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The Borders Within: Socio-economic Rights and Non-discrimination in EU Law
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Access to Social Benefits for Third-country Nationals in the European Union Between Fragmentation and Equal Treatment

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ABSTRACT: The article explores the fragmented legal framework governing third-country nationals' (TCNs) entitlement to equal treatment with nationals of the host Member State regarding access to social benefits under EU law. Access to social advantages for TCNs is shaped by detailed EU secondary legislation, which defines rights and obligations based on an individual's specific legal status. While EU secondary legislation establishes differentiated rules depending on migration status, its transposition and implementation at the national level remain inconsistent: some Member States provide TCNs with broader access to welfare systems, while others impose more restrictive eligibility criteria. In light of this fragmented landscape, the article examines the CJEU's case law concerning the equal treatment provisions in three key migration directives: Directive 2003/109 on long-term residents, Directive 2011/95 on beneficiaries of international protection, and Directive 2024/1233 on the Single Permit. The study further investigates how the Charter of Fundamental Rights might help address the fragmentation surrounding TCNs' access to social benefits. Special attention is given to the role of Article 20 in guiding the interpretation and evaluation of exclusionary or discriminatory measures, and to the potential of Article 34 in guaranteeing a dignified standard of living by establishing core minimum standards. Such standards would limit Member States' discretion in regulating access to social benefits and reduce the legal uncertainty associated with case-by-case assessments by national courts.

KEYWORDS: social benefits – equal treatment – third-country nationals – migration directives – fragmentation – core benefits.

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1. Equal treatment and social benefits for third-country nationals in the European Union

The article underscores the complex landscape of third-country nationals' (TCNs) right to equal treatment with nationals of the host Member State concerning social benefits within the framework of EU migration law. Access to social advantages for TCNs is regulated by a detailed framework of EU secondary legislation, which varies depending on their specific category. However, national practices remain largely inconsistent: some Member States offer broader access to their welfare systems, while others adopt a more restrictive stance.[1]

The lack of a coherent framework continues to render access to social benefits for TCNs ambiguous and inconsistent, largely due to the absence of a dedicated non-discrimination clause for TCNs in EU primary law, unlike the provisions afforded to EU citizens.[2] As it is well known, Article 18 TFEU provides that non-discrimination on the basis of nationality shall be guaranteed within the scope of application of the Treaties. The EU Court of Justice (CJEU or Court) has asserted that the article in question does not apply to TCNs, since it concerns situations in which an EU citizen of a Member State suffers discriminatory treatment in relation to citizens of another Member State merely on the basis of his nationality.[3] Specifically, the CJEU affirmed that as the background to Article 18 TFEU was EU citizenship, this article could not apply 'as it stands' to a situation where a TCN has a residence permit in a Member State.[4]

Similarly, Article 21, paragraph 2 of the Charter of Fundamental Rights prohibits discrimination on grounds of nationality 'within the scope of application of the Treaties and without prejudice to any of their specific provisions'. The Charter provision mirrors the intent and limitations of Article 18 TFEU, emphasizing the systemic connection between the prohibition of nationality-based discrimination and the broader EU framework, which governs relationships primarily between Member States and their citizens. The CJEU held that, on the basis of the explanations relating to the Charter, Article 21, paragraph 2 is equivalent to Article 18 TFEU and has the same

[1] For further insights see S Morano-Foadi and K de Vries, 'The equality clauses in the EU directives on non-discrimination and migration/asylum' in S Morano-Foadi and M Malena (eds), *Integration for Third-country nationals in the European Union* (Edward Elgar Publishing 2012) 16.

[2] D Thym, *European Migration Law* (Oxford University Press 2023) 484.

[3] Joined Cases C-22/08 and C-23/08 *Vatsouras and Koupatantze* EU:C:2009:344, para 52.

[4] Case C-45/12 *Hadj Hamed* EU:C:2011:217, para 41. On this point see E Brouwer and K de Vries, 'Third-country nationals and discrimination on the ground of nationality: article 18 TFEU in the context of article 14 ECHR and EU migration law: time for a new approach', in M van den Brink, S Burri and J Goldschmidt (eds), *Equality and Human Rights: Nothing but Trouble? Liber amicorum Titia Loene* (Utrecht University 2015) 123. The Authors observe that the Court, using the wording 'as it stands' seems to indicate that Art 18 TFEU could apply to Third-country nationals, but only if their situation is covered by EU law (141).

scope.[5] So far, the Court has indeed excluded an extensive interpretation of the concept of nationality-based discrimination under Article 18 TFEU, thereby conditioning the interpretation of the analogous notion contained in Article 21, paragraph 2, of the Charter.

By limiting the scope of Article 21, paragraph 2 to EU citizens, the Court underscores that EU citizenship is a privileged status intrinsically linked to Member States and their nationals. This ensures that the legal framework prioritizes the rights and obligations of EU citizens over those of TCNs. It also reflects the institutional and political objectives of EU law, which seek to strike a balance between fostering inclusivity and preserving Member State sovereignty in areas such as immigration and the treatment of TCNs. However, this approach has resulted in a fragmented legal framework for protecting the rights of third-country nationals, leaving their entitlements heavily reliant on the provisions of secondary legislation rather than enjoying the same guarantees provided to EU citizens under primary law.[6]

The significance of this restrictive interpretation is heightened in the context of the EU's shifting governance of asylum and immigration. Scholars have observed a gradual convergence between these traditionally distinct legal regimes, spurred by evolving EU law and jurisprudence.[7] Historically, asylum and immigration were governed by distinct legal frameworks, with specific regulations and directives addressing each area separately. However, recent developments, including changes in EU law and jurisprudence, have led to a convergence of these areas, resulting in increased interaction and integration between asylum, immigration, and other provisions of the Treaties.[8]

One of the main objectives of the EU immigration policy is to ensure the 'fair treatment' of TCNs residing legally in the Member States as mentioned in Article 79, paragraph 1, TFEU as well as in Article 67, paragraph 2, TFEU. This standard,

[5] See, *ex multis*, Case T-452/15 *Andrei Petrov* EU:T:2017:822, paras 38–39; Case T-618/15 *Udo Voigt* EU:T:2017:821 paras 79–80.

[6] D Thym, 'European Migration Law between "Rescuing" and "Taming" the Nation State: A History of Half-Hearted Commitment to Human Rights and Refugee Protection' (2023) 8 *European Papers* 1663, 1667–1668.

[7] B Friðriksdóttir, *What Happened to Equality?: The Construction of the Right to Equal Treatment of Third-Country Nationals in European Union Law on Labour Migration* (Brill 2017), 13–14; S Morano-Foadi and V Protopapa, 'Equality Of Third Country Nationals (TCNs) Twenty Years After Tampere: EU And ECHR Protection' (2019) 26 *Revista General de Derecho Público Comparado* 1.

[8] See, *inter alia*, M Jesse, 'Missing in Action: Effective Protection for Third-Country Nationals from Discrimination under Community law' in E Guild, K Groenendijk and S Carrera (eds), *Illiberal Liberal States: Immigration, Citizenship and Integration in the EU* (Routledge 2009) 187; C Hublet, 'The scope of Article 12 of the Treaty of the European Communities vis-à-vis Third-Country Nationals: Evolution at Last?' (2009) 15 *European Law Journal* 757; S Iglesias Sánchez, 'Fundamental Rights Protection for Third-Country and Citizens of the Union: Principles for Enhancing Coherence' (2013) 15 *European Journal of Migration and Law* 137; C Favilli, 'L'applicazione ai cittadini di Paesi terzi del divieto di discriminazione per motivi di nazionalità' in G. Caggiano (ed.), *I percorsi giuridici per l'integrazione* (Giappichelli 2014) 121.

whose content appears uncertain, is better specified with reference to third-country nationals who have been residing permanently in the European Union for a certain period of time. At the Tampere meeting on 15 and 16 October 1999, which laid the foundations for the Area of Freedom, Security and Justice, the European Council established that a 'set of uniform rights which are as near as possible to those enjoyed by EU citizens' should be defined.[9] This framework was incorporated into Directive 2003/109 concerning the status of TCNs who are long-term residents (the so-called 'Long-term resident Directive').[10]

The principle of equal treatment plays a significant role in the development of the common immigration policy within the European Union, thanks to the legal bases contained in Article 79, paragraph 2, letters a) and b), TFEU.[11] Despite these legal provisions, there may be instances where the interpretation of Article 21, paragraph 2, of the Charter of Fundamental Rights proposed by the Court appears contradictory. This inconsistency stems from the selective application of equal treatment provisions within various directives governing immigration and asylum policies. Certain EU directives[12] explicitly exclude specific categories of foreigners, such as short-term visa holders or temporary residents, from the scope of equal treatment protections. As a result, the application of equal treatment among TCNs is uneven, creating disparities based on residency status or purpose of stay.[13]

Furthermore, TCNs face significant barriers due to measures imposed by several Member States, which have been reviewed in cases before the Court. These measures include, for instance, restrictions on housing benefits justified by budgetary concerns,[14] requirements for long-term residents to demonstrate basic language proficiency as a condition for accessing housing assistance,[15] limitations on social assistance for beneficiaries of international protection,[16] and strict residency requirements

[9] European Council, Presidency Conclusions, 15 and 16 October 1999, para 18.

