

LEGAL BASIS FOR REGULATING MIGRATION AND MIGRATION PROCESSES IN THE EUROPEAN UNION ON THE EVE OF THE EUROPEAN “MIGRATION CRISIS”

The article deals with analyses and structuration of the legal framework for regulating migration and migration processes in the European Union on the eve of the European “migration crisis”. This is researched in view of the fact that the migration processes in the region have intensified and began to manifest themselves in an extraordinary variety of forms during the recent decades. The author found that the legal framework for regulating migration and migration processes in the European Union, in particular in retrospective and prognostic sections and mainly on the eve of the European “migration crisis” (i.e. until 2014–2015), was mostly gradually liberalised and simplified, although it provided for greater responsibility. Accordingly, the legal or political and legal specifics of the regulation of migration and migration processes in the EU were one of the factors that contributed or did not prevent the beginning and intensification of the European “migration crisis” in 2014–2015.

Keywords: migration, migration processes, European “migration crisis”, the EU, legal regulation.

PODSTAWA PRAWNA REGULACJI PROCESÓW MIGRACYJNYCH I MIGRACYJNYCH W UNII EUROPEJSKIEJ W PRZEDSTAWIENIU EUROPEJSKIEGO „KRYZYSU MIGRACYJNEGO”

Artykuł dotyczy analiz i strukturyzowania ram prawnych regulacji migracji i procesów migracyjnych w Unii Europejskiej w przededniu europejskiego „kryzysu migracyjnego”. Jest to badane z uwagi na fakt, że procesy migracyjne w regionie nasiliły się i zaczęły manifestować się w niezwykle różnorodnych formach w ostatnich dziesięcioleciach. Autor uznał, że ramy prawne regulowania migracji i procesów migracyjnych w Unii Europejskiej, w szczególności w działach retrospektywnych i prognostycznych, a przede wszystkim w przededniu europejskiego „kryzysu migracyjnego” (tj. Do 2014–2015), ulegały w większości stopniowej liberalizacji i uproszczeniu, choć zakładał większą odpowiedzialność. W związku z tym prawna lub polityczno-prawna specyfika regulacji migracji i procesów migracyjnych w UE była jednym z czynników, które przyczyniły się lub nie zapobiegły wystąpieniu i nasileniu się europejskiego „kryzysu migracyjnego” w latach 2014–2015.

Słowa kluczowe: migracja, procesy migracyjne, europejski „kryzys migracyjny”, UE, regulacje prawne.

ПРАВОВІ ЗАСАДИ РЕГУЛЮВАННЯ МІГРАЦІЇ ТА МІГРАЦІЙНИХ ПРОЦЕСІВ У ЄВРОПЕЙСЬКОМУ СОЮЗІ НАПЕРЕДОДНІ ЄВРОПЕЙСЬКОЇ «МІГРАЦІЙНОЇ КРИЗИ»

У статті проаналізовано та структуризовано правові засади регулювання міграції і міграційних процесів у Європейському Союзі напередодні європейської «міграційної кризи». Це зроблено з огляду на той факт, що останніми десятиліття в регіоні міграційні процеси інтенсифікувались та почали виявлятися у надзвичайному розмаїтті форм. Встановлено, що правові засади регулювання міграції і міграційних процесів у Європейському Союзі, зокрема у ретроспективному і прогностичному зрізах й головню у період напередодні європейської «міграційної кризи» (тобто до 2014–2015 рр.), здебільшого поступово лібералізувались та спрощувались, хоча згідно із ними й передбачалась більша відповідальність. Відповідно, правова або політико-правова специфіка регулювання міграції і міграційних процесів у ЄС були одним з чинників, які сприяли чи не завадили початку й інтенсифікації європейської «міграційної кризи» у 2014–2015 рр.

Ключові слова: міграція, міграційні процеси, європейська «міграційна криза», ЄС, правове регулювання.

Migration and migration processes in the European Union are quite important and interesting issues, including from the point of view of science. The fact is that in recent decades in this region, migration processes have been intensified significantly and began to manifest themselves in an extraordinary variety of forms. In addition, in the last decade, the European Union and its individual member states have faced the problem of the so-called “migration crisis”, against which the unified position of this organization has proved quite questionable. On the one hand, this called into question the expediency and relevance of the European Union’s migration policy, but on the other hand, it raised the issue of further reforming the field of migration and migration processes in the EU. Against this background, the issue of legal bases of migration regulation and migration processes in the European Union, in particular in retrospective and prognostic sections, needs special research attention, mainly in the run-up to the European “migration crisis” (i.e. until 2014–2015), on what actually the attention of the offered research is focused.

To solve this issue, the article first proposes to consider and analyze the main legal acts that previously regulated and still regulate migration and migration processes in the EU, in particular in the format of this organization as we know it today. In view of this, the signing of the Treaty on European Union (the so-called Maastricht Treaty) in 1992, which states that every citizen of an EU member state is a citizen of the Union, i.e. enjoys the right to move freely and to choose a place of residence throughout its territory. The fact is that all aspects of asylum policy, rules for

crossing and controlling external borders, as well as immigration policy in general (conditions of entry, movement, residence, family reunification, employment of foreigners, prevention of unauthorized immigration, etc.) were qualified by the Maastricht Treaty as being of common interest and to be decided exclusively on an intergovernmental basis¹. Moreover, the policy in these areas should be considered in accordance with European Convention on Human Rights and Freedoms, as well as the 1951 UN Convention Relating to the Status of Refugees. However, the Maastricht Treaty states that there is nothing to prevent governments from taking such measures as they deem necessary to control immigration from third countries, prevent crime and smuggling, and so on².

At the same time, within the EU institutions, decisions were made and are made mostly in the form of optional recommendations and only with full unanimity. As a result, after the signing of the Maastricht Treaty, EU members were able to agree on many important issues that were later incorporated into common legislation, including migration one.

