

TOWARDS A PROACTIVE IMMIGRATION POLICY FOR THE EU?

JOANNA APAP
AND
SERGIO CARRERA

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JOANNA APAP^{*}
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SERGIO CARRERA^{**}

Abstract

This report involves an assessment of the legislative progress achieved towards a *proactive immigration policy* regarding those described as ‘third country nationals’ (TCNs) entering into and residing legally in the European Union (EU). We also evaluate the extent to which the attacks of 11 September 2001 in the US had a real impact on the legislative developments and policy agenda in relation to this area.

The main points of analysis of this report thus include:

- 1) The evolution of immigration policy at the European level.
- 2) The study of the key legal instruments dealing with TCNs, and their potential effects and consequences: Do they guarantee a closer position to the EU citizens’ status? What level of rights and protection do they confer to foreigners? Do they truly contribute to the current political desire for the integration of immigrants within the host country?
- 3) A comparison with EU citizens’ status, particularly looking at the similarities and differences between them.
- 4) To what extent did the events of 11 September influence in any way the policy priorities relating to the development of a European immigration policy?

^{*} Joanna Apap is Head of the Justice and Home Affairs Research Unit at CEPS.

^{**} Sergio Carrera is a Research Assistant at CEPS.

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Introduction

Issues relating to ‘third country nationals’ (TCNs) have historically been considered to be of a purely intergovernmental character, residing at the heart of national sovereignty. During the 1990s, Justice and Home Affairs (JHA) moved to centre stage in the whole European debate, and immigration became one of the most controversial policy areas. Concern has been growing about immigration since the Maastricht Treaty institutionalised the third pillar of the EU.¹ This concern has been further stimulated by several factors, most notably the persistence of illegal immigration with its associated atrocities,² the need for immigrant workers/labour force in some specific sectors in the EU as a whole,³ and the spectre of an ageing European population.

Two aspects are central to the immigration policy currently under development at European level: *control* and *openness*, representing two sides of the same coin. Convergence of policy seems to have been achieved much faster on *control*, while various reservations still exist on *openness*, especially by certain member states. We focus on this latter aspect – *openness* – of the European immigration policy by assessing the extent to which key legislative measures are going to confer on and foster a status for third country nationals that is “as near as possible” to that enjoyed by EU citizens.⁴

The Treaty of Amsterdam, which entered into force in May 1999, represented a major development in overall JHA policy, marking a brand new phase. The fields of “visas, asylum, immigration and other policies related to the free movement of persons” came under the first pillar, and thus within the competence of European Community law, under Title IV of the EC Treaty, Articles 61-69. For the first time the EU legislative machinery had a mandate to enact EU legislation on TCNs.

The Tampere European Council of 15-16 October 1999, aimed to establish an equitable balance between freedom, security and justice. The Presidency Conclusions called for the creation of a uniform set of rules through which *fair treatment* of TCNs residing

¹ Former Title VI, *Provisions on Cooperation in the Fields of Justice and Home Affairs*, Article K.

² Such as the tragedy at Dover in July 2000 in which 58 Chinese nationals lost their lives trying to enter the United Kingdom illegally, and the continued discovery of dead bodies floating in the Mediterranean believed to have been victims of traffickers of human beings.

³ See United Nations (2000) for worldwide demographic projections for the period 1995-2050.

⁴ See Paragraph 21 of the Presidency Conclusions of the Tampere European Council, 15-16 October 1999, SN 200/99: “A person who has resided legally in a Member State for a period of time to be determined and who holds a long-term residence permit, should be granted in that Member State a set of uniform rights which are as near as possible to those enjoyed by EU citizens”.

legally in the EU would be ensured. This body of law should be also “as near as possible” to those enjoyed by EU citizens, thus providing a “true equal treatment” for EU and non-EU nationals alike.⁵ However, “equal treatment” is still far from being achieved and has largely remained more a vision than a reality.

Since 1999, the European Commission has progressively worked to establish the main elements for the creation of a common policy on immigration, having as a basis Article 63 TEC⁶ and the Tampere milestones. It seems to us, however, that policy-makers are at times hesitant to support the Commission’s initiatives in such a *sensitive* policy area. Political convergence is certainly needed to break with the past and the still predominant philosophy of ‘Fortress Europe’, particularly at the time of national elections.

The Treaty of Amsterdam framed neither a coherent strategy nor a comprehensive approach to non-EU citizens. Nonetheless, until the entry into force of this treaty, TCNs were not covered by the provisions of Community law (see Apap, 2002). Only a *privileged group* could and can benefit *indirectly* from free movement rights for a duration of more than three-months through the so-called ‘derived rights’:

- members of the family of an EU national who has exercised free movement rights;⁷
- nationals of states connected to the EU by an association (EEA) or cooperation agreement; and
- workers of a company on whose behalf they carry out services in another member state.

This report focuses on those third-country nationals who were considered as a ‘non-privileged group’ or non-addressees of European Community law, i.e. those not falling into any of the above three categories, and thus facing a rather low degree of protection in the form of guaranteed rights in the current situation at national as well as at European level.

1. Main EU initiatives and measures at stake on immigration

Despite the European Commission’s efforts to prepare a whole package of proposals that would provide the bases for a legal framework to open legal channels for immigration as well as to extend certain rights pertaining to EU citizenship, clear political direction and commitment have not yet been reached within the Council. This can be seen clearly by reviewing the Commission’s Communication on the biannual update of the scoreboard.⁸ Indeed, as we will see later in this report, *only* one from the

⁵ See also Paragraph 18 of the Conclusions.

⁶ Article 63 TEC reads as follows: “The Council...shall adopt: (3) measures on immigration policy within the following areas: (a) conditions of entry and residence, and standards on procedures for the issue by Member States of long term visas and residence permits,...

⁷ See the Opinion of Advocate General Geelhoed in Case C-109/01, *Secretary of State for the Home Department v Hacene Akrich*, of 27 February 2003.

⁸ Communication from the Commission to the Council and the European Parliament, Biannual Update of the Scoreboard to review progress on the creation of an area of “Freedom, Security and Justice” in the European Union, first half of 2003, Brussels, 22.5.2003, COM(2003) 291 final.

group of European legislative proposals dealing with ‘legal immigration’ has been adopted so far.

The Commission has presented three core Communications as the basis for discussion of a proactive immigration policy since Tampere:

1. Commission Communication on a Community immigration policy,⁹
2. Commission Communication on an open method of coordination for the Community immigration policy,¹⁰ and
3. Commission Communication on immigration, integration and employment.¹¹

In the two first Communications, the Commission underlined the need to foster a “proactive” immigration policy, i.e. a policy that instead of focusing on vain attempts to prevent and stop immigration, would try to open up legal channels and help address the needs and gaps of the European labour market. The Commission also expressed the urgency to adopt a more flexible approach common to all member states on the issue of legal immigration. It also recognised that the adoption of an *open method of coordination* was the more appropriate way to stimulate the further development of a common immigration policy.¹²

The Communication on immigration, integration and employment, presented at the Thessaloniki European Council of 19 and 20 June 2003, highlights the need to develop a sound immigration policy in parallel with a “holistic integration policy”. Thus, in the European Commission’s opinion, a series of key elements should be taken into account in order to ensure the success of the policy measures in the field, namely “employment, economic participation, education, language training, health, and social services, housing, town planning, culture and involvement in social life”.

Furthermore, among the group of legislative acts dealing with the so-called ‘legal or regular immigration’, the following need to be highlighted:

1. Council Resolution of 20 June 1994 on limitation of admission of third-country nationals to the territory of the Member states for employment
2. Council Resolution of 30 November 1994 on limitation on admission of third-country nationals to the territory of the Member states for the purpose of pursuing activities as self-employed persons
3. Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, 19/07/2000

⁹ Commission Communication to the Council and the European Parliament *on a Community Immigration Policy* COM (2000) 757, 22.11.2000.

¹⁰ Communication from the Commission to the Council and the European Parliament *on a open method of co-ordination for the Community immigration policy*, 11th July, COM (2001) 387 final.

¹¹ Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the regions, *on immigration, integration and employment*, Brussels, 3.6.2003, COM (2003) 336 final.

¹² The Commission does not propose any quota system on a European scale, which would be “impracticable”, but rather some “indicative targets”. The proposed system will produce periodic reports of the member states, re-examine the impact of member states’ immigration policies during the past period and make projections on the number of economic migrants needed in future.

4. Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation, 27/11/2000
5. Proposal for a Council Directive concerning the status of third-country nationals who are long-term residents, COM/2001/0127 final, 13.3.2001¹³
6. Proposal for a Council Directive, COM/2001/0386 final, on conditions of entry and residence of third-country nationals for the purposes of paid employment and self-employed economic activity of 11.07. 2001
7. Council Directive on *the right to family reunification* 2003/86/EC, 22.09.2003¹⁴
8. Council Regulation (EC) No. 1030/2002 of 13.06.2002 laying down a uniform format for residence permits of third-country nationals
9. Proposal for a Council Directive on the conditions of entry and residence of third-country nationals for the purpose of studies, vocational training or voluntary service, COM/2002/548 final, 7.10.2002
10. Council Regulation No. 859/2003 of May 2003 extending the provisions of Regulation (EEC) No. 1408/71 and Regulation (EEC) No. 574/72 to nationals of third countries who are not already covered by these provisions solely on the ground of their nationality
11. Proposal for a Council Regulation amending Regulation (EC) 1030/2002 *laying down a uniform format for residence permits for third-country nationals*, and Proposal for a Council Regulation amending Regulation (EC) 1683/95 *laying down a uniform format for visas*, COM/2003/0558 final, 24.9.2003.

2. Evolution of immigration policy at EU level – Towards an equal treatment?

In contrast to the relatively wide EU legal corpus covering EU citizens' social, political and economic rights, there are few parallel provisions concerning third country nationals (TCNs). It seems to us that the first-pillar measures of the EU constitutional framework have attached high priority to EU nationals' interests and rights, but neglected those of TCNs.

The Tampere European Council stressed the necessity to adopt decisions on “the approximation of national legislation on the conditions for admission and residence of third country nationals based on a shared assessment of the economic and demographic developments within the Union as well as the situation in the countries of origin”.¹⁵ The Conclusions did not specify how this policy should be implemented.

In the same vein, it also underlined in its paragraph 21 that:

A person who has resided legally in a Member State for a period of time to be determined and who holds a long-term residence permit, should be granted in that Member State a set of uniform rights which are as near as possible to those enjoyed by EU citizens.

¹³ Official Journal C 240 E, 28/08/2001 P. 79-87. See also the new version of 24 July 2003, Brussels, 10501/1/03, MIGR 48.

¹⁴ Official Journal L 251/12, 3.10.2003.

¹⁵ See paragraph 20 of the Presidency Conclusions.

It is true that some progress has been made in the achievement of a legal framework that aims to diminish the differences between TCNs' and EU citizens' status. We need to stress, for instance, the importance of two Directives – one insisting on equal treatment irrespective of racial or ethnic origin and the other to combat racism and discrimination.¹⁶ However, these are only the first steps in a long-term process.

This section assesses four key legal instruments affecting TCNs and compares them with legislation governing the status of EU citizens:

1. Council Directive on the right to family reunification
2. Proposal for a Council Directive concerning the status of third-country nationals who are long-term residents
3. Proposal for a Council Directive on conditions of entry and residence of third-country nationals for the purposes of paid employment and self-employed economic activity
4. Proposal for a Council Directive on the conditions of entry and residence of third-country nationals for the purpose of studies, vocational training or voluntary service.

2.1 The Council Directive on family reunification – Does it confer a right?

The proposal for a Directive on the right to family reunification constituted the first of a set of measures presented by the European Commission on TCNs after the entry into force of the Amsterdam Treaty.¹⁷ Discussion on the proposal lasted for four long years before it was possible to reach agreement and formally adopt its key provisions on 22 September 2003.¹⁸

After the entry into force of the Amsterdam Treaty on 1 May 1999, Article 63(3) (a) of the Treaty Establishing the European Community (TEC) became the legal basis to harmonise this controversial policy issue. This provision formally requests the Council to adopt measures, following the procedure referred in Article 67 EC Treaty, in the areas of “immigration policy: a) conditions of entry and residence...including those for the purpose of family reunion...”.

It is our opinion that family reunification provides a perfect example to show the *lacunae* that exist between the rights conferred on TCNs and the nationals of the member states. A high level of ‘disparity’ can be appreciated between the status of both categories, as we will show looking at the wording of the recently adopted legal text.

¹⁶ These two Directives were initiated by DG Employment and Social Affairs; Directive 2000/43, OJ L 180 of 19.7.2000, implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, and Directive 2000/78, OJ L 303 of 2.12.2000, establishing a general framework for equal treatment in employment and occupation.

¹⁷ The initial proposal dates from 1 December 1999, COM(1999) 638 final.

¹⁸ Council Directive on the right to family reunification 2003/86/EC of 22 September 2003, OJ L 251/12, 3 October 2003. See also the numerous different versions of the proposal for a Directive since 1999 in the public register of the Council documents, Council of the EU

(<http://register.consilium.eu.int/utfregister/frames/introfsEN.htm>).

Some remarks on the new Council Directive

Before analysing in detail some of the core aspects of the Directive, it is important to note that there does not exist at the moment a harmonised concept of family either at international or at European level. The UN Convention on Migrant Workers¹⁹ indeed provides the most recent definition in Article 44,²⁰ but none of the EU member states has signed or ratified this instrument of public international law.

The current international and European legal sources providing for a family's right to live together as well as for the preservation of family unity are mainly: the Universal Declaration of Human Rights – Article 16.1,²¹ the European Convention on Human Rights (ECHR) – Articles 8 and 14,²² the European Court of Human Rights (ECtHR) case law,²³ the Council of Europe's Social Charter – Article 19,²⁴ as well as the European Convention on the Legal Status of Migrant Workers of 1977,²⁵ among others.²⁶

At EU level, the Resolution on the harmonisation of national policies on family reunification, adopted by the European immigration ministers in Copenhagen on the 12 June 1993,²⁷ represented until recently the only existing governing measure in this area. The Resolution, however, does not recognise the existence of a right to family reunification. Additionally, this measure falls within the category of the so-called 'soft law', and is therefore not legally binding on the EU member states.

¹⁹ Adopted by the UN General Assembly on 18 December 1990, and it entered into force on 1 July 2003.