[10] Council Directive 2003/109/EC of 25 November 2003 concerning the status of Third-country nationals who are long-term residents.

[11] See, for instance, the aforementioned Directive 2003/109/EC (n 10); Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted; and Directive (EU) 2024/1233 of the European Parliament and of the Council of 24 April 2024 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.

[12] One may consider, *ex multis*, Directive 2003/109/EC (n 10), which provides equal treatment for TCNs who have legally resided in an EU Member State for at least five years and who hold long-term resident status. However, it does not apply to short-term visa holders or temporary residents, as these individuals do not meet the residency requirements for long-term status.

[13] Morano-Foadi and de Vries (n 1) 22–23; D McCormack-George, 'Equal Treatment of Third-Country Nationals in the European Union: Why Not?' (2019) 21 *European Journal of Migration* 53, 63–69.

[14] Case C-571/10 *Kamberaj* EU:C:2012:233.

[15] Case C-94/20 *Land Oberösterreich* EU:C:2021:477.

[16] Case C-713/17 *Shah Ajubi* EU:C:2018:929.

to qualify for social benefits.[17] Such policies create substantial challenges for TCNs and raise serious questions about their compliance with EU law and the principle of equal treatment. Nevertheless, Member States frequently defend these restrictive measures by invoking the notion of national solidarity, arguing that social benefits should be reserved for individuals who demonstrate integration into the host society either through contributions to social systems or proof of integration.[18]

In order to critically assess the scope for limiting Member States' reliance on exceptions to the principle of equal treatment, and to address the fragmented protection of TCNs' access to social benefits under EU secondary law, this contribution will explore the potential of the Charter of Fundamental Rights, particularly Article 20 (Equality before the law) and Article 34 (Social security and social assistance), as a unifying framework.

Article 20 enshrines the general principle of equality, which the CJEU has confirmed is applicable to TCNs insofar as their situations fall within the scope of Union law. In particular, in Opinion 1/17 the Court pointed out that the right enshrined in Article 20 of the Charter is 'available to all persons whose situations fall within the scope of EU law, irrespective of their origin'.[19] Following its case-law, the CJEU recalls that 'equality before the law' requires that 'comparable situations must not be treated differently and different situations must not be treated in the same way, unless such treatment is objectively justified'.[20] Moreover, it clarifies that their comparability 'must be assessed in the light of all the elements that characterise them and, in particular, in the light of the subject matter and purpose of the act that makes the distinction in question, while the principles and objectives of the field to which the act relates must also be taken into account'.[21]

This principle was further explained through the Court's recent interpretation of Article 4, paragraph 6, of Framework Decision 2002/584 (European Arrest Warrant) in conjunction with Article 20 of the Charter, which has implications extending beyond criminal law into other areas, including social benefits. This interpretation suggests that national laws which categorically deny any TCN residing or staying in a Member State the possibility of benefiting from the grounds for optional non-execution of a European Arrest warrant are incompatible with EU law. The Court's ruling

[17] Joined Cases C-443/14 and C-444/14 *Alo and Osso* EU:C:2012:233.

[18] H Verschueren 'Equal treatment as an instrument of integration. The CJEU's case law on social rights for third-country nationals under the EU migration directives' (2023) 25 *European Journal of Social Security* 243, 244.

[19] Opinion 1/17 *Accord ECG UE-Canada* ECLI:EU:C:2019:341, paras 168–175, 172. See C Contartese and M Andenas, 'Opinion 1/17 and Its Themes: An Overview' (2021) 6 *European Papers* 621, 627–628.

[20] Ibid., para 176.

[21] Ibid., para 177. See also Case C-930/19 *X v Belgian State*, ECLI:EU:C:2021:657, para 57. For further details, see F Strumia, 'Speaking too little, yet saying too much. The wrong signals about EU values: X. v. Belgian State' (2022) 59 *Common Market Law Review* 1195, 1204–1208.

implies that such laws should not automatically exclude TCNs from the possibility of the executing judicial authority assessing their connections with the Member State.[22] By analogy, this reasoning extends to the realm of social benefits, suggesting that TCNs should not face automatic denial based on rigid criteria such as residency duration or language proficiency. This assessment is crucial as it allows for a more nuanced consideration of the individual circumstances and ties that a TCN may have within the Member State, taking into account factors like the person's societal contributions, family connections, and efforts toward integration.

As far as Article 34 of the Charter is concerned, its potential lies in interpreting social assistance and social security schemes as instruments that must uphold fundamental rights, and not applied in a way that undermines human dignity or disproportionately excludes TCNs. This provision encompasses two key types of social rights: the right to access social security benefits (paragraph 1) and the right to social and housing assistance (paragraph 3), both of which must be upheld in accordance with Union law and national legal systems and practices. As for the field of application *ratione personae*, Article 34, paragraph 2, configures a right to access to social benefits for everyone residing and moving legally within the European Union.[23]

While paragraph 1 outlines a non-exhaustive list of social risks covered by social security systems, paragraph 3 explicitly links the right to social and housing assistance to ensuring 'a decent existence for all those who lack sufficient resources'. This emphasis on securing a decent existence reinforces the connection to the right to human dignity, a core principle enshrined in Article 1 of the Charter. By doing so, paragraph 3 not only underscores the importance of providing assistance but also highlights the obligation to design these measures in a way that upholds and protects the inherent dignity of individuals who lack sufficient resources.[24]

Starting from these considerations, the following sections will examine the CJEU's case law concerning the application of the equal treatment provisions set out in three key migration directives: Directive 2003/109 on long-term residents, Directive 2011/95 on beneficiaries of international protection, and Directive 2024/1233 on the single permit. This analysis will explore whether and how Articles 20 and 34 of the Charter of Fundamental Rights can be leveraged to address the fragmented approach to TCNs' access to social benefits under EU secondary law. attention will be devoted to examining the role of Article 20 in guiding the interpretation and eval-

[22] Case C-700/21 *O.G.*, ECLI:EU:C:2023:444, para 158. For further analysis see M Manfredi 'L'obiettivo del reinserimento sociale del condannato quale limite all'esecuzione del mandato d'arresto europeo' (2024) *Eurojus* 100.

[23] O Golynker, 'Art 34 – Social Security and Social Assistance' in S Peers, T Hervey, J Kenner and A Ward (eds), *The EU Charter of Fundamental Rights* (Bloomsbury Publishing 2021) 985.

[24] E De Becker, 'Social security in the fundamental rights case law of the Court of Justice' in F Pennings and G Vonk (eds), *Research Handbook on European Social Security Law* (Edward Elgar Publishing 2023) 2, 4.

uation of exclusionary or discriminatory measures, and how the obligation to guarantee a decent existence under Article 34 serves as a legal basis for extending protections grounded in the fundamental principle of human dignity.

2. The patchwork approach to social benefits under the EU migration directives

It is apparent from the previous section that TCNs' right to equal treatment with the nationals of the host Member State with regard to social benefits is laid down in various instruments of EU migration law.

As already pointed out, the Tampere conclusions provided significant political impetus for the European Commission to develop policies and instruments aimed at supporting the integration of migrants within EU Member States and at enacting a direct relationship between integration and equality of TCNs residents. It is with reference to individuals who have resided in a Member State for a certain period of time and benefit from a long-term residence permit that the European Council of Tampere set out the objective of granting rights as similar as possible to those enjoyed by EU citizens. This includes the right to reside, receive education, and work as an employee or self-employed person.[25]

Shortly after Tampere, the Commission proposed a directive that would regulate labour migration from outside the European Union, in order to harmonise the access to national labour markets.[26] However, this proposal was rejected by the Member States, that feared to lose their control on the admission criteria governing the entry of TCNs to their labour market. For this reason, the Commission changed its strategy and adopted what scholars refer to as the 'patchwork approach': it divided migrant workers into different categories and proposed legislative initiatives for specific categories of labour migrants, to be negotiated separately.[27]

In the current complex context, characterised by regulatory fragmentation in the field of migration,[28] the European Commission has put forward proposals seeking to simplify

[25] V Passalacqua and L Grossio, 'Migrants' Equal Access to Social Benefits under EU Law: Fragmentation and Exclusion during the Covid-19 Crisis in Italy' (2023) 19 *Utrecht Law Review* 57, 59.

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

[27] H Verschueren, 'Employment and Social Security Rights of Third-Country Labour Migrants under EU Law: An Incomplete Patchwork of Legal Protection' (2016) 18 *European Journal of Migration and Law* 373, 376–377.

