Chapter 5

Two Decades EU Migration Law for Third Country Nationals

Are there any integration challenges left?

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5.1. *Introduction*

As the current Migration Agenda of the Commission has been dominated by asylum and irregular migration, the political and public debate on legal migration seems almost absent. At the same time, in European societies integration of third country nationals has been hotly debated, fuelled by the emerging populist right wing parties and the threat of terrorism. Integration has been one of the main objectives of EU policy on legal migration, which started to develop twenty years ago. It is therefore relevant to assess the extent to which the EU legal migration instruments have contributed to the integration of third country nationals: the Family Reunification Directive and the Long-Term Residents Directive. To what extent do Member States use the directives to maximise their chances for integration, and what more steps are needed?

5.1.1. *History*

At the time the Centre for Migration Law was established, the competence for regulating the rights of third country nationals was still at the national level. However, the Council had already defined some principles. In 1985, when it became clear that the residence of third country nationals had acquired a more permanent character, the Council called on the Member States to cooperate in order to promote their integration and participation.¹ It referred to its resolution, adopted in 1974, which emphasized the importance of equal treatment between EU citizens and third country nationals including their family members regarding

¹ Resolution of the Council 16 July 1985 on Guidelines for a communitarian Migration Policy, *Pb* C 186, 26 July 1985, p. 0003-0004.

their life and work circumstances. The Council explicitly intervened in the rights of legally residing third country nationals, but operated cautiously regarding the admission policy of third country nationals.² At that time, a clear competence was absent from the Treaties.³ Until the Treaty of Maastricht entered into force, cooperation on admission remained outside the institutional framework of the EEC. In mid-1997 the Commission introduced a proposal for a Treaty on admission. This proposal served as a model for the legal migration instruments based on the Treaty of Amsterdam, especially the Family Reunification Directive and the Long-Term Residents Directive.⁴

The content of both directives was guided and inspired by the Tampere conclusions in which the European leaders declared that a vigorous integration policy would need to grant third country nationals rights and obligations comparable to those of EU citizens. According to the conclusions, enhancement of the non-discrimination of third country nationals in economic, social and cultural life should be part of this policy.⁵ The preambles of both directives make reference to these Tampere conclusions.⁶ So besides harmonization of national policies, integration has always been an important goal of the European rules on family reunification and long-term residents.

5.1.2. *Equal rights?*

This firm objective of equal treatment, however, did not prevent the Member States from retaining clear distinctions between third country nationals and EU citizens in both directives. Just to mention a few differences: for family reunification, Member States are allowed to impose material conditions and to limit the scope to core family members. During the first five years after admission, the rights and status of admitted family members remain dependent on the sponsor fulfilling the requirements.

The regime of intra-EU mobility for long-term residents is still a long way from the right of free movement for Union citizens. Economic activity is insufficient for settlement in another Member State; instead a minimum income is required and the second Member State can apply a labour market test, prioritizing Union citizens. Furthermore, the free movement is limited to one other Member State.

2 Resolution of the Council 21 January 1974 regarding a Social Action Programme, *Pb* C 013, 12 February 1974, p. 0003-0004.

3 The legal basis for policies on integration was Article 177 EC Treaty.

4 Articles 63 (3) and (4) EC Treaty.

5 Conclusion no. 18.

6 Recital no. 3 of Directive 2003/86 and recital no. 2 of Directive 2003/109.

Any onward settlement is only permitted after five years of residence in the second Member State.

Despite the remaining distance from Union citizens, both directives have clearly strengthened the rights of third country nationals in most Member States. The EU Court of Justice has made clear that family reunification and the granting of a long-term residence status are subjective EU rights and that the discretion of the Member States is limited to the requirements in the directives. Both directives entered into force a decade ago, which enables us to assess their impact.⁷ To what extent have they enhanced the harmonization of national policies and the integration of third country nationals? I will highlight the main results below.

