

# **Narrowing the Gap Between EU Citizens and Third Country Nationals?: The Legal Status of Long-term Residents in the EU**

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## **Abstract**

This thesis has investigated whether the aims set up by the Tampere Summit, namely to approximate third country nationals' legal status to those of the member states' nationals, thus narrowing the gap between third country nationals and EU citizens has been reached or not through the in-depth analysis of Council Directive 2003/109/EC regulating the status of long-term residents in the EU. The major finding of the thesis is that although the fact itself that the EU has recognised the presence of these long-term resident third country nationals participating in the everyday life of the host member states is a positive step, the actual provisions of the Long-Term Residents Directive provide very minimal standards in the field, leaving member states several opportunities to exercise their discretionary powers. It concludes that the adopted Directive reflects the member states' restrictive approach towards regulating the inflow and status of third country national migrants in the European Union.

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## Introduction

According to Article 3 of the Treaty on European Union "The Union shall offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime."<sup>1</sup> Freedom of movement thus is ensured for the citizens of the EU, but at the same time, in the area of freedom, security and justice, security of the citizens has to be provided as well, mainly through the strict control of external borders and of course through the effective management of migration, in order to avoid the entrance of non desired third country nationals (TCNs) into the EU.<sup>2</sup>

In accordance with the classical division of competences, the law of the Union shall ensure the freedom of movement to its citizens, while immigration laws of the member states shall set out the rules and conditions for TCNs on how they can enter their territory, how they can seek for jobs and how they can reunite with their family members. However, the relationship between EU law and member states' national law is more complex in reality. Due to the rapid evolution of EU law starting from the 1990s in this policy field, the Union has entered into domains which were traditionally in the competence of the member states' legislation, for example their immigration law. In connection with this process the rights of TCNs in the EU seemed to have gained strength, thus the concept of dividing Europeans from non-Europeans, EU citizens from TCNs, because of the insuperable gap existing between them might be questioned<sup>3</sup>.

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<sup>1</sup> See.: Article 3 TEU

<sup>2</sup> This idea can be found in the Communication from the Commission to the Council and the European Parliament - towards integrated management of the external borders of the member states of the European Union, COM (2002) 233

<sup>3</sup> Gyeney, Laura: Legális bevándorlás az Európai Unióba különös tekintettel a családi élet tiszteletbe tartásának jogára (Legal migration in the EU, with special focus on the right to family life) PPKE JÁK 2011, p15.

The traditional view of dividing these two groups of people emerged with the creation of European citizenship in the beginning of the 1990s, when the goal was to distinguish European citizens from TCNs on the grounds that the freedom of movement for member states' citizens is based on the provisions of the founding treaties, furthermore, that EU citizens should receive equal treatment with the nationals of the host member state.<sup>4</sup> On the other hand, in the case of TCNs, security of member states prevailed over the individual rights of the immigrants. Although the approximation of the rights of EU and non-EU citizens has started with the creation of the common immigration and asylum policy in the Amsterdam Treaty<sup>5</sup> and with the aims set up by the Tampere Summit <sup>6</sup>, according to many, the Tampere Programme was only successful in attracting attention to this issue but did not bring any important changes.

The 9/11 terror attack also played an important role in drawing the attention from legal migration towards illegal migration and securitization policies, which was not beneficial for the status of TCNs in the EU. The European Pact on Immigration and Asylum, which was drafted during the French Presidency in 2008 was hoped to materialize the goals of the Tampere and Hague Programmes, but in the end did the opposite and reflected a rather intergovernmentalist than a common European approach towards immigration policy<sup>7</sup>.

The EU has received several critics for its sharp distinction between EU citizens and TCNs and for the unstable and vulnerable rights it provides for the non-EU citizens living on

<sup>4</sup> According to Judit Tóth the creation of the EU citizenship is to blame for the legal and social exclusion of TCNs, notwithstanding the fact that they might have been living and paying taxes in the EU for years. See: Judit Tóth: Miért nem lehet, ha szabad. A többes állampolgárság a nemzetközi és az európai közösségi jog felől (Why is it not allowed if it is possible, Dual citizenship from the perspective of international and Community law), In: Beszélő, October 2003., [http://www.kettosallampolgarsag.mtaki.hu/tanulmanyok/tan\\_03.html#22](http://www.kettosallampolgarsag.mtaki.hu/tanulmanyok/tan_03.html#22)

<sup>5</sup> Teodora Kostakopoulou: Long-term Resident Third-Country Nationals in the European Union: Normative Expectations and Institutional Openings In: Journal of Ethnic and Migration Studies, Volume 28 Issue 3, 2002, p443-462.

<sup>6</sup> The European Council on its meeting in 15 and 16 October 1999 held in Tampere declared that „the legal status of TCNs should be approximated to that of Member States' nationals. 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”. [http://www.europarl.europa.eu/summits/tam\\_en.htm#a](http://www.europarl.europa.eu/summits/tam_en.htm#a)

<sup>7</sup> Sergio Carrera and Elspeth Guild: The French Presidency's European Pact on immigration and Asylum: Intergovernmentalism vs. Europeanisation? Security vs. Rights? CEPS Policy Brief 2008.

its territory. Critics stress that the EU cannot ignore the fact that four percent of its population consists of TCNs<sup>8</sup>, who usually participate in the every day life of the Union. In the opinion of Carrera and Wiesbrock it is unacceptable that only EU citizens can enjoy the benefits of the "Europe of rights"<sup>9</sup>. The Stockholm Programme, adopted by the Council of the European Union in March 2010 was hoped to eliminate these issues since it aimed at creating "an open and secure Europe serving and protecting citizens", thus the Citizens' Europe, but in the end did not cope with the problematique of the division between EU and non-EU citizens, thus enhancing the tension between nationals of the member states and those of third countries<sup>10</sup>.