A key element in shaping the single European migration area was also the Schengen Agreement, which entered into force in 1995, first for seven EU member states (Belgium, Spain, Luxembourg, the Netherlands, Germany, Portugal and France), and later for Denmark, Sweden and Finland. In 1996, Norway and Iceland, which were not members of the EU, concluded special agreements on their participation in the arrangements. In 1997, Italy, Austria and Greece joined the Schengen Agreements. As a result of EU enlargement, the Schengen Club was gradually replenished with new member states. In 2009, Switzerland, which is not a member of the European Union, joined the agreement³. To prevent the undesirable consequences of the abolition of border controls, the Convention Implementing the Schengen Agreement provided for measures to combat uncontrolled migration, arms and drug trafficking, and smuggling. The Convention also introduced a permanent exchange of information and cooperation between law enforcement and judicial institutions of different countries, in particular, the creation of the Schengen Information System, which includes data on all persons who in one case or another draw the attention of the police of the participating countries. The Schengen agreements also provide for the harmonization of visa policies of the signatory states. In particular, a single-entry visa has been introduced, and a list of countries whose citizens must have visas to enter the Schengen area has been drawn up. The Convention also contains common criteria for issuing visas. Thus, in accordance with Art. 5 of the Convention, entry to a foreigner is allowed if he is not considered a person who poses a threat to any of the contracting parties, in addition, has the necessary documents to cross the border, visa, confirmation of the purpose and conditions of the planned trip, travel funds for travel and return.

It should be noted that the Schengen Agreement contained a section on the issue of asylum. However, it was later withdrawn following the signing of the Dublin Convention in 1990 (which

¹ Malynovska O., *Mihratsiina polityka Yevropeiskoho soiuзу: vyklyky ta uroky dlia Ukrainy*, Wyd. NISD 2014, s. 11.

² Rees P., Stillwell J., Convey A., Kupiszewski M., *Population and Migration in the European Union*, Wyd. John Wiley and Sons 1996, s. 313.

³ Malynovska O., *Mihratsiina polityka Yevropeiskoho soiuзу: vyklyky ta uroky dlia Ukrainy*, Wyd. NISD 2014, s. 11.

entered into force in 1997). By signing the Dublin Convention, EU member states agreed that asylum seekers should be considered by the country that allowed them to enter, i.e. by issuing a visa, or the first country of entry in the event of illegal entry. At the same time, safeguards were developed to ensure the transparency, objectivity and fairness of refugee status. One of the main provisions of the EU Council Resolution of 1995 on minimum safeguards for asylum procedures was to provide opportunities for appeals against refusal to grant refugee status. European countries have therefore agreed on the need to protect those at risk of repatriation as a result of circumstances not covered by the Geneva Convention / Convention relating to the Status of Refugees of 1951. That is, asylum in Europe may be granted to a wider category than provided for in the Geneva Convention 1951⁴.

In 1997, in order to harmonize the policy of European states in the field of migration, the Amsterdam Treaty (which entered into force in 1999) was signed, in which a separate part is devoted to freedom of movement, asylum and immigration. A special protocol to the Agreement integrates the Schengen Agreements into EU law. The Amsterdam Treaty contains a provision that allows the EU to adopt binding migration laws for member states. Already in October 1999, at a summit in Tampere (Finland), EU presidents agreed to implement the Amsterdam Treaty, in particular in the field of immigration and asylum. A special program was approved, outlining the ultimate and short-term (five-year) goals for creating a common system for regulating migration and migration processes in the EU⁵.

However, as early as 2004, the following action program was approved in The Hague (which was in force until 2010), which set out the following objectives: to create a single European asylum system; to develop legal migration and combat illegal employment; to ensure the integration of third-country nationals; to develop the foreign policy vector of migration policy; to improve the management of migration flows. The Hague program also focused on strengthening the solidarity of the EU countries in resolving migration issues, and provided for the operation of a number of financial assistance programs. In turn, the Stockholm Program of 2009 focused on maintaining the results achieved, ensuring the functioning of the agreements reached, in particular the Schengen system⁶. It should be noted that the Stockholm Program was in force at the time of the entry into force of the Lisbon Treaty, which made significant changes to the functioning of the EU. In particular, in accordance with Article 68 of the Lisbon Treaty, the Council of the European Union has been empowered to determine the guidelines for the development of legislation and operational planning in the area of freedom, security and justice, which includes migration issues⁷.

⁴ Malynowska O., *Migracyjna polityka Unii Europejskiej: wyzwyki i uroki dla Ukrainy*, Wyd. NISD 2014, s. 12.

⁵ Malynowska O., *Migracyjna polityka Unii Europejskiej: wyzwyki i uroki dla Ukrainy*, Wyd. NISD 2014, s. 12–13.

⁶ Collett E., Beyond Stockholm: overcoming the inconsistencies of immigration policy, *European Policy Centre Working Paper* 2009, nr 32.

⁷ Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007, *Official Journal of the European Union* 2007, C 306/1.

An important aspect of EU migration policy was the peculiarities of regulation and internal European migration of citizens. In 2004, two regulations and nine directives on the entry and stay of citizens of EU member states in other Commonwealth states were combined into one piece of legislation. Note that this act regulates the conditions under which EU citizens and members of their families are free to move and stay in the territory of the Member States, to move for permanent residence, and restricts the exercise of this right for security reasons.

