals who can rely on EU legal instruments allowing such movements.[4] This paper will not examine these EU instruments in detail. Nor will it analyse EU directives regulating immigration for other purposes than labour, even though some of these instruments also allow the persons concerned to take up employment in the EU and contain provisions on their employment and social rights.[5]

Before starting the analysis, it should be pointed out that employment and social security law are in the first place a matter for the Member States to decide on. Despite the fact that the

[3] See Directive 2004/38/EC of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (*Official Journal of the European Union* (hereinafter 'OJ') 2004 L 158/77).
[4] Such as Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents (OJ 2004 L16/44).
[5] Such as Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification (OJ 2003 L251/12; Art. 14)) and Directive 2003/109/EC (see previous footnote) (Art. 11).

Member States' labour law has ended up in the economic and social setting of the European internal market, the European legislature itself has only intervened to a limited extent in this matter. The small repertory of European employment rules and regulations is the result of the limited powers granted by the European treaties to the European legislature as well as of the absence of a political consensus to make proper use of these powers. Yet, the European legislation that has been developed over the past decades should not be ignored. In a number of fields EU legislation has produced a far-reaching form of harmonization, such as in the matter of the ban on discrimination, safety and health in the workplace, and in other fields harmonization through minimum standards, e.g. with regard to working hours, restructuring of undertakings and the rights of workers with a-typical employment contracts. However, as regards other essential elements of both individual and collective labour law, national law has kept its leading role. As far as social security law is concerned the impact of EU law on the national systems is even more limited. In the absence of harmonization at Union level, it is indeed up to each Member State to determine the rights and duties associated with social security insurance as well as the conditions for benefit entitlement. The only really important piece of EU legislation in this field is the European system of coordination of social security schemes in Regulation 883/2004[6] (and its predecessor Regulation 1408/71) which is designed to remove obstacles to the free movement of persons resulting from the diversity of the social security systems of the Member States. This EU social security coordination system guarantees that persons migrating within the EU can keep their social security allowances (export of benefits) or have access to benefits in the new host country through the mechanism of aggregation of periods or the right to equal treatment. Regulation 883/2004 applies to all branches of social security.[7] It is also applicable to third-country nationals legally residing in a

[6] Regulation 883/2004 on the coordination of the social security systems (OJ 2004 L 200/1).

[7] Article 3 of Regulation 883/2004 refers to the following branches of social security: sickness benefits; maternity and equivalent paternity benefits; invalidity benefits; old-age benefits; survivors' benefits; benefits in respect of accidents at work and occupational diseases; death grants; unemployment benefits; pre-retirement benefits and

Member State in a cross-border situation.[8] It may, in some circumstances, also apply to persons and situations situated outside the territory of the EU Member States.[9]

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

2.1. EU labour migration policy

Since the coming into force of the Amsterdam Treaty in 1999 the EU has obtained certain competences to legislate in the field of migration policy, albeit shared with the Member States. The ambitions of the EU in this respect were laid down in the Tampere Programme of 1999 which acknowledged the need of approximation of national legislation in the field of labour migration to the EU and its Member States.[10] This was done in the context of the economic and demographic developments in which labour migration was seen as a solution to solve economic (labour shortages, the global competition of talents) and demographic problems (aging of population). The European Commission suggested to develop a common European policy for the controlled admission of economic migrants, including a gradual introduction of equal treatment with the host States' nationals.[11] Soon after the Commission proposed a 'Labour Migration Directive' to regulate labour migration from outside the EU. Its objective was to harmonize admission criteria and national labour migration schemes.[12] However, this far-

family benefits. For a recent overview of this EU coordination system: F. Pennings, 'Coordination of Social Security within the EU Context', in P. Arellano Ortiz, M. Olivier and G. Vonk (eds.), *Social Security and Migrant Workers*, Kluwer Law International, Alphen aan den Rijn (NL), 2014, 117-132.

[8] By virtue of Regulation (EU) No 1231/2010 of the European Parliament and of the Council of 24 November 2010 extending Regulation (EC) No 883/2004 and Regulation (EC) No 987/2009 to nationals of third countries who are not already covered by these Regulations solely on the ground of their nationality (OJ 2010 L344/1).

[9] For a detailed analysis of the extra-territorial scope of the EU social security coordination rules see: G. Vonk, 'Social Security rights of Migrants: Links between the Hemispheres', in P. Arellano Ortiz, M. Olivier and G. Vonk (eds.), *Social Security and Migrant Workers*, Kluwer Law International, Alphen aan den Rijn (NL), 2014, 50-56.

[10] Tampere European Council, 15-16 October 1999, Presidency Conclusions, SN 200/99.

[11] European Commission, 'Communication on a Community Immigration Policy', 22 Nov. 2000, COM(2000) 757.

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

reaching proposal was rejected by the Member States and eventually withdrawn by the Commission. It was clear that a political consensus on the harmonization or streamlining of labour migration legislation at EU level had not yet been reached. Some years later, in its 2005 Policy Plan on Legal Migration [13] the Commission announced legislative initiatives for specific categories of labour migrants, in particular highly skilled workers, seasonal workers, intra-corporate transferees and remunerated trainees. The Commission also announced a framework directive regarding a single permit and the rights of labour migrants, which should underline a rights-based approach of labour migration, in addition to the demand driven approach of labour migration, inspired by the economic and demographic situation. The proposals the Commission subsequently introduced have led to a series of labour migration directives which will be discussed further in part 2.2. These proposals also included one on the sanctions against employers of illegally staying third-country nationals, in the context of the combat against illegal migration, which has also become an issue of EU policy.

