Hailbronner / Thym (eds)

EU Immigration and Asylum Law

A Commentary

Second Edition

C.H.BECK · Hart · Nomos

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Hailbronner/Thym

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edited by

Kay Hailbronner
Daniel Thym

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2016

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Preface

Immigration and asylum policy have become the object of intense political disputes in many Member States and at supranational level. Their legal dimension is increasingly influenced by EU directives and regulations on various aspects of border controls, visas, immigration and asylum. For that reason, legal and political debates at national and the European level often revolve around the contents of EU legislation which determines the outcome of court cases throughout the continent and guides national parliaments when adopting domestic rules. After 15 years of legislative activities at EU level, it has become difficult to keep an oversight of the diverse instruments adopted on a variety of topics ranging from visa applications in consulates abroad and border controls at sea over rules on the entry and residence of family members, students, seasonal workers or inter-corporate transferees to reception conditions and procedural guarantees for asylum seekers. This commentary pursues the objective of assisting readers to confront the complexity of supranational legislation.

The publication of a new directive or regulation in the Official Journal is the beginning of an occasionally cumbersome process of implementation, enforcement and adjudication at national and supranational level. It is the purpose of this commentary to support all those involved in different functions and at various levels in the interpretation and application of European rules: judges at domestic courts, officials working for administrative authorities or national ministries, members of civil society, practicing lawyers, civil servants with an EU institution and academics. To support all these readers required the authors to pay attention to both the seemingly technical detail of a specific measure and the grand scheme connecting different instruments. The chapters of this commentary are meant to achieve both in parallel through a combination of four thematic introductions and more specialised sections on no less than 20 different instruments.

In order to provide readers with a comprehensive overview of European immigration and asylum law, this book employs the method of a 'commentary' in the German tradition explaining the content and legal context of each legislative instrument article by article. Thus, the chapter on a specific directive or regulation will not usually be read from A to Z like a book. Rather, readers will consult the information on a specific article and will then be re-directed, by means of cross-references, to related information elsewhere in the commentary. By way of example, someone interested in the scope and interpretation of the equal treatment provision in Article 11 Long-Term Residents Directive will open the relevant pages on this article and look for the information he/she requires. In addition, the four thematic introductions provide readers with an outline of overarching legal, constitutional and contextual questions relevant for a better understanding of the policy field as a whole.

We have paid attention to bring together a rich collection of different authors with various backgrounds from across Europe. Some are experienced practitioners with a high expertise in the field they are writing on. Others are senior academics or promising young researchers involved in debates about immigration and asylum. Not all authors contributing to this book share exactly the same opinions on underlying themes. Therefore, different views on overlapping issues of interpretation cannot be excluded. But we are united by the ambition to provide our readers with reliable and in-depth materials on a complex area of the law.

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Preface

It is a characteristic of immigration and asylum law that its interpretation is the object of legal and political disputes and disagreements. For that reason, reliability and objectivity are meant to be core features of this commentary which intends primarily to present the law as it stands, while always keeping in mind that existing rules may provide a large scope for divergent interpretation. Whenever there is room for disagreement, existing opinions in the literature shall be presented, possibly together with a proposal by the author how the question should be resolved. In doing so, the contributors participate in the doctrinal reconstruction of the law in line with the continental tradition also in areas where no case law exists so far.

As a transnational undertaking, it is not the purpose of this commentary to give detailed information on how different Member States implemented European rules. It aims, rather, to describe the content of existing European legislation, to identify potential interpretation issues and to provide arguments for applying such rules. Given that the EU is a multilingual polity, we have invited authors to include case law by national courts from across Europe and academic writing in different languages into their line of argument.