[28] The first set of directives adopted by the EU legislator lays out the rules on access to employment and employment related rights for the main categories of TCNs who are resident in the Member States. This includes the Family Reunification Directive (Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification), the Long-Term Residents Directive (Directive 2003/109/EC (n 10)), the Students Directive (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), the Reception Conditions Directive, originally 2003/9 now 2013/33 (Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast)), the Qualification Directive on the status of refugees and beneficiaries of subsidiary protection, originally 2004/84 now 2011/95 (Directive

existing rules and improve the governance of regular migration.[29] On one hand, there is recognition of the need for intervention to enhance the flexibility of national labour markets, which could involve measures to facilitate the entry and residence of certain categories of migrants, such as entrepreneurs, self-employed professionals, and job seekers. On the other hand, this favourable stance tends to dissipate when considering the inclusion of workers with lower qualifications. The hesitancy towards including workers with lower qualifications may stem from various factors. There may be concerns about potential competition with native workers in sectors where labour is already abundant or where there are existing challenges related to unemployment or underemployment.[30]

Most of the migration directives contain clauses that require to the Member States to guarantee equal treatment of migrants having a secure residence status with nationals of the host States, regarding specifically employment and social security rights. However, the specific entitlements and conditions may vary depending on the legal framework governing the rights of TCNs in that particular EU Member State. In some countries, legal residence and a specific duration of stay are enough to presume integration and grant rights.[31] In others, individuals must demonstrate integration by passing state-

2011/95/EU (n 11)). Other set of directives were adopted on admission of certain categories of TCNs, such as the Blue Card Directive (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), the Directive on admission for seasonal employment (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) and the Directive on intra-corporate transferees (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). The third set of relevant EU instruments facilitates short-term employment and implicitly opens ways for TCNs to enter the Union and remain lawfully in a Member State for a short time and work or look for employment. These include the Visa Code (Regulation (EC) No 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas), the EU Visa Regulation (Council Regulation (EC) No 539/2001 of 15 March 2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement) and the Regulation on local border traffic at external borders (Regulation (EC) No 1931/2006 of the European Parliament and of the Council of 20 December 2006 laying down rules on local border traffic at the external land borders of the Member States and amending the provisions of the Schengen Convention). In addition to these, the Single Permit Directive (Directive 2011/98 has been recast by Directive 2024/1233 (n 11)) stipulates procedural rules to be applied by Member States and ensures equal treatment of third-country workers who have been issued the single permit with the nationals of the Member State where they reside. See K Groenendijk, 'Equal treatment of workers from third countries: the added value of the Single Permit Directive (2015) 16 *ERA Forum* 547, 549–550.

[29] European Commission, 'Commission Staff Working Document of 29 March 2019, Fitness check on EU legislation on legal migration', SWD(2019) 1055 final, 4, 105.

[30] Presidency discussion paper of 28 October 2020, n. 12272/20, 'A new way forward on European Migration and Asylum Policy' point 20. See M Borraccetti, 'Le vie legali di accesso all'Unione nel nuovo Patto su asilo e migrazione della Commissione europea', (2020) *I Post di AISDUE II* 97, 103.

[31] In France, a long-term resident status can often be granted after five years of legal residence, provided certain basic requirements (such as proof of income and residence) are met. Integration is

imposed exams.[32] While Member States have significant discretion, this is subject to review by the Court to ensure that measures are legally defined and do not create disproportionate barriers to the exercise of rights.[33]

To delve into the analysis of the CJEU's case law on the application of the equal treatment provisions laid down in Directive 2003/109, Directive 2011/95 and Directive 2024/1233, it is necessary to clarify the concept of social benefits referenced by these.

We need to consider that most welfare benefits can be divided into two categories: social assistance and social security. The difference between these categories was clarified by the Court since the *Frilli* case of 1972. According to the CJEU, social assistance seeks to relieve a state of need or poverty: it is the need that causes and justifies the right to assistance.[34] Furthermore, the Court specified in the *Dano* and *Alimanovic* cases that social assistance refers to 'all assistance schemes established by the public authorities, whether at national, regional or local level, to which recourse may be had by an individual who does not have resources sufficient to meet his or her own basic needs and those of his or her family'.[35] By contrast, social security is not focused on alleviating poverty but rather on indemnifying individuals against certain social risks by providing a supplementary or substitute income. Its purpose is to replace or supplement income rather than to provide a specific level of financial support.

When determining social security and social assistance measures subject to the principle of equal treatment, Member States must uphold the rights and principles enshrined in the Charter of Fundamental Rights of the EU, particularly those outlined in Article 34. This provision plays a pivotal role in interpreting and reviewing legislative acts that implement the access to social benefits, such as Regulation 883/2004 on the coordination of social security systems.[36]

The regulation at issue covers various social benefits, including sickness benefits, old-age pensions, and maternity allowances.[37] However, the determination of whether certain benefits fall under the scope of Article 34 is often challenging due

presumed through prolonged residence. Moreover, in Portugal long-term residence is primarily based on a stable legal stay of five years, often without additional integration requirements.

[32] In Germany, the Netherlands, and Austria, individuals seeking long-term resident status must pass both a language test and an integration test, which covers knowledge of the respective country's society, culture, and legal systems.

[33] A Lang, 'Social Integration: The Different Paradigms for EU Citizens and Third Country Nationals' (2018) 3 *European Papers* 663, 691.

[34] Case 1/72 *Frilli* EU:C:1972:56, para 14.

[35] Case C-333/13 *Dano* EU:C:2014:2358, para 63; Case C-67/14 *Alimanovic* EU:C:2015:597, para 44.

[36] Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems.

[37] Art 3 of Regulation 883/2004 (n 36) encompasses various aspects of social security, including sickness benefits, maternity and paternity benefits, old-age pensions, survivors' benefits, invalidity benefits, and benefits for accidents at work and occupational diseases, among others.

to the diversity of social measures across national legal systems. This definitional ambiguity raises important questions about the implications of leaving these concepts incomplete or subject to varying interpretations.[38] For example, benefits like maternity allowances are explicitly included under the concept of maternity, as outlined in Article 3, paragraph 1, letter b), of Regulation 883/2004, and thus clearly fall within the scope of Article 34 of the Charter. In contrast, determining whether birth allowances are covered is more problematic. The wide variety of family-related benefits in national legal systems complicates the classification of birth allowances as family benefits under Regulation 883/2004.[39]

Also, Article 34 serves as a key interpretative tool in applying social security and social assistance provisions within the EU legal framework, particularly in cases where the classification of benefits is ambiguous or varies among Member States. However, limiting the review of measures under Article 34 solely to legislative acts that explicitly implement it risks narrowing its broader purpose within the EU legal order. Such a restrictive approach could result in situations where measures in other policy domains that indirectly undermine the right to social security or social assistance remain beyond review. For instance, policies affecting employment, migration, or healthcare that inadvertently infringe on social security rights might escape scrutiny.[40] Consequently, some scholars argue for a broader interpretation of Article 34, one that would allow the right to social security and social assistance to be used to review measures that indirectly affect national social security policies within the European Union.[41]

Moreover, when it comes to access to social assistance, it is important to note that equal treatment is generally excluded for TCNs, except for long-term residents falling under the scope of Directive 2003/109.[42] This fragmentation creates differences between migrants that do not necessarily follow coherent criteria, such as the length of migrants' residence in the Member State, their level of integration or their employment status. Furthermore, migrants can fall into multiple categories defined

[38] C Barnard, *The Substantive Law of the EU* (Oxford University Press 2019) 290.

[39] G Strban, 'Family Benefits in the EU: Is it Still Possible to Coordinate Them? (2016) 23 *Maastricht Journal of European and Comparative Law* 775, 783.

[40] Y Joren and F Van Overmeiren, 'General Principles of Coordination in Regulation 883/2004' (2009) 11 *European Journal of Social Security* 47, 67.

[41] D Gallo and A Nato, 'Cittadini di Paesi terzi titolari di permesso unico di lavoro e accesso ai benefici sociali di natalità e maternità alla luce della sentenza *O. D. et altri c. INPS*', (2021) 4 *Lavoro, Diritti, Europa* 1, 13–14.

[42] See, on this point, the case of Italy, which introduced a 10-year residence condition for entitlement to a basic income, intended to ensure a minimum level of subsistence. The Court considered that the residency condition at issue constitutes indirect discrimination towards TCNs who are long-term residents, as they are legally required to reside in a Member State for only five years to obtain long-term resident status under EU law. Even though that condition also applies to nationals of the Member State, it affects primarily non-nationals, which includes, *inter alia*, those TCNs (Joined Cases C-112/22 and C-223/22 *CU and ND* EU:C:2024:636).

by these directives (for example, one can simultaneously be a subordinate worker and an asylum seeker) but their status and rights will be determined by their residence permit.[43] As a result, migrants in comparable situations may face unequal access to social benefits or other rights, depending on the legal category under which they are classified.