In 2007 the Commission developed further ideas on circular labour migration, which included propositions on mobility partnerships with third countries as well as on seasonal workers.[14] As regards the latter issue the Commission made a formal proposal in 2010, which subsequently led to a directive on this category of workers. In the meantime the Lisbon Treaty, which came into force in 2009, confirmed the EU competences in the field of migration, including labour migration. However, it explicitly acknowledged that these competences '*shall not affect the right of Member States to determine volumes of admission of third-country nationals coming from third countries to their territory in order to seek work'*.[15] Accordingly, the Stockholm

[13] European Commission, 'Policy Plan on Legal Migration', 21 Dec. 2005, COM(2005) 669.
[14] European Commission, 'On circular migration and mobility partnerships between the European Union and third countries', 16 May 2007, COM(2007) 248.
[15] Article 79 (5) of the Treaty on the Functioning of the European Union. It is also important to note that this new Treaty provision allows the adoption of immigration instruments under the so-called 'ordinary legislative process' meaning that the European Parliament and the Council of Ministers have to agree and that the Council decision is subject to a qualified majority instead of unanimity.

Programme adopted in December 2009 called for a flexible migration policy taking account of the situation in each Member State.[16] More recently, labour migration has continued to be an issue in policy documents on migration. For instance in its *General Approach to Migration and Mobility* (GAMM) the Commission underlined the need for the EU to organize and facilitate legal migration '*based on the premise to offering employers wider opportunities to find the best individuals',* '*offering new employment possibilities for talented people from around the world'*.[17] In its 2014 report on this GAMM the Commission again suggested to make better use of the role that migration can play in addressing labour and skill shortages in Europe.[18] However, these more recent policy documents were not followed by proposals for legislative action of the EU, even though the Commission recognized the need for an evaluation of the current legislation on legal migration in order to identify the gaps, improve consistency and assess the impact of the existing legal framework.[19]

It should be clear that all these initiatives do not reflect a coherent and balanced policy on labour migration at EU level. On the contrary, the EU institutions have failed to develop a coordinated labour migration policy of the Member States, the latter having retained the main competence to decide on the conditions as well as on the number of third-country labour migrants they admit to their labour market. The European Union was only fragmentally and gradually able to develop an arsenal of rules of its own in this field, still leaving a lot of leeway for the Member States to implement them.[20]

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[16] OJ 2010 C115/1.
[17] European Commission, 'The Global Approach to Migration and Mobility', 18 Nov. 2011, COM(2011)743
[18] European Commission, 'Report on the implementation of the Global Approach to Migration and Mobility 2012-2013', 21 Feb. 2014, COM(2014)96
[19] European Commission, 'An open and secure Europe: making it happen', 11 March 2014, COM(2014)154, p. 4.
[20] For a more detailed account of the EU labour migration policy see, *inter alia*: S. Carrera, E. Guild and K. Eisele (eds.), *Rethinking the Attractiveness of EU Labour Immigration Policies,* Brussels, CEPS, 2014; A. Faure Atger, 'Competing Interests in the Europeanisation of Labour Migration Rules', in: E. Guild and S. Mantu (eds.), *Constructing and Imagining labour migration: perspectives of control from five continents,* Franham, Ashgate, 2010, p. 157-174; E. Guild, 'Equivocal Claims? Ambivalent Controls? Labour Migration Regimes in the European Union', in E. Guild and S. Mantu (eds.), *Constructing and Imagining labour migration: perspectives of control from five continents,* Franham, Ashgate, 2010, p. 207-228; S. Guir, 'EU Labour immigration policy: discourses

Nevertheless, over the past decade the EU has adopted a number of legal instruments on labour migration. We will now examine specifically to which extent these EU legal instruments define the margin the Member States have to determine the employment and social security rights of the third-country labour migrants covered by these instruments.

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

2.2.1. Students and researchers

Chronologically the first directive which is relevant in this respect, is Directive 2004/114/EC on students and trainees. [21] This directive is not really a labour migration directive since is does not deal directly with access of third-country nationals to the labour market of the Member States. However, it does contain a provision which allows students to be employed in the host Member States outside their study time, subject to a maximum number of hours to be determined by the host State (but not less than 10 hours) (Article 17). Surprisingly, this directive does not contain any provisions as to the employment and social security rights of the students allowed to work in the host State.

The first directive which directly concerns labour migration as such is Directive 2005/71/EC on researchers.[22] It lays down the conditions for the admission of third-country researchers in the Member States. In its Article 12 it also provides for equal treatment with the nationals of the host State as regards working conditions, including pay and dismissal as well as for the

and mobility', *Refugee Survey Quarterly* 32, 4, 2013, p. 90-111 and B. Ryan, 'The EU and Labour Migration: Regulating Admission or Treatment', in: H. Toner, E. Guild and A. Baldaccini (eds.), *Whose Freedom, Security and Justice?: EU Immigration and Asylum Law and Policy*, Oxford, Hart, 2007, p. 489-496.

[21] Council Directive 2004/114/EC of 13 December 2004 on the conditions of admission of third-country nationals for the purposes of studies, pupil exchange, unremunerated training or voluntary service (OJ 2004 L375/12).

[22] Council Directive 2005/71/EC of 12 October 2005 on a specific procedure for admitting third-country nationals for the purpose of scientific research (OJ 2005 L289/15).

social security branches as defined in Regulation 1408/71 (now Regulation 883/2004).[23] However, this does not automatically mean that these researchers will be covered by a traditional employment contract or by all branches of social security. This depends on the right national researchers would have in comparable situations. In some cases researchers do not enter into an employment relationship with a genuine employer (such as universities or research institutes) but only receive a grant to cover their expenses during their research (as for instance some PhD students). Directive 2005/71/EC only guarantees third-country researchers who are admitted to the territory of a Member State under the terms of this directive and as holders of a residence permit issued under its provisions, the same treatment with regard to employment and social security rights as nationals of the host State in the same situation would obtain.

In its recent proposal to merge and recast both Directive 2004/114/EC on students and trainees and Directive 2005/71/EC on researchers, the Commission proposed to introduce a general equal treatment clause for all third-country nationals falling under the scope of the new directive and employed in a Member State, by referring to the equal treatment clause of the meanwhile adopted Directive 2011/98/EU on the Single Permit (see point 2.2.4.).[24] However, the limitations to equal treatment allowed by the latter directive with regard to social security would not be applicable to researchers. The adoption of such a proposal would of course improve the employment and social protection of third-country nationals such as students, trainees, voluntaries as well as au-pairs. The negotiations on this proposal in the Council of Ministers and the European Parliament are still going on.