²⁰ Article 44 provides: "1. States Parties, recognising that the family is the natural and fundamental group unit of society and is entitled to protection by society and the State, shall take appropriate measures to ensure the protection of the unity of the families of migrant workers. 2. States Parties shall take measures that they deem appropriate and that fall within their competence to facilitate the reunification of migrant workers with their spouses or persons who have with the migrant worker a relationship that, according to applicable law, produces effects equivalent to marriage, as well as with their minor dependent unmarried children".

²¹ Adopted and proclaimed by General Assembly resolution 217 A (III) of 10 December 1948. Article 16 provides: "(3) The family is the natural and fundamental group unit of society and is entitled to protection by society and the State".

²² Article 8 of the ECHR says that "everyone has the right to respect for his private and family life, his home and correspondence". See Case C-60/00, *Carpenter v. Secretary of State for the Home Department*, Judgment of 11 July 2002.

²³ Indeed since 1985 the ECtHR's case law provides the most important framework for protection of TCNs on this concern. See for instance *Jakupovic v Austria* ECtHR 6 February 2003, and *Al Nashif v Bulgaria* 20 June 2002.

²⁴ 529 U.N.T.S. 89, *entered into force* 26 February 1965.

²⁵ Strasbourg, 24.11.1977. See also the Explanatory Report on the Convention, Council of Europe, Strasbourg, 1978.

²⁶ See the International Covenant on Civil and Political Rights, Article 23(1), adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976. The International Covenant on Economic, Social and Cultural Rights, Article 10 (1), adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 3 January 1976.

²⁷ Doc. SN 2828/1/93 WGI 1497 REV 1.

The proposal for Council Directive on the right to family reunification first reached political agreement within the Council on 28 February 2003, and, as previously mentioned, it was officially adopted in September 2003.²⁸ In our view, the wording presented within the final version of the Directive presents some substantial differences and changes, which deserve to be highlighted, in comparison to the first text proposed by the Commission in 1999. Moreover, generally speaking, the regime presented within the Directive, which will have to be transposed into all the member states' national legislation no later than 3 October 2005, only represents the first stage necessary to achieve the desired harmonisation on family reunification at EU level.

Looking specifically at some of the Directive's provisions, Article 1 provides that the main purpose of the legal act is:

to determine the conditions for the exercise of the right to family reunification by third country nationals residing lawfully in the territory of the member states.

At first sight it could appear that the Directive's direct consequence would be a 'significant improvement' on this sort of 'secondary immigration movement'.²⁹ It is striking to see how, on the one hand, however, the right to family reunification is not recognised expressly in any of the proposal's provisions, and on the other it leaves considerable discretion in the hands of the member states as far as the conditions for the exercise of this right are concerned, and thus not preventing the undesired 'family separation' (see Cholewinski, 2002).

The Council Directive does not prevent the application of 'more favourable provisions' existing under the European Convention on the Legal Status of Migrant Workers, the ECHR, European Social Charter as well as predated bilateral/multilateral agreements with third countries.³⁰ The member states shall also have the possibility to adopt or retain more favourable provisions.³¹ Furthermore, looking at the Explanatory Memorandum, the UK, Ireland and Denmark, in accordance with Articles 1-2 of their respective Protocols annexed to the Treaty on European Union and the TEC, are not bound in any way by the Directive.

The final version of the Directive incorporates a new category/concept, in comparison with the former versions of the proposal, to define its personal scope, i.e. 'sponsor'. Article 2 thus establishes that:

Sponsor means a third-country national residing lawfully in a Member State and applying or whose family members apply for family reunification to be joined with him/her.

²⁸ See also the version of Council Directive on the right to family reunification, Brussels, 29 July 2003, 10502/2/03, REV 2, MIGR 49, Council of the European Union.

²⁹ Family reunification is based on the movement of the primary migrant or recently called 'sponsor'.

³⁰ See Article 3.4.b of the Directive. There are some 30 international agreements that have been signed by the European Community together with its member states and third countries purporting to grant rights to TCN residents. For a study of these agreements, see Hedemann-Robinson (2001).

³¹ See Article 3.5 of the proposed Directive.

The introduction of this category has indeed clear economic and financial connotations. Article 3 provides that the Directive shall apply where the sponsor is residing lawfully in a member state and is holding a residence permit issued by that member state for a period of validity of one year or more. A new sentence has also been added in comparison with the former wording of the proposal, according to which only those TCNs who have “reasonable prospects of obtaining the right of permanent residence” will be granted the right to apply, which means that those persons staying in the host state temporarily and who have not “the prospect” of renewal will not have this opportunity.³² The “possibility” to grant family reunification to refugees, whose family relationships started before their refugee status, is also provided by Article 9.³³

These persons will have the opportunity to lodge an application for family reunification when their respective family members are outside the territory of the member state.³⁴ Also, it is interesting to see how the Council Directive refers now in its Article 5.3 to the possibility for the application to be submitted when the family members are already inside the host state.³⁵

The requirements for the exercise of the right of family reunification, set out in Chapter IV, Articles 6-8, are different in content from those concerning EU citizens. Thus, for instance, under Article 6 it is provided that member states may reject an application for entry and residence of family members, on grounds of “public policy, public security or public health”. This Article is inspired by the Council Directive of 25 February 1964 on the Co-ordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health, 64/221/EEC.³⁶ However we think that some differences may exist with regard to the ‘nature’ and ‘content’ of the exceptions used in both measures. The text of the Preamble of the Council Directive on family reunification provides now that “the notion of public policy and public security covers also cases in which a third-country national belongs to an association which supports the international terrorism, supports such an association or has extremist aspirations”.³⁷ Also, Article 6 stipulates that “when taking the relevant decision, the member state shall consider, besides Article 17, the

³² Article 3 stipulates that “This Directive shall apply where the sponsor is holding a residence permit issued by a Member State for a period of validity of one year or more who has reasonable prospects of obtaining the right of permanent residence, if the members of his/her family are third country nationals of whatever status”.

³³ Chapter V of the Directive, Article 9 (2) states that “Member States may confine the application of this Chapter to refugees whose family relationships predate their entry”.

³⁴ See Chapter III of the Directive, Submission and examination of the application. Article 5.3 says that “The application shall be submitted and examined when the family members are residing outside the territory of the Member State in which the sponsor resides”.

³⁵ See new Article 5.3, “By way of derogation, a Member State may, in appropriate circumstances, accept an application be submitted when the family members are already in its territory”.

³⁶ See in relation to the public policy concept the judgement of the Court of 27 October 1977, *Régina v Pierre Bouchereau*, Case 30-77. Also, interesting is the judgement of the Court of 25 July 2002, “Mouvement contre le racisme, l’antisémitisme et la xénophobie” *ASBL (MRAX) v Belgian State*, C-459/99 on one of the newest interpretations of Articles 1(2), 3(3) and 9(2) of the Council Directive 64/221/EEC.

³⁷ See point 14 of the Directive’s Preamble.

severity or type of offence against public policy or public security committed by the family member, or the dangers that are emanating from such person”. This may lead, in our opinion, to a broader character of the grounds for rejection of non-EU citizens, applications for entry and residence of their family members.

Article 7 states that the applicant must provide evidence not only of accommodation, but also of sickness insurance in respect of all risks to the host member state, for him/her and every member of his/her family, as well as stable resources so not as to rely on public funds.

Concerning family members of EU citizens who have not exercised their right to free movement, they do not fall under the Directive’s scope. Therefore it seems that reverse discrimination is kept intact. However, the situation of these persons will be dealt with in a specific Directive on the rights of citizens of the Union and their family members to move and reside freely within the territory of the member states, but it has not yet been adopted.³⁸ The adoption of this Directive will solve the existing gap between those EU nationals who exercise their free movement rights and those who do not.

Set of Rights conferred under the Directive

The Council Directive presents a narrow concept of family³⁹ by recognising only the reunion of the sponsor’s spouse,⁴⁰ the minor children below the age of majority⁴¹ and not married of the sponsor and of his/her spouse, as well as those adopted of the sponsor or/and the spouse when they have custody and the children are dependent on them.⁴² Member states will have total discretion regarding – “may authorise the entry and residence” – all further relatives, as for instance first-degree relatives in direct ascending line who are dependent, the adult unmarried children as well as unmarried partner.⁴³

³⁸ Amended proposal for a Directive of the EP and of the Council, on the rights of citizens of the Union and their family members to move and reside freely within the territory of the member states, Brussels, 15.4.2003, COM(2003) 199 final.

³⁹ The concept of family that can claim protection under the Directive is not so wide as the one provided by international and European instruments. In addition in the ECtHR case *Marckx v. Belgium*, for example, the Court recognised the ties between near relatives such as grandparents and grandchildren as being included in family life, 27 April 1979, Serie A No. 31. Same-sex relationships may also be protected, although under the rubric of private, rather than family, life. *X and Y v. UK*, European Commission on Human Rights Admissibility Decision of 3 May 1983, Appl. No. 9369/81.

⁴⁰ However, following the new Article 4.5, “in order to ensure better integration and to prevent forced marriages Member States may require the sponsor and his/her spouse to be of a minimum age, and at maximum 21 years, before the spouse is able to join him/her”.

⁴¹ The required age of majority will be set by the law of the particular member state. Also, it is striking to see how Article 4.6 stipulates that “By way of derogation, Member States may request that the applications concerning family reunification of minor children have to be submitted before the age of 15, as provided for by its existing legislation on the date of the implementation of this Directive. If the application is submitted after the age of 15, the Member States which decide to apply this derogation shall authorise the entry and residence of such children on grounds other than family reunification”.

⁴² See Article 4.1 of the Council Directive.

⁴³ See Article 4.2. See also the Judgment of the Court of 17 April 1986, *State of the Netherlands v Ann Florence Reed*, Case 59/85, paragraph 30, which in relation to “community migrants” states that “...a

In addition, the last paragraph of Article 4.1 must be criticised, as far as it stipulates that:

By way of derogation, where a child is aged over 12 years and arrives independently from the rest of his/her family,⁴⁴ the Member States may, before authorising entry and residence under this Directive, verify whether he or she meets a condition for integration provided for by its existing legislation on the date of implementation of this Directive.

The expression “capacity” or “condition for integration” remains open to interpretation by the member states, as far as it will be defined exclusively according to national legislation. This provision may be considered as being contrary to international and European set of rules which have defined the concept of minor and the special protection that has to be granted to them.⁴⁵

It is also of interest to assess briefly the evolution, since the proposal was first presented in 1999, of the concept of family and the categories of family members who shall or may enjoy reunification together with the sponsor. The first version of the proposal presented a broader personal scope by obliging the member states to authorise the entry and residence of, among others, the following family members:

- Relatives in the ascending line of the applicant or his spouse or unmarried partner who are dependent on them and have no other means of family support in the country of origin; and
- Children of the applicant or his spouse or unmarried partner, being of full age, who are objectively unable to satisfy their needs by reason of their state of health.⁴⁶

However, these two categories do not appear anymore as being of mandatory character for the member states in the final version of the Council Directive. Instead member states may, by law or regulation, authorise their entry and residence.⁴⁷ It seems clear that the scope of *ratione personae* has been tightened in the successive amendments and final version of the Directive on family reunification. Also, the initial reference to persons enjoying subsidiary protection has been omitted in the latest versions.

Member State which permits the unmarried companions of its nationals, who are not themselves nationals of that Member State, to reside in its territory cannot refuse to grant the same advantage to migrant workers who are nationals of other Member States”.

⁴⁴ The new expression “and arrives independently from the rest of his/her family” was introduced in the version of February 2003 by the Council of Ministers.

⁴⁵ The Federal Republic of Germany represented the main supporter for this clause to be introduced into the Council Directive. See, among many other legal instruments, the Convention on the Rights of the Child, adopted and opened for signature, ratification and accession by General Assembly resolution 44/25, of 20 November 1989, entry into force 2 September 1990.

⁴⁶ Former Article 5 of the Commission proposal of 1999.

⁴⁷ See Article 4 of the Council Directive which establishes that “the Member States may, by law or regulation, authorise the entry and residence, pursuant to this Directive and subject to the compliance with the conditions laid down in Chapter IV, of the following family members: (a) first-degree relatives in the direct ascending line of the sponsor or his or her spouse, where they are dependent on them and do not enjoy proper family support in the country of origin; (b) the adult unmarried children of the sponsor or his or her spouse, where they are objectively unable to provide for their own needs on account of their state of health”.

When one examines the status of EU citizens in this area, however, the rights conferred to their family will be granted, “irrespective of their nationality and which is only derivative of the original right conferred to the EU citizen involved, to the spouse and descendants who are under the age of 21 years or are dependents, as well as dependent relatives in the ascending line of the worker and his spouse”, following Article 10.1 of the Council Regulation 1612/68 on freedom of movement for workers within the Community as amended by Regulation 312/76, 15 October 1968.⁴⁸

Another aspect of the Directive that may be criticised is the period of time allotted the member states to take the decision. At the present time, member states may take between two and three years between the receipt of the application for family reunification and the issuing of the pertinent residence permits for the family.⁴⁹ This provision may contradict, among other international and European legal instruments, the European Social Charter, because by specifying such a long period of time, the main substance and aim of the right of family reunion, which is to make family life possible, would be clearly undermined.⁵⁰ To allow member state authorities to spread the decision taken over several years constitutes a restrictive measure, which should be addressed by reducing the period of time to one year, as the initial proposal from the Commission recommended in its Explanatory Memorandum.

Article 13, which deals with entry and residence of family members, provides that after the application for family reunification has been accepted, the member state may grant to the family members a residence permit of at least one-year validity, whose duration will not go beyond the expiration of the sponsor’s permit.

It is equally interesting to see how in Article 18 of the Council Directive it is provided that “the Member states shall ensure that the sponsor and/or the members of his/her family have the right to mount a legal challenge where an application for family reunification is rejected or a residence permit is either renewed or is withdrawn or removal is ordered”.

⁴⁸ On the interpretation of Community Law on freedom of movement of persons and the right of a TCN who is the spouse of an EU citizen to reside in the EU, see the judgment of the Court of 23 September 2003, *Secretary of State for the Home Department v Hacene Akrich*, Case C-109/01. See in particular paragraph 50, which reads: “in order to benefit in a situation such as that at issue in the main proceedings from the rights provided in Article 10 of Regulation No 1612/68, the national of a non-member state, who is the spouse of a citizen of the Union, must be lawfully resident in a member state when he moves to another member state to which the citizen of the Union is migrating or has migrated”.

⁴⁹ Article 8 of the Directive provides: “By way of derogation, where the legislation of a member state relating to family reunification in force on the date of adoption of this Directive has regard for its reception capacity, the member state may provide for a waiting period of no more than three years between submission of the application for family reunification and the issue of a residence permit to the family members”.

