

# EU Immigration and Asylum Law

Thym / Hailbronner

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# EU Immigration and Asylum Law

Article-by-Article Commentary

edited by

Daniel Thym  
Kay Hailbronner

  
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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 entry, border controls, visas, immigration and asylum – as the policy crisis of 2015/16 demonstrated exemplarily. Legal and political debates at the national and supranational 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 more than 20 years of legislative activities at EU level and more than 200 judgments of the Court of Justice in Luxembourg, 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 the entry and stay of family members, students or intra-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 the national and supranational level. This Commentary aims to support those involved in different functions and at various levels in interpreting and applying supranational rules: judges at domestic courts, officials working for administrative authorities or national ministries, members of civil society, academics, practicing lawyers or civil servants with an EU institution. To support all these potential readers required the authors to pay attention to both the seemingly technical detail and the grand scheme connecting different instruments. Four thematic introductions, written by the lead editor, are meant to allow newcomers to keep an oversight of a highly complex area of the law, thus recognising the proverbial forest behind the trees. Detailed comments no less than 20 different instruments provide an in-depth analysis of the most important pieces of legislation written by eminent experts from both academia and legal practice from across Europe.

In order to provide a comprehensive overview, this book employs the method of a ‘commentary’ in the German tradition explaining the contents 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 public policy exception in Article 6 Long-Term Residents Directive 2003/109/EC will open the relevant pages on this article and look for the information she requires. Reading the more specific comments, she will be directed to horizontal information on the interpretation of the public policy standard in the introductory chapter on the legal framework for EU immigration policy. They explain how the ECJ case law on different instruments feeds into a more or less consistent whole. However, not all provisions have been subject to court rulings at the national or supranational level. In such cases, the authors of the chapter may present legal argument how the provision should be interpreted in light of the interpretative standards described in the general introduction explaining the constitutional framework.

## Preface

We have been careful to bring together a rich collection of 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 will necessarily share the same opinions on specific topics. Therefore, different views cannot be excluded; they are the hallmark of legal debates on controversial topics. We are united by the ambition to provide our readers with reliable and in-depth materials on a complex area.

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 is a core feature of this Commentary. Each chapter provides a trustworthy overview of the state of the art, including court judgments. 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 of interpretative hermeneutics in areas where no case law exists so far.

As a transnational undertaking, it is not the purpose of this Commentary to inform our readers how the Member States implement European rules. Rather, it has the objective of describing the contents of EU legislation, of identifying open questions of interpretation and of providing arguments what a potential answer might be. 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.

The third edition was delayed as a result of the ongoing reform of asylum policy, which the Commission had kickstarted with several legislative initiatives during 2016. For many years, we had assumed – and hoped – that the EU institutions would agree on a compromise that would help overcome the structural deficits of supranational asylum policy. That did not happen. Similarly, the ‘Pact on Migration and Asylum’, presented by the Commission in September 2021, seems not to have reversed the political stalemate. At the time of writing, discussions within the Council were ongoing at a technical level and the European Parliament was preparing to adopt its position; it remained uncertain whether the package would ever be adopted. Even if that happened, we may expect the contents of the final legislation to differ markedly from the Commission’s proposals in important respects as a result of inter-institutional compromises. We have decided, therefore, to publish the third edition on the basis of secondary legislation as it stood during the spring of 2021. At the same time, failure of policy reform reinvigorates the idea behind the Commentary: to analyse highly complex legislation that raises formidable questions of interpretation when being applied to scenarios the legislature did not necessarily have in mind.

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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## List of Abbreviations

ADD .....	addendum
AFSJ .....	Area of Freedom, Security and Justice
AG .....	Advocate General
AMIF .....	Asylum, Migration and Integration Fund
Asylum and Migration Interoperability Regulation (EU) 2019/ 818 .....	Regulation (EU) 2019/818 of the European Parliament and of the Council of 20 May 2019 on establishing a framework for interoperability between EU information systems in the fields of police and judicial cooperation, asylum and migration (OJ 2019 L 135/27)
Asylum Procedures Directive 2013/32/EU .....	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)
former Asylum Proce- dures Directive 2005/85/ EC .....	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)
Asylum Qualification Directive 2011/95/EU .....	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)
former Asylum Quali- fication Directive 2004/ 83/EC .....	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)
Asylum Reception Directive 2013/33/EU .....	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)
former Asylum Recep- tion Directive 2003/9/EC	Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers (OJ 2003 L 31/18)
Blue Card Directive 2009/50/EC .....	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)
Borders and Visa Inter- operability Regulation (EU) 2019/ 817 .....	Regulation (EU) 2019/817 of the European Parliament and of the Council of 20 May 2019 on establishing a framework for interoperability between EU information systems in the fields of borders and visa and amending (OJ 2019 L 135/27)
BVerfGE .....	Decision of the German Federal Constitutional Court
BVerwGE .....	Decision of the German Federal Administrative Court

## List of Abbreviations

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
CISA .....	see Convention Implementing the Schengen Agreement
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 2004/38/EC .....	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), as amended last by Regulation (EU) No 492/2011 (OJ 2011 L 141/1)
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.)
Convention Implementing the Schengen Agreement .....	Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders of 19 June 1990 (OJ 2000 L 293/19).
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 (EC) No 343/2003 .....	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 (EU) No 604/2013 .....	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
EASO .....	European Asylum Support Office
EASO Regulation (EU) No 439/2010 .....	Regulation (EU) No 439/2010 of the European Parliament and of the Council of 19 May 2010 establishing a European Asylum Support Office (OJ 2010 L 132/11).
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