[23] The branches of social security to which this regulation applies are the traditional branches. See above footnote 7.

[24] Proposal for a Directive of the European Parliament and of the Council on the conditions of entry and residence of third-country nationals for the purposes of research, studies, pupil exchange, remunerated and unremunerated training , voluntary service and au pairing (recast), COM(2013) 151 of 25 March 2013.

2.2.2. Highly qualified workers

Much more substantial in terms of labour migration, is the so-called 'EU Blue Card' Directive 2009/50/EC.[25] In the context of the increasing global competition for talent, this directive was adopted to facilitate the admission and mobility of highly qualified migrants and their family members by harmonizing, to a certain extent, entry and residence conditions throughout the EU and by providing a legal status and a set of rights. Those admitted on the basis of this directive obtain the so-called 'EU Bleu Card'.[26] Since the objective of this directive is to attract as many highly talented people as possible for the European labour market, it comes as no surprise that under this directive these persons enjoy a wide range of rights including the right to be treated equally with the nationals of the Member States that issued the 'Blue Card'. This equal treatment is explicitly guaranteed in Article 14 for all employment conditions, including the freedom to join workers organizations, as well as for the branches of social security as defined in Regulation 1408/71. Moreover, this directive provides for equal treatment with nationals of the host Member State as regards the portability of statutory pensions when moving to a third country (Article 14(1)(f)). This means that the Member States are obliged to (continue to) pay pensions to the former 'EU Blue Card' holders when they move to any non-EU-Member State whatsoever. This is the first provision in an EU directive that provides such an obligation, which also applies if there is no bilateral social security agreement between the countries involved.

[25] Council Directive 2009/50/EC of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purpose of highly qualified employment (OJ 2009 L155/17).

[26] The term 'EU Blue Card' is in fact misleading since in practice Member States issue a 'national' 'EU Bleu Card' which allows the holder only access to the labour market of that Member State. However, the holders of such a 'national' 'EU Blue Card' have under certain conditions the right to move to another Member State for the purpose of highly qualified employment and to obtain there another 'national' 'EU Blue Card' (Article 18).

2.2.3. Illegally staying third-country nationals

The EU was less generous in Directive 2009/52/EC which was adopted only a few weeks later and which dealt with sanctions and measures against employers of illegally staying third-country workers.[27] In the first place this directive prohibits the employment of illegally staying third-country nationals and lays down minimum common standards and measures, including criminal and administrative sanctions, to be applied in the Member States against employers who infringe that prohibition. It seeks to make the employment of irregular workers less attractive, employment which is characterized by low wages, poor working conditions, even exploitation and the lack of payment of social security contributions. The directive therefore also contains some provisions on the employment and social security rights of these workers. Of particular importance is Article 6 on back payments to be made by employers. The directive provides that the Member State shall ensure that the employer of illegally staying third-country nationals '*shall be liable to pay any outstanding remuneration to the illegally employed third-country national, an amount equal to any taxes and social security contributions that the employer would have paid had the third-country national been legally employed … and any cost arising from sending back payments to the country to which the third-country national has returned or has been returned*'.[28] Furthermore, the Member States must make available to these workers effective procedures to claim these rights from the employers, including the possibility for a national authority to institute procedures on behalf of the workers, even if they are no longer present in the State. In addition, Member States shall provide that an employment relationship of at least three months duration be presumed and they must ensure that these workers also receive these back payments in cases in which these workers have returned to their

[27] Directive 2009/52/EC of the European Parliament and of the Council of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals (OJ 2009 L168/24).

[28] Still, the directive does not provide for any guarantee that these workers, for whom social security contributions are made, will have entitlement arising from them. See for the same criticism: S. Mc Kay, 'Transnational aspects of undeclared work and the role of EU legislation', *European Labour Law Journal* 5, 2014, p. 123.

home State. Member States may even provide that residence permits of limited duration are extended until the third-country national has received any of these back payments. Furthermore, Article 8 provides that Member States shall ensure that the contractor of which the employer is a direct subcontractor may, in addition to or in place of the employer, be liable to pay the back payments. This obligation may even be extended to any intermediate subcontractor who knew that the employing subcontractor employed illegally staying third-country nationals. However, it is surprising that this directive does not contain an equal treatment clause guaranteeing the workers involved equal treatment as regards employment and social security rights with the nationals of the host Member State. Therefore the extent of the employment or social security rights such workers have in a Member State fully depends on the domestic legislation of each of the Member States, most of which have adopted very different approaches in this respect. Moreover, it appears that in practice the Member States are mainly interested in the return of the irregular immigrants to their host State. In addition, an expulsion measures could very well jeopardize their employment and social security rights. [29]

2.2.4. Single Permit Directive

Much more attention to employment and social security rights is given by the so-called 'Single Permit' Directive 2011/98/EU.[30] This directive does not create a right for third-country national workers to enter a Member State for the purpose of employment. It only introduces a single application procedure and single permit for both stay on the territory and access to employment in the host State. But it guarantees a set of rights for third-country national workers legally

[29] See, *inter alia*, E. Dewhurst, 'The Right of Irregular Immigrants to Outstanding Remuneration under the EU sanctions Directive: Rethinking Domestic Labour Policy in a Globalised World', *European Journal of Migration and Law* 13, 2011, p. 389-410.

[30] Directive 2011/98/EU of the European Parliament and of the Council of 13 December 2011 on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State (OJ 2011 L343/1).

admitted to the Member States. The Directive has a broad scope, which is defined in its Article 3. It not only includes third-country national workers who have been admitted for reasons of work, but also third-country national workers who have been admitted for other reasons but are permitted to work in a Member State. However, a number of categories are excluded from the scope of the directive, such as third-country family members of EU citizens, posted workers, intra-corporate transferees (see further), seasonal workers (see further), au pairs, third-country nationals enjoying temporary or international protection.