According to Lukács one should not see the status of TCNs in the EU so darkly. The Union went through a serious paradigm change in the last fifty years, moving from a restrictive to a liberal approach in regulating migration. The first step of this process was the construction of the EU citizenship which made it possible to grant the freedom of movement and equal treatment to nationals of one member state throughout the whole EU. The second step of the process was the aim to create a common immigration policy for the EU, which would move towards a more liberal regulation, widening the rights of TCNs residing in the EU.<sup>11</sup> In her opinion a positive sign reflecting the paradigm change on the EU level were the adoption of the several Council directives regulating the entrance and residence of TCNs into and in the EU, as well as the one controlling their movement across member states<sup>12</sup>, which not only extended the rights of EU citizen workers in the EU but also the rights of TCNs.

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<sup>8</sup> In 2010, 4 % of the EU's total population consisted of third-country nationals, officially residing on its territory (ie. Excluding illegal immigrants) Source: Eurostat: [http://epp.eurostat.ec.europa.eu/statistics\\_explained/index.php/Migration\\_and\\_migrant\\_population\\_statistics#Non-national\\_population](http://epp.eurostat.ec.europa.eu/statistics_explained/index.php/Migration_and_migrant_population_statistics#Non-national_population)

<sup>9</sup> Sergio Carrera and Anja Wiesbrock: Whose Citizenship to Empower in the Area of Freedom, Security and Justice? The Act of Mobility and Litigation in the Enactment of European Citizenship, CEPS Policy Brief May 2010, p2.

<sup>10</sup> Elspeth Guild and Sergio Carrera: Towards the Next Phase of the EU's Area of Freedom, Security and Justice: The European Commission's Proposal for the Stockholm Programme, CEPS Policy Brief No. 196, CEPS 2009.

<sup>11</sup> Dr. Gellérné Lukács Éva: Személyek szabad mozgása az Európai Unióban (The free movement of persons in the European Union), Tullius Kiadó, Budapest 2008, p5.

<sup>12</sup> Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents; Council Directive 2004/114/EC on the admission of third-country nationals for the purposes of studies, pupil exchange and voluntary service; Council Directive 2005/71/EC of 12 October 2005

Given the fact that the directives contained provisions about the host states' obligation to provide equal treatment between TCNs and their own citizens, which lead certain scholars to the conclusion that certain groups of TCNs already enjoy the same rights and treatment as EU citizens and that if this path will be followed EU citizenship will soon be independent from holding a nationality of a member state.<sup>13</sup>

Taking into account the opinion mentioned above in my thesis I would like investigate the question whether the rights of TCNs residing on the territory of the Union can really be compared to the rights and status enjoyed by EU citizens. In other words, has the creation of the Tampere Programme and the adopted directives brought a change of paradigms, moving towards a more liberal approach in regulating and approximating the status of TCNs and EU citizens? Indeed, if the Union sees itself as a promoter of democratic values and fundamental human rights then its approach towards immigration policy and immigrants should reflect this outlook, not only on the level of Programmes but in the level of the legislation as well.

In this thesis I chose to look at whether the adopted legislation reflects the aims of bringing convergence between the rights of EU and non-EU citizens living in the EU and the principle of equal treatment through the analysis of the Long-term Resident Directive<sup>14</sup> (hereafter referred to as 'Directive' or LTRD). Selecting this Directive can be confirmed with the fact that it is said to be the one containing the most similar rights to those of the EU citizens', especially considering the mobility rights of the two groups<sup>15</sup>. Taking the status of EU citizens as a basis of comparison is justified by the fact that the Tampere Programme itself considers it as a benchmark in regulating the status of TCNs residing in the EU. Nonetheless, it is important to point out that the thesis, due to the time and length limitations, will only

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on a specific procedure for admitting third-country nationals for the purposes of scientific research; Council Directive 2009/50/EC of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment

<sup>13</sup> Carrera – Wiesbrock *ibid*, p2.

<sup>14</sup> <sup>14</sup> LTRD of 25 November 2003 concerning the status of third-country nationals who are long-term residents

<sup>15</sup> Here I would like to note that the right to family reunification is out of the scope of the thesis.

investigate whether the aim to grant similar rights to TCNs and EU citizens was reached from a normative point of view, on the level of legislation. Therefore the thesis only looks at the provisions of the adopted legislative acts and not at their actual implementation by member states<sup>16</sup> or interpretation by the Court<sup>17</sup>.

I come to the conclusion that placing immigration policy on the EU's agenda and the adoption of the before mentioned directives should certainly be considered as a positive thing. It shows that the issue to facilitate the legal status of TCNs living on the territory of the EU has been started, but barriers still limit TCNs' total and equal access to the same rights enjoyed by the EU citizens. Politically this area is still very sensitive; legislation in the EU is still 'overshadowed' by member states' fear of losing their sovereignty, which derogates further evolution of broadening TCNs' rights. The Commission's ambitious proposals are often set back by member states and at the end accepted in a more modest form, as the thesis will show through the example of the Long-term Resident Directive. Therefore the opinion of Carrera and Wiesbrock mentioned above, that citizenship of the EU will soon be independent from holding the nationality of a member state at this point still seems quite radical.