We hope that the common methodological concept underlying a commentary article-by-article will be useful for both practitioners and academics working on domestic or supranational immigration and asylum law. Of course, there may be gaps and omissions. The editors and authors therefore appreciate any suggestion how to improve the general scheme or individual chapters in subsequent editions of this book. They should be directed to

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Summary of Contents

Preface V
Acknowledgments VII
List of Authors XV
List of Abbreviations XVII

Part A Introduction

Constitutional Framework and Principles for Interpretation *(Kay Hailbronner/Daniel Thym)* 1

Part B Entry and Border Controls

I. Legal Framework for Entry and Border Controls *(Daniel Thym)* 31
II. Schengen Borders Code Regulation (EC) No 562/2006 *(Astrid Epiney/Andrea Egbuna-Joss)* .. 52
III. Visa Code Regulation (EC) No 810/2009 *(Annalisa Meloni)* 116
IV. Frontex Regulation (EC) No 2007/2004 *(Bernard Ryan)* 195
V. Sea Borders Regulation (EU) No 656/2014 *(Bernard Ryan)* 238

PART C. Immigration

I. Legal Framework for EU Immigration Policy *(Daniel Thym)* 271
II. Family Reunification Directive 2003/86/EC *(Kay Hailbronner/Carolin Arévalo (Articles 1–5), Kay Hailbronner/Tobias Klarmann (Articles 6–22))* 300
III. Long Term Residents Directive 2003/109/EC *(Daniel Thym)* 427
IV. Human Trafficking Directive 2004/81/EC *(Marcel Kau)* 520
V. Students Directive 2004/114/EC *(Kay Hailbronner/Sigrid Gies)* 567
VI. Researchers Directive 2005/71/EC *(Kay Hailbronner/Sigrid Gies)* 617
VII. Return Directive 2008/115/EC *(Fabian Lutz (Articles 1–11, 14 and 18), Sergo Mananashvili (Articles 12–13, 15–17 and 19–23))* 658
VIII. Blue Card Directive 2009/50/EC *(Kay Hailbronner/Julia Herzog-Schmidt)* 764
IX. Employers Sanctions Directive 2009/52/EC *(Florian Schierle)* 836
X. Single Permit Directive 2011/98/EU *(Sara Iglesias Sánchez)* 880
XI. Seasonal Workers Directive 2014/36/EU *(Anja Wiesbrock/Tobias Jöst/Alan Desmond)* 928
XII. Intra-Corporate Transfer Directive 2014/66/EU *(Hendrik Lörges)* 974

Part D. Asylum

I. Legal Framework for EU Asylum Policy *(Kay Hailbronner/Daniel Thym)* 1023
II. Temporary Protection Directive 2001/55/EC *(Achilles Skordas)* 1054
III. Asylum Qualification Directive 2011/95/EU *(Harald Dörig (Articles 1–10), Ingo Kraft (Articles 11–14), Hugo Storey (Articles 15–19), Hemme Battjes (Articles 20–42))* 1108
IV. Asylum Procedures Directive 2013/32/EU *(Jens Vedsted-Hansen)* 1284
V. Asylum Reception Conditions Directive 2013/33/EU *(Markus Peek/Lilian Tsourdi)* 1381
VI. Dublin III Regulation (EU) No 604/2013 *(Constantin Hruschka/Francesco Maiani)* 1478

Index 1605

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Table of Contents

Preface V
Acknowledgments VII
Summary of Contents IX
List of Authors XV
List of Abbreviations XVII

Part A Introduction 1

Constitutional Framework and Principles for Interpretation 1
I. General Remarks 1
II. Overarching Principles 6
III. Territorial Scope (Member State Participation) 19
IV. Human Rights and International Law 23