This directive contains an elaborate provision on the right to equal treatment (Article 12). It stipulates that third-country workers shall enjoy equal treatment with nationals of the Member State where they reside with regard to employment conditions (including freedom of association and affiliation and membership of an organization representing workers) as well as for branches of social security, as defined in Regulation 883/2004. However, Member States may restrict equal treatment by limiting social security rights. Indeed, Member State may limit equal treatment for these rights for those third-country workers who are no longer in employment after having been employed for less than six months. This would bring those who become unemployed very soon after their entry into the labour market of the host State in a very vulnerable position, since this provision would allow Member States to refuse unemployment benefits and other social security benefits, such as family benefits or sickness benefits, to these workers. It would even jeopardize their right to remain in that country. Family benefits may also be refused to third-country workers who have only been admitted for a short period of time. In contrast, regarding the export of benefits, Article 12 (4) guarantees the portability of old-age pensions to a third country, however only insofar as this has been provided for nationals of the Member State involved. The latter provision is very important given the wide personal scope of this directive (see above) and the fact that this provision also applies in situations where there is no bilateral social security agreement between the states involved.

2.2.5. Seasonal workers

More recently, in 2014, the EU adopted two additional labour migration instruments applicable for specific categories of migrants. The first is Directive 2014/36/EU on seasonal workers.[31] This directive determines the conditions of entry, stay and access to the labour market for a limited period of third-country seasonal workers in the EU Member States and defines their rights. It seeks to respond to the needs of Member States for temporary and seasonal low skilled workers in sectors like agriculture and tourism, and to ensure decent working and living conditions for these seasonal workers. It is also designed to promote circular migration of these workers, so as to avoid that these workers become permanent residents in the EU, but at the same time allowing them to come back several years in a row to perform seasonal work.[32] As regards employment and social security rights this directive also contains an equal treatment clause (Article 23). It guarantees the seasonal worker admitted to the host Member State under this directive equal treatment with nationals of this State with regard to all terms of employment[33], the right to strike and take industrial action and freedom of association. It also provides for equality of treatment with nationals of the host country regarding back payments to be made by the employers, concerning any outstanding remuneration to the third-country national.

Equal treatment for the branches of social security, as defined in Regulation 883/2004 is also provided for. However, as far as social security is concerned Article 23(2)(i) allows Member

[31] Directive 2014/36/EU of the European Parliament and of the Council of 26 February 2014 on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers (OJ 2014 L94/375).
[32] For a more detailed analysis of this directive see, *inter alia*: J. Fudge and P. Herzfeld Olsson, 'The EU Seasonal Workers Directive: When Immigration Controls Meet Labour Rights', *European Journal of Migration and Law* 16, 2014, p. 439-466.
[33] However, the Commission's original proposal did not provide for equal treatment of working conditions but only referred to the national law of the Member States. This was heavily criticized by, *inter alia*, the ILO, and modified in the legislative process into an obligation for the Member States to ensure equal treatment for all employment rights. See on this discussion: J. Fudge and P. Herzfeld Olsson, *o.c.*, p. 457-459 and p. 464-466.

States to restrict equal treatment for social security by excluding family benefits and unemployment benefits, meaning that Member States may deny seasonal workers entitlement to these benefits even if they meet the conditions imposed on the nationals of the Member States with regard to these benefits and even if they themselves or their employer paid contributions for the financing of these benefits. This provision clearly highlights the circular migration aspect of this directive: the seasonal workers are not supposed to remain in the host Member State after having finished the seasonal work, or to be joined by their family members. Their presence on the territory of the host Member State is by definition temporary.[34] Further integration into the society of the host State is clearly not what this directive aims at. In addition, the circular aspect of this type of labour migration is underlined by the provision in the final paragraph of Article 23(1) that guarantees the portability of pensions to a third country, provided the export to the third country involved is also guaranteed to the nationals of the Member State in question. Article 25 obliges Member States to ensure that there are effective mechanisms through which seasonal workers may lodge complaints against their employers, either directly or through third parties which have a legitimate interest in ensuing compliance with this directive (such as trade unions and other NGO's). These third parties must also be allowed to engage either on behalf or in support of a seasonal worker, in any administrative or civil proceedings. It also states that the Member State shall ensure that seasonal workers have the same access as other workers to protective measures against dismissal or other adverse treatment by the employer as a reaction to a complaint. Moreover, pursuant to Article 9 Member States may withdraw the authorization for the purpose of seasonal work when the employer has failed to meet his legal obligations regarding social security, labour rights, working conditions or terms of employment or when the employer has not fulfilled his obligations under the work contract. In case of withdrawal the Member States shall ensure that the employer shall be liable

[34] The definition of 'seasonal worker' in Article 3(b) of the Directive clearly says that this worker 'retains his or her principal place of residence in a third country'.

to pay compensation to the seasonal worker (Article 17(2)). However, although the equal treatment provisions of the finally adopted directive are much stronger than the one originally proposed by the European Commission, there is nothing in this directive that prevents Member States from tying a migrant worker's legal status to an ongoing employment relationship with the sponsoring employer, a linkage which makes the migrant worker vulnerable to abuse. [35]

2.2.6. Intra-corporate transferees

The second new directive adopted in 2014 is Directive 2014/66/EU on the so-called intra-corporate transferees (ICTs).[36] This directive has a very specific scope since it concerns temporary assignments by companies of highly skilled third-country nationals, in particular managers, specialist or trainee employees, to subsidiaries in the EU.[37] It aims at facilitating such transfers by setting up harmonized conditions for admission, residence and work, including speedy application procedures. This directive also contains a provision on the right to equal treatment of these workers, but in a rather conditional way. As far as employment conditions are concerned, Article 18(1) provides that ICTs admitted under this directive shall enjoy at least equal treatment with persons covered by Directive 96/71/EC [38] with regard to the terms and conditions of employment in accordance with Article 3 of Directive 96/71/EC in the Member State where the work is carried out. Under this Posting of Workers Directive workers posted within the EU must be granted equal treatment with the workers of the host State in the