An EU citizen can enter the territory of any country of the Community only with an identity document. This document is sufficient for a short-term (up to three months) stay. Family members of EU citizens who are third-country nationals enjoy the same rights as citizens of EU member states with whom they travel in Europe. Residence in another EU country for more than three months is allowed under the following conditions: the citizen must either be economically active (employed or self-employed), or have sufficient financial resources, health insurance, i.e. prove that he will not become an additional burden on the social security system of the host country (the same requirement applies to students and pupils). A citizen who meets these conditions can move with family members. EU citizens do not need a residence permit. At the same time, Member States may require them to register their stay in their territory no later than three months after moving. If their family members are third-country nationals, they must apply for a residence permit.

It also stipulates that EU citizens acquire the right to permanent residence in another EU member state after five years of continuous legal residence in its territory, if the authorities of the host country have not decided to expel them. This right is granted without any conditions. It is also used by family members of EU citizens who are third-country nationals if they have been in a family relationship with an EU citizen for at least five years. The right of permanent residence is lost only in case of absence for two or more years. EU citizens can receive official confirmation of their permanent resident status. Persons who have the right to reside or permanent residence, as well as members of their families, enjoy full rights. Family members who are third-country nationals have access to employment. At the same time, in the first three months, the host countries are not obliged to include them in their social security systems if they are not officially employed. EU member states are not obliged to provide immigration assistance to EU immigrants (grants, loans) until they become permanent residents. EU citizens and their families may be expelled from another country for security reasons. However, under no circumstances can economic reasons lead to expulsion. Note that restrictive measures are applied only in the event of a real threat to the interests of the country and only on an individual basis. The decision to expel an EU citizen if he or she has lived in the country for more than 10 years, or if he or she is a minor, can only be taken in exceptional circumstances. The entry ban or expulsion decision, as well as the reasons for it, must be communicated to the citizen in a clear form. He should also be given the opportunity to appeal against such a decision. The person in respect of whom the decision to expel has been made must be given up to one month

to leave. Under no circumstances can a life ban be imposed. A person who has been expelled may apply for a review of the relevant decision after three years.

Let's further analyze the EU regulations on immigration from the third countries. According to scientists, the first detailed document on the EU's common immigration policy in this regard was issued by the European Commission in 2000, as the implementation of the decisions taken in Tampere on the formation of the European migration space required a political assessment of the migration situation in Europe, taking into account demographic developments and the situation on the labor market, as well as migratory pressure from outside⁸. Given the shortage of skilled labor caused by the declining working population, the message called for the introduction of a policy of controlled attraction of economic migrants as part of the EU's common policy on migration and asylum, the development of common legislation on this issue. The message stated that immigration could not be a panacea, but could reduce labor market problems and contribute to the sustainability of the social protection system. The document proposed ways and means of implementing such a policy, the central element of which is the cooperation of member states and close cooperation of all stakeholders, i.e. governments, employers, trade unions and other civil society actors. It was pointed out that immigration policy should be accompanied by effective integration programs, which are the key to using the positive results of the arrival of foreign workers, as well as measures against racism and discrimination, promoting cultural diversity through education and the media⁹. To implement the strategy, the European Commission has proposed a special mechanism for the convergence of migration policies of member countries. The first identified common goals and principles in four areas: migration management; acceptance of economic migrants; partnership with third countries; integration of third-country nationals. The second part offered tools to achieve the goals, including the development of national plans, legislative decision-making, involvement of European institutions, and the use of the civil society opportunities.

In 2003, a directive was adopted on the legal status of third-country nationals who have resided continuously (for at least five years) in the territory of the EU Member States¹⁰.

The directive applies to third-country nationals who have a stable and regular source of income, health insurance, do not pose a threat to the security or public order of the country of residence. In addition, persons who have a residence permit in one of the EU countries are guaranteed the right to move and reside in other EU countries, guaranteed basic economic and social rights at the level of citizens, namely, the right to employment and entrepreneurship, education and vocational training, social protection. An agreement was reached in 2010 that the rights provided for in this directive also apply to beneficiaries of international protection, i.e. refugees from third countries if they meet the requirements for length of residence in the EU.

⁸ Malynovska O., *Mihratsiina polityka Yevropeiskoho soiuzu: vyklyky ta uroky dlia Ukrainy*, Wyd. NISD 2014, s. 13.

⁹ Malynovska O., *Mihratsiina polityka Yevropeiskoho soiuzu: vyklyky ta uroky dlia Ukrainy*, Wyd. NISD 2014, s. 14.

¹⁰ Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents, *Official Journal of the European Union* 2003, L 16.

In addition, in 2003, another directive granted migrants the right to family reunification and guaranteed the rights of persons arriving as members of their families¹¹. Under this directive, third-country nationals residing legally in the EU may bring their spouses, minor children and minor children of the spouses to their country of residence. Host countries may, at their discretion, expand this range and allow the immigration of an unmarried adult child and parent if they are dependent on the migrant. Persons arriving as family members have the right to employment and vocational training on the same grounds as other third-country nationals. After five years of residence, they can be granted autonomous legal status if family ties are maintained. At the same time, the right to family reunification is not absolute, i.e. it may be limited in the interests of public order and state security. A migrant who applies for a permit for the arrival of his relatives must have sufficient income, housing, health insurance; he must live in the country for a certain period (but not more than two years). The directive provided for penalties for fictitious marriages in order to obtain an immigration permit. The implementation of the Family Reunification Directive into the national legislation of the Member States has been difficult. For example, amid public warnings, governments concerned about possible abuses have sometimes applied restrictions that run counter to the directive. Accordingly, in 2012, the European Commission launched a broad discussion on the future of this directive, which was attended by governments, NGOs (non-governmental organizations) and individuals. As a result, it was decided to leave the directive unchanged and to ensure the consistent implementation of its norms, while applying, if necessary, mechanisms to influence violators¹². To establish Europe as a world center of education and science, common legislation has been developed for students and scholars from third countries. In 2004, the common rules for admission of foreign students to higher and secondary educational institutions, paid internships, as volunteers¹³. Common conditions for admission of students are proper knowledge of the language, availability of financial resources, health insurance, etc. Foreigners, who came to study, receive a residence permit for a period of one year, which can be extended. Under certain conditions (participation in international programs, possession of a residence permit for at least two years) students have the right to travel throughout the EU to continue their studies. In turn, in 2005 the relevant directive introduced a simplified procedure for immigration of scientists at the invitation of recognized scientific institutes for a period of more than three months¹⁴. A researcher who receives the right to stay automatically acquires the right to work, i.e. does not need a separate employment permit, as well as passing the labor market test. The directive also provides for the right of the scientist to family reunification. Scientists enjoy the same rights in the field of

¹¹ Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification, "Official Journal of the European Union" 2008, L 251.