## List of Abbreviations

ECtHR .....	European Court of Human Rights
ed/eds .....	editor/editors
EDPS .....	European Data Protection Supervisor
EEA .....	European Economic Area
EEC .....	European Economic Community
EES .....	Entry/Exit System
EES Regulation (EU) 2017/2226 .....	Regulation (EU) 2017/2226 of the European Parliament and of the Council of 30 November 2017 establishing an Entry/Exit System (EES) to register entry and exit data and refusal of entry data of third-country nationals crossing the external borders of the Member States and determining the conditions for access to the EES for law enforcement purposes (OJ 2017 L 327/28).
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 2009/52/EC .....	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
ETS .....	European Treaty Series
EU .....	European Union
EuConst .....	European Constitutional Law Review
Eurodac Regulation (EU) No 603/2013 .....	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 (OJ 2013 L 180/1)
EUROSTAT .....	Statistical Office of the European Union
Family Reunification Directive 2003/86/EC .....	Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification (OJ 2003 L 251/12)
Free Movement Direc- tive 2004/38/EC .....	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), as amended last by Regulation (EU) No 492/2011 (OJ 2011 L 141/1)
FRONTEX .....	European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union



## List of Abbreviations

Frontex Regulation (EU) 2019/1896 .....	Regulation (EU) 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624 (OJ 2019 L 295/1)
former Frontex Regulation (EC) No 2007/2004 .....	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 .....	See Refugee Convention
GLJ .....	German Law Journal
HRL Rev. ....	Human Rights Law Review
HRC .....	Human Rights Committee
Human Trafficking Directive 2004/81/EC .....	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 2014/66/EU .....	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
JEMS .....	Journal of Ethnic and Migration Studies
JCMS .....	Journal of Common Market Studies
JRSt. ....	Journal of Refugee Studies
lit. ....	litera/letter
Long-Term Residents Directive 2003/109/EC ...	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), as amended last by Directive 2011/51/EU (OJ 2011 L 132/1)

## List of Abbreviations

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 96/71/EC .....	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), as amended last by Directive (EU) 2018/957 (OJ 2018 L 173/16)
Refugee Convention .....	Geneva Convention relating to the Status of Refugees of 28 July 1951 as amended by the New York Protocol of 21 January 1967
Rec. ....	Recommendation
former Researchers Directive 2005/71/EC .....	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 2008/115/EC .....	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 (EU) 2016/399 .....	Regulation (EU) 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) (OJ 2016 L 77/1), as amended last by Regulation (EU) 2019/817 (OJ 2019 L 135/27)
former Schengen Borders Code Regulation (EC) No 562/2006 .....	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)
Schengen Implementing Convention .....	see Convention Implementing the Schengen Agreement
Sea Borders Regulation (EU) No 656/2014 .....	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 2014/36/EU .....	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

## List of Abbreviations

SIAC .....	Special Immigration Appeals Commission
Single Permit Directive 2011/98/EU .....	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
SIS II Regulation (EC) No 1987/2006 .....	Regulation (EC) No 1987/2006 of the European Parliament and of the Council of 20 December 2006 on the establishment, operation and use of the second generation Schengen Information System (SIS II) (OJ 2006 L 381/4), with later amendments
SIS Border Checks Regulation (EU) 2018/ 1861 .....	Regulation (EU) 2018/1861 of the European Parliament and of the Council of 28.11.2018 on the establishment, operation and use of the Schengen Information System (SIS) in the field of border checks (OJ 2018 L 312/14)
SIS Return Regulation (EU) 2018/ 1860 .....	Regulation (EU) 2018/1860 on the use of the Schengen Information System (SIS) for the return of illegally staying third-country nationals (OJ 2018 L 312/1)
Social Security Coordi- nation Regulation (EC) No 883/2004 .....	Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security system (Text with relevance for the EEA and for Switzerland) (OJ 2004 L166/1), as amended last by Regulation (EU) 2019/1149 (OJ 2019 L186/21)
SOLAS Convention .....	Safety of Life at Sea Convention (1974)
Students and Research- ers Directive (EU) 2016/ 801 .....	Directive (EU) 2016/801 of the European Parliament and of the Council of 11 May 2016 on the conditions of entry and residence of third-country nationals for the purposes of research, studies, training, voluntary service, pupil exchange schemes or educational projects and au pairing (OJ 2016 L132/21)
former Students Direc- tive 2004/114/EC .....	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 ver- sion) .....	EC Treaty (as amended by the Treaty of Maastricht)
TEC (Amsterdam ver- sion) .....	EC Treaty (as amended by the Treaty of Amsterdam)
Temporary Protection Directive 2001/55/EC .....	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), as amended last by Commission Decision 2003/690/EC (OJ 2003 L 251/23)
TEU .....	Treaty on European Union
TEU (Nice version) .....	EU Treaty (as amended by the Treaty of Nice)
TEU (Maastricht ver- sion) .....	EU Treaty (as amended by the Treaty of Maastricht)

## List of Abbreviations

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 (EC) No 810/2009 .....	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), as amended last by Regulation (EU) 2019/1155 (OJ 2019 L 188/25)
VIS .....	Visa Information System
VIS Regulation (EC) No 767/2008 .....	Regulation (EC) No 767/2008 of the European Parliament and of the Council of 9 July 2008 concerning the Visa Information System (VIS) and the exchange of data between Member States on short-stay visas (VIS Regulation) (OJ 2008 L 218/60), with later amendments
Visa List	
Regulation (EU) 2018/1806 .....	Regulation (EU) 2018/1806 of the European Parliament and of the Council of 14 November 2018 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 2018 L 303/39), as amended last by Regulation (EU) 2019/592 (OJ 2019 L1031/1)
former Visa List	
Regulation (EC) No 539/2001 .....	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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