[35] J. Fudge and P. Herzfeld Olsson, o.c., 465.
[36] Directive 2014/66/EU of the European Parliament and of the Council of 15 May 2014 on the conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer (OJ 2014 L 157/1).
[37] 'Intra-corporate transfer' is defined as '*the temporary secondment for occupational or training purposes of a third-country national who, at the time of application for an intra-corporate transferee permit, resides outside the territory of the Member States, from an undertaking established outside the territory of a Member State, and to which the third-country national is bound by a work contract prior to and during the transfer, to an entity belonging to the undertaking or to the same group of undertakings which is established in that Member State, and, where applicable, the mobility between host entities established in one or several second Member States*' (Article 3(b)).
[38] Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services (OJ 1997 L18/1).

following matters: maximum work periods and minimum rest periods; minimum number of paid annual holidays; minimum wages; conditions for the posting of employees, in particular by temporary employment agencies; health, safety and hygiene in the workplace; protective measures for special groups of employees (pregnant women, youngsters); provisions regarding equal treatment and non-discrimination. However, Article 18(1) of Directive 2014/66/EU states explicitly that it applies without prejudice to point (b) of its Article 5 (4) on the basis of which the Member States shall require that the remuneration granted to the third-country national during the entire intra-corporate transfer is not less favourable than the remuneration granted to nationals of the Member State where the work is carried out occupying comparable positions in accordance with applicable laws or collective agreements or practices in the Member State where the host entity is established. Thus the ICTs must not only be granted the minimum wages applicable in accordance with Directive 96/71/EC, but the real wage that nationals of the host Member State receive for comparable positions. It appears that these provisions of Directive 2014/66/EU with respect to equal treatment regarding employment conditions are quite ambiguously formulated. Anyway, compared to the equal treatment provisions in the other above discussed directive, it is clear that ICTs shall not be treated fully equally with workers of the host State in comparable situations. In fact, the provisions of Directive 2014/66/EU leave open to which extent the employment protection of the host State is applicable as well as the question of which law is applicable to the employment relationship. The latter is indeed a matter to be decided by the rules of Private International Law (PIL). Within the EU these rules are harmonized by the so-called Rome I Regulation 593/2008/EC.[39] In the absence of a choice of law the principle is that the employment contract is subject to the law of the country where the employee usually carries out his job (or from where he usually carries out his job[40]), even when

[39] Regulation (EC) 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) (OJ 2008 L177/1).
[40] Specifically referred to in Art. 8 (2), Rome I Regulation.

he is temporarily employed in another country.[41] The employment contract of ICTs who are sent temporarily to a subsidiary in the EU by an employer established in a third country, while maintaining his or her habitual place of work in that third country, will, on the basis of this PIL Directive 593/2008/EC normally remain subject to the employment law of this third country and not to the employment law of the receiving State.

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

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

2.2.7. Some conclusions on the EU labour migration directives

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

Generally speaking they guarantee labour migrants coming from third countries equal treatment with the nationals of the host Member States regarding employment rights and conditions. The only major exception is the position of the so-called intra-corporate transferees, whose legal position is comparable to that of posted workers who are only entitled to equal treatment in the host State for a limited number of employment rights. Moreover, it appears that the provisions of these directives do not interfere with the Private International Law rules, as laid down in EU Regulation 593/2008. In particular in situations in which the third-country worker who is performing activities on the territory of a EU Member State remains bound by an employment contract with an employer in the home country by which he/she is temporarily seconded in a EU Member State, these rules may well be leading to the result that the law applicable to the employment contract is the law of the home country. From a legal point of view the abovementioned equal treatment provisions in EU labour migration directives may well be not applicable in such cases. This may for instance be the case with posted or seconded workers, including seasonal workers.

Even more striking are the exceptions concerning the right to equal treatment regarding social security benefits. In particular for third-country labour migrants who have only worked in an

EU Member State for a short period, several exceptions to the equal treatment rule are allowed. However, it is doubtful whether the exclusion of the entitlement to benefits such as family benefits or even unemployment benefits is in line with other European and international instruments on the rights of labour migrants or on human rights in general. As far as the European Convention on Human Rights (ECHR) is concerned, the European Court of Human Rights (ECtHR) repeatedly found that in principle all forms of discrimination on grounds of nationality regarding the right to social security benefits are contrary to the ECHR, unless they are duly justified by '*very weighty reasons'*.[42] The European Charter of Fundamental Rights, which is applicable when the implementation of EU law is at stake, contains a general anti-discrimination clause in its Article 21. Pursuant to Article 52(3) of the EU Charter, the interpretation of this clause must be in line with the case law of the ECtHR. ILO Conventions 96 and 143 also include the right to equal treatment for generally social security.[43] On the positive side we must acknowledge that importance of the provisions in a number of directives, and in particular in the widely applicable Single Permit Directive, regarding the portability of pensions when the migrant worker moves to a third country. These provisions guarantee them the same rights in this respect as the nationals of the Member States concerned, even if no bilateral social security agreement has been concluded between the countries involved.

[42] See for instance ECtHR, 19 September 2003, Koua Poirez v. France, no. 40892/98, § 46 and ECtHR, 18 February 2009, Andajeva v. Latvia, no. 55707/00, §87.
[43] See Article 6(1)(a)(i) of Convention 96 and Article 10 of Convention 149.