However, there is a chance that a tendency towards placing emphasis on providing the freedom of movement within the EU and enforcing legal principles like the prohibition of discrimination on the grounds of nationality and the principle of proportionality might prevail over member states' will to keep the question of security on the top of the agenda instead of these principles, resulting in a more liberal immigration policy on the EU level. The ECJ

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<sup>16</sup> For further information on the topic see the Report from the Commission to the European Parliament and the Council on the application of Directive 2003/109/EC concerning the status of third-country nationals who are long-term residents (COM/2011/0585 final)

<sup>17</sup> So far the Court only dealt with cases in reference to Directive 2003/109/EC: Judgment of the Court of 24 April 2012 in case C-571/10 *Servet Kamberaj v Istituto per l'Edilizia sociale della Provincia autonoma di Bolzano (IPES) and Others*, and Judgment of the Court of 26 April 2012 in case C-508/10 *European Commission v Kingdom of the Netherlands*.



might be a key player in converging the rights of long-term resident TCNs by using these legal concepts and principles in their cases as well, as it did in the case of EU citizens before.

The thesis adopts a qualitative research design to investigate its goals. It includes review of the relevant, mostly legal scholarly literature that deals with the subject directly or indirectly. Contrasting the existing opinions might help to get closer in answering the questions set up in the thesis. Furthermore, since the main subject of the paper is the Long-term Resident Directive I go into its in-depth content analysis to understand the nature and aim of its provisions and at the same time to compare it with the provisions of EU legislation regulating the rights of EU citizens. The paper also examines at some points the relevant case-law of the ECJ to understand better its decisions, the role it plays in promoting integration and the possibilities it holds in extending the rights of TCNs residing in the EU.

The thesis is structured around three main parts. The first chapter draws a theoretical background to the topic, introducing the two major ways to approach immigration policymaking and the notion of integration in order to be able to place the EU's approach towards migration into context. The second chapter focuses on the status of TCNs in the EU. Firstly it places the issue into a historical context, by looking at how this issue became more and more important in the EU and how EU law regulates their status. The final section of the chapter analyzes the question whether the communitarization of immigration and asylum policy by the Amsterdam Treaty could widen the scope of Article 18 TFEU (former Article 12 TEC) prohibiting discrimination on the grounds of nationality to TCNs residing on the territory of the EU as well. The relevant decision of the Court will be mentioned to show the potential lying in the extensive interpretation of this Article. The final chapter revolves around the in depth analysis and critical evaluation of the Long-term Resident Directive. After describing the circumstances around the creation of the Directive, the actual provisions will

be examined and compared to the rights of EU citizens to see whether the gap between the two groups is really narrowing or not.

## Chapter 1: Theoretical Background

Mass migration of the 20th century has constituted one of the biggest challenges of the globalized world. States, while creating their immigration policy have to find the balance between their own and the migrants' interest. They have to take into consideration their labour market situation, economic interests, but at the same time to concentrate on assisting migrants' integration into their society and protecting their fundamental rights<sup>18</sup>. According to Zapata-Barrero<sup>19</sup> states can approach and handle the phenomenon of immigration in two ways, in a reactive and proactive manner. The reactive approach considers the security of the state to be the most important factor when shaping immigration policy, while the proactive approach follows a more global logic, placing universal human rights in the center of immigration policy making.

The reactive logic concentrates more on the local factors and on sustaining a unified political community within the state. It sees migration as an issue, a problem that has to be controlled strictly in order to maintain security and the single identity of the country. In their view migrants have to cope with the host country's rules and are obliged to integrate into the society as fast as possible. Countries following this reactive approach try to control the number of inflowing migrants by setting up strict entry criteria and by 'selecting' between them, allowing entrance only to the ones who live up to their conditions and cause as less problems as possible.

The proactive approach, on the other hand looks at immigration as a positive thing, which can have a beneficial effect on the host country's demography, culture and society. In their eyes migration is caused by the negative effects of globalization and capitalism, which constitute a huge gap between developed and underdeveloped countries, often forcing

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<sup>18</sup> Gyeney ibid, p12.

<sup>19</sup> Ricard Zapata-Barrero: Political discourses about borders: On the emergence of a European Political Community In: H. Lindahl (ed.) A Right to Inclusion or Exclusion? Normative Faultlines of the EU's Area of Freedom, Security and Justice, Oxford: Hart Publishing; p21-27.

migrants to leave their home country in search for a better life. Therefore in their eyes it is the moral obligation of the more developed host states to help migrants, thus serving the good of the global human community. Consequently, immigration policy measures have to focus on the enforcement and protection of human rights, most importantly the principles of non-discrimination and the right to equal treatment. Host states furthermore have to let migrants keep their identity, exercise their culture and religion and can not force them to assimilate totally into the host society.

From the perspective of international law there are two ways of looking at international migration and the integration of migrants into the host country's society. The first one focuses on the assertion of fundamental human rights which have to be granted for every person, no matter where he might be. Consequently, according to this perception, migrants can not loose the enjoyment of fundamental human rights by leaving their home country; these have to be granted to them in the host country as well. Furthermore, the host state's obligation to progressively include migrants into their society, by progressively granting them economic, social and political rights, which are similar to the ones granted to their own citizens<sup>20</sup>. Of course, it acknowledges that this process can be dependent on the migrant's length of stay and willingness to integrate into the society, but integration can not be a condition of providing the fundamental human rights. This theory lets the same person to have a relationship with more than one country at the same time.