¹² Malynovska O., *Mihratsiina polityka Yevropeiskoho soiuzu: vyklyky ta uroky dlia Ukrainy*, Wyd. NISD 2014, s. 19.

¹³ 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, "Official Journal of the European Union" 2004, L 375.

¹⁴ Council Directive 2005/71/EC of 12 October 2005 on a specific procedure for admitting third-country nationals for the purposes of scientific research, "Official Journal of the European Union" 2005, L 289.

labor and social protection as local citizens; they have the right to teach, to move freely between the countries of the Schengen area for up to three months for the purpose of scientific research.

In turn, the policy plan on legal immigration, approved by the European Commission in December 2005, reaffirmed changes in EU immigration policy from restrictive to more pragmatic and open, due to the demographic decline, the need for skilled workers to build a “knowledge economy” and cultural understanding, and additional sources of entrepreneurship and innovation¹⁵. The aim of this policy is to use the potential of migration for the development of Europe, through the fullest integration of those foreigners who are already on its territory, as well as the regulated attraction of new contingents of foreign workers¹⁶. At the same time, it should be noted that a number of EU countries have developed their own mechanisms to encourage the entry of highly qualified migrants, including: reduction of the period of residence required to obtain a long-term residence permit and family reunification; simplified procedure for access to the labor market of foreign graduates of educational institutions; abolition or simplification of the labor market test (i.e. checking whether a citizen of the host country or another EU country is applying for a suitable job) for representatives of certain professions or qualifications; access to a residence permit based on a scoring system, i.e. taking into account various characteristics of a potential immigrant, the main of which is the level of qualification in the profession required for the economy¹⁷.

After analyzing the migration situation in Europe at the beginning of the 21st century, in 2008 the European Commission formulated such principles of EU immigration policy as: 1) the creation of a transparent system of rules and procedures to ensure legal immigration. This includes providing third-country nationals with information on legal entry and stay in the EU, guaranteeing their rights, which should be close to those enjoyed by EU citizens, ensuring a flexible common visa policy, especially on temporary visits and travel for educational and professional purposes; 2) economic immigration must meet the needs of the EU labor market, not only in quantity but also in quality, i.e. in terms of professional qualifications, to promote economic growth. The implementation of this policy should not conflict with the rights of migrants and preferences enjoyed by EU citizens in the labor market, as well as the right of each member state to determine the amount of economic immigration into its territory, in cooperation with social partners, employers and local authorities. To meet the needs of the EU labor market, it was suggested to organize vocational training for potential migrants, including in countries of origin, to recognize the qualifications acquired at home, to promote the employment of immigrants, especially women, and the development of immigrant entrepreneurship; 3) integration of immigrants in the host countries – a bilateral process involving immigrants and host societies; 4) solidarity, which provides for mutual trust and fair distribution of responsibilities between member countries.

¹⁵ *Policy Plan on Legal Migration: Communication from the Commission (COM(2005) 669 final)*, źródło: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52005DC0669> [odczyt: 20.10.20].

¹⁶ Malynovska O., *Mibratsiina polityka Yevropeiskoho soiuзу: vyklyky ta uroky dlia Ukraïny*, Wyd. NISD 2014, s. 14.

¹⁷ Malynovska O., *Mibratsiina polityka Yevropeiskoho soiuзу: vyklyky ta uroky dlia Ukraïny*, Wyd. NISD 2014, s. 19.

This requires the exchange of information, the assessment of migration policy at national level in terms of the interests of the EU as a whole, and provides financial and organizational assistance to countries experiencing the greatest immigration pressures. Cooperation with third countries is also a component of solidarity. It provides assistance in developing migration management and legislation in the countries of origin and transit of migrants; 5) ensuring the internal security of the EU in the context of migration is integrated border protection and adequate visa policy, in particular, the creation of visa centers. The European Commission points out to member states that mass legalization of illegal migrants is not an effective means of migration management and should be stopped. At the same time, member states focus on resolutely combating trafficking organizers and traffickers, protecting and supporting victims of trafficking, and ensuring fundamental rights for illegal migrants, including access to emergency medical care and children's education. Measures to prevent illegal migration also include the return of illegals to their homeland, the development of cooperation in this matter both between EU member states and the countries of origin of migrants.

The European Pact on Immigration and Asylum¹⁸, approved by the Heads of State at the Brussels Summit in October 2008, enshrined the slogan "Prosperity, Solidarity, Security". The pact emphasizes that migration can make a significant contribution to the economic development of the EU, as well as provide resources for migrants themselves and their countries of origin, thus promoting their development. At the same time, EU countries need to manage international population movements, taking into account the real possibilities of receiving migrants in terms of the labor market, housing, and access to health care, education and social services, and protection from possible exploitation. In the field of migration, five main areas of activity have been identified: 1) organization of legal immigration in accordance with the priorities, needs and capabilities of individual countries, ensuring the integration of migrants; 2) prevention of illegal migration, ensuring the return of illegal migrants to countries of origin or transit; 3) increasing the efficiency of border control; 4) development of the European asylum system; 5) deepening cooperation with migrants' countries of origin in order to ensure synergistic interaction between migration and development. The Immigration and Asylum Pact was approved at the time of the global financial and economic crisis, which inevitably affected its implementation¹⁹.