3. International agreements concluded by the EU

Over the past decades the European Union has concluded a large number of agreements with third countries which also may have an impact on the employment and social security rights of third-country labour migrants working in the EU Member States.[44]

3.1.Agreement with Turkey

The oldest of international agreements of that kind that are still in force, is the Association Agreement with Turkey which was signed as early as 1963.[45] According to Article 36 of the Additional Protocol of 1970[46], the freedom of movement for workers between EU Member States and Turkey shall be secured by progressive stages. However, the Court of Justice of the European Union (CJEU) did not recognize the direct effect of this provision [47] and it was never implemented by other legally binding texts either. Accordingly, a Turkish national's first admission to the territory of a Member State is, as a rule, still governed exclusively by that State's own domestic law.[48] On 19 September 1980 the Association Council adopted Decision 1/80 to implement the agreement. This decision regulates the situation of Turkish workers already integrated into the labour force of a Member State. It also contains a provision on equal treatment of these Turkish migrant workers. Article 10 provides that the Member States shall,

[44] In this paper we will not discuss the agreement creating the European Economic Area (between the EU on the one hand and Norway, Iceland and Liechtenstein, on the other) nor the agreement with Switzerland. These agreements provide for the right to free movement of workers between these countries and the EU, and also guarantee equal treatment with regard to employment and social rights, including the implementation of the specific EU social security coordination system. Workers, nationals of these countries, have in principle the same rights as nationals of EU Member States with regard to free movement and equal treatment, and are therefore not really 'third-country nationals'.
[45] OJ 1963, 3685.
[46] OJ 1972 L293/1.
[47] CJEU 30 September 1987, Case 12/86, Demirel.
[48] CJEU 11 May 2000, Case C-37/98, Savas, § 65; CJEU 21 October 2003, Case C-369/01, Abatay, § 65, CJEU 29 September 2011, Case C-187/10, Unal, § 41 and CJEU 8 November 2012, Case C-268/11, Gülbache, § 47.

as regards remuneration and other conditions of work, grant Turkish workers who are duly registered as belonging to their labour force treatment involving no discrimination on the basis of nationality between them and EU workers. The CJEU has recognized the direct effect of this provision.[49]

The EU-Turkish Association Council also adopted, on 19 September 1980, Decision 3/80 on the application of the social security schemes of the Member States of the European Communities to Turkish workers and members of their families.[50] However, the Court of Justice ruled that in the absence of any measures to implement this Decision 3/80, its legal effect is limited.[51] Still, the Court of Justice recognized the direct effect of the equal treatment provision of Article 3 of Decision 3/80 and of the provision on the export of benefits to Turkey of Article 6.[52] This means that Turkish workers in the EU Member States can claim equal treatment with nationals of the host State as regards social security benefits and that Turkish nationals who acquired rights to social security benefits in a Member State are, in principle, entitled to the export of these benefits when they return to Turkey. [53]

[49] CJEU 8 May 2003, Case C-171/01, Wählergruppe and CJEU 25 July 2008, Case C-152/08, Kahveci.
[50] This decision was published in OJ 1983 C110/60.
[51] CJEU 10 September 1996, Case C-277/04, Taflan-Met. On 8 February 1983 the Commission presented a proposal for a Council Regulation implementing Decision 3/80 within the Community (OJ 1983 C110/1), but this decision was never adopted by the Council.
[52] CJEU 4 May 1999, Case C-262/96, Sürül and CJEU 26 May 2011, Case C-485/07, Akdas.
[53] Currently the Association Council EU-Turkey is discussing a proposal to replace Decision 3/80 by a new decision. The EU Council of Ministers adopted as early as December 2012 the position to be taken on behalf of the EU within the Association Council (OJ 2012, L340/19), but so far no agreement has been reached.

3.2.Agreements with the Maghreb countries

The next series of relevant agreements concluded by the EU, are the Association Agreements with the so-called Maghreb Countries (Morocco, Tunisia and Algeria). Currently applicable are the Euro-Mediterranean Agreements signed in 1995, 1996, and 2002.[54]

These agreements include provisions on the rights of workers who are nationals of these countries. They are entitled to equal treatment with the nationals of the host Member State with regard to working conditions, remuneration and dismissal.[55] They enjoy equal treatment in the field of social security as well.[56] [57] Moreover, the provision on social security also determines that the workers in question shall be able to claim export of pensions, including invalidity pensions when they return to their home country. However, the right to receive family benefits is limited for those members of their families who are resident in the EU. Furthermore, the agreements explicitly provide that these provisions do not apply to nationals of these countries residing or working illegally in the territory of their host State.[58] In addition, the agreements authorize the Association Council to adopt provisions to implement the principles with regard to social security, in particular as regards the coordination between the social security schemes of the EU Member States on the one hand and of the three other countries on the other.[59] For this purpose and on the proposal of the European Commission, the EU Council of Ministers has in the meantime adopted the positions to be taken by the European Union within the different Association Councils.[60] These positions confirm the right to equal treatment for social security benefits as well as the right to export old-age and invalidity benefits. They would also set up

[54] Agreement with Tunisia of 17 July 1995 (OJ 1998 L97/1); the Agreement with Morocco of 26 February 1996 (OJ 2000 L70/1) and the Agreement with Algeria of 22 April 2002 (OJ 2005 L265/1).
[55] Article 64 Agreement with Tunisia; Article 64 Agreement with Morocco and Article 67 Agreement with Algeria.
[56] Article 65 Agreement with Tunisia; Article 65 Agreement with Morocco and Article 68 Agreement with Algeria.
[57] The CJEU has confirmed the direct applicability of these equal treatment provisions. See, *inter alia*, CJEU 31 January 1991, Case C-18/90, Kziber; CJEU 20 April 1994, Case C-58/93, Yousfi; CJEU 3 October 1996, Case C-126/95, Hallouzi-Choho and CJEU 13 June 2006, Case C-336/05, Echouikh.
[58] Article 66 Agreement with Tunisia; Article 66 Agreement with Morocco and Article 69 Agreement with Algeria.
[59] Article 67 Agreement with Tunisia; Article 67 Agreement with Morocco and Article 70 Agreement with Algeria.
[60] Decisions of 21 October 2010 (OJ 2010 L306/8).

mechanisms of cooperation, such as for administrative checks and medical examinations. However, they do not contain any further rules on social security coordination, such as the determination of the applicable legislation or rules on aggregation of periods of insurance, payment of contributions or employment for obtaining or calculating social security benefits. But even so, after more than four years, these proposals are still waiting for the final approval of the Association Councils. This means that the social security coordination between the systems of the EU Member States and these third countries continue to be governed by the bilateral social security agreements, if any, that are concluded between these states.[61]