5.2. *Family Reunification*

The comparative studies on the transposition of the Family Reunification Directive show a mixed picture of the impact the directive has had on national policies.⁸ On the one hand, the directive led to a liberalisation of the national policies: some Member States needed to raise their standards, some had to restrict their national discretion by introducing the right to family reunification in their national legislation.⁹ This result was achieved despite, rather than thanks to, the actual aims of the Member States. An analysis of the negotiations shows that they did not negotiate with a view to harmonization or integration, but to defend their national legislation and preferably their discretion.¹⁰ It is therefore no surprise that some Member States used the adoption of the directive as a vehicle for restricting their policies, although the directive in no way condones to

7 The Family Reunification Directive entered into force on 3 October 2005, the Long Term Residence Directive entered into force on 23 January 2006.

8 Groenendijk, C.A., Fernhout, R., Dam, D.P.L.M. van, Oers, R. van & Strik, M.H.A. (2007), *The Family Reunification Directive in EU Member states. The first year of implementation*, (report, Nijmegen Migration Law Working Papers Series, no 2007/01). Nijmegen: Radboud University Nijmegen. Labayle, H. & Pascouau Y. (2008), *Directive 2003/86/EC on the Right to Family Reunification, synthesis report, in the framework of the 'Conformity checking of the transposition by Member States of 10 EC directives in the sector of Asylum and Immigration'*, Odysseus Network. Pascouau Y. & Labayle H., *Conditions for Family Reunification under Strain. A comparative study in nine EU member states*, European Policy Centre. Strik, T. B. De Hart & E. Nissen (2013), *Family Reunification: a barrier or facilitator of integration? A comparative study*, Nijmegen: Wolf Legal Publishers.

9 Groenendijk, C.A., Fernhout, R., Dam, D.P.L.M. van, Oers, R. van & Strik, M.H.A. (2007), *The Family Reunification Directive in EU Member States. The First year of implementation*, Centre for Migration Law, Nijmegen: Wolf Legal Publishers, 2007, paragraph 11.1.

10 Strik, T. (2011), *Besluitvorming over asiel- en migratierichtlijnen. De wisselwerking tussen nationaal en Europees niveau*, Den Haag: Boom Juridische Uitgevers, paragraaf 3.2.2, 3.2.3 en 3.7.2.

lowering certain standards. Those governments negotiated restrictive measures into the directive and legitimized them on the national level by presenting them as transposition. This strategic use of Europeanization however outweighed the liberal changes that Member States were forced to make.

Although the transposition has been subject to several studies, less is known about the impact of the directive and the case law of the Court of Justice after the transposition process. Can we observe certain tendencies in national policy changes related to the directive? And does it lead to adjustments in the decision making practice?

5.2.1. Policies

As the directive limits national discretion and possibilities for regression, Member States rely on the optional clauses to make their policy more restrictive. A lobby for a standstill clause in the directive, prohibiting regressive changes at national level, had failed.¹¹ The case of the Netherlands exemplifies the impact: after an unsuccessful attempt to persuade the Commission to propose a more restrictive directive, it decided in 2010 to apply most of the optional clauses of the directive to restrict the right to family reunification.¹² Since these policy changes, the directive has been functioning as standard setting for the Dutch family reunification policies instead of being the bare minimum. This result is in contrast to the formal position the Dutch government communicated to its parliament at the start of the negotiations on the directive that it aimed at the highest protection level and insisted on the possibility to deviate from the norms in the directive in a positive sense.¹³ As in other countries, the government's attitude towards family reunification reversed from perceiving it as a chance to integrate migrants to a threat to social cohesion and integration.

Many governments have used the optional clauses of the directive to adopt policies from the Netherlands (f.i. the pre-entry test, minimum age level of 21 for spouses, three-month time limit for family reunification for refugees), and also from other countries. Hence, the search for possibilities to reduce the number of family migrants within the limits of the directive has had a harmonizing effect, albeit not in the upward sense that the directive was initially meant to create. An

11 Strik, T. (2011), *Besluitvorming over asiel- en migratierichtlijnen. De wisselwerking tussen nationaal en Europees niveau*, Den Haag: Boom Juridische Uitgevers, paragraaf 3.2.1.

12 'Kabinetsaanpak gezinsmigratiebeleid', 2 October 2009, *Kamerstukken II* 2009-2010, 32.175, no 1; The Coalition Agreement VVD-CDA, "Vrijheid en Verantwoordelijkheid" Chapter 6, 30 September 2010.