The second approach places emphasis on the integrity of the state's three 'components': its territory, population and sovereignty, which cannot be separated from each other. It is more traditional in a way that it lets the individual to belong only under the sovereignty of one state at the same time. Since states are the only subject of international law,

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<sup>20</sup> Gyeney *ibid*, p24.

they are the ones who can create the link between the individual and the 'international'<sup>21</sup>, therefore have the exclusive competence to determine whom they let to enter their territory and what rights they provide to their people. This theory only acknowledges two kinds of migrants, temporary ones with limited rights (e.g. guest workers) and long-term migrants. Long-term migrants however, are expected to integrate into the host society both culturally and socially. The final goal of their total assimilation is for them to become citizens of the host state through naturalization and only after that they are eligible to enjoy the rights provided by the state to their citizens. Therefore, before becoming citizens of the host country, migrants can not enjoy equal treatment with host country nationals. Although this is a longer process, in the eyes of this theory it is the only way to restore the unity of the population and the integrity of the state.

Taking into account the above mentioned theories one can see that states have different 'options' they can follow in immigration policy making and decision is often complicated on the level of the nation state. Therefore it is obvious that in the context of the EU creating a common or at least more harmonised migration policy is an even more complex issue, since different opinions and regulations collide on the supranational level. Moreover the situation in the EU is complicated with the fact, that according to Boswell and Geddes<sup>22</sup> in the context of the EU this is a two-fold issue. As they argue, in the EU we have to differentiate between two types of population movement, migration and mobility. Migration refers to movement of non-EU or TCNs to the EU, while mobility refers to the movement of member state nationals or EU citizens practicing their freedom of movement within the EU. As they discover "there are important legal, social and political distinctions made at EU level between

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<sup>21</sup> Anuscheh Farahat: 'We want you! But . . .' Recruiting Migrants and Encouraging Transnational Migration Through Progressive Inclusion, In: European Law Journal, Volume 15, Issue 6, November 2009, p707.

<sup>22</sup> Christina Boswell and Andrew Geddes: Migration and Mobility in the European Union, Palgrave Macmillan 2011, p2-3.

'migration' by non-EU citizens and 'mobility' or 'free movement' by EU citizens".<sup>23</sup> Regulating mobility on the EU level has been easier, since states were willing to follow the more liberal, proactive approach towards the migration of their own citizens or those of other member states, in order to reach the goal of the single market and provide the four freedoms set up by the Treaty of Rome and subsequent treaties and EU legislation. Of course one should not forget that the Court of Justice also played an important role in strengthening the rights of EU citizens in other member states<sup>24</sup>.

On the other hand, regulating the extra-EU migration by TCNs is a rather new and more contested issue in the EU's policymaking scene. On the EU level the matter first appeared in the Treaty of Maastricht, but over time became evident that it constitutes a 'European issue'. The EU realizing that the member states' differing approaches to immigration policy erodes their effectiveness started to push for a more harmonised policy on the EU level<sup>25</sup> accepting directives in the field. The question arises which of the above mentioned approaches these directives were following. When looking at the main aim of these directives, which were to provide a common status for TCNs residing on the territory of the member states and to converge their rights to the ones guaranteed to their own citizens, it can be argued that the Commission in their proposals were pushing for the liberal, proactive approach, promoting the logic of the progressive inclusion of immigrants. However, after analyzing the Long-term Resident Directive I argue that although the adoption of the Directive was a huge step moving towards a harmonised regulation considering the legal status of long-term resident TCNs, the member states achieved to keep great discretionary powers in the field. The Directive therefore reflects more the reactive political approach,

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<sup>23</sup> Boswell and Geddes *ibid*, p3.

<sup>24</sup> On the development of the case law strengthening the rights of EU citizens in other member states see *inter alia*: Susanna Schmidt: The Path-dependency of Case Law and the Free Movement of Persons, [http://euce.org/eusa/2011/papers/5b\\_schmidt.pdf](http://euce.org/eusa/2011/papers/5b_schmidt.pdf)

<sup>25</sup> Szalayné Sándor Erzsébet: Bevándorlási politika az Európai Unióban és Magyarországon (Immigration policy in the European Union and Hungary), p4, [http://www.ittvagyunk.eu/application/essay/91\\_1.pdf](http://www.ittvagyunk.eu/application/essay/91_1.pdf)

focusing on maintaining the security of the states and on the migrants' obligation to integrate into the host country's society, only granting them equal treatment with their own nationals if they pass their integration requirements. Thus it seems that so far intergovernmentalism<sup>26</sup> has prevailed in this field, with member states protecting their own interests, claiming that it has to be up to them whom they let to enter their territory and by focusing on maintaining their integrity.

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<sup>26</sup> Following the distinction made by Lahav based on Sweet Stone and Sandholtz, intergovernmental approaches to European policy-making result in more protectionist policy outcomes and bring limited forms of cooperation, thus restrictive immigration policies, while a neofunctionalist approach favors supranational governance, resulting in more liberal immigration policy.

See further: Gallya Lahav: *Immigration and Politics in the New Europe. Reinventing Borders*, Cambridge University Press 2004, p5-6; Wayne Sandholtz and Alec Stone Sweet (eds): *European Integration and Supranational Governance*, Oxford University Press 1998.