⁵⁰ See also Paragraph 61 of the Judgment of the Court of 23 September 2003, *Secretary of State for the Home Department v Hacene Akrich*, Case C-109/01, which provides an interesting and forward-looking interpretation by the European Court of Justice of the right to respect family life provided by the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950, “..., the competent authorities of the first-mentioned Member State, in assessing the application by the spouse to enter and remain in that Member State, must none the less have regard to the right to respect for family life under Article 8 of the Convention,...”.

The precise limits of the expression ‘legal challenge’ are not fully provided by the Council Directive, as the member states are the competent authority to establish the real meaning and extent of that concept.

Table 1 presents the more important differences and similarities that exist between the status of foreigners/TCNs and EU citizens, as far as the issue of family reunification is concerned.

Table 1. Main differences and similarities between the status of family members of TCN^a and EU citizens^b

| Third Country Nationals | EU Nationals |
|---|---|
| Eligibility | |
| <p>Criteria for eligibility</p> <p><i>Member states are obliged to accept the sponsor's:</i></p> <ul style="list-style-type: none"> • Spouse and minor children (below the age of majority set by the law of the Member State and not been married, as well as taking into consideration the wording provided in <i>Article 4.1.c</i>). See also <i>Article 4.6</i>. <p><i>At the discretion of member states: Article 4.2</i></p> <ul style="list-style-type: none"> • First-degree relatives in the direct ascending line of the person applying for reunification or his/her spouse, being dependent on them. • The adult unmarried children of the sponsor or his/her spouse, where they are objectively unable to provide for their own needs on account of their state of health. • The unmarried partner, being a third country national, with whom the sponsor is in a duly <i>attested</i> stable long-term relationship, or of a third-country national who is bound to the applicant by a <i>registered partnership</i>. Member states may also decide whether registered partnerships are to be treated equally as spouses. In the event of polygamous marriage the member state shall not authorise the reunification of a further spouse than the one who is already living with him in the territory of the host state. | <p>Criteria for eligibility</p> <p><u>Following Article 10</u>, <i>Member states are obliged to accept:</i></p> <ul style="list-style-type: none"> • Spouse and their descendents who are under the age of 21 years or are dependents. • Dependent relatives in the ascending line of the worker and his spouse. <p><i>At the discretion of member states:</i></p> <ul style="list-style-type: none"> • Any member of the family not entering the above categories <i>if</i> dependent on the worker. |

| | |
|--|---|
| <p>Access to education, employment & training</p> <p><i>Article 14</i>, the family of the sponsor shall be entitled to have access to education, to employment and self-employed activity, to vocational guidance, initial and further training and retraining.</p> <p>However, member states may restrict access to employment or self-employed activity by relatives in the ascending line or children above the age of majority to whom <i>Article 4.2</i> applies. member states will also decide the conditions under which family members will exercise an employment or self-employed activity.</p> | <p>Access to education, employment & training</p> <p><i>Article 12</i>, under the same conditions as the nationals of the State of destination. See also <i>Article 11</i> of the Regulation, the spouse and those of the children who are under the age of 21 years or dependent on him shall have the right to take up any activity as an employed person throughout the territory of that same State, even if they are not nationals of any member state.</p> |
| <p>Waiting Period</p> <p><i>Article 8</i> provides that the member states may require the sponsor to have stayed lawfully on their territory <u>for a period not exceeding two years</u>, before having his/her family. By way of derogation, where the legislation of a member state relating to family reunification in force on the date of adoption of this Directive as regard for its reception capacity, the member state may provide <u>for a waiting period of no more than three years</u> between submission of the application for family reunification and the issue for residence permit to the family members.</p> | <p>Waiting Period</p> <p>Family reunification will take place immediately after all the necessary conditions are met – no waiting period exists.</p> |
| <p>Grounds for rejection</p> <p><i>Article 6</i>, The member state may reject an application for entry and residence of family members <i>on grounds of public policy, domestic security or public health</i>. The member states shall consider the ‘severity’ or type of offence or the dangers emanating from the person. In the <i>Explanatory Memorandum</i> it is further explained that <i>the notion of public policy may cover a conviction for committing a serious crime and cases in which a TCNs belongs to an association which supports terrorism</i>. The same reasons may be used to justify the renewal of the residence permit, which may not be withheld and removal from the territory may not be ordered by the competent authority of the member state concerned on the sole grounds of illness or disability suffered after the issue of the residence permit.</p> | <p>Grounds for rejection</p> <p>Council Directive of 25 February 1964 <i>on the Co-ordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health</i>, 64/221/EEC.</p> |

| | |
|---|--|
| <p>Conditions to be fulfilled</p> <p><i>Article 7</i>, the applicant must provide evidence that she/he has: accommodation regarded as normal for a ‘comparable family’ in the same region and which meets the <i>general health and safety standards</i> in force in the Member State concerned (proof of good health); sickness insurance in respect of all risks in the Member State concerned for himself and the members of his family; <i>stable resources</i> which are higher than or equal to the level of resources below which the Member states may grant social assistance. Additionally, Member states may ‘<i>require</i>’ TCNs to comply with integration measures, in accordance with national law.</p> | <p>Conditions to be fulfilled</p> <p><i>Article 10.3</i>, ‘<i>The worker must have available for his family housing considered as normal for national workers in the region where he is employed</i>’, no discrimination. Neither proof of good health, nor sickness insurance is required. The family must not be a burden to public funds. However since the <i>Cristini Case 32/75 (1975) ECR 1085</i>, family members could claim social advantages on the basis of their relationship with the worker. <u>No requirement of integration is provided.</u></p> |
| <p>Grant of autonomous residence permit</p> <p><i>Article 15</i> stipulates that if the family relationship still exists the family members shall be entitled to ask for an autonomous residence permit, at the latest after five year of residence.</p> | <p>Grant of autonomous residence permit</p> <p>It depends on the law of the Member State involved. Normally the family will acquire without any problem a permanent residence permit in their own name.</p> |
| <p>Other requirements</p> <p>In chapter III of the Directive, <i>Article 5</i> says that the application (accompanied by documentary evidence of the family relationship) shall be submitted when the family members are still outside the territory of the member state in which the applicant resides (<i>By way of derogation, a member state may accept an application be submitted when the family members are already in its territory</i>).</p> <p>As far as the waiting period is concerned, the same Article states that a response shall be given in any event no later than <u>nine months from the date of application</u>. Under exceptional circumstances, linked with the complexity of the application, the time period <i>may be extended</i></p> | <p>Other requirements</p> <p>This is not required.</p> |

^a Council Directive on the right to family reunification 2003/86.

^b Regulation 1612/68 on freedom of movement for workers within the Community as amended by Regulation 312/76, among others.

2.2 Towards an equal status between EU nationals and third-country nationals who are long-term residents

The Tampere European Council called for the approximation of the legal status of TCNs to that of EU nationals.⁵¹ It also underlined the importance of conferring on those persons residing legally in the EU and holding a long-term residence permit a uniform set of rights “as near as possible to the EU citizens”, as well as the objective that “long-term legally resident third-country nationals be offered the opportunity to obtain the nationality of the member states in which they are residents”.⁵²

As mentioned previously TCNs have practically been invisible within European Community law. The majority of references to individual rights are exclusively intended to reinforce the rights of EU citizens (see Hailbroner, 2000). The introduction of the notion of EU citizenship in the Maastricht Treaty enhanced even further this concern.⁵³ Citizenship and, more importantly, the rights related to it, are linked directly to every person holding the nationality of a member state,⁵⁴ and not to the category of TCNs or aliens.

In addition, most TCNs only had residence or other rights in the member state where they had been admitted, but they did not have the right to move to a second member state within the European Union unless they belonged to the group of privileged non-EU citizens who held derived rights – also referred to as indirect or secondary rights.⁵⁵ In other words, only those enjoying a legally recognised relationship with an EU citizen (for instance, family ties) would have the opportunity to benefit from the rights conferred under European Community law (see Barret, 2003).

In the belief that there should be a common status of long-term resident in the whole EU, the Commission presented a proposal in March 2001,⁵⁶ having as a legal basis Article 63.4 TEC which states that “the Council shall adopt...measures defining the rights and conditions under which nationals of third countries who are legally resident in a Member state may reside in other Member states”.

⁵¹ See Paragraph 21 of the Presidency Conclusions.

⁵² See Paragraph 18 of the Presidency Conclusions, “The European Union must ensure fair treatment of third country nationals who reside legally on the territory of its Member States. A more vigorous integration policy should aim at granting them rights and obligations comparable to those of EU citizens. It should also enhance non-discrimination in economic, social and cultural life and develop measures against racism and xenophobia”.

⁵³ Articles 17-22, consolidated version of the Treaty Establishing the European Community; Article 18: “Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States....”

⁵⁴ To learn more about the relationship between citizenship and nationality of the member states, see De Groot (1998).

⁵⁵ The concept of derived rights has been used by the European Court of Justice in several instances. See for instance, Case 40/76, *Kermaschek v. Bundesanstalt für Arbeit* [1976] ECR 1669, Case C-243/91, *Belgian State v. Taghavi*, [1992] ECR I-4401. See also the opinion of the Advocate General La Pergola in Case C-356/98, *Kaba v. Secretary of State for the Home Department*, [2000] ECR I-2623.

⁵⁶ Proposal for a Council Directive *concerning the status of third-country nationals who are long-term residents*, COM/2001/0127 final, CNS 2001/0074. Council WP meetings and SCIFA meetings ongoing; Discussed at JHA Council 14/15 October 2002, and finally agreed politically at JHA Council 5/6 May 2003.

The Seville European Council urged the speeding up the implementation of the aspects presented at Tampere for the creation of an area of freedom, security and justice, and set a deadline for the adoption of this particular Directive. The Council reached political agreement ‘on time’ after long negotiations on the proposal at its 2514th meeting held in Luxembourg.⁵⁷

Subsequently, the legislative proposal was modified on July 2003 and thus presented at the Thessaloniki European Council in the summer of 2003, but it has not been formally adopted.

Analysis of the core points of the proposal on the status of third-country nationals who are long-term residents

This assessment is based on the last version of the initiative politically agreed within the Council of the European Union on July 2003.⁵⁸ The differences between the former and the recent version of the proposal merit special attention. Before evaluating whether the initiative has achieved the goals established at Tampere, it is necessary to assess its scope. One is first struck by the fact that the former reference to a right to reside in other member states has been omitted within the current proposal.⁵⁹ The new wording establishes that the Directive will determine ‘the terms of residence’ in member states other than the one that conferred the long-term resident status.⁶⁰ Therefore, it remains highly uncertain whether it truly confers a right of free movement to those meeting the requirements for obtaining the long-term resident’s EC residence permit provided by Article 8 of the proposal.

As far as the scope of *ratione personae* is concerned, one of the positive elements of the first proposal was the broad scope of persons who could qualify for the status. However, the actual text stipulates that the Directive will exclusively apply to those TCNs residing legally on the territory of an EU member state for at least five years.⁶¹ It will thus exclude the following category of persons:

- Students and those following vocational training;

⁵⁷ 2514th Council Meeting JHA, Luxembourg, 5-6 June 2003, 9845/03 (Press 150).

⁵⁸ Proposal for Council Directive concerning the status of third-country nationals who are long-term residents, 10501/1/03, REV 1, MIGR 48, Interinstitutional File: 2001/0074 (CNS), Brussels, 24 July 2003. See also the previous version of the proposal of 7 July 2003, Brussels, Council of the European Union, Doc. 2001/0074, MIGR 48.

⁵⁹ The former Article 1 of the Proposal Com/2001/0127 final, provided that the Directive would determine ‘(b) the terms on which third-country nationals enjoying long-term resident status have the right of residence in member states other than the one which conferred that status on them’. Additionally, the new version of Chapter III, it is now titled ‘Residence in the other member state’, omitting again the reference to a right of residence.

⁶⁰ See new Article 1, Subject matter, which says that the Directive determines “(b) the terms of residence in member states other than the one which conferred long-term status on them for third-country nationals enjoying that status”.

⁶¹ Article 3, Scope, “This Directive applies to third-country nationals residing legally in the territory of a member state”, as well as Article 4, Duration of residence, “Member states shall grant long-term resident status to third-country nationals who have resided legally and continuously within its territory for five years immediately prior to the submission of the relevant application”.

- The beneficiaries of temporary or subsidiary forms of protection;
- Refugees, and those who have applied for the recognition of this status;
- Temporary residents; and
- Those holding diplomatic or consular protection.

The persons to whom the Directive may apply are therefore fewer in number than what may initially appear at *prima facie*. Also, the proposal does not clarify the grounds for the exclusion of all these categories. The recent inclusion of refugees as falling outside the personal scope may be considered an unfortunate political choice.

The main goal of the measure is “to grant an EC status of long-term residents to TCNs who have legally resided for 5 years” in the territory of a member state; it does not intend however to replace existing national legislation on long-term resident status. Indeed, looking at the wording of the Directive, new Article 4,⁶² the only obligation incurred by the member states is to grant the status to those TCNs who have resided legally for a period of five years immediately prior to the submission of the relevant application.

The proposal also stipulates, in Article 4(2), that periods of absence shorter than six consecutive months and that do not exceed in total ten months within the period of five years, may not interrupt the period of residence and will be included in the final calculation. The new text, however, leaves to member states’ discretion the exclusion from calculation of the periods of residence consisting of:

- Studies or vocational training – half of the periods of residence – may be taken into account for the calculation as far as the person involved has acquired a title of residence which “will enable him/her to obtain a long-term resident status”.
- Periods of absence for employment purposes, including cross-border services, may be also taken into consideration by the member states.

An additional requirement is established within Article 4 regarding the obligation by the person involved to prove that s/he has “stable resources” and a “sickness insurance” in order not to become a burden for the particular EU member state.⁶³ He/she must also present evidence of “appropriate accommodation”.⁶⁴ Article 5 has introduced a new paragraph dealing with the integration conditions of the migrant as an additional requirement for the acquisition of the status. There seems to be no clarification about the real limits of this requirement, leaving wide room for discretion to the member states to define, through their respective national immigration laws, the real meaning and content of the conditions that need to be fulfilled for the effective integration of these persons within their societies. This condition also appears in Article 15(3), by saying that “Member states may require third-country nationals to comply with integration measures, in accordance with national law”.

⁶² Article 4, Duration of residence, “Member States shall grant long-term resident status to third-country nationals who have resided legally and continuously for five years immediately prior to the submission of the relevant application.”