In 2011, the European Commission, taking into account the effects of the economic crisis and the revolutionary events in the southern and eastern Mediterranean countries, from where numerous migratory flows were directed to Europe issued a new message on migration in order to update the common migration policy²⁰. The main objectives of this message were as follows:

¹⁸ *European Pact on Immigration and Asylum*, [w:] Council of the European Union, źródło: <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=LEGISSUM:jl0038&from=EN> [odczyt: 20.10.20].

¹⁹ Malynovska O., *Migratsiina polityka Yevropeiskoho soiuзу: vyklyky ta uroky dlia Ukrainy*, Wyd. NISD2014, s. 16.

²⁰ *Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions on migration (COM (2011/248 final)*, źródło: https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/pdf/1_en_act_part1_v11_en.pdf [odczyt: 20.10.20].

the need to provide asylum to those who need it; prevention of mass illegal influx of economic migrants. The European Commission also stressed the need to complete the formation of the European asylum system, strengthen borders, and improve the regulation of legal immigration to the EU of persons who have the profession necessary for the EU economy. Also in 2011, the Directive on the introduction of a single permit for both employment and residence of third-country nationals in the EU and a common list of rights and freedoms that they can enjoy²¹ was approved (implementation of the directive to the national legislation of the member states were completed in 2012). This decision was aimed at improvement of the situation with migrants and their ability to adapt in the host countries. It should be noted that in 2009 the procedure for admitting highly qualified migrants from third countries was approved by introducing “blue cards”²² (in 2012, 3,664 “blue cards” were issued, and in 2013 – 15,261)²³ (except for the United Kingdom and Ireland) and Denmark). This applies to people with higher or secondary special education and a salary that is at least one and a half times higher than the average salary for the EU country where they work. These persons have free access to all EU member states and can move to another country after 18 months of stay, but must apply for a new “blue card” in that country.

In the context of regulating immigration processes in the EU, it is important to properly inform migrants, which should facilitate more organized and legal movement of people. In 2011, the “EU Immigration Portal”²⁴ was launched, which contains extensive information on immigration procedures of all member states, contacts with national governmental bodies and non-governmental organizations in the field of migration. At the same time, a significant place in the EU’s common migration policy belongs to the control of immigration processes, the fight against illegal migration and the protection of borders. As it already has been mentioned, the Schengen Agreements, i.e. the abolition of controls at the EU’s internal borders and their transfer to the external border, were incorporated into EU law with the adoption in 1997 of the Amsterdam Treaty. In 2004, the European Agency for the Management of Operational Cooperation at the External Border (FRONTEX) was established, the main functions of which are: coordination of joint actions at the external border; staff training; risk analysis and forecasting of the migration situation; allocating resources and providing assistance to member countries to which illegal migrants arrive en masse. In addition, a Rapid Border Response Team (RABITs), which can be sent at the request of any Member State with a large influx of illegal migrants, has been developed, and joint patrols have been introduced in the Mediterranean, through which the channel for smuggling migrants to Europe passes²⁵. It should be noted that in

²¹ 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, *“Official Journal of the European Union”* 2011, L 343.

²² 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, *“Official Journal of the European Union”* 2009, L 155/17.

²³ Malynowska O., *Mihratsiina polityka Yevropeiskoho soiuzu: vyklyky ta uroky dlia Ukrainy*, Wyd. NISD 2014, s. 19.

²⁴ *EU Immigration Portal*, źródło: <http://ec.europa.eu/immigration/> [odczyt: 20.10.20].

²⁵ Malynowska O., *Mihratsiina polityka Yevropeiskoho soiuzu: vyklyky ta uroky dlia Ukrainy*, Wyd. NISD 2014, s. 21.

2008 the European Commission proposed to the EU Member States a roadmap for the gradual development of the European Border Control System (EUROSUR), which is a mechanism for exchanging information and cooperation between Member States' institutions responsible for border control and FRONTEX on tactical, operational and strategic levels. EUROSUR aims to prevent crime at the border and strengthen the EU's internal security; reduce the number of illegal migrants who manage to enter the EU; reduce the number of victims caused by the transportation of illegal migrants by sea. During the formation of EUROSUR, national coordination centers and communication lines were established, support was provided to neighboring countries (non-EU members) in the development of border infrastructure, and research was organized to improve border control at sea. Also, in order to develop the system of external border protection, a special Fund for External Borders was created. The total budget of the fund as of 2014–2020 amounted to 10.52 billion Euros. The Fund's objectives are: to provide financial support to member countries for which common border control standards are too difficult; to finance FRONTEX; support measures to develop a common EU visa policy.

It should be noted that the rules on crossing and control at external and internal borders are defined by the Schengen Border Code, approved in 2006. The new Schengen Border Code was approved in March 2016²⁶. The Code applies to any person crossing the internal or external borders of the EU member states, without prejudice to: 1) the rights of persons enjoying the right of free movement in accordance with EU law; 2) the rights of refugees and persons in need of international protection, in particular with regard to their non-expulsion (Article 3). According to Part 1 of Art. 6 of the Code, for a planned stay in the territory of EU member states of no more than 90 days during any 180-day period, the conditions of entry for third-country nationals are as follows: 1) they have a valid travel document entitling the holder to cross the border and meet the following criteria: (a) the document will remain valid for at least three months after the scheduled date of departure from the territory of the Member States. In case of justified need, this obligation may be canceled; b) the document must be issued within the previous 10 years; 2) third-country nationals are holders of a valid visa, if required by Council Regulation № 539/2001 of 15 March 2001 establishing a list of third countries whose nationals must be in possession of a visa for crossing the EU external border, and of countries whose nationals are not subject to this requirement, unless they have a valid residence permit or a valid long-term visa.