Part B Entry and Border Controls 31
I. Legal Framework for Entry and Border Controls 31
I. General Remarks 31
II. Treaty Guidance under Article 77 TFEU 35
III. Overarching Principles 44
IV. Human Rights and International Law 46
II. Regulation (EC) No. 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code) 52
Title I General Provisions (Articles 1–3a) 65
Title II External Borders (Articles 4–19a) 71
Title III Internal Borders (Articles 20–31) 94
Title IV Final Provisions (Articles 32–40) 105
III. Regulation (EC) No 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas (Visa Code) 116
Title I General Provisions (Articles 1–2) 121
Title II Airport Transit Visa (Articles 3) 130
Title III Procedures and conditions for issuing visas (Articles 4–36) 133
Title IV Administrative management and organisation (Articles 37–47) 174
Title V Local Schengen cooperation (Articles 48) 180
Title VI Final Provisions (Articles 49–58) 181
IV. Council Regulation (EC) No 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union 195
Chapter I Subject matter (Article 1) 199
Chapter II Tasks (Articles 2–14) 206
Chapter III Structure (Articles 15–28) 232
Chapter IV Financial requirements (Articles 29–32) 236
Chapter V Final provisions (Articles 33–34) 237
V. Regulation (EU) No 656/2014 of the European Parliament and of the Council of 15 May 2014 establishing rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union 238
Chapter I General provisions (Articles 1–2) 243
Chapter II General rules (Articles 3–4) 249
Chapter III Specific rules (Articles 5–13) 255
Chapter IV Final provisions (Articles 14–15) 270

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Table of Contents

PART C. Immigration 271
I. Legal Framework for EU Immigration Policy 271
I. General Remarks 272
II. Treaty Guidance under Article 79 TFEU 275
III. Overarching Principles 284
IV. Human Rights and International Law 294
II. Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification 300
Chapter I General provisions (Articles 1–3) 303
Chapter II Family members (Article 4) 331
Chapter III Submission and examination of the application (Article 5) 350
Chapter IV Requirements for the exercise of the right to family reunification (Articles 6–8) 358
Chapter V Family reunification of refugees (Articles 9–12) 391
Chapter VI Entry and residence of family members (Articles 13–15) 397
Chapter VII Penalties and redress (Articles 16–18) 411
Chapter VIII Final provisions (Articles 19–22) 424
III. Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents 427
Chapter I General provisions (Articles 1–3) 430
Chapter II Long-term resident status in a Member State (Articles 4–13) 448
Chapter III Residence in the other Member States (Articles 14–23) 497
Chapter IV Final provisions (Articles 24–27) 517
IV. Council Directive 2004/81/EC of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities .. 520
Chapter I General provisions (Articles 1–4) 523
Chapter II Procedure for issuing the residence permit (Articles 5–8) 530
Chapter III Treatment of holders of the residence permit (Articles 9–12) 548
Chapter IV Non-renewal and withdrawal (Articles 13–14) 558
Chapter V Final provisions (Articles 15–19) 564
V. 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 567
Chapter I General provisions (Articles 1–4) 570
Chapter II Conditions of admission (Articles 5–11) 585
Chapter III Residence permits (Articles 12–16) 602
Chapter IV Treatment of the third-country nationals concerned (Article 17) 607
Chapter V Procedure and transparency (Articles 18–20) 612
Chapter VI Final provisions (Articles 21–26) 615
VI. Council Directive 2005/71/EC of 12 October 2005 on a specific procedure for admitting third-country nationals for the purposes of scientific research 617
Chapter I General provisions (Articles 1–4) 620
Chapter II Research organisations (Articles 5–6) 631
Chapter III Admission of researchers (Articles 7–10) 638
Chapter IV Researchers' rights (Articles 11–13) 646
Chapter V Procedure and transparency (Articles 14–15) 653
Chapter VI Final provisions (Articles 16–21) 656
VII. Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals 658
Chapter I General provisions (Articles 1–5) 662
Chapter II Termination of illegal stay (Articles 6–11) 685
Chapter III Procedural safeguards (Articles 12–14) 714
Chapter IV Detention for the purpose of removal (Articles 15–18) 731
Chapter V Final provisions (Articles 19–23) 762
VIII. 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 764
Chapter I General provisions (Articles 1–4) 769
Chapter II Conditions of admission (Articles 5–6) 783
Chapter III EU blue card, procedure and transparency (Articles 7–11) 790
Chapter IV Rights (Articles 12–17) 803