13 *Kamerstukken II* 1999-2000, 23.490, nr. 154, p. 13 and nr. 158, p. 10.

analysis of the political debates demonstrates huge similarities in the arguments Member States use to justify their restrictions: these are, apart from promoting integration, protecting the national economy and preventing fraud.¹⁴

5.2.2. *Response to refugees*

Recital no. 8 of the Family Reunification Directive recognizes that the situation of refugees requires special attention due to the compelling reasons for their flight, which has prevented them from leading a normal family life in their own country. For this reason, they are entitled to more favourable rules, laid down in Chapter V. However, in response to the recent increase in the number of refugees, many Member States have restricted the right to family reunification. With regard to those persons with subsidiary protection, the Austrian government has suspended their right to family reunification for two years (an increase from one to three years), and Germany has introduced a suspension of two years. The Swedish government has suspended family reunification for all protection categories, suggesting that it will lift the suspension for convention refugees after three years.

Those with subsidiary protection are not covered by the Family Reunification Directive, as most Member States rejected the initial Commission's proposal to include them, arguing that at that time there was no common definition of subsidiary protection. The Commission excluded them in its second proposal, but announced that it would insert a *rendez-vous* clause in order to review this decision after adoption.¹⁵ Member States now benefit from this legal loophole, not only by introducing these suspension mechanisms, but also by granting the subsidiary protection status more frequently than before (for instance to Syrian refugees). It however remains doubtful if such different treatment between convention refugees and those with subsidiary protection, who are in an analogous situation, is allowed, as Article 14 ECHR requires very high standards for justification and proportionality.¹⁶

With regard to convention refugees, Belgium has reduced the time limit for application to three months and Sweden has introduced a minimum age limit of 21 years for both spouses. In several countries the waiting period has or will be

¹⁴ Strik, T., B. De Hart & E. Nissen (2013), *Family Reunification: a barrier or facilitator of integration? A comparative study*, Nijmegen: Wolf Publishers, chapter 4.

¹⁵ See COM (1999)638, Council document no. 6504/00 MIGR 24, 16 March 2000 and COM (2000)624, 10 October 2000. See Art. 19 of the directive for the *rendez-vous* clause.

¹⁶ See also "Information Note on Family Reunification for Beneficiaries of International Protection in Europe" ECRE/ELENA, June 2016.

introduced or existing periods extended. The Dutch government has published a legislative proposal to expand the time limit for deciding on family reunification for refugees to nine months, which is the minimum norm in the directive.¹⁷

These changes, if at all allowed, clearly run counter to the objective of integration. In earlier research, family members often described their lives during the application procedure as being on hold. Delay in the process means that the family members live separately, and thus, focus on the process and not on the host society.¹⁸ These conclusions contrast with the objective of integration, formally used by governments to introduce restrictive admission rules. The emotional impact is especially strong when refugee parents are separated from their children, as the constant worrying about the safety of the family members left behind are detrimental to the wellbeing of the refugee. The delay therefore also affects the refugees' ability to recover from the traumatic experiences of persecution and war and their capacity to benefit from existing integration support and learn a new language, search for a job and adapt to their country of asylum. In a research report on the Netherlands, a Burundian refugee woman whose family reunification process with her five children took more than four years stated: *'I came as a young and healthy woman and now I am a wreck.'*¹⁹ Other research confirms that the psychological effect especially hampers integration, and that the longer the period of separation, the harder it is to regain the balance within the family.²⁰ These outcomes relate to the primary aim of refugees: reuniting with their family members.²¹

17 *Kamerstukken II*, 2016-2017, 34 544.

18 Strik, T., B. De Hart & E. Nissen (2013), *Family Reunification: a barrier or facilitator of integration? A comparative study*, Nijmegen: Wolf Publishers.