It should be noted that the Schengen Agreement has also created the Schengen Information System (SIS), which is the largest public security information system in Europe. This system contains information on: those who have committed offenses and those who are not allowed to stay in the EU; data on missing people, children, as well as on cars, documents, weapons that

²⁶ Regulation (EU) No 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code), źródło: http://frontex.europa.eu/assets/Legal_basis/Regulation_2016_399.pdf [odczyt: 20.10.20].

could have been stolen. The content is provided by the member states. The system is used by border guards, customs and police. Since 2013, the second generation Schengen Information System (SIS-II) has been operating. It consists of three elements: the central system, the national systems and the means of communication between them.

The system is capable of processing biometric information, can combine different requests, for example, for a missing person and for a vehicle, provides reliable protection of personal data. At the end of 2013, there were just over 50 million notifications in the system. By November 2016, the number of notifications had increased to almost 70 million²⁷. In 2008, the Visa Information System (VIS) was additionally created, which allowed member states to quickly exchange information on Schengen visas. It gradually accumulated data on applications and issuance of Schengen visas in different regions of the world. The purpose of the VIS is to verify the visa history of third-country nationals, as well as to control whether the visa is used by the person to whom it is issued when crossing the border²⁸. Eventually, the EU Visa Code, which entered into force on 5 April 2010, significantly changed and supplemented the legal field of both the EU itself and the international legal rules governing the EU's relations with third countries (primarily the Visa Facilitation Agreement). The EU Visa Code has defined the procedure for issuing visas, the requirements for documents that must be submitted to obtain them. Member states have agreed on a list of countries whose citizens need visas to enter the EU and a list of countries whose citizens enjoy a visa-free travel regime. Finally, the EU Visa Code, which entered into force on 5 April 2010, significantly changed and supplemented the legal field of both the EU itself and the international legal rules governing the EU's relations with third countries (primarily the Visa Facilitation Agreement). The EU Visa Code has defined the procedure for issuing visas, the requirements for documents that must be submitted to obtain them. Member states have agreed on a list of countries whose citizens need visas to enter the EU and a list of countries whose citizens enjoy a visa-free travel regime. Strengthening controls at the EU's external border is accompanied by measures to simplify procedures for crossing it for law-abiding citizens who travel²⁹. This is mainly demonstrated by the initiatives to introduce a "smart border" in 2013 and 2016.

In addition, the EU has harmonized sanctions imposed on carriers transporting foreigners to the EU without proper documents. They are obliged to check the availability of the documents necessary for entry into the EU before taking on board a third-country national. In the event that EU border guards do not allow such a citizen to pass, the carrier must transport him to the country of origin at his own expense. The transportation of illegal migrants threatens the company with sanctions of up to 5 thousand Euros per person. The next EU directive obliges air carriers to pass information about passengers to the control authorities of the destination country before arriving at a point in the EU. Violation of this requirement may result in financial

²⁷ *Security Union: Technical and operational updates of the Schengen Information System – Questions & Answers*, Brussels 2016, źródło: http://europa.eu/rapid/press-release_MEMO-16-4427_en.htm [odczyt: 20.10.20].

²⁸ Malynovska O., *Mibratsina polityka Yevropeiskoho soiuзу: vyklyky ta uroky dlia Ukrainy*, Wyd. NISD 2014, s. 22.

²⁹ Malynovska O., *Mibratsina polityka Yevropeiskoho soiuзу: vyklyky ta uroky dlia Ukrainy*, Wyd. NISD 2014, s. 23.

sanctions up to and including the confiscation of the vehicle and the suspension / revocation of the transport license³⁰. In this context, the Directive on Common Standards and Procedures for the Return of Illegal Migrants³¹ was adopted in 2008 (it entered into force in 2010). The directive obliges member states to either deport identified illegal migrant, or to settle his legal status in order to avoid a situation of "hanging" of a person outside the legal field. The directive also contains a number of human rights rules, including the right to appeal against deportation decisions. Returnees should be provided with legal assistance, access to medical care and education for their children while they await deportation and prepare to return home voluntarily. Forced repatriation is not allowed if migrants are at risk of persecution at home. At the same time, it is up to the European Parliament to determine which countries can be considered safe. Detention of an illegal migrant for the period of his identification and preparation for expulsion is allowed only in emergencies (a migrant may escape to avoid expulsion, but poses a threat to public safety) and may not last more than 6 months. Detained illegals should be held in special facilities, but not in prison. Note that the ban on re-entry has a maximum term of no more than five years (except for foreigners who pose a threat to public safety) and must be set individually.

It is noteworthy that the EU countries cooperate in the field of return of illegal migrants. In particular, the procedure for mutual recognition of decisions on expulsion of third-country nationals has been approved. In 2008–2013, there was a Return Fund, which financed projects for the voluntary repatriation of illegal migrants (€ 676 million was allocated for this purpose). In order to effectively manage migration flows and implement, strengthen and develop a common approach to asylum and immigration for the period 2014–2020, the Asylum, Migration and Integration Fund (AMIF) was established. 3.37 billion Euros were allocated for seven years. The fund contributes to the achievement of four specific goals: 1) strengthening and developing the Common European Asylum System by ensuring the effective and equitable application of EU law in this area; 2) supporting legal migration to EU member states in accordance with the needs of the labor market and promoting the effective integration of non-EU citizens; 3) expanding fair and effective return strategies that help combat irregular migration, with an emphasis on the sustainability and efficiency of the return process; 4) EU countries most affected by migration and asylum flows can count on solidarity with other EU Member States.