⁶³ New Article 5 of the Directive, Conditions for acquiring long-term resident status.

⁶⁴ New version of Article 7.1, which concerns the acquisition of long-term resident status.

It may be also remarked that the new text of the proposal has omitted inappropriately the reference to the non-discrimination clause, which was provided by the old Article 4.⁶⁵ The main justification may have been the adoption of the two Council Directives on implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, and the one establishing a general framework for equal treatment in employment and occupation. However, as a matter of fact, at the moment only the UK and France have transposed into their domestic legislation the Directive on *equal treatment irrespective of racial and ethnic origin*, even though the deadline for implementation was 19 July 2003.⁶⁶ This shows again a worrying lack of political will towards these policy issues,⁶⁷ as well as a high necessity to double protect these fundamental concerns which represent the bases for equal treatment.

Another change in the newly proposed text is contained in Article 6 – Public policy and public security. Under the current wording, “Member states may refuse to grant long-term resident status on the grounds of public policy or public security”. In that concern two main changes may be perceived in comparison to the former version: first, the former categories of public order or domestic security do not appear in the new language used. And second, the member states will examine the “severity or type of offence against public policy or public security, or the danger that emanates from the person concerned”.⁶⁸ This new provision follows the same wording as the one provided in the Directive assessed above on the right to family reunification. It is also worrying to see once again the wide room of discretion given to the member states authorities to determine whether a particular person may constitute or not a “threat or danger” to public security/policy.

Article 7 of the new proposal needs special consideration. It stipulates the obligation by the specific competent national authorities to notify the applicant of the decision taken “as soon as possible” and “in any event” no later than six months from the date on which the application was lodged. Although the final version of this Article may be welcome in some respects, it is unlikely that the national authorities will take the final decision in such a short term. This shortcoming may be exacerbated in that any punitive consequences of taking a non-proportional length of time in reaching a decision will be determined exclusively by the specific national legislation of the member state involved.

If a person fulfils all the above-mentioned requirements s/he will be granted a long-term resident’s EC residence permit following Article 8. The new period of validity of the

⁶⁵ Former Article 4 stated that ‘The Member State shall give effect to the provisions of this Directive without the discrimination on the basis of sex, race, colour, ethnic or social origin, genetic characteristics, language, religion or beliefs, political or other opinions, membership of a national minority, fortune, birth, disabilities, age or sexual orientation’.

⁶⁶ Article 16 of the Council Directive 2000/43/EC of 29 June 2000, *implementing the principle of equal treatment between persons irrespective of racial or ethnic origin*.

⁶⁷ Spain, Germany, Greece and Luxembourg in particular have shown a major reluctance to implement this Directive within their respective national legislations.

⁶⁸ See also paragraph 2 of Article 6 which stipulates that “the refusal referred to in paragraph 1 shall not be founded on economic considerations”.

residence permit has been dramatically reduced from ten years to five years.⁶⁹ Additionally, it will be renewable only upon submission of a new application by the person involved, and not automatically.⁷⁰

Article 9 – Withdrawal or loss of status – establishes that member states shall withdraw long-term resident status when it has detected one of the following circumstances:

- Fraudulent acquisition of the status;
- Expulsion measure based on Article 12 of the proposal. The new categories of public security, and specifically public policy, have been also introduced within this provision. These grounds seem to be wider than the previous public order or domestic security grounds used in the former version. This is further exemplified by the national authorities' discretion to withdraw the status even though the threat to public policy is not a reason for expulsion within the meaning of Article 12;⁷¹
- Absence from the territory for a duration of twelve consecutive months. Member states may not consider that period of absence as a ground for the withdrawal/loss of status;⁷² and
- Acquisition of the status pursuant to Article 23, which deals with the acquisition of the long-term resident status in a second EU member state.⁷³

Other critical aspects within the Directive's scope and contents

Although adoption of the Directive would represent beneficial progress towards achievement of an “equal treatment status”, this measure seems still to leave some critical questions open. First, the long-term resident's EC residence permit and the rights it confers are confined to the particular member state in which the migrant has been legally residing for a duration of five years. Therefore, the residence permit cannot

⁶⁹ Article 8.2 reads as follows, “Member States shall issue a long-term resident's EC residence permit to long-term residents. The permit shall be valid at least for five years; it shall, upon application if required, be automatically renewable on expiry”.

⁷⁰ See also new Article 9.6 in which it is provided that the expiry of a long-term resident's EC residence permit shall in no case entail withdrawal or loss of long-term status. The resident permit will follow the patterns provided by the Council Regulation (EC) No. 1030/2002, laying down a uniform format for residence permits for third-country nationals, of 13 June 2002, OJ L 157, 15.6.2002, and the forthcoming Proposal for a Council Regulation amending Regulation (EC) 1030/2002, COM/2003/0558 final, 24.9.2003.

⁷¹ Article 9.3, stipulates that “Member State may provide that the long-term resident shall no longer be entitled to maintain his/her long-term resident status in cases where he/she constitutes a threat to public policy, in consideration of the seriousness of the offences he/she committed, but such threat is not a reason for expulsion within the meaning of Article 12”.

⁷² Article 9.4, further provides that a six-year period of absence will represent the loss of the status, even though the member states will (may) have the possibility to maintain this status.

⁷³ Article 23 states that “1) Upon application, the second member state shall grant long-term residents the status provided for by Article 7, subject to the provisions of Articles 3, 4, 5 and 6. The second member state shall notify its decision to the first member state. (2) The procedure laid down in Article 7 shall apply to the presentation and examination of applications for long-term resident status in the second member state. Article 8 shall apply for the issuance of the residence permit. Where the application is rejected, the procedural guarantees provided for by Article 10 shall apply”.

be used in a second EU member state if that status is not also granted there.⁷⁴ Article 15 of the proposal stipulates that after a period of three months since entry to the territory of a second member state, the person involved will have to follow again the same required administrative procedure in order to check whether s/he fulfils the conditions contained in Article 15 to receive a residence permit in that state.⁷⁵ It is unfortunate that the competent national authorities of the second member state will have a further period of four months to process the application from the date it is lodged.⁷⁶ It seems to us that the length of waiting time since the person first entered the territory of the second member state until the final decision is actually taken is too long, and it would be highly desirable to shorten this period. Also, in point three of same Article the requirement to comply with integration measures according to the national law of the second member state has again been introduced.⁷⁷

Second, after having received the residence permit, Article 21 provides that the person will enjoy an “equal treatment” similar to the one s/he had within the first state’s territory, following Article 11 of the proposal. However, the current wording of the latter Article needs to be evaluated carefully. Although Article 11 states that long-term residents shall enjoy equal treatment in a number of areas,⁷⁸ member states have the possibility nevertheless to restrict this equality in a number of instances:

- 1) Limitations having as a basis public policy and public security considerations covered by national provisions. These factors will apply, for example, to the free access to the totality of the territory of the state, freedom of association and membership to organisations of specific occupations;
- 2) Concerning social protection and assistance falling outside core benefits;
- 3) Access to employment and/or self-employed activities where these posts are reserved to nationals of the state, EU citizens and EEA nationals. Thus, discrimination on grounds of nationality is kept intact as regards non-EU citizens in comparison to the situation of European Community migrants to whom apply Article 12 TEC and the case law emanating thereof and the European Court of Justice (ECJ);⁷⁹ and

⁷⁴ See the current version of Chapter III of the Directive, entitled “Residence in the other member states”, Articles 14-23.

⁷⁵ This article establishes that “member states may require the persons concerned to provide evidence that they have: (a) stable and regular resources...(b) sickness insurance...”.

⁷⁶ Article 19, Examination of applications and issue of residence permit.

⁷⁷ Integration measures will not be applicable to those persons who had already complied with these conditions in order to obtain the long-term resident status, but the requirement to attend language courses will be still necessary following Article 15(3).

⁷⁸ These being: access to employment and self-employment activities, education and training (including study grants), recognition of diplomas and other qualifications, social security, social assistance and social protection as defined by national law, tax benefits, access to goods and services, freedom of association and free access to the entire territory of the member state.

⁷⁹ Article 12 TEC states: “Within the scope of application of this Treaty, and without prejudice to any additional provisions contained therein, any discrimination on grounds of nationality shall be prohibited”. See Case 36/74, *Walrave and Koch*, [1974] ECR 1405, [1975] 1 CMLR 320, in which it was held that Article 39 TEC provided nationals of the member states with rights that are directly effective before national courts. Also Case 167/73, *Commission v. French Republic*, [1974] ECR 359, [1974] 2 CMLR

- 4) Finally, concerning education (including study grants) and vocational training, social security, social assistance and social protection, tax benefits, access and supply of goods and services made available to the public and to procedures for obtaining housing, as well as freedom of association may also be restricted “where the registered or usual place of residence of the long-term resident, or that of family members for whom s/he claims benefits, lies within the territory of the member state concerned”.⁸⁰ The exact meaning of this paragraph is far from being clear and transparent.

On reviewing the above points, it would not be easy to argue that the proposal confers a “true equal treatment” in comparison with EU citizens, either in the member state where the application was first lodged, or in the second state where the long-term resident may move and reside at a later stage. This provision should be improved and amended towards a closer status to that of EU citizens.

Third, it is surprising to see how Article 18 – Public Health – introduces the possibility by a member state to impose a medical examination for those “persons to whom this Directive applies”,⁸¹ as well as the possibility to refuse applications of persons (or their families) who constitute a threat to the public health, when this is not precisely a pre-condition for EU citizens moving within the EU.

Fourth, the Directive does not guarantee in any way that a homogeneous EC status of long-term resident will exist throughout the European Union. Each of the member states may keep their bilateral agreements with third countries⁸² or more favourable legislation concerning specific TCNs even after this Directive is implemented in their legal system.⁸³ Therefore, all the association and cooperation agreements adopted under Articles 308 and 310 will remain fully applicable (see Apap, 2002). Thus, for instance, the Association Agreement with Turkey and the Decisions of the Association Council EEC-Turkey, as well as the existing Maghreb Cooperation agreements will be applicable even when the Directive will be transposed to national law (see Groenedijk, 2001). It also appears that the legal provisions presented do not confer any further direct obligation on the member states in the more important issues. The Directive does not seem to intend to set up a higher set of standards or to replace the existing national legislation on long-term resident status.

216 which deals with prohibition of discrimination on the grounds of nationality in the field of employment, and in which the ECJ held that any conflicting national measure will automatically be rendered inapplicable. See also, among others, Joined Cases C-92/92 and C-326/92 *Phil Collins and Others* [1993] ECR I-5145.

⁸⁰ Paragraph 2, Article 11.

⁸¹ Article 18(4), “A Member State may require a medical examination, for persons to whom this Directive applies, in order to certify that they do not suffer from any of the diseases referred to in paragraph 2. Such medical examinations, which may be free of charge, shall not be performed on a systematic basis”.

⁸² These being for instance the Association Agreement with Turkey, the Euro-Med Agreements with Tunisia and Morocco, etc.

⁸³ Article 13 (former Article 14) “Member States may issue residence permits of permanent or unlimited validity on terms that are more favourable than those laid down by this Directive. Such residence permits shall not confer the right of residence in the other Member States as provided by Chapter III of this Directive”.

Fifth, Article 10 covers the procedural safeguards against a decision rejecting the issuing or withdrawal of the status. The rights to appeal against expulsion and the procedural safeguards in general for the migrant involved, as well as his/her respective family members are not necessarily as strong as those applicable to EU nationals. As set out above, it appears that in the whole package of Commission proposals on TCNs the member states have too much discretion as regards the grounds on which expulsion may be applied – mainly the one concerning public policy. A clear statement on the possibility to have access to appeal should have been included in the proposed legal text. Article 10 stipulates that “the person concerned shall have the right to mount a legal challenge in the member state concerned”. However, the real meaning of legal challenge is not clarified in the proposal; it is thus certain that it will be defined at a later stage by the precise member state in which the application has been lodged. However, to compare with the EU citizens’ situation, consider that the Council Directive *on the co-ordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health*⁸⁴ provides, in Articles 8 and 9, the procedural/judicial remedies available to them, including expressly the right of appeal. Some scholars have argued that a future possible solution to that gap would be given by the European Court of Justice. The ECJ has recognised the existence of the right to a fair trial under European Community Law, independently of the European Convention of Human Rights,⁸⁵ in the cases *Heylens*⁸⁶ as well as *Johnston*.⁸⁷ Therefore, through a future interpretation of those Articles dealing with judicial remedies, the ECJ could broaden the scope/content of the rights conferred on the TCNs by the proposals. Thus, even though the proposed Directive(s) do(es) not allude expressly to the right of appeal, TCNs may nevertheless have this possibility in the future by claiming that right before the ECJ.

Sixth, the main legal provisions of the Directive should be based to a greater extent on the international instruments that already existed on the issue.⁸⁸

Finally, those migrants not fulfilling the requirement of *five years* residence remain under the scope of the national immigration laws of the member states. A harmonised legal framework providing for their protection needs to be agreed at EU level as soon as possible. Thus we can conclude that once again the desired equal treatment agreed at Tampere has not been met by this proposed Directive. It does not go far enough in order to guarantee a comparable treatment between TCNs and EU citizens, and it leaves too much room for member states’ discretion.

⁸⁴ Council Directive of 25 February 1964, 64/221/EEC, OJ Sp. Ed. 1964, No. 850/64, p. 117.

⁸⁵ The European Convention on Human Rights, Rome, 4 November 1950.

⁸⁶ Judgement of the Court of 15 October 1987, *Union Nationale de Entraîneurs et cadres techniques professionnels du football v Georges Heylens and others*, Case 222/86.

⁸⁷ Judgement of the Court of 15 May 1986, *Marguerite Johnston v. Chief Constable of the Royal Ulster Constabulary*, Case 222/84.

⁸⁸ These being the ECHR, the ECtHR case law, the International Labour Organisation (ILO) Convention No. 143, the Social Charter of 1961, the UN Convention on the Protection of the Rights of all Migrant Workers and Members of their Families, etc.

Table 2. Comparison between the rights associated with the long-term resident status of Third country nationals and EU citizens.