## **Chapter 2: TCNs' Legal Status in the European Union**

The previous chapter has described the different approaches states can take when formulating their immigration policy. It also demonstrated how this issue is more complicated in the context of the EU, since it has to deal with regulating migration by EU citizens within the Union on the one hand and extra-EU migration by TCNs. It concluded that while the EU took a more liberal, proactive approach in regulating the migration of its own citizens, it has not been so generous to TCNs. The directives adopted in the fields of immigration policy reflect a more restrictive approach, where the will and security concerns of member states prevailed over the Commissions will to follow a harmonised and liberal approach. This present chapter describes the current EU regulation on the status of TCNs residing on the territory of the EU. First of all it describes whom the EU law considers a TCN. Then it turns to the emergence of the legal regulations concerning their status and finally looks at the question whether TCNs are granted equal treatment with EU citizens in general.

### ***2.1 Defining the category of TCNs***

Defining what the law of the Union means by a 'TCN' is necessary to be able to describe their legal status in the Union. The definition is quite simple, since everybody who is not a citizen of a member state, thus is not an EU citizen, falls within the 'TCN' category. However, this negative definition is very general, therefore it seems logical to investigate the background of the people who reside on the territory of the EU but do not hold EU citizenship. Finding and understanding the immigrants' motifs might be useful in determining the politics and policies in which the Union should approach these people, constituting almost four per cent of its population.



The first big wave of migrants arrived after the Second World War when the rebuilding of Europe started, attracting a great number of guest workers, coming mostly from the Mediterranean countries and former European colonies. The majority of immigrants and workers arriving from the colonies targeted the United Kingdom and the Netherlands in the first place, while guest workers from North Africa and Turkey went to Germany, Denmark, France and Sweden. As mentioned before these TCNs usually arrived to the EU as guest workers, which meant that they were only granted temporary residence permits in the host countries. The economic recession in the late 1960s and the 1973 oil crisis however ended the labour conscription, thus the liberal regime of granting work permits in the EU. Member states accepted measures to limit labour migration, hoping to ease the high unemployment rates and the social tensions caused by the assumption that the growing number of migrants in the EU might be harmful to its social cohesion.

However, these restrictive measures resulted in the effect that the majority of migrants who already resided in one of the member states chose to settle there permanently, since they feared that if they leave the EU, they will not be able to return again. This phenomenon caused the second huge inflow of migrants, because family members of these new long term residents started to enter the EU in the name of family reunification. The third wave of migration to the EU took place in the late 1980s, when lot of TCNs from Yugoslavia and the Near East arrived to the EU as refugees protected by international law.

Although recently the number of migrants arriving to the EU has been decreasing, the rate of migration still outperforms many countries' natural population growth, which makes it necessary to keep immigration policy on the top of the EU agenda. The number of immigrants is highest in Germany, than followed<sup>27</sup> by France and the United Kingdom. As for the cause

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<sup>27</sup> The number of immigrants who entered Germany was 10.8 million by 2010, which was around 7.6 % of its total population, in France it was 6.7 million, which was 9.7 % of its total population and in the UK there were 6.5 million immigrants, which meant 10.3 % of its total population.

of the entrance, in the recent years labour migration has increased again. Forty per cent of the migrants arrived with the aim to work in the host countries like Germany, Denmark and the United Kingdom. In the Netherlands and Sweden most of the immigrants arrived on the basis of family reunification<sup>28</sup>. The huge number of TCNs in the EU made it necessary to regulate their status on the EU level, at least partially. The Amsterdam Treaty therefore introduced Article 63 which provided the legal basis for the Community/Union to adopt legislative measures regulating immigration policy and the status of TCNs legally residing on the territory of the EU<sup>29</sup>. The following sections will introduce the evolution and the current regulation on the rights of the legally resident TCNs in the EU.

## ***2.2 Regulating the legal status of TCNs in the EU***

The European Union recognizing the quite huge number of TCNs residing on its territory started to grant rights, although in a quite ad hoc manner in the beginning. In 1960 Directive 1612/68<sup>30</sup> for example has provided the right for EU citizens to be accompanied by their TCN family members when coming to the EU. It also allowed companies providing extra-territorial services to employ workers from third countries.<sup>31</sup> But as it can be seen, in both of these cases the rights of TCNs were dependent and derived from the rights of an EU citizen or a company based in the EU.

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Source: <http://iom.int/jahia/Jahia/about-migration/facts-and-figures/europe-facts-and-figures> and [www.trueknowledge.com](http://www.trueknowledge.com)

<sup>28</sup> Gyeney ibid

<sup>29</sup> See Amsterdam Treaty Title IV, Article 63 (3) (a): "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: 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, including those for the purpose of family reunion," (4) "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."

<sup>30</sup> Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community

<sup>31</sup> See Judgement of the Court of 9 August 1994 in case C - 43/93 Raymond Vander Elst v Office des Migrations Internationales

Later certain rights were granted to TCNs residing in the EU, regardless their nationality. These included the right "to address, individually or in association with other citizens or persons, a petition to the European Parliament on a matter which comes within the Union's fields of activity and which affects him or her directly"<sup>32</sup> and the "right of access to documents of the Union institutions, bodies, offices and agencies, whatever their medium"<sup>33</sup>. Furthermore every employee and consumer in the Union, independent from their residence is entitled to get equal payment for equal work<sup>34</sup> and to consumer rights<sup>35</sup>.