The CJEU has issued multiple rulings that clarify when Member States can invoke exceptions to equal treatment provisions. These judgments[44] establish broad criteria, such as necessity, proportionality, and non-discrimination principles, which Member States must satisfy when justifying exceptions. Yet, uncertainties persist regarding the justification of unequal treatment in cases where secondary legislation lacks explicit derogations.

Despite the progressive features of the directives involved, the CJEU has been criticised for neglecting the selective nature of integration criteria that Member States use to manage immigration. Pre-entry and post-entry integration measures can operate as exclusionary tools, potentially marginalising immigrants seen as less socio-economically or culturally desirable. By endorsing these integration requirements, the CJEU may have missed opportunities to challenge restrictive practices and promote a more inclusive approach to immigration and integration.[45] This underscores the ongoing conflict between State sovereignty in migration control and rights of TCNs within the EU legal framework.

3. Equal treatment and access to social benefits under Directive 2003/109

The principle of equal treatment between EU citizens and TCNs is expressly referenced in Directive 2003/109, whose main objective is to promote the integration of long-term residents in the host Member States.

According to Article 4 of the Directive, the Member States must grant long-term resident status to TCNs who have resided legally and continuously on their territory for five years immediately prior to the submission of the relevant application. Moreover, Article 5 imposes additional conditions for acquiring long-term resident status, such as demonstrating sufficient resources and having sickness insurance and other 'integration conditions, in accordance with national law'. These requirements are

[43] P Melin, 'Access to social security and social assistance for third-country nationals: An overview of the recent Court's case law' (2023) 23 *ERA Forum* 325, 334.

[44] Case C-153/14 *K and A* EU:C:2015:453, para 53; Case C-579/13 *P and S* EU:C:2015:369, para 47; Case 540/03 *European Parliament v. Council* EU:C:2006:429, para 70; case C-257/17 *C and A* EU:C:2018:876, paras 62–65. See D Vitiello, 'In Search of the Legal Boundaries of an "Open Society". The Case of Immigrant Integration in the EU' (2022) 2 *Freedom, Security & Justice: European Legal Studies* 151, 163–164.

[45] M Bottero, 'Integration (of Immigrants) in the European Courts' Jurisprudence: Supporting a Pluralist and Rights-Based Paradigm?' (2023) 24 *Journal of International Migration and Integration* 1719, 1742–1743.

intended to ensure that individuals seeking long-term residence have the means to support themselves and access healthcare services, thereby reducing the potential burden on the Member State's welfare system.[46] Once TCNs have acquired long-term resident status, they are entitled to invoke equal treatment with nationals of the host country for a wide range of rights and benefits according to Article 11.[47]

The interpretation of Articles 5 and 11 of the Directive was crucial in the case of *P and S*, which dealt with a Dutch law requiring a civic integration examination. This exam tested both oral and written proficiency in the national language, along with knowledge of Dutch society. The requirement applied not only to newcomers but also to long-term residence permit holders, who had to pass the exam within a specific period or face fines.[48] Given that this requirement did not apply to Dutch nationals, the CJEU assessed whether it contravened the principle of equal treatment laid down in Article 11, paragraph 1 of Directive 2003/109. The Court held that the examination itself did not violate the principle of equal treatment, as long-term residents and nationals of the host State are not in the same position regarding language proficiency and societal knowledge.[49]

The key concern was ensuring that the implementation of these exams did not violate Article 11 or undermine the Directive's effectiveness. The Directive's purpose is to facilitate the integration of long-term residents by ensuring they are proficient in the language and knowledgeable about society, aiding their access to employment and vocational training.[50] However, if the exams come with excessive financial burdens (e.g., high fees for taking the exam or retaking it) or if fines are

[46] For an in-depth analysis of Directive 2003/109/EC (n 10) see S Peers, 'Implementing equality? The Directive on long-term resident third-country nationals' (2004) 29 *European Law Review* 437; S Boelaert-Suominen, 'Non-EU nationals and Council Directive 2003/109/EC on the status of third-country nationals who are long-term residents: Five paces forward and possibly three paces back' (2005) 42 *Common Market Law Review* 1011; D Acosta Arcarazo, *The Long-Term Residence Status as a Subsidiary Form of EU Citizenship* (Nijhoff 2011).

[47] Art 11, para 1, of Directive 2003/109/CE (n 10): 'Long-term residents shall enjoy equal treatment with nationals as regards: (a) access to employment and self-employed activity, provided such activities do not entail even occasional involvement in the exercise of public authority, and conditions of employment and working conditions, including conditions regarding dismissal and remuneration; (b) education and vocational training, including study grants in accordance with national law; (c) recognition of professional diplomas, certificates and other qualifications, in accordance with the relevant national procedures; (d) social security, social assistance and social protection as defined by national law; (e) tax benefits; (f) access to goods and services and the supply of goods and services made available to the public and to procedures for obtaining housing; (g) freedom of association and affiliation and membership of an organisation representing workers or employers or of any organisation whose members are engaged in a specific occupation, including the benefits conferred by such organisations, without prejudice to the national provisions on public policy and public security; (h) free access to the entire territory of the Member State concerned, within the limits provided for by the national legislation for reasons of security'.

[48] *P and S* (n 44).

[49] Ibid. paras 35, 44.

[50] Ibid. paras 47–48.

imposed for non-compliance that are unaffordable for many long-term residents, this may deter individuals from participating. Such obstacles would undermine the effectiveness of the Directive, as they prevent long-term residents from benefiting from the equal treatment and opportunities intended by the Directive.[51]This outcome stemmed from a contentious interpretation of integration, which was assumed to be achieved through the mandatory acquisition of the host-state's language, despite the fact that the migrants in question had been long-term residents and had legally lived in the Netherlands for more than 10 years.[52]

In the following case *Land Oberösterreich* the Court provided a different interpretation of Article 11 of Directive 2003/109, ruling that Member States cannot require long-term resident to prove basic language proficiency as a condition for receiving housing assistance, assuming that such assistance is deemed a 'core benefit' under the directive at issue.[53]

Before considering the concept of 'core benefit' as a limit of the discretionary power of the Member States to adopt integration requirements, it is appropriate for the purposes of our investigation to recall Article 11, paragraph 1, letter d), which refers to equal treatment regarding 'social security, social assistance and social protection as defined by national law'. As already mentioned in the former section, the specific content, scope, and eligibility for these benefits are left to national law and that it is up to the national court to ascertain whether a certain benefit falls under the scope of social security, social assistance or social protection according to the national legislation.[54] Yet, as clarified by the CJEU, Member States do not enjoy unlimited discretion when defining the measures subject to the principle of equal treatment established in the directive.[55]

The Court addressed the issue in the well-known *Kamberaj* case, concerning the refusal to grant housing assistance to a TCN holding a long-term residence permit.[56] The CJEU recalled that Directive 2003/109 expressly precludes the EU legislator from giving an autonomous and uniform definition of the concepts of social security and social protection under Article 11, paragraph 1, letter d) thereof.[57] Thus, it was for the national court to assess whether the housing benefit at issue fell under the

[51] Ibid. para 54. See M Jesse, 'Integration Measures, Integration Exams and Immigration Control: P and S and K and A', (2016) 53 *Common Market Law Review* 1065, 1071–1072.

[52] Bottero (n 45) 1730.

[53] *Land Oberösterreich* (n 15) para 49.

[54] Verschueren (n 18) 246.

[55] *Kamberaj* (n 14) para 77.

[56] For a detailed comment on the judgment see F Costamagna, 'Diritti fondamentali e prestazioni sociali essenziali tra diritto dell'Unione europea ed ordinamenti nazionali: il caso *Kamberaj*' (2012) 6 *Diritti umani e diritto internazionale* 672; S Peers, 'The Court of Justice lays the foundations for the Long-Term Residents Directive: *Kamberaj*, *Commission v. Netherlands*, *Mangat Singh*' (2013) 50 *Common Market Law Review* 529.

[57] *Kamberaj* (n 14) para 77.

concept of social security and social protection subject to the principle of equal treatment enshrined in the Directive.[58] However, the EU judges clarified that the interpretation of these concepts under national law cannot undermine the effectiveness of the principle of equal treatment. National courts are therefore required to ensure that the application of social security and social protection provisions does not lead to arbitrary exclusions or discriminatory outcomes, thus preserving the scope and purpose of Directive 2003/109.[59]

Furthermore, the CJEU ruled that the derogations can only be relied upon by the Member States if they clearly stated their intention to do so, for instance in the legislation transposing Directive 2003/109 into national law.[60] Indeed, on this point, the Court underlined in case *INPS v VR*,[61] that none of the derogations allow Member States to exclude from the right to equal treatment long-term residents whose family members reside not in the territory of the Member State but in a third country, when it grants family benefit to its nationals irrespective of the place of residence of their family members.[62]

It is important to highlight that Article 11, paragraph 4, of the Directive allows Member States to restrict equal treatment in terms of social assistance and social protection to the 'core benefits'. However, this limitation does not extend to benefits that fall under social security as defined by national law.[63] Moreover, in relation to this exception, recital 13 of the Directives specifies that 'with regard to social assistance, the possibility of limiting the benefits for long-term residents to core benefits is to be understood in the sense that this notion covers at least minimum income support, assistance in case of illness, pregnancy, parental assistance and long-term care. The modalities for granting such benefits should be determined by national law'.