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| <p>Third country nationals</p> <p>Proposal for Council Directive concerning the status of third-country nationals who are long-term residents.</p> | <p>EU citizens</p> <p>Council Regulation 1612/68/EEC on freedom of movement for workers within the Community, and the Council Directive 68/360/EEC on the abolition of restrictions on movement and residence within the Community for workers of Member states and their families, among other secondary legislation. Proposal for a Directive on the rights of citizens of the Union and their family members to move and reside freely within the territory of the Member states, 2003/199.⁸⁹</p> |
| <p>Scope</p> <p>The Directive establishes '(a) the terms for conferring and withdrawing long-term resident status; and (b) the terms of residence in Member states other than the one which conferred long-term resident status. <u>Article 3</u>. Personal Scope, 'This Directive applies to third-country nationals residing legally in the territory of a Member State'</p> | <p>Scope</p> <p>Freedom of movement and of residence for <i>Union citizens</i> - <u>Articles 12, 14, 17, 18, 39, 43 and 49</u> of the Treaty Establishing the European Community.</p> <p><u>Article 4</u> of the Council Directive 68/360/EEC states that member states shall grant the right of residence in their territory to the persons referred to in its Article 1, these being EU citizens and their family members.</p> |
| <p>Procedure to be granted with a Long-term residents' EC residence permit</p> <p>It will be granted upon acquisition of long-term resident status. <u>Article 4</u>. Duration of residence, 'Member states shall grant long-term resident status to third-country nationals who have resided legally and continuously within its territory for five years immediately prior to the submission of the relevant application'.</p> | <p>Procedure to be granted with a Residence Permit for a National of a Member State of the EEC</p> <p><u>Articles 4 -9</u> of the Council Directive 68/360/EEC, which provides that in order to be granted with the so-called 'Residence Permit for a National of a Member State of the EEC', they will be required to produce a series of documents which are specified in paragraph 3 of <u>Article 4</u>. The completion of these formalities 'shall not hinder the immediate beginning of employment under a contract concluded by the applicants' (<u>Article 5</u>).</p> |

⁸⁹ We will carry out the comparison looking at the Amended Proposal for a Directive of the European Parliament and of the Council on the rights of citizens of the Union and their family members to move and reside freely within the territory of the Member States, COM(2003) 199 final, Brussels, 15.4.2003, 2001/0111 (COD), which would lead to the replacement and complement the former following European legislative texts: Council Regulation (EEC) No 1612/68 of 15 October 1968 on freedom of movement for workers within the Community, Council Directive 68/360/EEC of 15 October 1968 on the abolition of restrictions on movement and residence within the Community for workers of Member States and their families, Council Directive 73/148/EEC of 21 May 1973 on the abolition of restrictions on movement and residence within the Community for nationals of Member States with regard to establishment and the provision of services, Council Directive 90/364/EEC of 28 June 1990 on the right of residence, Council Directive 90/365/EEC of 28 June 1990 on the right of residence for employees and self-employed persons who have ceased their occupational activity, and Council Directive 93/96/EEC of 29 October 1993 on the right of residence for students.

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| <p>Procedure to be granted (continued)</p> <p><i>Article 7</i> 1. 'To acquire long-term resident status, the third-country national concerned shall lodge an application with the competent authorities of the Member states in which s/he resides. The application shall be accompanied by documentary evidence to be determined by national law that s/he meets the conditions set out in Articles 4 and 5 as well as, if required, by a valid travel document or its certified copy. 2. The competent national authorities shall give the applicant written notification of the decision as soon as possible and in any event no later than six months from the date on which the application was lodged. In exceptional circumstances linked to the complexity of the examination of the application, the time limit referred to may be extended.</p> | <p>Procedure to be granted (continued)</p> <p>Looking at the new wording under the Proposal for Directive 2003/199, establishes in its <i>Article 3</i>, that 'This Directive shall apply to all Union citizens who move to or reside in an Member State of the Union other than that of which they are a national and to their family members as defined in point 2 of Article 2 who accompany or join them'. Thus, no residence permit, visa or equivalent may be imposed to EU citizens (only valid identity card or passport). However, Member states may impose an administrative formality which may consist in a registration for those EU citizens willing to reside for more than six months (See Chapter III of the Proposal).</p> <p>As far as the Right of permanent residence, Chapter IV of the new Proposal for Directive 2003/199, and in particular <i>Article 14.1</i> says that 'Union citizens who have resided legally for a continuous period of four years in the host Member State shall have the right of permanent residence there. This right shall not be subject to the conditions provided for in Chapter III'.</p> |
| <p>Requirements to be fulfilled</p> <p><i>Article 5</i>. Conditions for acquiring long-term resident status, 1. Member states shall require third-country nationals to provide evidence that they have, for themselves and for dependent family members: a) stable and regular resources which are sufficient to maintain himself/herself and the members of his/her family, without recourse to the social assistance system of the Member State concerned. Member states shall evaluate these resources by reference to their nature and regularity and may take into account the level of minimum wages and pensions prior to the application for long-term resident status. b) Sickness insurance in respect of all risks normally covered for his own nationals in the Member State concerned. 2. Member states may require third-country nationals to comply with integration conditions, in accordance with national law (emphasis added).</p> | <p>Requirements to be fulfilled</p> <p>The new Proposal for Directive establishes in <i>Article 7</i> the conditions that EU citizens have to fulfill in order to reside for a period longer than six months in the territory of another Member State. Thus, 'All Union citizens shall have the right to reside within the territory of another Member State for a period of longer than six months if they: a) are engaged in gainful activity in an employed or self-employed capacity or are recipients of services; or b) have sufficient resources for themselves and their family members not to become a burden on welfare assistance in the host Member State during their stay and have comprehensive sickness insurance cover in the host Member State; or c) are enrolled at an accredited establishment for the principal purpose of following a course of study, including vocational training and have comprehensive sickness insurance cover in the host Member State; or d) are family members of a Union citizen who satisfies conditions (a), (b) or (c)'.</p> |

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| <p>Withdrawal or loss</p> <p>The cases in which the long-term resident status will be lost are described by <u>Article 9</u>: (a) <i>detection of fraudulent acquisition of long-term resident status</i>; (b) <i>adoption of an expulsion measure under the conditions provided for in Article 12</i> (i.e. when the person constitutes an actual and sufficiently serious threat to public policy or public security); (c) <i>in the event of absence from the territory of the Community for a period of twelve consecutive months</i>, being this last situation optional for the member states to apply.</p> <p><u>Article 8.2</u> says that ‘<i>The permit shall be valid at least for five years; it shall, upon application if required, be automatically renewable on expiry</i>’.</p> | <p>Withdrawal or loss</p> <p>See <u>Article 2</u> of the Council Directive <i>on the coordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health</i>, 64/221/EEC. See also the <i>Annex</i> of the Directive.</p> <p>In the new proposal for Directive 2003/199 it is <u>Article 14.3</u> states that ‘<i>Once acquired, the right of permanent residence shall be lost only through absence from the host Member State for a period exceeding four years at a time</i>’.</p> |
| <p>Residence in other Member states</p> <p>A person holding the long term resident status shall be entitled to reside in the territory of a Member State other than the one which granted her/him the status, provided that the conditions set up in Chapter III of the Proposal are met – <u>Article 15</u>.</p> <p>Following <u>Article 14</u> the TCN involved may reside in a second Member State on the following <u>grounds</u>:</p> <ol style="list-style-type: none"> 1. <i>exercise of an economic activity in an employed or self-employed capacity;</i> 2. <i>pursuit of studies or vocational training;</i> 3. <i>other purposes.</i> <p>Also, in the same Article it is provided that ‘<i>For reasons of labour market policy, Member states may give preference to Union citizens, to TCNs, when provide for by Community legislation, as well as TCNs who reside legally and receive unemployment benefits in the Member State concerned</i>’.</p> <p>Moreover, <u>Article 4.3</u> stipulates that ‘<i>member states may limit the total number of persons entitled to be granted right of residence, provided that such limitations are already set out for the admission of third-country nationals in the existing legislation</i>’.</p> | <p>Residence in other Member states</p> <p>See above Scope.</p> |

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| <p>Procedural guarantees</p> <p><i>Article 10, ‘Where an application for long-term resident status is rejected or that status is withdrawn or lost or the residence permit is not renewed, the person concerned shall have the right to mount a legal challenge in the Member State concerned’.</i></p> | <p>Procedural guarantees</p> <p><i>Article 8 of the Directive on the coordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health, 64/221/EEC, stipulates that ‘The persons concerned shall have the same legal remedies in respect of any decision concerning entry, or refusing the issue or renewal of a residence permit, or ordering expulsion from the territory, as are available to nationals of the State concerned in respect of acts of the administration’. See also Article 9 of the same Directive.</i></p> |
| <p><i>Article 13 (former Article 14) ‘Member states may issue residence permits of permanent or unlimited validity on terms that are more favorable than those laid down by this Directive. Such residence permits shall not confer the right of residence in the other Member states as provided by Chapter III of this Directive’.</i></p> | <p>Not existent.</p> |

2.3 The Proposal for a Council Directive on the conditions of entry and residence of third country nationals for the purpose of paid employment and self-employment activities

Access to the EU employment market for immigrants represents an essential component on the achievement of a common immigration policy. “Channels for legal immigration to the EU should be made available as soon as possible for labour migrants.”⁹⁰ However, it is well known that this policy area involves a high political sensitivity for the member states and European populations throughout Europe, which has given rise to questions of competence.⁹¹ The European Union has enjoyed a rather tortured relationship with primary economic immigration for at least the last ten years.⁹²

The goal to achieve an approximation of the legislation in the different EU member states on the rules of admission of TCNs to work in the EU was highlighted at the Tampere European Council by saying that “the legal status of third country nationals should be approximated to that of Member states’ nationals. A person... should be granted... the right to work as an employee or self-employed person...”

⁹⁰ Communication from the Commission to the Council and the European Parliament, on a Community Immigration Policy, Brussels, 22.11.2000, COM(2000) 757 final.

⁹¹ In fact, the demarcation of the boundary between Community and member states’ competence is still a contentious issue and has not yet been fully clarified. This is due to the unwillingness of the member states to lose their sovereignty in this area.

⁹² Guild (2001) points out: “While on the one hand the European Union has sought to improve labour mobility among the Member States on the grounds that primary migration improves prosperity, it has maintained a discourse against primary economic immigration from outside the Union”.

Following that ‘call for action’, the European Commission presented a proposal for a Directive on the issue having as a legal basis Article 63 EC Treaty. This Article provides that the Council is to adopt “measures on immigration policy within the following areas: (a) conditions of entry and residence, and standards on procedures for the issue by Member states of long-term visas and residence permits”. It is also important to recall that the legislative measures adopted pursuant to Article 63(3) (a) EC Treaty will not be subject to the five-year period stated in Article 62 TEC.⁹³

The proposal for a Directive has not yet been adopted by the Council,⁹⁴ leading once again to questions of why it is so and whether national governments are genuinely committed to allow for an effective policy convergence in this field.

It is clear that the ‘zero immigration’ policies of the past 30 years are no longer appropriate in the current economic and demographic context of the European Union. The Commission has underlined the need to have a ‘proactive’ immigration policy, i.e. a policy that instead of attempting to prevent and stop immigration, would try to control immigration according to the needs of the European labour market. The member states have to be aware that many economic migrants have been driven either to seek entry through the asylum procedure or to enter illegally in the EU due to the so-called ‘Fortress Europe’ policies. This does not allow for an adequate response to labour market needs/gaps and plays into the hands of well-organised traffickers and unscrupulous employers. Member states should also keep in mind and recognise that independently of the restrictive policies they may adopt towards TCNs, migratory pressures will continue in the European Union.

The need for TCN labour was first underlined at international level by a report of the United Nations (2000) entitled *Replacement Migration: Is it a solution to declining and ageing populations?*. The report advocated ‘replacement immigration’ in order to compensate the inevitable population decline in Europe and other parts of the world. However, it is also well known that migration alone is unlikely to be the answer to Europe’s demographic problems. Policies for legal migration of labour should also be coupled with other broader labour market reforms, such as promoting the employment of minorities and women (e.g. facilitating the integration of women following childbirth) as well as allowing for longer participation in the labour market, modifying pension plans, etc.

The Commission presented at the Thessaloniki European Council a Communication on immigration, integration and employment.⁹⁵ This particular instrument deserves special

⁹³ Article 63.4 EC Treaty provides that “Measures adopted pursuant to points 2(b), 3(a) and 4 shall not be subject to the five year period referred to above”. Article 62 stipulates: “The Council, acting in accordance with the procedure referred to in Article 67, shall, within a period of five years after the entry into force of the Treaty of Amsterdam, adopt: (1) measure with a view to ensuring, in compliance with Article 14, the absence of any controls on persons, be they citizens of the Union or nationals of third countries, when crossing internal borders, ...”.

⁹⁴ The EP voted in March 2003, but there has been no discussion within the Council since July 2002.

⁹⁵ Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, *on immigration, integration and employment*, Brussels, 3.6.2003, COM(2003) 336 final. See also the Presidency Conclusions, Thessaloniki European Council, 19 and 20 June 2003, pp. 8-10.

attention representing the first step towards an open discussion in the EU on the sensitive issue of TCNs' integration policy as well as on the necessity of labour migration due to the socio-demographic and economic future changes within the EU and its positive consequences for the host state in particular and for the EU in general.⁹⁶ It is equally important because it has been agreed that a holistic approach⁹⁷ towards integration of immigrant needs to be taken, thus covering a series of key elements, such as "employment, economic participation, education, language training, health, and social services, housing, town planning, culture and involvement in social life".⁹⁸

The Commission's proposal for a Directive on employment and self-employment activities is nonetheless a welcome attempt to suggest a rather flexible system to deal with the requirements that the workers from third countries may have to face in the EU. Although the proposal may be considered a positive instrument, many aspects need to be improved in order to ensure a comparable treatment between TCNs and EU citizens.

Analysis of the key elements of the proposal

The granting of a work permit should be simple, rational and flexible on the basis of verifiable and objective criteria, delivered within a short period of time and the procedure should be transparent. We will assess whether this has been efficiently achieved through the detailed analysis of the proposal.

Firstly, the main goal of the measure is to establish common definitions and conditions, as well as a single national application procedure leading to one combined title for both residence and work permits.⁹⁹

As far as the *personal scope* is concerned, the proposal will not cover the following categories:

1. TCNs established within the Community who provide cross-border services;
2. Applicants for asylum, as well as under subsidiary/temporary protection;
3. Illegal migrants;
4. TCNs family members of EU citizens who have exercised their right of free movement; and
5. TCNs staying in a member state of the EU under family reunification rules.