Last but not least the Charter of Fundamental Rights states that "freedom of movement and residence may be granted, in accordance with the Treaties, to nationals of third countries legally resident in the territory of a Member State"<sup>36</sup>. The Commission in its proposal on the LTDR even highlighted this article of the Charta, claiming that it "it reflects the European Union's traditions and positive attitude to equal treatment of citizens of the Union and third-country nationals".<sup>37</sup>

One can see that the legal status of TCNs who enter and reside on the territory of the EU can be different, depending on which provisions of EU law apply to them. Thus, based on their legal status three groups of TCNs can be distinguished. Special regulations apply to TCNs who are family members of EU citizens practicing their freedom of movement in the Union. These cases are regulated by the Citizenship Directive 2004/38/EC<sup>38</sup>. Similarly to the EU citizens' TCN family members' status, immigrants arriving from third countries, who concluded agreements with member states to grant special treatment to their citizens have a

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<sup>32</sup> Article 227 TFEU (ex Article 194 TEC)

<sup>33</sup> Article 15. TFEU (ex Article 255 TEC)

<sup>34</sup> Article 157 TFEU (ex Article 141 TEC)

<sup>35</sup> Article 169 TFEU (ex Article 153 TEC)

<sup>36</sup> Article 45 (2) Charter of Fundamental Rights

<sup>37</sup> Proposal for a Council Directive concerning the status of third-country nationals who are long-term residents. COM (2001) 127 final, point 1.6

<sup>38</sup> European Parliament and Council Directive 2004/38/EC of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States

privileged status in the EU and constitute the second group<sup>39</sup>. Finally, the third group of migrants is very mixed and consists of all TCNs who entered the Union – except for the United Kingdom, Denmark and Ireland - on the basis of directives accepted in the field of the common immigration policy.<sup>40</sup> Status of migrants who do not fall under any of these categories, namely TCN family members of EU citizens not practicing their freedom of movement in the Union and TCNs residing lawfully in the United Kingdom, Denmark and Ireland, is regulated by the national law effective in their place of residence.

### ***2.3 Prohibiting discrimination on the grounds of nationality in the case of TCNs***

Anti-discrimination on the basis of nationality<sup>41</sup> has been one of the most important principles in the history of EU integration, since it was inevitable in order to achieve a common market. Therefore it is important not to forget that the inclusion of the prohibition of discrimination on the basis of nationality was not included in the Treaties because of the necessity of social justice, but because of economic reasons. It was the Court of Justice, who started to apply this principle in its case law in cases concerning the freedom of movement<sup>42</sup> and to citizens of member states<sup>43</sup>.

The question is whether it is prohibited to discriminate TCNs on the grounds of nationality came to the picture after the changes of the Amsterdam Treaty. The

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<sup>39</sup> For example the Agreement on the European Economic Area, the Euro-Mediterranean or the Decision No 1/80 of the EEC-Turkey Council of Association created a privileged status for their citizens arriving to the EU

<sup>40</sup> Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification and directives mentioned under footnote 7.

<sup>41</sup> Article 18 TFEU (former Article 12 TEC)

<sup>42</sup> Chloe Hublet: The Scope of Article 12 of the Treaty of the European Communities Vis-à-Vis Third-Country Nationals: Evolution at Last 759.o

<sup>43</sup> Judgment of the Court of Justice of 13 February 1985 in Case C-293/83 Gravier; Judgement of the Court of 2 February 1989 in Case C-186/87 sz. Cowan; Judgment of the Court of Justice of 6 June 2002 in case C-360/00 Ricordi; Judgment of the Court of Justice of 26 September 1996 in case C-43/95 Data Delecta and Forsberg; Judgment of the Court of Justice of 20 March 1997 in case C-323/95 Hayes

communitarization of Title IV<sup>44</sup> placed the scope of ex-Article 12 TEC, now 18 TFEU into a new perspective, since the article did not exclude *expressis verbis* TCNs from its scope of application. Unfortunately scholars do not have a definite opinion on the question either. Scholars like Hublet, Groenendijk, Guild and Peers<sup>45</sup> argue that the case law of the Court does not help in deciding whether Article 12 (currently Article 18 TFEU) can be applied to TCNs as well. However, it is worth to investigate this issue and to look at the arguments which could help to decide the question.

The Treaty of Lisbon may suggest that Article 18 (previously Article 12) applies only to EU citizens, since it was placed under Title two of the Treaty, which is named 'Non-discrimination and Citizenship of the Union'. However this perception might not be so obvious, concerning the fact that the Article 19 TFEU (former Article 13 TEC) generally prohibiting discrimination, which undoubtedly applies to non-EU citizens as well is placed under the same Title. Therefore the question whether Article 18 could be applied in the case of TCNs as well seems to be relevant<sup>46</sup>.