19 Strik, De Hart & Nissen (2013), paragraph 6.5.

20 Marsden, R. & C. Harris (2012), *We started life again: Integration Experiences of Refugee Families Reuniting in Glasgow*, Glasgow: British Red Cross/Scottish Refugee Council, with reference to RASNZ (2012), *Refugee Family Reunification, Mental Health and Resettlement Outcomes in Aotearoa New Zealand*; McDonald-Wilmsen, B. & S. Gifford (2009), 'Refugee Resettlement, family separation and Australia's humanitarian programme', in: *New Issues in Refugee Research* Paper No. 178R; Schweitzer, R. *et al.* (2006), 'Trauma, post-migration living difficulties, and social support as predictors of psychological adjustment in resettled Sudanese refugees', in: *Australian and New Zealand Journal of Psychiatry*, 40:179-187; Derluyn, I. *et al.* (2009), 'Mental health problems in separated refugee adolescents' in: *Journal of Adolescent Health*, 44, 291-297; A. Smith, *et al.* (2004), 'Serial Migration and Its Implications for the Parent-Child Relationship: A Retrospective Analysis of the Experiences of the Children of Caribbean Immigrants', in: *Cultural Diversity Ethnic Minority Psychology*, 10 (2):107-22.

21 UNHCR (2013), *A New Beginning: Refugee Integration in Europe*, September 2013, p. 127, <www.refworld.org/docid/522980604.html>.

5.2.3. *Practice*

In all Member States, however, it is not only legislation that determines the extent to which migrants can exercise a right to family reunification. The way requirements are applied or assessed and procedures are organized are equally important for their possibilities to bring their families.²² Jurisprudence has made clear that the Family Reunification Directive not only impacts the policy level but also the practical implementation. The Court of Justice has imposed clear requirements for the examination of individual applications, whether it concerns admission or the renewal of the residence permit of family members. The EU principles on effectiveness and proportionality oblige national authorities to assess the application in light of the aim to further family reunification, taking into account all individual circumstances, interests and rights of the Charter. These requirements are not easy to reconcile with the transformation of immigration authorities in many countries in the past decade, from a *street-level bureaucracy* (with daily face to face contact with applicants) to a *system-level (screen-level) bureaucracy* (with a computerized, standardized procedure), which seems to have certain drawbacks for individual applicants in terms of being able to tell their story.²³

In a research study on the impact of the family reunification procedures, family members mentioned the faceless procedure as a problem, specifically in the Netherlands and the United Kingdom. The respondents complained that they could not contact the official who handled their application to provide information, ask questions or be informed about the state of affairs.²⁴ In the case of the Netherlands the consistent emphasis on the individual assessment by the Court, has finally compelled the central organized Immigration and Naturalization Service to transform its practice from a mechanical assessment of the requirements into a full 'EU-proof' examination, taking a more individual and active approach. For years the government managed to retain its practice by framing categorical exemptions as an individual approach. However, when the national courts became more critical, encouraged by the Court of Justice, the authorities had no other option than to comply with Union law on an individual level.

22 Strik, T., B. De Hart & E. Nissen (2013), *Family Reunification: a barrier or facilitator of integration? A comparative study*, Nijmegen: Wolf Publishers, p. 109.

23 Böcker, A. & B. De Hart, 'Wat zijn de bedoelde en onbedoelde effecten van het migratierecht?' in: Hertogh & Weyers (eds), *Recht van onderop. Antwoorden uit de rechtssociologie*, p. 409-426, 2011, Nijmegen: Ars Aequi Libri.

24 Strik, De Hart & Nissen (2013), paragraph 3.8.

This example shows that governments tend to (fully) adjust to the case law of the Court only if they are forced to on a national level. One-way pressure, however, is not always sufficient. According to Van der Vleuten, compliance by governments that do not intend to comply only occurs if there is pressure from both national and European level.²⁵ As the possibility for the Court of Justice to come up with a decisive ruling depends on an action from the Commission or national judges, the extent to which national governments are being compelled to adjust their legislation to European case law largely depends on the position and perseverance of national actors.

5.2.4. *Disconnecting objectives*

The negotiation results reached thirteen years ago still determine where the race to the bottom ends. The harsher the climate towards migrants grows, the more visible and relevant these boundaries become. Different national strategies can be observed: restricting policies to the minimum standards, circumventing the directive or not complying with its obligations and waiting to see if courts overturn this decision. The objectives of furthering family reunification, harmonization and integration, or the principle that the optional clauses should be interpreted strictly (and not in a manner that undermines the objectives),²⁶ do not seem to be part of the considerations when defining these strategies.