The CJEU has interpreted the contingent nature of the non-exhaustive list in recital 13 of Directive 2003/109 as evident from its literal wording, particularly the phrase 'at least', which implies flexibility in the scope of core benefits. Furthermore, the Court has emphasised that any derogation from the principle of equal treatment

[58] Ibid. para 81.

[59] Ibid. para 78. On this point, see the aforementioned *CU and ND* (n 42) on the entitlement to a basic income.

[60] Ibid., para 87.

[61] Case C-303/19 *INPS v VR* EU:C:2020:958. For a detailed analysis see L Grossio 'Who is entitled to family benefits? Lights and shadows of the ECJ rulings in *WS* and *VR*' (2021) 28 *Maastricht Journal of European and Comparative Law* 582.

[62] *INPS v VR* (n 61) para 30. The non-payment of a family allowance and the reduction of its amount, depending on whether all or some of the family members are absent from the territory of a Member State, are contrary to the right to equal treatment provided for in Art 11, para 1, lett d) of Directive 2003/109/EC (n 10), since they constitute a difference in treatment between long-term residents and nationals of the member States (para 33).

[63] H. Verscheueren believes this exclusion to be unclear, since a clear distinction between social assistance, social security and social protection cannot always be made (Verschueren (n 18) 246).

must be interpreted strictly, as equality remains the general rule.[64] This principle was further clarified in the *Kamberaj* case, where the CJEU qualified housing assistance as a 'core benefit' under Directive 2003/109. The Court reasoned that housing assistance fulfils the objective of Article 34, paragraph 3, of the Charter, which aims to ensure a decent existence for those lacking sufficient resources. Consequently, where housing assistance serves this purpose, it cannot be excluded from the scope of core benefits, reinforcing the requirement for a consistent and rights-based approach in assessing social benefit entitlements for TCNs.[65]

The same approach was followed by the CJEU in the aforementioned *Land Oberösterreich* case, in which the EU judges recognised housing allowance for a TCN with long-term residence in a Member State as a benefit that 'contributes to combating social exclusion and poverty, it being intended to ensure a decent existence for all those who lack sufficient resources, as referred to in Article 34, paragraph 3, of the Charter'.[66] Housing subsidy represents a necessary tool for meeting the essential need for access to decent housing and can rightfully be considered a core benefit under Directive 2003/109.

It is worth noting the distinction made by the Court in *Land Oberösterreich* regarding derogations from the principle of equal treatment is significant. According to the Court's judgment, if a social benefit is not considered a 'core benefit', then a Member State's derogation from the principle of equal treatment does not fall within the scope of EU law. As a result, such a derogation cannot be assessed under Union law, including the EU Charter.[67] This stance contrasts with the Opinion of the Advocate General, who argued that a derogation explicitly foreseen or contemplated by EU law falls under the purview of EU law itself. The Advocate General emphasised that when a Member State invokes a derogation as provided in Article 11, paragraph 4, of Directive 2003/109, it is essentially implementing EU law and must therefore adhere to the Charter and the general principles recognised within the Union's legal framework.[68]

Starting from the recalled case law, the European Commission recently submitted a proposal to recast Directive 2003/109.[69] Concerning its provisions on equal treatment, article 12 of the Commission proposal clarified that EU long-term residents should have the same right as nationals with regard to the acquisition of private housing. Secondly, the article in question aligns the definition of social security to

[64] *Kamberaj* (n 14) paras 85–86.

[65] Ibid. para 92.

[66] Ibid. para 42.

[67] Ibid. paras 61–62.

[68] Opinion of AG Hogan in Case C-94/20 *Land Oberösterreich* EU:C:2021:477, paras 64–71. See Verschueren (n 18) 248.

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

the provisions of the other legal migration Directives (that they will be discussed below) and it refers to the branches of social security ruled by Regulation 883/2004.[70] Nevertheless, the Commission did not propose to delete the reference to the Member States' national definitions of the concepts of 'social assistance' and 'social protection'. However, the proposal does extend the equal access to social protection and social assistance for long-term residents by eliminating the option for Member States to limit such access to 'core benefits'. The removal of these limitations could probably support long-term residents in marginal positions, preventing national authorities from denying social benefits to individuals. Despite this, as the Council decided not to proceed with the recast directive, it is believed that the identification by the EU Commission of additional 'core benefits' subject to equal treatment provisions could reasonably contribute to strengthening TCNs' access to social benefits aimed at ensuring a decent existence.

4. Equal treatment and social benefits for beneficiaries of international protection

The second directive examined in this contribution is Directive 2011/95/EU, often referred to as the 'Qualification Directive'. It establishes standards for the qualification of beneficiaries of international protection, including refugees[71] and beneficiaries of subsidiary protection,[72] within the European Union. While the primary focus of this directive is on defining the criteria and procedures for granting international protection status, it also includes provisions related to the right to equal treatment, including access to social benefits.

Article 29, paragraph 1, of the Directive specifically provides that Member States shall ensure that beneficiaries of international protection receive, in the country that has granted such protection, 'the necessary social assistance as provided to nationals of that Member State'. However, by way of derogation from this general rule, Article 29, paragraph 2 allows Member States to limit social assistance provided to 'core benefits', although such derogation applies to subsidiary protection holders only.

A key issue in this context is the discrepancy in the duration of residence permits between refugees and beneficiaries of subsidiary protection. It has been suggested in legal scholarship[73] that while the latter may receive permits with a shorter duration,

[70] Regulation (EC) No 883/2004 (n 36) Art 3.

[71] The person is considered a refugee within the meaning of Art 1(A) of the Geneva Convention.

[72] A TCN or stateless person is eligible for subsidiary protection if this person does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, or in the case of a stateless person, to his or her country of former habitual residence, would face a real risk of suffering serious harm (Directive 2011/95/EU (n 11) Art 2, para 1, lett f)).

[73] G Morgese, 'La direttiva 2011/95/UE sull'attribuzione e il contenuto della protezione internazionale' (2012) 2 *La Comunità internazionale* 255.

this distinction alone does not justify unequal treatment in terms of social assistance. The principle of equal treatment underscores the necessity of ensuring that all individuals granted international protection have access to essential support services and benefits for their integration and well-being. Nevertheless, the Directive maintains an exception to national treatment in social assistance, but only for those granted subsidiary protection status (Article 29, paragraph 2). Refugees, on the other hand, are entitled to the same benefits as nationals.[74]

This distinction has been widely criticised as difficult to justify.[75] Both refugees and beneficiaries of subsidiary protection require protection, and neither group has chosen nor can change their circumstances. If differential treatment is based solely on their status, it appears discriminatory. An alternative justification could be the difference in the length of residence permits; however, this factor alone does not warrant significant disparities in social assistance. As some scholars argue,[76] the relevance of status should outweigh the duration of residence permits in determining entitlements to social benefits.

Another critical issue concerns the interpretation of 'TCNs legally resident', who are entitled to uniform access to social benefits under EU law. The fragmented nature of EU legislation on TCNs, with distinct legal statuses governed by separate directives, limits the scope of uniform protection. Interpreting 'legally resident' with residence in accordance with EU law may ensure consistency and reflect the Court of Justice's approach to preserving the autonomy of EU law from national legislation. As Pistoia suggests, a reasonable approach would be to interpret the Qualification Directive in light of Article 20 of the Charter, allowing the application of Directive 2003/109 to beneficiaries of international protection who have legally resided in a Member State for at least five years, even if they have not yet obtained long-term resident status.[77]

The Court provided clarification on the application of Article 29 of the Qualification Directive in the well-known *Alo and Osso* case. This case specifically addressed whether the imposition of geographical restrictions on residence permits constituted discrimination against nationals and other legally residing TCNs in the host state, thereby potentially violating the Qualification Directive. Under German law, beneficiaries of international protection who receive social benefits may have their residence permits restricted to a specific area. The Court examined whether such restrictions were compatible with the principle of equal treatment and the rights guaranteed under

[74] JY Carlier 'Choice of Residence for Refugees and Subsidiary Protection Beneficiaries; Variations on the Equality Principles: Alo and Osso' (2017) 54 *Common Market Law Review* 642.

[75] E Pistoia, 'Social Integration of Refugees and Asylum Seekers Through the Exercise of Socio-economic Rights in European Union Law' (2018) 3 *European Papers* 781, 796–797.

[76] Morgese (n 73) 274; S Salomon 'Constructing Equality in the EU Asylum Law' (2021) 33 *International Journal of Refugee Law* 608, 639–641.