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Chapter V Residence in other Member States (Articles 18–19) 825
Chapter VI Final provisions (Articles 20–25) 833

IX. 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 836

X. 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 880
Chapter I General provisions (Articles 1–3) 885
Chapter II Single application procedure and single permit (Articles 4–11) 904
Chapter III Right to equal treatment (Article 12) 916
Chapter IV Final provisions (Articles 13–18) 925

XI. 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 928
Chapter I General provisions (Articles 1–4) 936
Chapter II Conditions of admission (Articles 5–10) 942
Chapter III Procedure and authorisations for the purpose of seasonal work (Articles 11–21) .. 954
Chapter IV Rights (Articles 22–25) 966
Chapter V Final provisions (Articles 26–30) 972

XII. 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 974
Chapter I General provisions (Articles 1–4) 981
Chapter II Conditions of admission (Articles 5–9) 990
Chapter III Procedure and permit (Articles 10–16) 1000
Chapter IV Rights (Articles 17–19) 1006
Chapter V Intra-EU Mobility (Articles 20–23) 1011
Chapter VI Final provisions (Articles 24–29) 1019

Part D. Asylum 1023

I. Legal Framework for EU Asylum Policy 1023
I. General Remarks 1024
II. Treaty Guidance under Article 78 TFEU 1028
III. Overarching Principles 1041
IV. Human Rights and International Law 1045

II. Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof 1054
Chapter I General provisions (Articles 1–3) 1057
Chapter II Duration and implementation of temporary protection (Articles 4–7) 1072
Chapter III Obligations of the Member States towards persons enjoying temporary protection (Articles 8–16) 1079
Chapter IV Access to the asylum procedure in the context of temporary protection (Articles 17–19) 1090
Chapter V Return and measures after temporary protection has ended (Articles 20–23) 1093
Chapter VI Solidarity (Articles 24–26) 1097
Chapter VII Administrative cooperation (Article 27) 1100
Chapter VIII Special provisions (Article 28) 1100
Chapter IX Final provisions (Articles 29–34) 1102

III. Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) 1108
Chapter I General provisions (Articles 1–3) 1114
Chapter II Assessment of applications for international protection (Articles 4–8) 1131
Chapter III Qualification for being a refugee (Articles 9–11) 1165
Chapter IV Refugee status (Articles 12–14) 1223
Chapter V Qualification for subsidiary protection (Articles 15–17) 1233

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Table of Contents

Chapter VI Subsidiary protection status (Articles 18–19) 1246
Chapter VII Content of international protection (Articles 20–35) 1248
Chapter VIII Administrative cooperation (Articles 36–37) 1281
Chapter IX Final provisions (Articles 38–42) 1281

IV. Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast) 1284
Chapter I General provisions (Articles 1–5) 1292
Chapter II Basic principles and guarantees (Articles 6–30) 1303
Chapter III Procedures at first instance (Articles 31–43) 1347
Chapter IV Procedures for the withdrawal of international protection (Articles 44–45) 1372
Chapter V Appeals procedures (Article 46) 1374
Chapter VI General and final provisions (Articles 47–55) 1377

V. 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 1381
Chapter I Purpose, definitions and scope (Articles 1–4) 1386
Chapter II General provisions on reception conditions (Articles 5–19) 1399
Chapter III Reduction or withdrawal of material reception conditions (Article 20) 1453
Chapter IV Provisions for vulnerable persons (Articles 21–25) 1458
Chapter V Appeals (Article 26) 1470
Chapter VI Actions to improve the efficiency of the reception system (Articles 27–29) 1473
Chapter VII Final provisions (Articles 30–34) 1474