It is also important that in 2009 the Directive on sanctions against employers who use the labor of illegal migrants was adopted³². According to the directive, before hiring a foreign worker, the employer must check whether he has the right to stay in the country. Fines are imposed for the use of illegal labor.

³⁰ Council Directive 2004/82/EC of 29 April 2004 on the obligation of carriers to communicate passenger data, *Official Journal of the European Union* 2004, L 261/24.

³¹ 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, *Official Journal of the European Union* 2008, L 348/98.

³² 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, *Official Journal of the European Union* 2009, L 168.

In addition, the employer undertakes to pay unpaid wages (compared to those that citizens or legal migrants would receive), all taxes and social security contributions, and to finance the repatriation of an illegal worker. The penalties also include such measures as exclusion of the violating entrepreneur from the number of executors of state orders, return of budget subsidies, etc. Employers, who allow the re-employment of illegals, employ a significant number of illegal migrants, exploit them and use the work of victims of trafficking in human beings or minors, are prosecuted. At the same time, the directive contains norms aimed at protecting the rights of migrants, in particular, it obliges the employer to pay the wages owed, provides the migrant with the opportunity to benefit from the support of trade unions or non-governmental organizations. EU member states are obliged to create conditions under which deceived illegal migrants can sue employers. To this end, illegal migrants may be granted a temporary residence permit (primarily for those who have been severely exploited or trafficked).

In the context of combating illegal migration, readmission agreements are also used, which set out the rules for the transfer of persons residing illegally in the EU to their countries of residence. The agreements apply after the competent authorities of the EU have taken a decision on expulsion and if repatriation is not dangerous for the migrant. However, in 2012 the EU Response Strategy to migration pressure was adopted. The EU's priorities in this area were: strengthening cooperation with countries of origin and transit on migration management; improving the management of external borders; prevention of illegal migration across the Turkish-Greek border; prevention of abuse of legal channels of migration movements; ensuring respect for the right to freedom of movement while preventing its abuse by third-country nationals; improving the system of regulation of migration movements, including the return of migrants to their homeland. The aim of the strategy is to strengthen the coordination of EU member states' efforts, in particular the full implementation of the directives on sanctions against employers and the return of illegal migrants, including further support for voluntary return, providing the necessary statistical and scientific support for illegal migration policy.

Let us also analyze the peculiarities of the formation of a single asylum system, which is based on the norms of the Geneva Convention relating to the Status of Refugees, adopted in 1951, as well as the common humanitarian principles of the EU member states. According to Art. 1 of the Geneva Convention of 1951, a refugee is a person who, as a result of events that occurred before January 1, 1951, and due to well-founded fears of persecution on the grounds of race, religion, citizenship, social group or political opinion is outside the country of his nationality and is unable to enjoy the protection of that country or unwilling to enjoy such protection due to such fears; or, not having a definite nationality and being outside the country of his former residence as a result of such events, is unable or unwilling to return to it as a result of such fears. The Geneva Convention of 1951 was created as a comprehensive

international legal instrument, which was designed to interpret the content and application of Article 14 of the Universal Declaration of Human Rights (the right to asylum) and to resolve the refugee problem in Europe caused by the Second World War. However, the international community soon realized that the problem of cross-border forced migration was not limited to space or time. The Protocol relating to the Status of Refugees, adopted on 31 December 1967, extended the 1951 Geneva Convention to all persons falling within the definition of "refugee", regardless of the time of the circumstances which led to the fact that such persons are unable or unwilling to enjoy the protection of the country of their nationality or previous residence.

At the same time, the principle of fair distribution of responsibility for refugees was established by the Dublin Convention of 1990. The norms provided by the Convention were improved with the adoption of agreements called "Dublin-II". These rules specified that the country issuing the visa or the country of first entry was responsible for examining the asylum seeker's applications. However, the presence of relatives and the experience of living in a country were also taken into account for an asylum seeker from one country to another³³. In 2000, in order to prevent the abuse of the refugee protection system, the EURODAC system was set up, a common dactyloscopic database of asylum seekers³⁴. The EURODAC system allows EU countries to identify applicants for and illegal crossing the EU's external borders. In addition to fingerprints, data sent by EU countries include: country of origin; gender of a person; place and date of filing an application for asylum or detention; reference number; date of fingerprinting; the date of sending this data to the Central Division of the EURODAC system. Data are collected for persons under 14 years of age and sent to the Central Unit through national access points. Data on asylum seekers are kept for ten years if the person does not acquire the citizenship of one of the EU countries; in the latter case, this data must be deleted immediately. Data concerning foreign nationals detained while attempting to cross the external borders illegally shall be kept for two years from the date of fingerprinting.

Data are immediately removed before the end of the two-year period, if a foreign citizen: receives a residence permit; left the territory of the EU; received EU citizenship. As for foreign nationals, who are illegally present in an EU country, the "EURODAC" system allows their fingerprints to be compared with the fingerprints in a central database and to determine whether that person has previously applied for asylum in another EU country. With regard to the protection of personal data, EU countries that transmit data to EURODAC must ensure that fingerprinting and all operations involving the use, transfer, storage and

³³ 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, *Official Journal of the European Union* 2003, L 50.

³⁴ Council Regulation (EC) No 2725/2000 of 11 December 2000 concerning the establishment of "EURODAC" for the comparison of fingerprints for the effective application of the Dublin Convention, *Official Journal of the European Union* 2000, L 316.

deletion of the data itself are carried out in a lawful manner. EU data processing activities are supervised by national supervisory authorities, while such actions of the European Commission are supervised by the European Data Protection Inspector (EDPS). In addition, in 2013 a document entitled “Dublin-III” was adopted³⁵. It rules the use of “EURODAC” to restrict law enforcement access to the asylum seekers’ fingerprint database. It is established that such access is possible only if it is necessary to investigate the most serious crimes, such as murder or terrorism.