The more lenient approach at the front door of family reunification, enforced by case law, seems to trigger two efforts to regain sovereignty. First, many Member States have intensified their methods to verify family members' identity or relationship or the genuineness of the marriage or partnership. These methods, applied on the basis of a wide range of indicative criteria, cause delays and frustration amongst the applicants. From empirical research it emerges that many applicants (both the sponsor and the spouse) feel that they are treated with suspicion, which impedes their feeling of belonging to the country in which they want to reunite. Nationals of 'nonwestern' countries feel discriminated against because they are faced with extra authentication procedures and with more requirements, like the pre-entry test.

Second, there seems to be a tendency towards a more restrictive policy and practice at the back door. At least in the Netherlands, family members lose their residence permit more easily when all requirements are no longer fulfilled or

²⁵ Van der Vleuten, A. (1998), 'Two-level interaction as source of influence: the European Union and equal treatment policies', in: Reinalda, B. & B. Verbeek (eds), *Autonomous Policy Making by International Organizations*, 62-78. London: Routledge.

²⁶ See CJEU 4 March 2010, C-578/08, *Chakroun*, paragraph 43.

when they fail to inform the authorities of changes in their situation. This fuels their insecurity of residence and hence affects their integration as well.

The overall reluctant attitude of Member States and national immigration authorities is quite in contrast with the principles of the Family Reunification Directive, emphasizing the importance of family reunification as a fundamental right and its positive impact for the whole society. Pressure will remain necessary to align the national policies and practices with these principles. In response to the Dutch lobby to restrict the Family Reunification Directive, the Commission announced in 2014 that the directive should not be re-opened. Instead, it should ensure the full implementation of the existing rules, open infringement procedures where necessary and produce guidelines on identified issues.²⁷ National courts feel encouraged by the guidelines to critically scrutinize the decisions of the immigration authorities, but they are cautious in asking for a preliminary ruling. Until now the Commission has refrained from infringement procedures, but it may be time to conclude that they have become necessary. Further research on the implementation by street-level bureaucrats and its impact on family members and their integration process, could provide substantive information for these judicial steps.

5.3. *Long Term Residents*

The Long-Term Residents Directive (2003/109) adopted in 2003 applies to third country nationals who have been residing in a Member State for five years or more. The Court of Justice has confirmed several times now that the directive has established a subjective right to the long-term residence status once the third country national has fulfilled the requirements.²⁸ Recital no. 6 expresses that the duration of residence in a Member State should be the main criterion for acquiring the status of long-term resident. Peers describes the directive as an accomplishment as it facilitates the security of residence, equal treatment and free movement of third-country nationals.²⁹ Security of residence, being a central element of the directive, forms the basis for the integration of the third country national in his or her country of residence. Integration is described as a key element in promoting economic and social cohesion, which is anchored in the Treaty as a fundamental objective of the Union.³⁰

²⁷ Communication on guidance for application of Directive 2003/86/EC on the right to family reunification, COM (2014)210, 4 April 2014, p. 2.

²⁸ CJEU 8 November 2012, C-40/11, *Iida*, ECLI:EU:C:2012:691; CJEU 26 April 2012, C-508/10, *Commission v The Netherlands*, ECLI:EU:C:2012:243.

²⁹ Peers, S. (2011), *EU Justice and Home Affairs Law*, 3rd edition, Oxford: OUP, p. 478-485.

³⁰ See the preamble of the directive, recital nr. 4, and Article 3 (3) TEU.