VI. Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) 1478
Chapter I Subject matter and definitions (Articles 1–2) 1485
Chapter II General principles and safeguards (Articles 3–6) 1495
Chapter III Criteria for determining the member state responsible (Articles 7–15) 1510
Chapter IV Dependent persons and discretionary clauses (Articles 16–17) 1527
Chapter V Obligations of the member state responsible (Articles 18–19) 1540
Chapter VI Procedures for taking charge and taking back (Articles 20–33) 1547
Chapter VII Administrative cooperation (Articles 34–36) 1589
Chapter VIII Conciliation (Article 37) 1595
Chapter IX Transitional provisions and final provisions (Articles 38–49) 1596

Index 1605

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List of Abbreviations

ADD	addendum
AFSJ	Area of Freedom, Security and Justice
AG	Advocate General
AMIF	Asylum, Migration and Integration Fund
Asylum Procedures Directive	Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (OJ 2013 L 180/60)
Asylum Qualification Directive	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 (OJ 2011 L 337/9)
Asylum Reception Directive	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 (OJ 2013 L 180/96)
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 (OJ 2009 L 155/17)
BVerfGE	Decision of the German Federal Constitutional Court
BVerwGE	Decision of the German Federal Administrative Court
C	Commission Documents relating to official instruments for which the Commission has sole responsibility
CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CEAS	Common European Asylum System
CEPS	Centre for European Policy Studies
cf.	confer
CFI	Court of First Instance of the European Union (until 2009; thereafter: General Court)
CFR	Charter of Fundamental Rights of the European Union
Citizenship Directive	Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (OJ 2004 L 158/77)
CJEL	Columbia Journal of European Law
CJEU	Court of Justice of the European Union
CML Rev.	Common Market Law Review
CoE	Council of Europe
COM	Commission Documents for the other institutions (legislative proposals, communications, reports, etc.)
CoR	Committee of the Regions
COREPER	Committee of Permanent Representatives of the Government of the Member States
CRC	Convention on the Rights of the Child
CUP	Cambridge University Press
doc.	Document
Dublin II Regulation	Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national (OJ 2003 L 50/1)
Dublin III Regulation	Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (OJ 2013 L 180/31).
e. g.	for example

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List of Abbreviations

EASO	European Asylum Support Office
EBGT	European Border Guard Team
EC	European Community (-ies)
ECHR	Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights)
ECJ	European Court of Justice
ECR	European Court Reports
ECRE	European Council on Refugees and Exiles
ECtHR	European Court of Human Rights
ed/eds	editor/editors
EEA	European Economic Area
EEC	European Economic Community
EFTA	European Free Trade Association
EJIL	European Journal of International Law
EJML	European Journal of Migration and Law
EL Rev.	European Law Review
ELJ	European Law Journal
Employers Sanctions Directive	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 L 168/24)
EP	European Parliament
ESC	Economic and Social Committee
et al.	et alii/and others
et seq	et sequentes/following
et seqq	et sequentes/and the following
etc.	et cetera
EU	European Union
EuConst	European Constitutional Law Review
Eurodac Regulation	Regulation (EU) No 603/2013 of the European Parliament and of the Council of 26 June 2013 on the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of Regulation (EU) No 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes, and amending Regulation (EU) No 1077/2011 establishing a European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice (2013 L 180/1)
EUROSTAT	Statistical Office of the European Union
Family Reunification Directive	Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification (OJ 2003 L 251/12)
former Asylum Procedures Directive	Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status (OJ 2005 L 326/13)
former Asylum Qualification Directive	Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (OJ 2004 L 304/12)
former Asylum Reception Directive	Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers (OJ 2003 L 31/18)
Free Movement Directive	Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (OJ 2004 L 158/77)
FRONTEX	European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union