3.3.Partnership and Cooperation Agreements

Apart from these specific agreements, the EU has also concluded a large number of agreements with third countries, such as Partnership Agreements, Partnership and Cooperation Agreements or Stabilization and Association Agreements. Most of these agreements contain provisions on the right to equal treatment with nationals of the host State as regards working conditions, remuneration and dismissal.[62] The CJEU has explicitly recognized the direct effect of such clauses.[63] However, in a series of other agreements the equal treatment clause has been worded in weaker terms, referring to the commitment of the EU Member States to '*endeavour to ensure'*

[61] For more details on the agreements with Turkey and with the Maghreb countries, see: H. Verschueren, 'Social Security Co-ordination in the Agreements Between the EU and Mediterranean Countries', in D. Pieters and P. Schoukens (eds.), *The Social Security Co-ordination Between the EU and Non-EU Countries*, Antwerp, Intersentia, 2009, 19-55.

[62] See for instance the following agreements and their provisions on equal treatment as regards working conditions: Agreement of 16 December 1991 on Cooperation and Customs Union with San Marino (OJ 2002 L84/43; Art. 20); Partnership and Cooperation Agreement of 24 June 1994 with Russia (OJ 1997 L 327/1; Art. 23); the Cotonou Partnership Agreement of 23 June 2000 with the members of the African, Caribbean and Pacific Group (the so-called ACS-States, 79 in total) (OJ 2000 L317/1; Art. 13(3)); Stabilisation and Association Agreement with FYR of Macedonia (OJ 2004 L84/13; Art. 44); Stabilisation and Association Agreement of 12 June 2006 with Albania (OJ 2009 L107/166; Art. 46); Stabilisation and Association Agreement of 15 October 2007 with Montenegro (OJ 2010, L108/3; Art. 49); Stabilisation and Association Agreement of 29 April 2008 with Serbia (OJ 2013 L278/16; Art. 49); Association Agreement of 21 March 2014 with Ukraine (OJ 2014 L161/3; Art. 17).

[63] See, *inter* alia, CJEU 12 April 2005, Case C-265/03, Simutenkov (on the Agreement with Russia).

equal treatment as regards working conditions.[64] Such clauses do not seem to qualify for direct effect in line with the case law of the CJEU. Their weak wording may even be inspired by the latter's broad interpretation of employment rights in other international agreements, which would have caused the Member States to avoid phrasing subsequent agreements in a similarly strong way.[65] Yet, the abovementioned 'Single Permit' Directive 2011/98 guarantees equal treatment for working conditions to all third-country nationals legally employed in the EU Member States. Hence, the weaker commitments in these international agreements only to 'endeavour' to ensure equal treatment in this respect, seem to be overruled by more recently adopted EU legislation.

Except for the agreement with San Marino, these agreements do not at all contain a non-discrimination clause with regard to social security benefits. Moreover, only a few of these agreements also provide for a mandate for the relevant Association Councils (created in the context of these agreements) to decide on provisions to coordinate the social security schemes applicable to workers of the third countries involved who are legally employed in an EU Member State. Such coordination measures should, *inter alia*, deal with the aggregation of periods of insurance, employment or residence completed by such workers in the various Member States for the entitlement to benefits such as pensions, medical care and family benefits. Such a decision should also regulate the portability of pensions to these third

[64] See for instance the following agreements and their relevant clauses: Partnership and Cooperation Agreement of 28 November 1994 with Moldova (OJ 1998 L 181/3; Art. 23); Partnership and Cooperation Agreement of 23 January 1995 with Kazakhstan (OJ 1999 L 196/3; Art. 19); Partnership and Cooperation Agreement of 9 February 1995 with the Kyrgyz Republic (OJ 1999 L 196/48; Art. 19); Partnership and Cooperation Agreement of 22 April 1996 with Georgia (OJ 1999 L205/3; Art. 20); Partnership and Cooperation Agreement of 22 April 1996 with Azerbaijan (OJ 1999 L246/3; Art. 20); Partnership and Cooperation Agreement of 22 April 1996 with Armenia (OJ 1999 L239/3; Art. 20); Partnership and Cooperation Agreement of 21 June 1996 with Uzbekistan (OJ 1999 L229/3; Art. 19); Partnership and Cooperation Agreement of 11 October 2004 with Tadzhikistan, (OJ 2009 L 350/3; Art. 17);

[65] K. Eisele, *The External Dimension of the EU's Migration Policy. Different Legal Positions of Third-Country Nationals in the EU,* Wolf Legal Publishers, Oisterwijk, 2013, p. 274, 281 and 294-285.

countries.[66] In the meantime, the EU Council of Ministers has adopted (except for the agreement with Russia) the position to be taken by the European Union within the relevant Councils set up by these agreements. [67] These positions have more or less the same (limited) scope comparable to the ones referred to above for the Maghreb countries. But again, after several years these proposals are still waiting for the final approval of the various Councils. Meanwhile, the existing bilateral agreements, if any, continue to apply.

What is striking in these series of international agreements the EU concluded with third countries, is the absence of any system of coordination between the social security schemes of the EU Member States on the one hand and these of the third countries involved on the other. Despite the mandate given in some of these agreements to adopt coordination rules between the social security systems of the Member States and the third countries involved, no such coordination rules have been adopted so far. These provisions '*remain sleeping beauties, waiting to be brought to life with a kiss by further measures of the contracting parties*'.[68]

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

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

[67] See Council Decisions of 21 October 2010 (OJ 2010 L306) for the agreements with Israel and with the FYR Macedonia, and the Decisions of 6 December 2012 (OJ 2012 L340) for the agreements with San Marino, with Montenegro and with Albania.

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

migrants to fulfil minimum periods of contribution, employment or residence for the entitlement to benefits in the host State. The principle of equal treatment guarantees migrant workers the same treatment as nationals of the country of work.[69] In 2012, the European Commission made an attempt to promote and strengthen cooperation between Member States in this field, so that a less fragmented approach to social security coordination with third countries would be developed.[70] However, it was an unsuccessful initiative. Member States clearly do prefer to maintain their autonomy in this field.