[77] Pistoia (n 75) 797.

the Directive. According to the CJEU 'the grant of social security benefits to a given person will entail costs for the institution that is required to provide those benefits, regardless of whether that person is a beneficiary of subsidiary protection status, a refugee, a third-country national' or a citizen.[78] In this regard, the unequal distribution of these benefits to the various categories of beneficiaries (citizens or foreigners) within the territory of the Member State may mean that 'the costs entailed are not evenly distributed among the various competent institutions, irrespective of the potential qualification of such recipients for subsidiary protection status'.[79] However, it does not breach the Directive if it aims to facilitate the social integration of beneficiaries of international protection. This assessment focused on whether the residence obligation discriminates against beneficiaries of international protection compared to nationals and other TCNs: it was deemed discriminatory compared to German nationals if aimed at financial burden distribution, but generally non-discriminatory compared to other TCNs if aimed at enhancing social integration.[80]

The Court evaluated whether the residence requirement aligns with the Directive's provisions and determined that it is not discriminatory regarding the treatment of nationals and TCNs.[81] Concerning nationals, the Court found no conflict with the Directive, noting that beneficiaries of international protection are not in a comparable situation to nationals as far as the objective of facilitating the integration of TCNs is concerned.[82] For TCNs residing under a different status from beneficiaries of international protection and receiving welfare benefits without a residence condition, the Court deferred this decision to the national court, which must assess if beneficiaries of international protection encounter greater integration challenges than other foreign nationals. If national legislation provides welfare benefits to TCNs residing for reasons other than subsidiary protection only after a certain residence period, due to the condition of financial self-sufficiency upon their admission, and if this period indicates sufficient integration. In such cases, a national court might conclude that beneficiaries of international protection face greater integration difficulties justifying the residence condition.[83]

The concern with this reasoning does not arise from the fact that beneficiaries of international protection may require specific support measures to facilitate their integration, but from the assumption that they are generally less integrated than other TCNs.[84] This assumption may or may not be accurate, depending on individual circumstances. The Court's judgment, which aligns with Directive 2011/95, points to a

[78] *Alo and Osso* (n 17) para 55.
[79] Ibid.
[80] Ibid. para 58.
[81] Ibid. para 50.
[82] Ibid. para 59. See Y Carlier (n 74) 249–250.
[83] Ibid. para 63.
[84] Lang (n 33) 679.

potentially concerning acceptance of restricting the freedom of movement for those under international protection. Moreover, although the CJEU advocates for a case-by-case assessment, it fails to provide guidelines for conducting this assessment in line with the Qualification Directive and the Charter.[85]

While restrictions on the free choice of the place of residence for beneficiaries of subsidiary protection may be justified by the objective to facilitate integration, a reduction in social benefits for refugees during the first three years of residence was found to be illegal. In the *Ayubi* case,[86] in particular, the Court emphasised that refugees' entitlement to equal treatment regarding social assistance derives from Article 23 of the Geneva Convention, which does not tie refugees' entitlements to the duration of their stay in the respective State.[87] Therefore, the level of social benefits provided to refugees must be equivalent to that offered to citizens, regardless of the duration of their residence permit.[88] The issuance of a temporary residence permit to refugees under Directive 2011/95 (initially for a period of three years) does not affect the subsequent treatment, which, according to the Court, must indeed be equal to that of citizens of the Member State, as the duration of the residence permit and the rights granted are two distinct and independent aspects. The granting of social benefits always entails costs, regardless of the status of the person involved, and this should not be an argument to justify the difference in treatment.[89]

The Court further clarified the interpretation of Article 29 by focusing on the concept of 'necessary social assistance'.[90] This concept was revisited in light of previous CJEU rulings, specifically the *Dano* and *Alimanovic* cases, which elaborated on the notion of social assistance.[91] However, it remains unclear whether the notion

[85] Pistoia (n 75) 800.

[86] Case C-713/17 *Shah Ayubi* EU:C:2018:929.

[87] Art 23 of the Geneva Convention states that contracting states must ensure that refugees residing lawfully on their territory receive the same treatment as their own citizens regarding public assistance, including aspects related to employment and social security.

[88] Mr. Ayubi, a TCN with refugee status in Austria, was granted a temporary residence permit valid for three years. He applied for assistance in securing means of subsistence and housing for himself and his family. However, his application was denied on the basis that individuals in Mr. Ayubi's situation, with only temporary residency, were eligible for only minimal subsistence benefits under Austrian law.

[89] *Shah Ayubi* (n 86) para 34.

[90] Ibid. para 21.

[91] In *Dano* (n 35), the CJEU ruled that economically inactive EU citizens who move to another Member State solely to access social assistance may be denied such benefits. The case involved a Romanian national, Ms. Dano, who moved to Germany without seeking employment. The Court emphasised that EU law does not grant an automatic right to social benefits for mobile citizens unless they meet certain residence and self-sufficiency requirements under Directive 2004/38. Similarly, *Alimanovic* (n 35) involved a Swedish national of Bosnian origin and her daughter, both of whom had lived and worked in Germany for less than a year before becoming unemployed. The CJEU ruled that Member States could restrict access to certain social assistance benefits for jobseekers after a specific period, in line with Directive 2004/38. The Court reaffirmed that economically inactive individuals cannot claim equal access to social assistance if they do not meet the residence criteria.

of social assistance for the purposes of Article 29 of the Directive may also cover the branches of social security defined in Regulation 883/2004. According to the Court, this concept cannot be left entirely to the discretion of Member States, which are not empowered to provide beneficiaries of international protection with social benefits that are lower than those provided to their own citizens.[92]

In the *Ayubi* case, in particular, the CJEU ruled that once the level of social assistance is determined, Member States have a precise and unconditional obligation to ensure that refugees receive the same level of social assistance as nationals.[93] By affirming the direct effect of Article 29, paragraph 1, the Court established that refugees can challenge any national legislation or practices that impose different conditions on their access to social assistance. This ruling reinforces the principle of equal treatment and upholds the rights of refugees to receive the necessary support for their integration and well-being within the host Member State.[94]

However, in the *Alo and Osso* case, the CJEU clarified that Article 29, paragraph 2 allows Member States to restrict social welfare assistance for beneficiaries of subsidiary protection to 'core benefits' provided to nationals. If a Member State adopts such a restriction, these core benefits must be granted under the same conditions as they apply to nationals.[95]

To define a 'core benefit', Article 20, paragraph 3, of Directive 2011/95 emphasises the importance of considering the specific circumstances of vulnerable individuals. This recognises the diverse needs and vulnerabilities of beneficiaries of subsidiary protection and underscores the importance of ensuring that essential support is provided to those most in need. Recital 45 further clarifies that limiting such assistance to 'core benefits' encompasses at least minimum income support, assistance in the case of illness or pregnancy, and parental assistance, consistent with benefits provided to nationals. Benefits falling within this definition should be regarded as 'core benefits'.

To date, the Court of Justice has not applied a Charter-based interpretation to the Qualification Directive, as it has with Directive 2003/109. Applying such a perspective could meaningfully enhance the protection of beneficiaries of international protection. In this context, essential needs such as food, housing, and healthcare should also be recognised as 'core benefits' in accordance with Article 34, paragraph 3, of the Charter, ensuring a more comprehensive and rights-based approach to social assistance.[96]

Establishing clear and precise minimum core standards for accessing social benefits by beneficiaries of international protection could mitigate the uncertainty of case-by-case assessments by national judicial authorities and limit the discretion of Member

[92] *Alo and Osso* (n 17) para 48.
[93] *Shah Ayubi* (n 86) para 23.
[94] Ibid., para 39.
[95] *Alo and Osso* (n 17) para 49.
[96] Verschueren (n 18) 250.

States. As correctly highlighted, the discretion of States in applying exceptions to the principle of equal treatment could encourage litigation between beneficiaries of international protection and national or regional authorities, undermining the former's sense of belonging to the host State, which is crucial for social integration.[97]

5. The Single Permit Directive: ensuring equal treatment and access to social benefits for migrant workers

The third directive at the core of this study is Directive 2024/1233, which recently recast Directive 2011/98. It lays down the procedure for issuing a single permit to TCNs residing in a Member State for work purposes, along with a common set of rights applicable to single permit holders, ensuring equal treatment with nationals of that Member State.

A key tenet underlying the Directive is that non-EU migrants contribute to the European Union through their labour and should therefore be entitled to a corresponding set of rights. Additionally, ensuring equal rights across EU territory prevents unfair competition between Member States and mitigates risks of social dumping and migrant exploitation.