Article 3 preserves the effect of international treaties and agreements concluded by the EC, the member states or both, if those provisions are more favourable. Therefore, the Association, Cooperation and Mixed Agreements¹⁰⁰ will still be applicable to these

⁹⁶ In addition to the above-mentioned UN report, other organisations such as Eurostat, the ILO, the OECD and the IMF have agreed on that argument.

⁹⁷ See page 18 of the Communication, point 3.2., "The need for a holistic approach".

⁹⁸ The same objective was highlighted in the Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions, *The future of the European Employment Strategy (EES); A Strategy for full employment and better jobs for all*, Brussels, 14.1.2003, COM(2003) 6 final.

⁹⁹ Article 1 of the proposal.

¹⁰⁰ Concerning the issue of Mixed Agreements see among many others rulings, *Demirel V. Stadt Shcawäbisch Gmünd*, Case 12/86, [1987] ECR 3719, *R. & V. Haegeman v Belgium*, of 30 April 1974,

situations. They will remain in force even after the Directive will be implemented by the member states. In our opinion the creation of a dual legal system may undermine TCNs' human rights as far as it is certain that under these agreements a higher level of protection exists in comparison to the ones recognised under the proposal for a Directive.¹⁰¹ Therefore, the adoption and future implementation of the Directive would represent a potential risk, i.e. the protection provided by the current national immigration rules based on the mentioned agreements will be lowered to meet the new European standards. On the other hand, this would perpetuate a discriminatory distinction in the labour force between various groups of TCNs themselves. Article 3 also gives the possibility to the member states to maintain or introduce more favourable provisions regarding researchers/academic specialists, priests/members of religious orders/sport professionals/artists/journalists as well as representatives of NGOs. This possibility may be questioned as far as the practices followed by the member states differ greatly in those concerns.

The system proposed by the European Commission would be one in which the member states would first agree on common definitions and practices. The harmonised regime would have as core criteria the proof that a post cannot be filled in the short-term within the domestic labour market by:

- EU citizens;
- TCNs family members of EU citizens who have exercised their right to free movement;
- TCNs already enjoying full access to the national labour market under the association, cooperation or mixed agreements mentioned above;
- TCNs legally resident in a member state and that have been exercising activities as an employed person in that member state for more than three years; or
- TCNs who have been legally resident in that member state, and who have legally exercised activities as an employed person in that member state for more than three years over the preceding five years.

The requirement to qualify for a post which has not been fulfilled “in the short term” will be respected if the vacancy has been made public through the employment services of several member states during four weeks and “no acceptable job application has been received” from any of the categories listed above.¹⁰² The precise meaning of “no acceptable job application” remains unclear, granting a wide room for the member states' discretion in determining it.

Case 181-73 [1974]. *Hauptzollamt Mainz v. Kupferberg*, Case 104/81, [1982] ECR 3641. See also *Parfums Christian Dior SA v TUK Consultancy BV and Assco Gerüste GmbH and Rob van Dijk v Wilhelm Layher GmbH & Co. KG and Layher BV.*, Joined cases C-300/98 and C-392/98 of 14 December 2000, on the interpretation of an article of a Mixed Agreement as having direct effect.

¹⁰¹ Through its case law, the ECJ has extended the rights provided by the provisions of these agreements making them as far as possible analogous to the ones conferred on EU citizens. See, for instance, Case C-18/90 *ONEM v. Kziber* [1991] ECR I-199 and Case C-1/97 *Birden* [1998] ECR I-7747.

¹⁰² Article 6(2) of the proposal. This article also states the possibility that the job vacancy will be made public through the European Employment Services (EURES) network established by the Commission Decision 93/569/EEC, OJ L 274, 6.11.1993.

The proposal also gives member states the opportunity to adopt national legislations in which the mentioned criteria are considered to be fulfilled “for a specific number of jobs, in a specific sector, for a limited time-period and, if appropriate, in a specific region without the need for individual assessment”.¹⁰³

Regarding the proposed single national application procedure, the measure differentiates between the entry and residence of TCNs for the purpose of paid employment (Chapter II – Articles 4 to 16) as well as for the purpose of exercising self-employed economic activities (Chapter III – Articles 17 to 24).

As far as the rules applicable to paid employment are concerned, first it is interesting to see how under Article 5 the applications to obtain the so-called “residence permit – worker” can be submitted both by TCNs as well as by their future employers.¹⁰⁴

The residence permit, which shall be valid for a period of up to three years to be determined by the national legislation,¹⁰⁵ will be issued if the person involved fulfils the following requirements/conditions:

1. Submission of the application along with the name and address of the applicant and employer;
2. A valid work contract or recruiting promise;
3. Description of the activities carried out;
4. Evidence that the vacancy cannot be fulfilled with any of the categories provided in Article 6;
5. Certificate/proof of good character and conduct and a health;
6. Valid passport (valid residence title);
7. Documents proving the skills that are necessary to carry out the envisaged activities;
8. Evidence of sufficient resources and sickness insurance covering all risks; and
9. Proof of payment of the application fee.

Throughout the provisions of the Commission’s proposal wide discretion is given to member states to apply horizontal measures limiting the admission of TCNs. A good example is Article 8 which states that a “residence permit – worker” shall be restricted during the first three years to the exercise of specific professional activities or fields of activities, as well as to the exercise of activities as an employed person in a specific region.

¹⁰³ Article 6(3) of the proposal.

¹⁰⁴ Article 5.1 reads: “In order to obtain a ‘residence permit – worker’, a third country national intending to exercise activities as an employed person in a Member State shall apply to the competent authority of the member state concerned; The future employer of a third-country national shall have the right to submit an application on behalf of the third-county national applicant”.

¹⁰⁵ Article 7 of the proposed Directive states: “A ‘residence permit-worker’ shall be issued for a predetermined period. The initial residence permit granted shall be valid for a period of up to three years to be determined in accordance with national legislation. It shall be renewable for periods of up to three years, to be determined in accordance with the national legislation, on application by the holder, to be submitted at least three months before the expiry date and after consideration by the competent authority of a file containing updated information on the items enumerated in Article 5.3 and in particular detailed information on the activities exercised as an employed person”.

In addition, Article 11, which establishes the specific rights entitled to the holder of a resident permit, both for paid employment and self-employed activities, deserves special attention. Comparable treatment between the TCNs covered by the proposal and EU citizens is provided in some circumstances, but there are some areas in which equality between the two is far from being ensured. By way of example, paragraph 2 of the legal provision states that member states may restrict access to vocational training necessary to complement the activities authorised under the resident permit; as well as access to goods and services and the supply of goods and services made available to the public, including public housing.¹⁰⁶

As Commissioner Vitorino (2003) mentioned in his speech before the European Parliament, “the Commission does not intend to decide by Directive the number of immigrants that our economies and societies are prepared to absorb. The proposed Directive leaves that decision with the member states; only they, together with their civil societies and local authorities know how many their societies are capable of integrating”. According to Article 26 of the proposal, member states remain responsible for the adoption of national provisions setting a ceiling or limiting the issuing of permits taking into account their overall capacity to receive and integrate TCNs on their territory. Indeed, the Commission does not intend to propose any quota system on a European scale but rather present some ‘indicative targets’, a system based on periodic reports of the member states, re-examining the impact of their immigration policies during the past period and making projections on the number of economic migrants they would need in future (including their qualification levels).¹⁰⁷

The common policy on admission for economic reasons proposed by the Commission leaves wide discretion to the member states, intending only to establish “indicative targets”. Nevertheless, labour migration remains a matter falling within the exclusive competence of the member states. Therefore, the Lisbon objective of “making the Union the most dynamic, competitive, sustainable knowledge-based economy, enjoying full employment and strengthened economic and social cohesion” by 2010 will be extremely difficult to achieve if there is no fundamental change in the member states’ priorities and policies towards economic migration in the near future.¹⁰⁸ Increasing labour force participation rates to 70% will not be an easy task, even for the most

¹⁰⁶ Article 11.2 states: “Member States may restrict the rights conferred under paragraph 1(f)(ii) to third country nationals who have been staying or who have the right to stay in their territory for at least one year. They may restrict the rights conferred under paragraph 1(f)(v) with respect to public housing to third-country nationals who have been staying or who have the right to stay in their territory for at least three years”.

¹⁰⁷ Communication from the Commission to the Council and the European Parliament, *on an Open Method of Coordination for the Community Immigration Policy*, Brussels, 11.7.2001, COM (2001) 387 final.

¹⁰⁸ Lisbon Presidency Conclusions, 23 and 24 March 2000. See also Communication from the Commission to the Spring European Council in Barcelona, *The Lisbon Strategy – Making Change Happen*, Brussels, 15.1.2002, COM(2002) 14 final.

optimistic, as long as the member states continue to face declining labour forces and a growing population of retirees, due to demographic patterns.¹⁰⁹

In Table 3 we aim to show the key similarities and differences that exist between the regime provided for TCNs by the Commission's Directive and that enjoyed by nationals of EU member states.

Table 3. Similarities and differences between the system proposed by the Directive on entry and residence of TCNs for employment and the one concerning EU citizens

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| <p>Third Country Nationals Proposal for a Council Directive <i>on the conditions of entry and residence of third country nationals for the purpose of paid employment and self-employment activities</i></p> | <p>EU Citizens Treaty Establishing the European Community (Free movement of services and establishment), Directive 64/221, Directive 68/360, Regulation 1612/68, Regulation 1251/70, etc.</p> |
| <p>Rights conferred The rights granted to the holder of a residence permit are stated in Article 11. These being:</p> <ul style="list-style-type: none"> • Entry to the territory of the member state issuing the 'residence permit –worker'; • Re-entry to the territory of the member state issuing the residence permit; • Passage through other member states in order to exercise the rights under the two previous points; • Residence in the member state issuing the residence permit • Exercise of the activities authorized under the residence permit; and • Enjoyment of equal treatment with citizens of the Union at least with regard to: working conditions, access to vocational training, recognition of diplomas, social security, access to goods and services made available to public, freedom of association and affiliation and membership of an organization. However, these rights being subject to limitations. | <p>Rights conferred Article 39 EC Treaty. The substantive nature of the rights conferred under this Article is given flesh by secondary legislation and in particular Regulation 1612/68 <i>on Freedom of Movement for workers within the Community</i>, 15 October 1968.</p> |

¹⁰⁹ See Summary report, The Athens Capstone Conference on 'Managing Migration for the benefit of Europe', May 15 & 16, 2003. See also the above-mentioned UN report *based on demographic considerations worldwide, projections for the period 1995-2050*.

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| <p>Grounds for rejection and exclusion</p> <p><u>Article 11.2</u> - The equal treatment is not fully ensured. member states “<i>may restrict the rights conferred under paragraph 1(f)(v) with respect to public housing to third-country nationals who have been staying or who have the right to stay in their territory for at least three years</i>”.</p> | <p>Grounds for rejection and exclusion</p> <p>Regulation 1612/68 ensures equal treatment as regards social and tax advantages, housing and trade union rights for EU national workers and their families.</p> <ul style="list-style-type: none"> • <u>Article 7.2</u> provides that a worker “<i>shall enjoy the same social and tax advantages as national workers</i>”; And • <u>Article 9</u> states that “<i>A worker who is a national of a member state and who is employed in the territory of another member state shall enjoy all the rights and benefits accorded to national workers in matters of housing, including ownership of the housing he needs</i>”. See also <u>Article 8</u> of the Regulation. |
| <p>Formal Requirements:</p> <ul style="list-style-type: none"> • <u>Article 5</u> <ol style="list-style-type: none"> 1) Submission of the application along with the name and address of the applicant and employer; 2) A valid work contract or recruiting promise; 3) Description of the activities carried out; 4) Evidence that the vacancy cannot be fulfilled with any of the categories provided in <u>Article 6</u>; 5) Certificate/proof of good character and conduct and a health; 6) Valid passport (valid residence title); 7) Documents proving the skills which are necessary to carry out the envisaged activities; 8) Evidence of sufficient resources and sickness insurance covering all risks; and 9) Proof of payment of the application fee. <ul style="list-style-type: none"> • <u>Article 6</u> — “<i>It must be demonstrated that a job vacancy in that member state cannot be filled in the short term by any of the following categories:...</i>”. • <u>Article 7</u> — “<i>A residence permit shall be issued for a predetermined period. The initial “residence permit – worker” granted shall be valid for a period up to three years to be determined in accordance with national legislation. It shall be renewable for periods of up to three years, to be determined in accordance with national legislation, on application by the holder, to be submitted at least three months before the expiry date and after consideration by the competent authority of a file containing updated information...</i>”. | <p>Formal Requirements:</p> <p>Council Directive of 15 October 1968 <i>on the abolition of restrictions on movement and residence within the Community for workers of member states and their families</i>, 68/360/EEC –</p> <ul style="list-style-type: none"> • <u>Article 2</u> provides “<i>...the right to leave their territory...shall be exercised simply on production of a valid identity card or passport...</i>” • <u>Article 3</u> establishes that member states shall allow EU nationals and the members of their families “<i>to enter their territory simply on production of a valid identity card or passport</i>”. No entry visa shall be required “<i>save from members of the family who are not nationals of a member state</i>”. • The documents necessary to be presented in order to acquire the ‘residence permit for a National of a member state of the EEC’ are listed in <u>Article 4</u> - the worker shall present <i>only</i>: <ol style="list-style-type: none"> a) the document with which he entered their territory; and b) a confirmation of engagement from the employer or a certificate of employment. • <u>Article 6</u> provides that the residence permit must be valid for at least five years and be automatically renewable. At the same time “<i>Breaks in residence not exceeding six consecutive months and absence on military service shall not affect the validity of a residence permit</i>”. |