As a result social security coordination with third countries continues to be subject to very divergent coordination rules laid down in a large number (about 350 in total) bilateral agreements between Member States and third countries. In its 2012 Communication, the European Commission identified the problems ensuing from this very fragmented approach, in particular the country-specific nature of these bilateral agreements as well as the limits in their personal and material scope or in the portability of benefits. Consequently migrants and businesses based in third countries do not only have to deal with fragmented social security systems of the EU States, but are also confronted with distinctive national bilateral agreements when moving into and out of the EU. In addition, the network of bilateral agreements is by no means complete: depending on the third country in question, there may be no bilateral agreement with the relevant EU country. This could amount to a loss of acquired social security rights for persons moving into or out of the EU.[71]

[69] See: European Commission (2012), 'The External Dimension of EU Social Security Coordination', COM(2012) 153, 30 March 2012, p. 3.
[70] See previous footnote.
[71] See for further analysis of the content and role of bilateral social security agreements, *inter alia,* G. Strban, 'The existing bilateral and multilateral social security instruments binding EU-States and non-EU States, in D. Pieters en P. Schoukens (eds.), *The Social Security Co-ordination Between the EU and Non-EU Countries*, Antwerp, Intersentia, 2009, p. 83-113; ILO, *Social Security Coordination for non-EU States in South and Eastern Europe: a legal analysis*, Budapest, 2012; S. Klosse, *External aspects of social security coordination*, MISSOC, Brussels, 2013, 30 p.; W. van Ginneken, 'Social protection for migrant workers: national and international challenges', *European Journal of Social Security*, 2013, p. 214-216.

4. To conclude

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

As regards the employment and social security rights of such workers, EU legal instruments provide for a very fragmented or even contradictory set of rules. They ensure, in principle, the equal treatment of these workers with the nationals of the host Member State, albeit with a number of specific exceptions. This is the case for the employment rights of temporary workers, such as inter-cooperate transferees. Moreover, the application of EU Private International Law instruments, such as the Posting of Workers Directive and the Rome I Regulation, may well lead to situations in which the law applicable to the employment contract of the third-country worker posted or seconded in an EU Member State, is not the law of the host State, but continues to be that of the country of origin.

In the field of social security rights even more exceptions to the equal treatment rule are allowed, more specifically for the rights of labour migrants who are only active in a Member State for a short period or whose access to its labour market is limited in time. These exceptions concern in particular family benefits and unemployment benefits. They might not pass the test of fundamental rights instruments such as the European Convention of Human Rights or ILO instruments. In addition, the coordination between the social security schemes of the Member States on the one hand and third countries on the other continue to depend mainly on the existence and the content of bilateral agreements concluded between Member States and third countries. In particular the aggregation of periods of employment, insurance and residence for the purpose of obtaining and maintaining social security benefits in the host State, almost fully

depends on such bilateral agreements. Moreover, these bilateral (or the few multilateral) agreements are very fragmented themselves since Member States have only concluded such agreements with a limited number of third countries. EU initiatives to coordinate these agreements at EU level or even to agree on coordination measures with some third countries have failed so far by lack of political willingness, apparently from both sides. Indeed, EU Member States do not seem to be very enthusiastic to pass on the competence to conclude such agreements to the EU supranational level, and third countries sometimes prefer to negotiate with every single Member State separately rather than with the EU block as a whole.[72] Consequently, many of these workers (and the members of their family) may have to wait for a certain period before becoming entitled to benefits in the host State or may lose entitlement to social security benefits upon returning to their home country, despite the fact that most likely they and their employers have paid contributions for the financing of these benefits. Positive is that meanwhile the latter issue has been partially dealt with in some EU labour migration directives which include provisions on the portability of pensions to third countries.

In the absence of sufficient social security coverage of these migrant workers, some sending third countries have meanwhile adopted schemes to protect national citizens living and working abroad, such as the Philippines.[73] But such initiatives, laudable as they are, indirectly confirm the receiving countries' unwillingness to protect labour migrants properly.

Anyway, in this debate a more prominent role should be given to the protection of human rights. We already mentioned above the prohibition of discrimination on grounds of nationality in the European Convention on Human Rights and the EU Charter of Fundamental Rights. Moreover,

[72] G. Vonk, 'Social Security Rights of Migrants: Links between the Hemispheres', in P. Arellano Ortiz, M. Olivier and G. Vonk (eds.), *Social Security and Migrant Workers,* Kluwer Law International, Alphen aan den Rijn (NL), 2014, 65-66.

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

a number of international instruments such as the ILO conventions and the UN Migrant Workers Convention protect the rights of migrant workers and have non-discrimination as a guiding principle.[74] These instruments should be used more frequently as the basis for political negotiations as well as in legal discussions on the rights of labour migrants, including at the level of the institutions of the European Union.

[74] See on this human rights approach, *inter alia*: R. Cholewinski, 'Labour Migration, Temporariness and Rights', in: S. Carrera, E. Guild and K. Eisele (eds.), *Rethinking the Attractiveness of EU Labour Immigration Policies,* Brussels, CEPS, 2014, p. 22-27; K. Hirose, M. Nikac and E. Tamango, *Social Security for Migrant Workers – A Rights-Based* Approach, ILO, 2011; L. Lamarche, 'Human Rights, Social Security and Migrant Workers', in P. Arellano Ortiz, M. Olivier and G. Vonk (eds.), *Social Security and Migrant Workers,* Kluwer Law International, Alphen aan den Rijn (NL), 2014, p. 9-30 and M. Oliver, O. Dupper, A. Godvidjee, 'Enhancing The Protection of Transnational Migrant Workers: a critical Evaluation of Regulatory Techniques, in *The Transnational Dimension of Labour Relations. A New Order in the Making?*, Giappicchelli, Turin, 2014.