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Frontex Regulation	Council Regulation (EC) No. 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (OJ 2004 L 349/1)
FYROM	Former Yugoslav Republic of Macedonia
GAMM	Global Approach to Migration and Mobility
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GC	General Court of the European Union (since 2009)
GC	Grand Chamber
GC	Geneva Convention
Geneva Convention	Geneva Convention relating to the Status of Refugees of 28 July 1951
GLJ	German Law Journal
HR Rev.	Human Rights Review
HRC	Human Rights Committee
Human Trafficking Directive	Council Directive 2004/81/EC of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities (OJ 2004 L 261/19)
i. e.	id est/that is/means
ibid.	ibidem/in the same place/the same
ICC	International Criminal Court
ICC Statute	(Rome) Statute of the International Criminal Court
ICJ	International Court of Justice
ICJ Statute	Statute of the International Court of Justice
ICT	intra-corporate transferee
ICT Directive	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 L157/1)
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICLQ	International and Comparative Law Quarterly
ICON	International Journal of Constitutional Law
ICRC	International Committee of the Red Cross
IJRL	International Journal of Refugee Law
ILO	International Labour Organization
IM Rev.	International Migration Review
IMO	International Maritime Organization
IO	International Organization
IOM	International Organization for Migration
ISCED	International Standard Classification of Education
JCMSt.	Journal of Common Market Studies
JRSt.	Journal of Refugee Studies
lit.	litera/letter
Long-Term Residents Directive	Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents (OJ 2004 L 16/44) with amendments (see the consolidated version of 2011).
MBA	Master of business administration
MN	margin number/note
MoU	Memorandum of Understanding
NGO	Non-Governmental Organisation
no.	number
OJ	Official Journal of the European Union
OSCE	Organisation for Security and Cooperation in Europe
OUP	Oxford University Press
p./pp.	page/pages
para.	paragraph
paras	paragraphs
Posted Workers Directive	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 L 18/1)

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List of Abbreviations

Rec.	Recommendation
Researchers Directive	Council Directive 2005/71/EC of 12 October 2005 on a specific procedure for admitting third-country nationals for the purposes of scientific research (OJ 2005 L289/15)
REV	revised
Return Directive	Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals (OJ 2008 L 348/98)
SAR Convention	International Convention on Maritime Search and Rescue (1979)
Schengen Borders Code Regulation	Regulation (EC) No. 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code) (OJ 2006 L 105/1)
Sea Borders Regulation	Regulation (EU) No. 656/2014 establishing rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (OJ 2014 L189/93)
Seasonal Workers Directive	Directive 2014/36/EU of the European Parliament and of the Council on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers of 26 February 2014 (OJ 2014 L 94/375).
SEC	Commission Documents which cannot be classified in any of the other series
sent.	sentence
SIAC	Special Immigration Appeals Commission
Single Permit Directive	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 L 343/1)
SIS	Schengen Information System
Social Security Coordination Regulation	Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security system
SOLAS Convention	Safety of Life at Sea Convention (1974)
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 (OJ 2004 L375/12)
TEC	Treaty establishing the European Community
TEC (Nice version)	EC Treaty (as amended by the Treaty of Nice)
TEC (Maastricht version)	EC Treaty (as amended by the Treaty of Maastricht)
TEC (Amsterdam version)	EC Treaty (as amended by the Treaty of Amsterdam)
Temporary Protection Directive	Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof (OJ 2001 L 212/12)
TEU	Treaty on European Union
TEU (Nice version)	EU Treaty (as amended by the Treaty of Nice)
TEU (Maastricht version)	EU Treaty (as amended by the Treaty of Maastricht)
TEU (Amsterdam version)	EU Treaty (as amended by the Treaty of Amsterdam)
TFEU	Treaty on the Functioning of the European Union
UDHR	Universal Declaration of Human Rights
UK	United Kingdom
UN	United Nations
UNCLOS	United Nations Convention on the Law of the Sea (1982)
UNHCR	United Nations High Commissioner for Refugees
Visa Code Regulation	Regulation (EC) No. 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas (Visa Code) (OJ 2009 L 243/1)

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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 (OJ 2001 L 81/1)

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