5.3.1. Policies

Despite this emphasis on integration as an objective of the directive, fourteen Member States require applicants to fulfil integration conditions before they grant EU status.³¹ They include knowledge of the language of the host country (at varying levels) and knowledge about the host society – mainly history, legal order and values. Some Member States require the third country national to pass an exam after following compulsory courses (which may be expensive) while others only require attendance at integration courses. In this way the EU status functions as proof rather than as a tool for integration. At the time the Commission launched the proposal for the EU Long-Term Residence Directive, only Germany had a language requirement for its national permanent status. This shows that Member States, as we saw before with the Family Reunification Directive, used the discretion the directive allowed them to restrict the right to EU status, by adopting policies from other states. Several national experiences have shown that an integration requirement reduces the number of applications for a permanent status as well as the number of permits issued.³² More third country nationals thus remain with a temporary, more conditional, status, which is in general not beneficial for their integration.

The directive foresees intra-Member State mobility for long-term residents with the possibility of work or residence in a second Member State. Article 14 paragraph 3 of the directive allows the second Member State to apply the labour market test prioritizing Union citizens in cases of admission for economic activities. The restricted access to the labour market can remain during the first year of residence (Article 21 paragraph 2). Only seven Member States exempt long-term residence status holders from the labour market test.³³ This means that the large majority doesn't treat labour migrants with a long-term residence status differently from those entering directly from outside the EU. Italy and Romania apply a national quota and they also (together with France) impose a higher income requirement than for the acquisition of a long-term residence permit.³⁴

31 COM (2011) 585, 28 September 2011. These Member States are Austria, the Czech Republic, Germany, Estonia, Greece, France, Italy, Lithuania, Luxembourg, Latvia, Malta, the Netherlands, Portugal and Romania.

32 Strik, T., A. Böcker, M. Luiten & R. Van Oers (2012), 'The INTEC Project, synthesis report. Integration and Naturalisation Tests. The New Way to European Citizenship', in: Pascouau, Y. & T. Strik (eds) (2012), *Which Integration Policies for Migrants? Interaction between the EU and its Member States*, Nijmegen: Wolf Legal Publishers.

33 Belgium, Cyprus, Hungary, Latvia, Poland, Portugal and Sweden, COM(2011)585, p. 7.

34 The Commission mentions Italy, Romania and Slovenia.

5.3.2. *Practice*

The introduction of the subjective right to the EU long-term status seems difficult to reconcile with the huge variety between the Member States in the number of holders of a long-term residence permit. In its evaluation report in 2011, the Commission pointed out that 80 per cent of the LTR status holders lived in only four Member States: Estonia, Italy, Austria and the Czech Republic.³⁵ In 2014 there were almost 7 million holders of a permanent residence permit in the EU, but less than 3 million of them have the EU permit. Austria and Italy have large numbers: more than 200,000 in Austria and more than 2 million in Italy. But in Germany and France compared to their high number of third country nationals, only a handful have been granted LTR status.³⁶

It is likely that these huge differences reflect national policy choices rather than the choices of the individual migrants. For some countries specific explanations can be given. Estonia and Slovenia granted the permit to long-term residents who did not naturalise after the disintegration of the USSR and Yugoslavia, in order to avoid large-scale statelessness. This explains why many of the EU permit holders are nationals of Russia, Ukraine, Serbia and Bosnia. Other Member States have de facto replaced the national permanent residence permit with the EU permit (Austria), or have introduced the EU permit as the first permanent permit.

But these reasons still don't explain why the permit is not applied and granted in other Member States. Groenendijk points to the relationship between the EU status and the national permanent residence status. In the Member States with low numbers of EU permit holders, long-term residents have to choose between the national permanent status and the EU long-term residence status, causing a threshold for migrants to invoke their EU rights. In other countries, the possession of a national permit is a condition for the granting of the EU permit.³⁷ The less migrants are aware of their rights under EU law and the benefits of the EU status, the less likely it will be that they will insist on the granting of the EU permit without unlawful requirements.

Another reason for differences in numbers might be the national accessibility to citizenship. If the requirements are more or less the same, then naturalization has the advantage of acquiring all the rights of a Union citizen. If naturalization

³⁵ COM(2011)585, 28 September 2011, p. 10.

³⁶ Source: Eurostat.