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| <p>Grounds for withdrawal</p> <p>Article 10 — “<i>Unemployment in itself shall not constitute a sufficient reason for revoking a ‘residence permit – worker’ unless the period of unemployment exceeds the following duration: (a) three months within a 12-month period, for holders of a residence permit who have legally exercised activities as employed or self-employed persons in the member state concerned for less than two years; (b) six months within a 12-month period, for holders of a residence permit who have legally exercised activities as employed or self-employed persons in the member state concerned for two years or more</i>”.</p> | <p>Grounds for withdrawal</p> <p>EU citizens can stay in the host member state as long as they are looking for employment and can demonstrate that there is a ‘<i>reasonable prospect</i>’ of finding it. See for instance Judgment of the ECJ of 26 February 1991, <i>Antonissen</i>, Case 292/89, as well as <i>Commission v. Belgium</i> Case C-344/95, and <i>Lair V. University of Hannover</i> Case 39/86.</p> |
| <p>Conditions to be met</p> <p>Member states shall be allowed to apply horizontal measures, such as ceiling or quotas, limiting the admission of third country nationals.</p> <p><u>Article 3.4</u> — “<i>Member states may maintain or introduce more favourable provisions regarding the following categories: researchers/academics, priests and members of religious orders, sport professionals, artists, journalists, representatives of non-profit making organisations.</i>”</p> <p>Additionally, the chief criterion for admitting third-country nationals to activities as a employed person should be a test demonstrating that a post cannot be filled form within the domestic labour market – See <u>Article 26</u>, which establishes the possibility by the member states to “<i>decide to adopt national provisions limiting the issuing of permits in accordance with this Directive to a set ceiling or suspending or halting the issuing of these permits for a defined period, taking into account the overall capacity to receive and to integrate third-country nationals on their territory or in specific regions thereof</i>”.</p> <p><u>Article 8</u> — “<i>A ‘residence permit – worker’ shall initially be restricted to the exercise of specific professional activities or fields of activities. It may also be restricted to the exercise of activities as an employed person in a specific region. After three years, it shall not be subject to these restrictions.</i>”</p> | <p>Conditions to be met</p> <p><u>Article 4</u> of the Regulation 1612/68 provides that “<i>Provisions laid down by law, regulation or administrative action of the member states which restrict by number of percentage the employment of foreign nationals in any undertaking, branch of activity or region, or at national level, shall not apply to nationals of the other member states</i>”.</p> |

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| <p>Rules on expulsion</p> <p>No rules on expulsion as such, and the rules on withdrawal or non-renewal of a residence permit will not necessarily result in equal treatment between third-country nationals and EU nationals. See Article 29.</p> | <p>Rules on expulsion</p> <p>Council Directive of 25 February 1964 <i>on the Co-ordination of special measures concerning the movement and residence of foreign nationals which are justified on the grounds of public policy, public security or public health</i>, 64/221/EEC provides a specific rights as far as the substantive scope of national decisions regarding expulsion and procedural rights of EU citizens and their families. See specifically Articles 8 and 9, in which it is provided that “<i>the person concerned shall have the same legal remedies in respect of any decision concerning entry, or refusing the issue or renewal of a residence permit, or ordering expulsion from the territory, as are available to nationals of the State concerned in respect of acts of the administration.</i>”</p> |
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2.4 The proposal for a Council Directive on the conditions of entry and residence of third-country nationals for the purposes of studies, vocational training or voluntary service

The positive implications of international exchange students and academics from third countries, as well as the ‘reciprocal enrichment’ that the process involves were welcomed and considered as positive even during the period of restricted immigration in the EU. This was already recognised in the Resolution of 30 November 1994 on the admission of third-country nationals to the territory of the Member states for study purposes,¹¹⁰ in which the Council agreed on the desirability of that policy.

A European harmonised system consisting of the approximation of national legislation on these issues was deemed to be also necessary since the Tampere European Council’s Conclusions.¹¹¹ Thus, in 2002, a proposal for a Directive was presented by the Commission on the conditions of entry and residence for studies, vocational training or voluntary service, thus completing the legal framework governing admission on the basis of the purpose of the stay. This proposal has not yet been adopted by the Council of Ministers.¹¹²

¹¹⁰ See point 2 of the Council Resolution of 30 November 1994 on the admission of third-country nationals to the territory of the Member States for study purposes, Official Journal C 274, 19/09/1996, p. 0010-0012. See also the Proposal for a European Parliament and Council Decision establishing a programme for the enhancement of quality in higher education and the promotion of intercultural understanding through co-operation with third countries (*Erasmus World*) (2004-2008), COM/2002/0401 final.

¹¹¹ See Paragraph 21 of the Conclusions, “A person, who has resided legally in a Member States for a period of time to be determined and who holds a long-term residence permit, should be granted in that Member State a set of uniform rights which are as near as possible to those enjoyed by EU citizens; e.g. the right to reside, receive education, and work as an employee or self-employed person, as well as the principle of non-discrimination vis-à-vis the citizens of the State of residence”.

¹¹² Open debate at JHA Council, 14-15 October 2002; the European Parliament voted in April 2003.

Firstly, it is necessary to keep in mind that this measure aims to deal with a sort of immigration that is *temporary* in character, in comparison with the one covered by the other legal tools analysed above.

As Commissioner Vitorino said, “the proposal was the last due to be submitted on asylum and immigration in order to complete the commitments endorsed by President Prodi at the Tampere European Summit”.¹¹³ Indeed, this has been one of the last legal instruments on TCNs presented by the European Commission, whose goal is to make it easier to host students from third countries under the future Erasmus World programme¹¹⁴ and to allow them to participate in the Youth and Euromed Youth programmes.

Centering oneself specifically in the assessment of the category of *student*, through the analysis of the Proposal one can appreciate the gaps of the system, as well as how even with its potential adoption the differences between TCNs and EU citizen status would not be diminished sufficiently to achieve a comparable status.

Some remarks on the Commission’s Proposal

The main purpose of the proposed Directive is to provide the conditions and procedures applicable to entry and residence by TCNs in the European Union for the purpose of studies, training or voluntary service.¹¹⁵ The member states and the specific ‘establishments’ themselves remain responsible to lay down the conditions for admission to education and vocational training.

Article 3 deals with the scope of the proposal and provides that the provisions of the measure will not exclude the application of “*more favourable provisions of bilateral or multilateral agreements between the Community or the Community and its Member states and one or more third countries*”. Thus, we can see again that the proposal does not intend to create a complete uniformisation of the provisions relevant to these categories of TCNs.

The measure distinguishes between four different categories of TCNs: students, pupils, unpaid trainees and volunteers. The measure defines ‘student’ as “*people admitted to an establishment of higher or professional education*”. Therefore, lower education levels are not covered. The category of ‘school pupil’ is also mentioned in the proposed Directive, meaning *people admitted to an establishment of secondary education*.¹¹⁶

¹¹³ Press Release, RAPID, IP/02/1437, *Studying, training, voluntary activity in the European Union: Towards common entry and residence criteria for third country nationals*, Brussels, 7 October 2002.

¹¹⁴ See Proposal for a European Parliament and Council Decision establishing a programme for the enhancement of quality in higher education and the promotion of intercultural understanding through co-operation with third countries (Erasmus World) (2004-2008), Com/2002/0401 final, Official journal C 331 E, 31/12/2002, pp. 0025-0049.

¹¹⁵ Article 1 of the proposed Directive states: “The purpose of this Directive is to determine: a) the conditions of entry and residence of third-country nationals in the territory of the Member States for a period exceeding three months for the purpose of studies, vocational training or voluntary service; b) rules concerning the procedures for issuing residence permits allowing third-country nationals to enter and reside in the Member States for those purposes”.

¹¹⁶ Articles 8 and 12 of the proposal.

However, the proposal covers mobility of these people only in the context of exchange schemes run by specialised organisations accredited for that purpose by relevant member states; it does not deal with individual mobility, which remains exclusively under national competence. It does not impose any obligation on the member states in issuing, for instance, pupil exchange. In addition, it will not be applicable to the following persons:¹¹⁷

1. those remaining in a member state as an asylum seeker, under subsidiary forms of protection or within a framework of temporary protection arrangements;
2. those who are members of a family of EU citizens having exercised their right to freedom of movement inside the EU; and
3. those enjoying long-term resident status — Article 16.1.b of the Council Directive on the status of TCNs who are long-term residents.

In the area of education, the proposed European system distinguishes three general categories of TCNs, applying a complete set of legislation to each of them (see Table 4):

- TCNs willing to enter and reside temporarily in the EU for the purposes of studies, vocational training and/or voluntary service (proposal for Directive *on the conditions of entry and residence for studies, vocational training or voluntary service*), who are the main target group of the proposed Directive;
- TCNs enjoying long-term resident status in the EU (Directive *concerning the status of TCN who are long-term residents*); and
- TCNs enjoying *non*-long term resident status, but who are legally residents in the EU (*national migration laws*).

Table 4. Legislation governing the three categories of TCNs pursuing education, training & voluntary service

| TCNs – willing to enter and reside temporarily in the EU for the purposes of studies, vocational training & voluntary service | TCNs enjoying long-term resident status in the EU | Non-long term resident status TCNs, but legally resident in the EU |
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| <p style="text-align: center;">↓</p> <ul style="list-style-type: none"> • Proposal for a Council Directive on the conditions of entry and residence of third-country nationals for the purposes of studies, vocational training or voluntary service, COM (2002) 548 final, 7.10.2002. • Council Resolution of 30 November 1994 on the admission of third-country nationals to the territory of the member states for study purposes, 30.11.1994. | <p style="text-align: center;">↓</p> <ul style="list-style-type: none"> • Council Directive concerning the status of third-country nationals who are long-term residents, COM (2001) 127 final, 13.3.2001. Article 16: “The exercise of the right of residence in a second Member State by a long-term resident shall be subject to compliance with the following conditions: <ul style="list-style-type: none"> b) pursuit of studies or vocational training, and possession of adequate resources available to avoid becoming a burden on the second MS during the period of residence and sickness insurance covering all risks in the second Member State.” | <p style="text-align: center;">↓</p> <p>National legislation of the member states – National migration laws</p> |

¹¹⁷ Article 3.3 of the proposal.

The situation of those TCNs enjoying long-term resident status in the EU is not covered by the legal initiative.¹¹⁸ The reason given in the *Explanatory Memorandum* is that they are already covered by the Directive concerning the status of TCNs who are long-term residents. Indeed, Article 16 of the latter provides the conditions under which long-term residents may pursue studies or vocational training in a second member state. It is also true, however, that the conditions applicable under both legislative measures are not completely similar in content as well as in character.¹¹⁹

Under the proposal for a Directive on the conditions of entry and residence of TCNs for the purposes of studies, vocational training or voluntary service, the conditions for granting a residence permit are dealt with in Articles 5 to 10. Article 5 states the general conditions for that must be met before a TCN may be issued a residence permit:

- Presentation of a valid passport or equivalent travel document;
- Health care insurance covering all risks;
- Not been regarded a threat to the public policy, public security and public health; and
- Proof of payment of a fee.

The TCN may provide, additionally, specific evidence that s/he:

1. has been admitted to follow a full-time course of study in an establishment of higher or professional education;
2. will have sufficient resources to cover the minimum monthly resources established by the particular member state; and *if the member state so requests*;
3. has sufficient knowledge of the language of the course; and
4. has paid the fees required by the establishment.

The issuing of a *student residence permit* is dealt with in Article 11. The foreign student will receive a residence permit for a period “not less than one year”, which may be renewed from year to year if s/he continues to meet the conditions mentioned above. The set of reasons for the withdrawal or/and the non-renewal of the permit are provided in Articles 11, 15 and 16 of the proposal. The right to enter and reside for the purpose of study, vocational training and voluntary service is recognised expressly in Chapter IV, entitled Rights of third-country nationals.¹²⁰

The Commission’s proposed Directive may be criticised on the grounds that it seems to leave once again too much discretion to the national authorities and institutions. Additionally, the legal language used within the measure, “may”/”shall”, shows the limited amount of obligations on behalf of the member states. On the other hand, it is

¹¹⁸ See Explanatory Memorandum, point 3.3. of the proposal for a Directive on the situation of third-country nationals who already reside in the European Union for whom this proposal contains no provisions.

¹¹⁹ On the contrary, under the Directive concerning the status of third-country nationals who are long-term residents, Articles 16 to 26 confine the main provisions dealing with the right of residence in a second member state to “pursuit of studies or vocational training”. However, as mentioned earlier, this Directive does not recognise the existence of a right to pursue studies or vocational training in a second member state, being thus more restrictive in nature than the above-mentioned proposal.

¹²⁰ Articles 17 and 18.

unfortunate that the Commission decided not to submit a legislative proposal covering all the existing categories of TCNs who may wish to carry out studies, vocational training or voluntary service in the EU. Thus, even if the proposal may be qualified as a positive development, it does not give a full solution to the uncertainties and gaps existing within the current system. It is equally not certain that those categories falling outside the personal scope of the proposal can be satisfactorily handled by the member states applying their specific national laws.

Comparing the proposal with the European regime for EU students,¹²¹ the latter, even though not being yet totally satisfactory, is much wider in scope and content than the former. Indeed, even though education and training are key factors in a successful integration of TCNs within the European Union,¹²² the current EU legal system on those issues does not fully cover that possibility in a complete manner.

Table 5. Similarities and differences between the provisions for TCNs introduced by the Directive on entry and residence for studies, vocational training or voluntary service and those governing EU citizens

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| <p>Third Country Nationals Proposal for a Directive on the conditions of entry and residence of third-country nationals for the purposes of studies, vocational training or voluntary service, COM/2002/548</p> | <p>EU Citizens Council Directive on the right of residence for students, 93/96/EEC, No. L317/59</p> |
| <p>Personal scope TCN admitted to reside in the territory of a member state to pursue a course of study in an establishment of higher or professional education.</p> | <p>Personal scope EU citizens – there is not any limitation as far as higher or professional education.</p> |
| <p>Persons excluded The proposal will not be applicable to the following categories of TCNs:</p> <ol style="list-style-type: none"> 1. TCNs remaining in a member state as asylum seekers, under subsidiary forms of protection or within a framework of temporary protection arrangements. 2. TCNs who are members of a family of EU citizens having exercised their right to freedom of movement inside the EU. 3. TCNs enjoying the long-term resident status – Article 16.1.b of the Council Directive on the status of TCNs who are long-term residents. | |

¹²¹ Council Directive on the right of residence for students, 93/96/EEC, No. L317/59.

¹²² See page 20 of the Communication on immigration, integration and employment, 3.3.2 Education and language skills.