The principle of equal treatment is explicitly reflected in Article 12 of the directive, which sets specifically that third-country workers falling under Article 3, paragraph 1, letters b) and c) should be treated equally as nationals of the Member State where they reside. This includes TCNs admitted for employment purposes as well as those with a right of residence in the Member State for reasons other than employment (such as family reunification) but are now legally employed there. Article 12, paragraph 1, letter e) grants them equal treatment regarding social security branches defined in Regulation 883/2004. However, social assistance is explicitly excluded from equal treatment by Recital 27 of the directive, meaning that single permit holders do not have the same rights to social assistance as nationals, highlighting a key distinction in the rights available to them compared to long-term residents.[98]

The Directive at issue also permits general restrictions on the right to equal treatment based on the employment situation of TCNs. Member States may restrict equal treatment in social security branches covered by Regulation 883/2004, limiting its application to third-country workers employed for a minimum of six months and registered as unemployed. Access to family benefits may be denied to certain categories of TCNs, such as those authorised to work for less than six months or based on a visa or admitted for study purposes. The Directive does not confer rights regarding family members residing in a third country but only grants rights to family members joining third-country workers in a Member State.[99] Nevertheless, Article 12, paragraph 4 ensures that third-country workers moving to a third country, as well

[97] Pistoia (n 75) 807.
[98] Verschueren (n 27) 106-108.
[99] Art 12, para 2 of Directive 2024/1233 (n 11).

as their survivors who reside in a third country and derive rights from those workers, receive statutory pensions related to old age, invalidity, and death, under the same conditions as the nationals of the Member States concerned when they move to a third country. It recognises the contributions made by third-country workers to the social security systems of the Member States and ensures that they receive comparable benefits when they relocate to a third country.[100]

The right to equal treatment with respect to social security benefits has been addressed in some judgments of the CJEU, particularly regarding Italian law's criteria for accessing family benefits, such as family, maternity, or childbirth allowance.[101] The Court examined the practice of the INPS, the Italian National Social Security Institute, aimed at denying access to specific social benefits to TCNs holding a residence permit for employment purposes rather than long-term residents.[102]

The CJEU recognised the discriminatory nature of this practice in the *Martinez Silva* case, concerning a TCN living in Italy with her three children on the basis of a single work permit and applying to receive a benefit provided for by Italian law. The application was rejected by the Italian government on the ground that national law only allowed the grant of such a benefit to long-term residents.[103] The Court found that the family benefit in question falls within the scope of Article 3, paragraph 1, of Regulation 883/2004, which pertains to social security benefits aimed at assisting recipients in meeting family expenses. This means that single permit holders are entitled to equal treatment in accessing this benefit under Article 12, paragraph 1, letter e), of the current Directive 2024/1233.[104] The CJEU emphasised that equal treatment is the general rule for accessing social security benefits, ensuring that single permit holders are not discriminated against based on their status,[105] and derogations from the principle at issue are only admissible when the authorities of the concerned Member State have clearly stated their intention to rely on them.[106]

[100] For a detailed analysis of the various aspects of the Directive, see A Beduschi, 'An Empty Shell? The Protection of Social Rights of Third-Country Workers in the EU after the Single Permit Directive' (2015) 17 *European Journal of Migration and Law* 210.

[101] See Case C-449/16 *Martinez Silva* EU:C:2017:485; Case C-302/19 *INPS v WS* EU:C:2020:957.

[102] R Palladino, 'Non-discrimination in accessing the welfare system. The effectiveness and primacy of EU law over Italian law' in A Di Stasi, I Caracciolo, G Cellamare and P Gargiulo (eds), *International Migration and the Law. Legal Approaches to a Global Challenge* (Taylor & Francis 2024) 209.

[103] *Martinez Silva* (n 101). See F Costamagna, S Montaldo and F Romanelli, *Access to social advantages for EU citizens and Third country nationals under the law of the European Union. Essential text, cases and materials* (Università degli Studi di Torino 2022) 36–38.

[104] *Martinez Silva* (n 101) paras 23–25.

[105] Ibid. para 27.

[106] Ibid. para 29. As correctly noted by the referring Court, the Italy had not opted to restrict equal treatment by utilizing the derogations provided by the Directive. Therefore, Mrs. Martinez Silva could not be excluded from receiving the benefit in question in the main proceedings. On this point see also *INPS v WS* (n 101) para 26.

Even in light of these exceptions, in the case *INPS v. WS*, the Court did not accept Italy's refusal to grant a family benefit based on the argument that the family members in question resided in a third country, while the same benefit would have been granted to Italian workers whose family members reside in a third country.[107] The CJEU pointed out that none of the derogations specified in the Single Permit Directive allows Member States to exclude from the right to equal treatment a worker holding a single permit whose family members reside not in the territory of the Member State concerned but in a third country.[108] Such a conclusion could not be inferred from the current Recitals 30 and 35 of the Directive either. Indeed, Recital 30 addresses the situation where the family members of a third-country worker holding a single permit benefit directly from the right to equal treatment, while Recital 35 clarifies that the Directive does not mandate Member States to pay social security benefits to family members who do not reside in the host Member State.[109]

The CJEU further stated that the objective pursued by the directive is also to establish a minimum level playing field within the Union.[110] By recognising the contributions of TCNs to the EU economy through their work and tax payments, the directive underscores the importance of equal treatment for non-EU citizens in areas such as social security and aims to prevent unfair competition and exploitation between them and nationals of Member States.[111] Rejecting the argument that TCNs cannot be compared to nationals of the Member State involved is significant. The Court's stance reinforces the principle of equal treatment enshrined in Article 12, paragraph 1, letter e), of the directive and ensures that its provisions hold meaningful weight and are effectively implemented to safeguard the rights of TCNs within the EU.[112]

Here it is appropriate to specify that the right to equal treatment under the Single Permit Directive can be invoked by all TCNs falling under the personal scope of the directive. This includes those admitted to a Member State for work purposes, family reunification, or other reasons allowing them to work. In contrast, long-term residents are excluded from the scope of Directive 2024/1233, which seems paradoxical. Long-term residents have already demonstrated their commitment to and integration within a host Member State by residing there for at least five years and meeting certain integration criteria. Despite this, they may have fewer rights to social benefits compared to TCNs covered by the Single Permit Directive, who can immediately benefit from its equal treatment provisions upon starting work in the host Member State.[113] For this reason, the European Commission proposed amendments to the former Directive 2011/98 to

[107] *INPS v WS* (n 101). See Grossio (n 61).
[108] *INPS v WS* (n 101) paras 27–28.
[109] Ibid. paras 29–32.
[110] Ibid. para 33.
[111] Ibid. para 34
[112] Ibid. para 43.
[113] Verschueren (n 18) 252.

strengthen the rights of TCNs regarding equal treatment. These included removing limitations on equal treatment for certain categories of TCNs and introducing provisions on equal treatment for social assistance, social protection, and the export of pensions to third countries.[114] Nevertheless, this amendment was not incorporated into the new Directive 2024/1233, and the right to equal treatment under Article 12 has remained unchanged.

Another aspect deserves close attention. In the *O.D. and Others* case,[115] the Court was asked to rule on the compatibility with EU law of the Italian legislation granting maternity or childbirth allowance exclusively to TCNs who were long-term residents and to clarify the scope of the right to social benefits enshrined in Article 34, paragraph 2, of the Charter, and of the right to equal treatment in the field of social security conferred upon third-country workers by Article 12, paragraph 1, letter e), of the Single Permit Directive.[116]

The Court found that the childbirth allowance and maternity allowance in question constituted benefits falling within the branches of social security listed in Article 3, paragraph 1 of Regulation 883/2004.[117] These allowances were automatically granted to households meeting specific legally defined, objective criteria, without any individual or discretionary assessment of the applicant's personal needs, with the intention of contributing to family expenses. Additionally, the Court noted that the Italian Republic had not chosen to restrict equal treatment under the Single Permit Directive, an option available to Member States.[118] Once again, the Court ruled that Italian law was contrary to the principle of equal treatment established in Article 12, paragraph 1, letter e), which specifically reflects the entitlement to social security benefits outlined in Article 34 of the Charter.

Although the Charter played a central role in the request for a preliminary ruling, as evidenced primarily by its emphasis in the question submitted to the Court,[119] the CJEU primarily analysed secondary EU law, specifically Directive 2011/98, to determine whether national legislation extending childbirth and maternity allowances solely to TCNs holding a single permit was permissible.[120] It referred to Article 34 of the Charter just to contextualise the principle of equal treatment enshrined in the Directive.[121]

[114] European Commission (n 69). See S Peers, 'Take this job and shove it: the revised EU law on non-EU migrant workers' (EU Law Analysis, 22 December 2023) at https://eulawanalysis.blogspot.com/2023/12/take-this-job-and-shove-it-revised-eu.html.

[115] Case C-350/20 *O.D. and Others* EU:C:2021:659.

[116] Gallo and Nato (n 41) 18–23.

[117] *O.D. and Others* (n 115) para 60.

[118] Ibid., para 64.

[119] See Constitutional Court, order 182/2020, para 7. N Lazzerini, 'Dual Preliminarity Within the Scope of the EU Charter of Fundamental Rights in the Light of Order 182/2020 of the Italian Constitutional Court' (2020) 5 *European Papers* 1463, 1470–1472.