³⁷ Groenendijk, C.A. (2012), 'Chapter 10, Long-Term Residents', in: Peers S. *et al.* (2012), *EU Immigration and Asylum Law. Text and Commentary: Second Revised Edition, volume 2: EU Immigration Law*, Leiden-Boston: 2012, p.327-330.

implies the loss of the original nationality, migrants might still prefer to opt for a strong residence permit. In 2014, the number of naturalizations in Austria was only 6,000, while in Germany it was 90,000. Despite the different national situations, the figures imply at least that the local authorities in certain states do not actively promote the EU status, or are even not aware that migrants are entitled to the permit. In Italy and the Netherlands, public campaigning by migrant organisations and lawyers was necessary to enforce effective access to the status. Again this shows that correct transposition is only the first step, as implementation at the practical level determines the effectiveness of the transposition. But EU compliance also needs knowledge and awareness by other actors, like lawyers, courts and migrant organisations in order to create pressure at national and European level.

The lack of awareness among third country nationals might also concern the added value of the EU permit, especially the intra-EU mobility right, due to the labour market test and the restricted access to the labour market in most Member States. The Commission observed in 2011 that only small numbers of LTR third country nationals had made use of this mobility right within the EU: less than fifty per Member State.³⁸ The labour market test most Member States apply is probably the main cause of this disappointing number. Jesse refers specifically to this provision while questioning the harmonization purpose through EU law when the same EU law allows so much discretion that national implementation can lead to fundamentally different legal situations.³⁹ The provisions on intra-EU mobility and their transposition have clearly not bridged the gap between TCNs and Union citizens. Besides using the discretion the directive allows, a number of Member States do not comply with the requirements of a second Member State, like granting equal treatment and giving full access to the labour market after one year of residence.

5.3.3. *New perspectives*

The Commission mainly blames the many deficiencies in the transposition of the directive and the lack of awareness of the directive for its limited impact. It however also admits that as the instrument itself is insufficient in promoting mobility, it should be amended by facilitating access to the labour market and further simplifying the acquisition of LTR status in the second Member State. As the Commission was dissatisfied with the thresholds for mobility, which the

³⁸ COM(2011)585, p.10.

³⁹ Jesse, M. (2012), 'Integration, access to employment and occupation under EU Law', in: S. Morano-Foadi & M. Malena (eds), *Integration for third country nationals in the European Union. The equality challenge*, Cheltenham, UK-Northampton: Edward Elgar, p.145-166.

Member States had established in the directive, it laid down a *rendez-vous* clause in Article 24 in which it gave priority to amending Chapter III of the directive. In its evaluation report of 2011 the Commission repeated that it would propose amendments to the directive in order to further promote intra-EU mobility.⁴⁰ Five years later, no such amendment has been tabled.

But the number of reasons not to wait any longer to enhance intra-EU mobility is only growing. First, the number of third country nationals living in the EU on a permanent basis is rapidly increasing, especially since refugees and those with subsidiary protection have gained access to the permit. On 1 January 2015 almost 20 million third country nationals lived in the 28 EU Member States.⁴¹ Second, as long as third country nationals are locked up in their Member State, no real participation in the internal market or integration into European society as such will be attained. This hampers the achievement of economic and social cohesion. Third, as the labour market test has created a de facto higher threshold with the enlargement of the EU in 2004 and later on, the prioritization of EU citizens has led to more exclusion of TCNs. Even citizens from Norway, Iceland, Liechtenstein and Switzerland have a privileged position over migrants who have lived in the EU for many years. Fourth, the accession and economic crisis has led to more competitiveness for third country nationals in their country of residence. Facing discrimination in the labour market, they end up jobless more frequently. Enlarging the scope of job opportunities would at least increase their perspective on participation. Lastly, employers as well as the national welfare systems would benefit from a better chance for a match in the labour market. The current restrictions on access to the labour market, although heavily defended, don't favour the Member States either, while 'isolated labour markets remain unattractive for foreign professionals'.⁴² Demographic changes will make this match even more urgent.