Turning to case law of the Court for assistance in deciding the matter, it seems that the Court supports the classical interpretation of Article 18 TFEU (ex Article 12 EC), namely that it can not be applied in case of TCNs. As the Court stated in its judgment of the Ricardi case: "provision [Article 12 EC] requires each Member State to ensure that nationals of other Member States in a situation governed by Community law are placed on a completely equal footing with its own nationals".<sup>47</sup> Therefore it placed emphasis only on EU citizens. The ruling in the Saldanha case reflects the same approach. The Court ruled that the Austrian Code of Civil Procedure's provision of asking security for the costs of the proceedings only from plaintiffs not resident in Austria, constituted a direct discrimination on the grounds of

<sup>44</sup> Title IV EC Treaty: Visas, asylum, immigration and other policies related to free movement of persons

<sup>45</sup> Groenendijk, Kees.: Citizens and TCNs: differential treatment or discrimination? p84., Guild, Elspeth - Peers, Steve.: Out of the Ghetto? The personal scope of EU law, p110

<sup>46</sup> Gyenyey ibid, p26

<sup>47</sup> Judgment of the Court of 6 June 2002, Case C-360/00 Ricordi, point 31.

nationality and Mr. Saldanha could call upon Article 12 (Article 18 TFEU) since he was a national of a member state and the fact that he was resident of a third country can not preclude him from enjoying equal treatment with EU citizens<sup>48</sup>. Consequently this means, that if Mr. Saldanha had only been a national of a third country, he could have not called upon the provision prohibiting discrimination on the grounds of nationality.

In the Vatsouras case one of the questions the Court had to decide was whether provisions of a national law, which excludes nationals of an EU member state from receiving social assistance benefits which are granted to illegal immigrants in the given member state violates Article 12 of the ECT. The Court declared "that the provision concerns situations coming within the scope of Community law in which a national of one Member State suffers discriminatory treatment in relation to nationals of another Member State solely on the basis of his nationality and is not intended to apply to cases of a possible difference in treatment between nationals of Member States and nationals of non-member countries"<sup>49</sup>. Therefore in the opinion of the Court Article 12 ECT is not applicable to compare situations and treatment between EU and non-EU citizens.

However, the Court seemed to turn from its classical interpretation and previous judgments in the ČEZ case.<sup>50</sup> The Court ruled that "It would appear to be contrary to both the purpose and the consistency of the treaties to allow discrimination on grounds of nationality, which is prohibited under the EC Treaty by virtue of Article 12 EC, to be tolerated within the scope of application of the EAEC Treaty. Although the principle of prohibition of any discrimination on grounds of nationality within the scope of application

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<sup>48</sup> Judgment of the Court of 2 October 1997, Case C- 122/96 Saldanha, points 26 and 30.

<sup>49</sup> Judgment of the Court of Justice in Joined Cases C-22/08 and C-23/08 Vatsouras and Koupatantze v. ARGE Nürnberg 900, point 52.

<sup>50</sup> Judgement of the ECJ of 27 October 2009, Case C-115/08 Land Oberösterreich v ČEZ

of Community law is expressly laid down only in Article 12 EC, it is a general principle which is also applicable under the EAEC Treaty".<sup>51</sup>

This judgment in the ČEZ case could be a positive sign and the beginning of a tendency, where the Court would enforce the principle of equal treatment in the case of TCNs as well. But until this time comes it has to be accepted that the principle of prohibiting any kind of discrimination on the grounds of nationality does not prevail in the case of TCNs. The simple existence of the partnership and cooperation programs between the EU and third countries, which distinguish between nationals of third countries, is a limitation to the emergence of the principle. As Hublet argues, if one looks at the visa policy of the Union can see that certain TCNs have to meet extra conditions to be able to enter the territory of the Union. These criteria also constitute a differentiation between TCNs and grants privileged treatment to certain citizens.<sup>52</sup> As she argues the scope of Article 12 EC (Article 18 TFEU) should not be "restricted to the right of free movement, in that the latter's restricted personal scope of application does not determine that of Article 12 EC" and should be applied to TCNs as well.<sup>53</sup> Similarly, Article 21 (2) of the EU Charter of Fundamental Right prohibiting any discrimination on the grounds of nationality "within the scope of the Treaties and without prejudice to any of their specific provisions" could be applied to provide equal treatment to TCNs in the EU.

Deciding the question whether the application of Article 12 EC (Article 18 TFEU) can be extended in the future to others than EU citizens and not only be used as a tool of promoting the idea of free movement for EU citizens within the Union therefore is very complicated and might depend on the decisions of the Court. A positive sign might be that since the beginning of the integration, free movement of persons has been extended widely.

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<sup>51</sup> Point 1 of the judgement Case C-115/08 Land Oberösterreich v ČEZ

<sup>52</sup> Hublet *ibid.*, p 768

<sup>53</sup> Hublet *ibid.* p 757.

Today, economically inactive EU citizens have the right to move and reside in other member states and although restrictedly, but several TCNs have the opportunity to move across member states as well. However, even if Article 18 TFEU (ex Article 12 EC) could be applied generally, it would not prohibit any kind of differential treatment in the case of TCNs; it would only prohibit unjustified discrimination.

After looking at the status of TCNs residing in the EU from a general perspective, the following chapter will turn to the directives accepted under the framework of the common immigration policy and the in-depth analysis of the LTDR.