On the other hand, a Directive on minimum standards for the reception of asylum seekers was approved in 2003³⁶. EU member states must provide these people with accommodation, food, clothing and pocket money at the time of the application. They should also, if necessary, provide access to health care and psychological support for these persons and to education for children. Asylum seekers were also guaranteed the right to family unity, to vocational training and, under certain conditions, to employment. It should be noted that in 2005 the Directive on the procedure for examining asylum seekers was adopted³⁷. They differ significantly from country to country due to the diversity of constitutional and administrative systems, but must meet the requirements of transparency and efficiency. It is mandatory to provide the asylum seeker with the necessary information in a language he / she understands, free legal aid and the opportunity to appeal the decision made against him / her. The decision on the application for protection must be made individually, objectively and by a competent person.

In turn, the “qualification” directive, which entered into force in 2006 for all EU countries (except Denmark)³⁸, obliges member states to ensure the protection not only of so-called conventional refugees, but also of other persons in need, i.e. to apply additional forms of protection. The directive states that protection may be needed not only by persons persecuted by the state, but also by those suffering from non-governmental groups or officially unrecognized forces. In addition, the directive reflects specific gender aspects and defines mental and sexual harassment. Some norms are devoted to the protection of unaccompanied refugee children and the satisfaction of their special needs.

The Asylum Directive established standards for temporary protection to be provided in the event of a mass influx of refugees as a result of military conflicts that require urgent assistance³⁹.

³⁵ 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), *“Official Journal of the European Union”* 2013, L 180/31.

³⁶ Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers, *“Official Journal of the European Union”* 2003, L 31.

³⁷ Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, *“Official Journal of the European Union”* 2005, L 326.

³⁸ 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, *“Official Journal of the European Union”* 2004, L 304.

³⁹ 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, *“Official Journal of the European Union”* 2001, L 212.

This form of protection is used only when there is reason to believe that the standard procedure for granting refugee status due to the large number of applications will not be effective. The Directive contains common approaches to the procedures for granting, extending and terminating temporary protection, as well as minimum standards for persons to whom it is granted: granting a residence permit for a period of 1-3 years; providing information; access to employment, housing, social protection and medical services, as well as children's education; guarantees of access to the standard refugee status procedure. In the case of normalization of the situation in the homeland of temporary protection users, procedures are provided to facilitate their return home. The directive contains separate rules for children separated from their families, as well as those with special traumatic experiences. In this regard, for example, in 2008–2013, the European Refugee Assistance Fund (ERF) provided assistance in organizing the proper reception and support of refugees, facilitating the integration of refugees into society and, if necessary, their repatriation or resettlement to other countries. The Fund also financed urgent actions in case of sudden and mass arrival of refugees. As noted above, these functions are now performed by the Asylum, Migration and Integration Fund (AMIF).

At the same time, in 2010 the European Asylum Support Agency (EASO) was established in order to form a common EU asylum policy, strengthen practical cooperation between member states in this area, harmonize legislation and administrative practices⁴⁰, tasked with deepening practical cooperation, supporting countries where refugee protection systems are under the greatest pressure due to geographical location or the sudden influx of refugees, and improving the implementation of EU asylum legislation.

The agency provides information exchange between countries analyzes and disseminates information about the countries of origin of refugees. In response to a request from EU countries with difficulties in receiving refugees, EASO may coordinate the establishment and deployment of support teams to provide technical assistance, including translation and dissemination of information on countries of origin. At the same time, already in 2011 a new version of the "qualification" directive was adopted, according to which the criteria for determining those persons who can apply for protection in the EU and the form of international protection⁴¹ (the directive was supported by all member states, except the United Kingdom and Ireland, which continued to use the 2004 directive). The directive clarifies the grounds for granting protection, expands the guarantees of rights and access to integration measures for its users. It is also worth noting that in 2013 the directive on procedures for granting refugee status was revised⁴². People with special

⁴⁰ Regulation (EU) No 439/2010 of the European Parliament and of the Council of 19 May 2010 establishing a European Asylum Support Office, *Official Journal of the European Union* 2010, L 252.

⁴¹ 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), *Official Journal of the European Union* 2011, L 337.

⁴² 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), *Official Journal of the European Union* 2013, L 180.

needs have more opportunities to argue their aspirations, especially unaccompanied children and victims of torture. In addition, in 2013 the directive on the conditions for accepting asylum seekers was revised. According to this directive, access to employment is possible in 9 months (instead of 12 as before); simplified procedures for receiving social assistance; access to training must be provided no later than 3 months after arrival; the specific accommodation needs of certain groups of asylum seekers, such as children and torture victims, are taken into account. Detention of asylum seekers qualifies as a last resort. The person must be notified in writing of the reasons for the detention and ways to avoid it, and legal proceedings against the detainee must take place as soon as possible. The directive also contains tools to prevent asylum abuses. In case of detection of such abuses the material help can be reduced or stopped; moreover, the person may be obliged to return the funds received. All this gives grounds to argue that the legal framework for regulating migration and migration processes in the European Union, in particular in retrospective and prognostic sections, mainly in the run-up to the European "migration crisis" (i.e. until 2014-2015), has largely been liberalized and simplified, although according to them, greater responsibility was envisaged. Accordingly, the legal or political-legal specifics of the regulation of migration and migration processes in the EU were one of the factors that contributed to the intensification of the European "migration crisis" in 2014-2015, as the EU was not ready for an extremely large influx of immigrants and refugees, in particular against the background of the experience of the late 20th – beginning of the 21st century, treated them in general quite liberally. This has certainly affected the modification of the legal status of immigrants and refugees in the region, but should be the subject of a separate scientific analysis.

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