Abolishing the labour market test in the second Member State, however, will not equalise the rights of LTRs and Union citizens. A more far reaching but also more effective step would be to grant them the right of free movement, for instance by enlarging the personal scope of the Union Citizens Directive. Article 45 of the

40 COM(2011)585, p. 11.

41 Source: Eurostat.

42 Jesse, M. (2012), 'Integration, access to employment and occupation under EU Law', in: S. Morano-Foadi & M. Malena (eds), *Integration for third country nationals in the European Union. The equality challenge*, Cheltenham, UK-Northampton: Edward Elgar, p.145-166; Kocharov, A.- (2008), 'What Intra-Community Mobility for Third-country Workers?', *European Law Review*, 33, p.913-926.

Charter offers a legal basis for this. However, the current negative perception of the free movement of EU citizens makes the political feasibility of widening the scope within the short or medium term rather unlikely.

5.4. *Conclusions*

We have seen antagonistic behaviour by the Member States. The Court contributes to coherence by taking the Member States' aims of equal rights seriously. But the Member States themselves try to limit the consequences of the jurisprudence, with as one of the results that the gap with EU citizens remains large. The tendency to minimize the application of certain granted rights also creates more different categories among third country nationals, leading to a further fragmentation of their rights. All categories have a different set of rights: Turkish nationals, long-term residents, Blue Card holders, students and researchers, other types of workers, family members, refugees, and those with subsidiary protection. This provokes questions on the justification for all those differences, and compatibility with the non-discrimination principle, as enshrined in Article 18 TFEU and Article 14 ECHR. The objective of the Single Permit Directive to achieve more equal treatment, has failed due to the many derogation clauses. And so its impact is again dependent on its use by Member States, which until now have shown merely reluctance to strengthen the legal position of migrants, except with regard to the most wanted ones: the Blue Card holders. According to Jesse the privileges of the highly skilled third country nationals exactly concern the lifting of optional restrictions applied to other TCNs, like waiting periods, pre-entry tests, labour market tests etc. It is therefore legitimate to question the real purpose of those optional requirements, if they have to be removed to attract the wanted immigrants. Preventing immigration of unwanted immigrants or furthering their integration?⁴³

These restrictions, leading to unequal treatment, are especially problematic as regards the ones who have settled in the EU permanently, many of them family members or long-term residents. Their rights are based in European legislation, they live in European societies, hence they de facto belong to the European integration as a whole. The European Council endorses the objective that long-term legally resident third country nationals be offered the opportunity to obtain the nationality of the Member State in which they are resident. But as access to EU citizenship remains a national competence, integration of TCNs could be

43 Jesse, M. (2012), 'Integration, access to employment and occupation under EU Law', in: S. Morano-Foadi & M. Malena (eds), *Integration for third country nationals in the European Union. The equality challenge*, Cheltenham, UK-Northampton: Edward Elgar, p.145-166.

promoted by making nationality less determining of their rights and participation within the EU. The Commission invented the concept of ‘civic citizenship’, inspired by the Charter of Fundamental Rights, which would enhance successful settlement into society.⁴⁴ The Commission relaunched this initiative in 2003 and although it was supported by the European Parliament, the idea was abandoned in further Communications.⁴⁵ It is time to think of a new, similar concept, like membership. This EU membership would still be based on criteria for inclusion and exclusion, but not along the lines of nationality, and not to be determined or granted by individual Member States. Membership could be directly linked to a European rather than a national society, and safeguard full integration and mobility. Such a concept would reflect the Tampere objectives of equal rights as well as the promotion of economic and social cohesion at EU level.

There are numerous remaining research challenges regarding the evolution of the position of third country nationals within the EU. Academic research could contribute to gaining insight into the strategic use of the directives by the Member States and finding explanations for it. Multi-disciplinary research on the impact of the directives is necessary to conclude to what extent they have led to harmonization and integration of TCNs or to other, unintended effects. It could contribute to a much needed evidence-based and rational approach to European immigration policy furthering harmonization and integration. Nowadays facts are widely ignored in the politicized and polarized debate on integration. If researchers also look into explanations of the impact of the directives, they could formulate recommendations on the necessary steps required to further the aimed integration. In finding ways to reconnect the objectives of the directives, on the one hand, and the Member States on the other hand, the reluctance of the latter to reduce their discretion should be taken into account. Perseverance by the Commission is however indispensable, because of its competence to start infringement procedures and to propose legislative changes.

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