[120] *O.D. and Others* (n 115) paras 50–63.

[121] Ibid., para 46. The Italian Constitutional Court, with the order 29/2024, decided to stay the proceedings and refer a question for a preliminary ruling to the Court to clarify the scope of Art 12,

The *O.D. and Others* case could have offered the CJEU the opportunity to clarify the fundamental nature of the principle of equal access to benefits for TCN migrants, which so far has been relegated to an 'ordinary legislative function',[122] by referring to the EU Charter. Instead, the Court evaded its obligation to interpret Article 34.[123] By contrast, in *Kamberaj* and *Land Oberösterreich*, the CJEU relied on Article 34 of the Charter to determine the scope of application of the equal treatment principle with regard to housing assistance. Following this reasoning, if a benefit serves the purpose outlined in Article 34, paragrah 3 - ensuring a decent standard of living and social assistance for those in need - then TCNs cannot be excluded from it.

Thus, the purpose of the benefit is central as Loxa also suggests: if it is essential for a dignified existence, it must be granted under equal treatment conditions, both for long-term residents (to support their integration) and for all migrants covered by the Single Permit Directive (to uphold fair treatment).[124]

By interpreting derogations under Single Permit Directive in light of Article 34, paragraph 3, of the Charter, the Court could set minimum protection thresholds, thereby limiting the discretion of both Member States and the EU legislator in restricting the social rights of migrant workers.

6. The potential impact of the Charter of Fundamental Rights on patching up the EU legislator patchwork approach

The analysis underscored the persistent lack of clear and consistent criteria for ensuring equal treatment of TCNs with regard to social benefits under EU law. A central issue is the fragmented personal scope of the migration directives, which fail to uniformly protect all TCNs legally residing or working within a Member State.

As highlighted in the previous sections, Directive 2003/109 on long-term residents and Directive 2011/95 on the beneficiaries of international protection defer to

para 1, lett. e) of Directive 2011/98 (n 28) concerning cash assistance provided by INPS to financially disadvantaged individuals over sixty-seven. This benefit is distinct from other welfare schemes and is specifically aimed at those in poverty, particularly the elderly. According to Italian law, only Italian and EU citizens, as well as TCNs with long-term residence permits, are eligible for this benefit, which also requires ten years of continuous legal residence in Italy. The main constitutional question is whether this social security benefit falls within the scope of benefits eligible for equal treatment under the Directive. Since the CJEU has not yet clarified this issue, the Constitutional Court has referred the question to the CJEU to determine if the benefit should be included under the Directive and if EU law, particularly Art 34 of the Charter, precludes national legislation from restricting such benefits to foreigners holding the single permit referred to in the Directive.

[122] E Muir, *EU Equality Law. The First Fundamental Rights Policy of the EU* (Oxford University Press 2020) 121.

[123] D Gallo, 'Migrants' Social Rights in the Dialogue between the CJEU and the Italian Constitutional Court: Long Live Article 267 TFEU!' (EU Law Live, 8 September 2021) at eulawlive.com.

[124] A Loxa, 'Insiders, Outsiders, and the Constructed Limits to Social Rights in EU Law' (2025) 10 *European Papers* 163.

national laws to define the scope of social security, social assistance, and social protection. In contrast, the Single Permit Directive aligns social security benefits with those defined under Regulation 883/2004. Additionally, exceptions to equal treatment provisions vary significantly between directives, reflecting inconsistent approaches to TCN rights. These discrepancies, along with the fragmented legal framework, highlight differences in the duration of TCNs' stays – whether temporary or long-term – and the economically driven nature of Member States' migration policies, influenced by political negotiations during the drafting of these directives.[125]

Although the European Commission has recognised the need for greater coherence – proposing to align the Long-Term Residence Directive and the Single Permit Directive in their recast – the current migration directives still lack harmonised provisions on equal treatment. This fragmented legal framework creates uncertainty for migrants while granting Member States excessive discretion to restrict or exclude TCNs' access to social security and social assistance.[126]

The current patchwork of provisions partially compensates for the fact that the general principle of non-discrimination based on nationality, as outlined in Articles 18 TFEU and 21 of the Charter of Fundamental Rights, does not apply to TCNs. As a result, the fragmented framework further entrenches disparities, highlighting the need for a more coherent and harmonised approach to equal treatment under EU law.

Greater consistency could be achieved by interpreting the relevant directives through the lens of Article 20 of the Charter, which enshrines the principle of equality before the law. Such an approach would ensure a stronger and more coherent application of equal treatment rights, particularly in access to social benefits, thereby reducing disparities and uncertainties for TCNs across Member States.

The CJEU has applied the principle of equality before the law, as stated in Article 20 of the EU Charter of Fundamental Rights, to non-EU citizens in contexts governed by Union law.[127] This principle implies that comparable cases should be treated equally, while differential treatment is only permissible if it is justified and proportionate. From this, it can be inferred that TCNs who have acquired a certain legal status under EU migration directives are in comparable situations to nationals of the host Member State regarding equal treatment for social benefits. The EU legislator indeed specified that these TCNs should be treated comparably to host Member State nationals regarding entitlement to social benefits, with certain explicit exceptions, such as in Article 12, paragraph 2, of the Single Permit Directive.[128]

Moreover, the Court has emphasised the strict interpretation of the exceptions to equal treatment, aligning with the goal of promoting integration and the prohibition of discrimination under the EU primary law. It has clarified that, although EU directives allow for some derogations from equal treatment provisions, such exceptions

[125] Morano-Foadi and de Vries (n 1) 41–43.
[126] Passalacqua and Grossio (n 25) 61–63.
[127] Opinion 1/17 (n 19) paras 168–175; *X v Belgian State* (n 21) para 57; *O.G.* (n 22) para 158.
[128] Verschueren (n 18) 258.

must be explicitly specified at the time of transposing the directives into national law. Member States are not permitted to introduce new limitations on access to social security or social assistance once the implementation process is complete. As emerged from the previous pages,[129] these exceptions can only be relied upon if clearly stated by the relevant authorities in the Member State.[130]

Along with considering Article 20, Article 34 of the Charter may have the potential to play a pivotal role in overcoming the patchwork approach of the EU legislator by providing a consistent framework for the protection of social rights of TCNs. However, the Court has been hesitant to apply it. This reluctance may be due to the fact that this right is subject to conditions established by 'Union law and national laws and practices', diminishing its effectiveness. As mentioned earlier, in the case of *O.D. and Others v INPS*, the Court barely addressed the right to social security. The case required the Court to evaluate the rights of TCNs with a single permit to access childbirth and maternity allowances under Italian law. Although Article 34, paragraph 2 was central to the preliminary ruling request by the Italian Constitutional Court, it remained peripheral in the Court's reasoning. The Court only stated that the right to equal treatment in Article 12, paragraph 1, letter e), of the Single Permit Directive specifically reflects the right to social security benefits outlined in Article 34, paragraphs 1 and 2.[131]

A more consistent interpretation of the migration directives in light of Article 34 of the Charter by the Court of Justice could also help prevent reverse discrimination against TCNs in accessing to social benefits. This approach has been followed by the Court of Justice in judgments concerning housing benefits (such as the *Kamberaj* case of 2012 and *Land Oberösterreich* case of 2021), where the CJEU invoked Article 34, paragraph 3 of the Charter to underscore the importance of the right to housing as a 'core benefit', a fundamental aspect of ensuring a dignified existence, especially for those lacking sufficient resources. By relying on the Charter to delineate the scope of the principle of equal treatment in relation to housing assistance, the Court has strengthened the obligation of Member States to ensure the provision of adequate social and housing support, even when such benefits are governed by national legislation.[132]

Establishing core minimum standards could promote at least a decent standard of living and ensure effective access to social assistance for those in need. Such standards would contribute to aligning national welfare provisions with the objectives set out in Article 34, paragraph 3 of the Charter, thereby constraining Member States' discretion in regulating access to social benefits and reducing the legal uncer-

[129] See the previous section 3.
[130] *INPS v VR* (n 61) para 26.
[131] De Becker (n 24) 14.
[132] Iglesias Sanchez (n 8) 146.

tainty associated with case-by-case assessments by national courts. However, defining 'core benefits' can be a complex and challenging task, especially given the different perspectives and interests involved. The EU Commission proposal to recast Directive 2003/109, which clarifies the equal treatment of EU long-term residents regarding the acquisition of private housing, exemplifies efforts to ensure equality and non-discrimination in access to essential services and benefits.[133]

Clarifying which benefits are fundamental and not subject to the discretion of national authorities is crucial, particularly when they pertain to essential needs like food, housing, and healthcare. By identifying 'core benefits', the national authorities could reasonably guarantee that individuals, including TCNs, have access to necessities for a dignified existence, regardless of their nationality or immigration status.

[133] European Commission (n 69).