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| <p>Requirements for the issuing of the residence permit</p> <p>Article 4: “Member states <i>may</i> authorise TCNs to enter and reside in their territory” only if a residence permit has been issued by their authorities — The residence permit will be issued if the conditions laid down in <i>Articles 5 and 6</i> are met.</p> <p>The conditions are:</p> <ul style="list-style-type: none"> • Presentation of a valid passport or equivalent travel document; • Health care insurance covering all risks; • Not been regarded a threat to the public policy, public security and public health; and • Proof of payment of a fee. <p>As well as:</p> <ol style="list-style-type: none"> 1. has been admitted to follow a full-time course of study in an establishment of higher or professional education; 2. will have sufficient resources to cover the minimum monthly resources established by the particular member state. The member states shall publish minimum monthly resources required in terms of the resources that a person pursuing studies on their territory must generally have, without prejudice to individual examination of each case; and if the member state so requests; 3. has sufficient knowledge of the language of the course; and 4. has paid the fees required by the establishment. <p>And in addition to the specific conditions for the category of persons defined in <u>Articles 6, 7, 8, 9 or 10</u>.</p> | <p>Requirements for the issuing of the residence permit</p> <p>Article 2: “For the purpose of issuing the residence permit or document, the Member State <i>may</i> require only that the applicant present a valid identity card or passport and provide proof that he or she meets the conditions provided in Article 1.”</p> <p>The conditions under Article 1 are:</p> <ul style="list-style-type: none"> • That s/he has sufficient resources to avoid becoming a burden on the social assistance system of the host member state during their period of residence; • That the student is enrolled in a recognised educational establishment for the principal purpose of following a vocational training course there; and • That s/he is covered by sickness insurance in respect of all risks in the host member state. • That the provision of the Council Directive 64/221/EEC, residence and public policy, security and health, of 25 February 1964 do not apply. |
| <p>Family members</p> <p>Not mentioned/covered within the proposal.</p> | <p>Family members</p> <p>Article 1, “Member states shall recognise the right of residence for any student who is a national of a Member State,..., and for student’s spouse and their dependent children”.</p> |

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| <p>Recognition of Diplomas</p> <p>Article 6, regarding the specific conditions for students, point a) provides that the residence permit may be issued if he proves that he has been admitted to an establishment of higher or professional education to follow a full-time course or “evidence that he is enrolled subject to a decision on the equivalence of his foreign qualification or passing an entrance test”.</p> | <p>Recognition of Diplomas</p> <ul style="list-style-type: none"> • Council Directive of 21 December 1988 on a General System for the Recognition of Higher-Education Diplomas Awarded on Completion of professional education and training of at least three years’ duration, 89/48/EEC • Council Recommendation of 21 December 1988 concerning nationals of member states who hold a diploma conferred in a third state, 89/49/EEC. • Council Directive 92/51/EEC of 18 June 1992 on a second General system for the recognition of professional education and training to supplement Directive 89/48/EEC |
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3. How have the events of 11 September 2001 affected the development of a European immigration policy?

The Justice and Home Agenda (JHA) agenda has been shaped by various dramatic events, policy spill overs, as well as the incoming troikas in the Council. These key factors in turn have affected the balance that is being struck in JHA between freedom and security. Despite the inherently inefficient decision-making process in this area, the EU has shown after 11 September 2001 that it can take decisions quickly – particularly with respect to security measures. In the Laeken European Council in December 2001, the question whether “we want to adopt a more integrated approach to police and criminal law cooperation” was presented. This concern became particularly acute following the events of 11 September. To some extent, the Tampere agenda was distorted due to the heightened sensitivity to security matters. The June 2002 Seville European Council highlighted the necessity to speed up implementation of all aspects of the programme presented at Tampere and to develop a common EU policy on the issues of asylum and immigration.¹²³ The field of action, however, was centred mainly in combating illegal immigration and trafficking/smuggling of human beings. The Presidency Conclusions represented a good example of such security concerns within JHA policies that have tended to dominate any serious discussions on liberty.¹²⁴

With regard to measures in the area of a proactive immigration policy - the topic of this report – the EU has had a rather angst-ridden relationship especially with primary economic immigration over the last ten years or so. Despite population decline and current economic needs, member states still seem reluctant to take the steps necessary to adopt a truly proactive immigration policy that bears a significant degree of convergence across Europe. All sectors of society recognise the need to fight against

¹²³ See Paragraph 26 of the Presidency Conclusions of the Seville European Council of 21 and 22 June 2002, Part III *Asylum and Immigration*.

¹²⁴ See Paragraph 30 of the Presidency Conclusions, entitled *Measures to combat illegal immigration*.

illegal immigration, smuggling and trafficking and to make these issues a top priority at European level. However this needs to start from a premise of liberty/freedom that upholds the fundamental values that member states have embraced in the European Convention of Human Rights and the European Charter on fundamental rights and freedoms. This should be reflected in a speedier adoption of the set of legislative proposals covering the ‘freedom’ side of the policy area vis-à-vis third country nationals. The two proposed directives first to be discussed in the Council – one on family reunification and the other on extending a long-term status to third country nationals – were re-written to try to give the member states maximum discretion on whom they allow to enter their territory and in the way they judge who could be a threat to public order as well as to allow them to decide who could be liable to integrate well in their societies. This could risk compromising the commitments undertaken by these same states at international as well as European levels. As we have shown previously, the discussions on these directives have been very lengthy and political agreement was indeed very slow to be reached – and that only after a certain watering down of the guaranteed rights originally attributed to third country nationals.

A recurring *leitmotiv* has been the concern of who actually constitutes a threat to public order. The scope of who is a threat to public order seems to be applied more vaguely, thus allowing for a wider interpretation than the one defined in the *Bouchereau* ECJ case of 1977. Some member states even used the events of 11 September as a pretext to change certain aspects of the texts in these directives, although in reality, discussions to this end had already started within the Council before the tragic events of 11 September 2001.

It is perceived also that the terrorist attacks in the US have also radically changed perceptions of security at EU level. Undoubtedly, these attacks have provided a new impetus for the development of the Area of Freedom, Security and Justice (AFSJ). The member states’ governments, security agencies and public opinion have been made dramatically aware of the extent to which international forms of crime threaten traditional internal security, and the AFSJ provides the perfect framework for such action to be taken. They have had, and continue to have, a powerful influence over the Justice and Home Affairs agenda. Consequently, the problem of the balance between security and freedom has never been more acute and needs to be carefully studied and assessed looking at the policy developments and concrete legislative instruments adopted so far by the Council of Ministers of the European Union. Biometrics, intrusive surveillance, exchange of data with third countries (at times risking infringement of data protection Directive 95/46/EC) and over-policing as well as viewing the immigrant with a certain suspicion have all been justified on grounds of the security rationale.

4. Conclusion

There are at present some 13 million non-EU nationals living legally in the 15 current member states (3.4% of the total population of the EU).¹²⁵ Managing this immigrant population correctly can bring immense benefits to Europe. To date, however, the efforts made at national and European level have been inadequate as well as inefficient.

International migration is intertwined with a wide set of other policy areas including employment, education, external relations, development cooperation, etc. Proper management requires that the decision-making would cover all those policy areas in order to deal thoroughly with the different aspects of the issue.

The European Union's growth, labour market imbalances and competitiveness cannot be addressed without greater attention to international migration, education, training and the integration of immigrants both within the labour market and in local communities of the host countries.

Migration equally poses serious issues of governance. EU citizens – electors – need to be made aware of immigration's beneficial effects by their governments, parliaments (at national and local level) and media in general. So far migration has been presented in a rather negative light. The public also needs to know that immigration does not constitute a *threat* to their security/safety. Policies intended to demonstrate to the public that immigration can be an orderly process and that immigrants are national assets could transform public attitudes into a more welcoming behaviour that tolerates cultural differences and supports the natural process of integration.¹²⁶ The host society needs to receive more information about the beneficial participation of migrants, in terms of their contribution both to society and to the labour market.

Setting aside the economic concerns/benefits of international migration, a *generalised amnesia* exists at EU governmental level in relation to the obligations undertaken by all the member states under the European Convention of Human Rights. Member states have to protect the set of human rights included within the Convention. However, looking at national practices and, particularly, at the wide room of discretion granted to member states by all the Commission's proposals on TCNs, it seems that a lower level of protection will exist by the time the Directives are fully implemented. This fact will lead to an institutional crisis in Europe due to a potential conflict between the Council of Europe and the European Union dimensions.

¹²⁵ See Eurostat & European Commission, Directorate General for Employment and Social Affairs (2002), *Social situation in the European Union*, European Communities, 2002.

¹²⁶ In its Communication on a Community Immigration Policy, COM(2000) 757 final, the Commission states: "It is essential to create a welcoming society and to recognise that integration is a two-way process involving adaptation on the part of both the immigrant and of the host society. The European Union is by its very nature a pluralistic society enriched by a variety of cultural and social traditions, which will in the future become even more diverse. There must, therefore, be respect for cultural and social differences but also of our fundamental shared principles and values: respect for human rights and human dignity, appreciation of the value of pluralism and the recognition that membership of society is based on a series of rights but brings with it a number of responsibilities for all of its members be they nationals or migrants".

The European Union is still far from formulating a uniform proactive immigration policy. However, policy-makers in the Council need to summon up the necessary political courage to move towards a greater convergence in this field, which is also an inevitable step to be taken towards the Single European Market and the consequent removal of internal borders in Europe.

Migration policies have been adversely affected by several factors, including policy spill overs as the Presidency rotates, and more importantly, the emergence of the so-called 'security concern' and the 'permanent state of exceptionalism' since the 11 September terrorist attacks. The latter constitutes a real threat as regards the Tampere European Council's goal to strike a balance between security and freedom. Indeed looking at the progress charted by the Commission on the creation of an area of freedom, security and justice, it seems clear that as far as immigration is concerned, the main policy instruments that have been adopted deal with the fight against illegal immigration and reinforcing EU border controls, which are two interrelated policies designed to prevent and combat terrorism. The control of illegal immigration, smuggling and trafficking is highly necessary and should be considered as a priority at European level. Nevertheless, security and law enforcement policies need to be developed with 'freedom' as the point of departure.

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- Council Directive of 21 May 1973 on the abolition of restrictions on movement and residence within the Community for nationals of member states with regard to establishment and the provisions of services, 73/148/EEC, No. L172/14.
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- Council Directive of 28 June 1990 on the right of residence for employees and self-employed persons who have ceased their occupational activity, 90/365/EEC, No. L180/28.

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- Council Directive of 29 October 1993 *on the right of residence for students*, 93/96/EEC, No. L317/59.
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International Covenant on Economic, Social and Cultural Rights, Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, *entry into force* 3 January 1976.

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Annex 1

Table 6. Body of EU legislation on Third Country Nationals/EU citizens

| Measures | Third Country Nationals - TCNs | EU Citizens Amended Proposal for a Directive of the European Parliament and of the Council <i>on the rights of citizens of the Union and their family members to move and reside freely within the territory of the Member states</i> , COM(2003) 199 final, Brussels, 15.4.2003, 2001/0111 (COD). |
|-----------------------------|--|---|
| <u>Family Reunification</u> | <ul style="list-style-type: none"> • Council Directive on <i>the right to family reunification</i>, 2003/86/EC of 22 September 2003, OJ L 251/12, 3rd October 2003 | <p><i>Family of:</i></p> <ul style="list-style-type: none"> • Workers – <ul style="list-style-type: none"> -Regulation (EEC) No 1612/68 of the Council of 15 October 1968 <i>on Freedom of Movement for Workers within the Community</i> as amended by Regulation 312/76, No. L257/2, <u>Article 10</u> -Council Directive of 15 October 1968 <i>on the abolition of restrictions on movement and residence within the Community for workers of Member states and their Families</i>, 68/360/EEC, No. L257/13. • Self-employed persons and receivers of services -Council Directive of 21 May 1973 <i>on the abolition of restrictions on movement and residence within the Community for nationals of member states with regard to establishment and the provisions of services</i>, 73/148/EEC, No. L172/14, <u>Article 1.1</u> • Retired persons – Council Directive of 28 June 1990 <i>on the right of residence for employees and self-employed persons who have ceased their occupational activity</i>, 90/365/EEC, No. L180/28, <u>Article 1.2</u> • Persons of independent means – Council Directive of 28 June 1990 <i>on the Right of Residence</i>, 90/364/EEC, No. L180/26, <u>Article 1.2</u> • Students – Council Directive of 29 October 1993 <i>on the right of residence for students</i>, 93/96/EEC, No. L317/59 |

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|--|--|---|
| <p><u>Students- Vocational training, education & voluntary service</u></p> | <ul style="list-style-type: none"> • Commission Proposal for a Council Directive <i>on the conditions of entry and residence of third-country nationals for the purpose of studies, vocational training or voluntary service</i> COM (2002)548 final, 7.10.2002 | <ul style="list-style-type: none"> • Council Directive of 29 October 1993 <i>on the right of residence for students</i>, 93/96/EEC, No. L317/59 • Council Directive of 21 December 1988 <i>on a General System for the recognition of higher-education diplomas awarded on completion of professional education and training of at least three years' duration</i>, 89/48/EEC, No. L19/16. • Directive 98/5/EC of the European Parliament and of the Council of 16 February 1998 <i>to facilitate practice of the profession of lawyer on a permanent basis in a member state other than that in which the qualification was obtained</i>, No. L77/36. • Council Directive 78/686/EEC of 25 July 1978 concerning <i>the mutual recognition of diplomas, certificates and other evidence of the formal qualifications of practitioners of dentistry, including measures to facilitate the effective exercise of the right of establishment and freedom to provide services</i>, OJ L 233, 24/08/1978, etc. |
| <p><u>Freedom of Movement and residence</u></p> | <p>Commission Proposal for a Council Directive <i>concerning the status of third-country nationals who are long-term residents</i>, COM/2001/0127 final</p> | <ul style="list-style-type: none"> • <i>Articles 17-22, 39, 43 and 49 TEC.</i> • Council Directive of 15 October 1968 on the Abolition of restrictions on movement and residence within the Community for workers of Member states and their families, 68/360/EEC. • Regulation No 1612/68 of the Council of 15 October 1968 on Freedom of Movement for workers within the Community as amended by Regulation 312/76. <p>Council Directive of 25 February 1964 on the Co-ordination of special measures concerning the movement and residence of foreign nationals which are justified on the grounds of public policy, public security or public health, 64/221/EEC.</p> |
| <p><u>Employment and self-employment activities</u></p> | <ul style="list-style-type: none"> • Commission Proposal for a Council Directive, COM/2001/0386 final, <i>on conditions of entry and residence of third-country nationals for the purposes of paid employment and self-employed economic activity</i> of 11.07. 2001. | <ul style="list-style-type: none"> • Workers - Regulation (EEC) No 1612/68 of the Council of 15 October 1968 <i>on Freedom of Movement for Workers within the Community</i> as amended by Regulation 312/76, No. L257/2 • Self-employed persons and receivers of services -Council Directive of 21 May 1973 <i>on the abolition of restrictions on movement and residence within the Community for nationals of member states with regard to establishment and the provisions of services</i>, 73/148/EEC, No. L172/14 • Retired persons – Council Directive of 28 June 1990 <i>on the right of residence for employees and self-employed persons who have ceased their occupational activity</i>, 90/365/EEC, No. L180/28, etc. |

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