### **Chapter 3: Secondary sources of the EU's immigration law; the Long-term Resident Directive concerning the status of third-country nationals who are long-term residents**

The EU law and the case law of the ECJ is characterized by the principles of integration on the basis of equal treatment, equal participation and transnational solidarity. However these general principles were 'created' for the European citizens and guaranteed to them by Article 39 EC (currently Article 45 TFEU) and Directive 2004/38 EC which expressed their right to move, reside and work freely in the EU. TCNs - except for the privileged ones - do not get such guarantees; moreover they are often presumed to be unable to integrate into the host society, to be a risk to social cohesion and to disrupt public order.<sup>54</sup> Scholars like Kostakopoulou argue that this situation is unacceptable; integration policy should be governed by the principles of equal treatment, equal participation and transnational solidarity generally, independently from citizenship in the whole EU.<sup>55</sup>

The aim to grant TCNs who reside legally in the EU "rights and obligations comparable to those of EU citizens"<sup>56</sup> by providing them equal and fair treatment and to draft the necessary legal measures was set up by the Tampere Programme. According to these aims several secondary sources in the field of the common immigration policy were born. The Commission usually drafted very ambitious proposals, advising to grant several rights to TCNs and placing them on equal stance with EU citizens. However, the Council in the end adopted these proposals in a more modest and cautious form. Among the directives accepted in this field and mentioned above (footnote 7) I chose to examine Directive 2003/109/EC

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<sup>54</sup> Tóth Judit: Az állampolgárság szerepe a migránsok beilleszkedésében (The role of citizenship in the integration of migrants), In: Kováts András (ed): *Magyarrá válni* (Becoming Hungarian), Institute for Ethnic and National Minority Studies of the Hungarian Academy of Sciences, Budapest 2011. p13-64.

<sup>55</sup> Teodora Kostakopoulou, Sergio Carrera and Moritz Jesse: *Doing and Deserving: Competing Frames of Integration in the EU*. In: Guild et alia (ed): *Illiberal Liberal States: Immigration, Citizenship and Integration in the EU*. Ashgate, Farnham-Surrey-Burlington, 2009. p167–186

<sup>56</sup> Tampere Programme Article 18.

concerning the status of third-country nationals who are long-term residents<sup>57</sup>, because this can be considered the only directive to achieve at least some of the goals of the Tampere Programme, since it set up the minimum standards that member states have to follow while regulating the status of long-term residents. This indicates that the legal status of EU citizens and TCNs more or less seem to converge thanks to the directive, but depending on the length and permanency of the latter's residence in the EU<sup>58</sup>. In the following sections the Directive will be critically examined to see whether long-term residents' status really seem to converge with the status of EU citizens.

### 3.1 The importance of the Directive

LTRD concerns the status of TCNs who have been long-term residents in one of the member states of the Union, therefore they are like 'half aliens, half citizens' in the host country. These *denizens* - as Groenendijk called them based on the work of Swedish political scientist Thomas Hammar- are "from a legal perspective, still aliens – non-citizens, [but] from a social or political perspective, they had obtained a status equal or similar to that of a citizen. The term denizen elegantly describes their status halfway between the 'real' non-citizen and the citizen".<sup>59</sup> The Directive is built upon the idea of total integration, meaning that the rights given by the host member states depend on how long the TCN has been living in the given state<sup>60</sup>.

When drafting the Directive the necessity of creating a new, *sui generis* status for long-term TCNs was questioned. It was argued, that the ideal solution would be to follow the

<sup>57</sup> Denmark, Ireland and the UK did not take part in the adoption of this Directive.

<sup>58</sup> Tóth *ibid* p23.

<sup>59</sup> Kees Groenendijk: The Legal Integration of Potential Citizens: Denizens in the EU in the Final Years before the Implementation of the 2003 Directive on Long-term Resident TCNs, [http://www.imiscoe.org/natac/documents/chapter\\_10\\_denizenship.pdf](http://www.imiscoe.org/natac/documents/chapter_10_denizenship.pdf), accessed on 13 May 2012.

<sup>60</sup> Sergio Carrera: In search of the perfect citizen? p171.

'integrity concept' described in Chapter one, thus to integrate *denizens* as quickly as possible and to make them acquire citizenship in order to enjoy rights provided only to nationals of the member state. However, it was obvious that whatever concept the drafters choose the issue needs great attention due to the huge number of affected people and the sensitiveness of the matter.

In Northern and Southern Europe for instance several TCNs lived, who could not or did not want to acquire the citizenship of their host country. Also in Germany according to the statistics, out of the 6.7 million TCN, sixty per cent has been living in Germany for more than ten and twenty per cent for more than twenty years. In Italy the situation is similar. Sixty per cent of the approximately three million registered immigrants has been living in Italy for more than five years and do not plan to leave the country in the near future.<sup>61</sup> The Commission expected that by 2006 - which was the deadline of the implementation period - ten million TCNs' status will be affected by the Directive<sup>62</sup> and this number was expected to increase due to the member states' strict criteria in citizenship acquisition. Due to the huge number of the affected people it is understandable why it was so important to create this *sui generis* status for long-term TCNs and a directive that regulates their status in the EU.

### **3.2 Efforts of harmonisation before the Directive**

Harmonisation efforts concerning the legal status of long-term immigrants within the EU lead back to 1996, when France proposed a non-binding resolution in the Justice and

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<sup>61</sup> Kees Groenendijk: The long term residents directive, Denizenship and integration, In Baldaccini, Guild and Toner (eds): Whose freedom, security and Justice, Oxford: Hart, 2007. p430.

<sup>62</sup> Press release IP/06/56 Brussels, 20th January 2006 Status of third-country nationals who are long-term residents in the EU : deadline for rules to take effect on 23 January 2006.  
<http://europa.eu/rapid/pressReleasesAction.do?reference=IP/06/56&format=HTML&aged=0&language=EN&guiLanguage=en>, accessed: 13 May 2012.

Home Affairs Council.<sup>63</sup> The resolution provided some additional rights to the long-term residents, but did not guarantee them the freedom to move freely across member states and did not set any common time period necessary for the acquisition of the status, apart from the fact that it maximised the length of the period determined by the member state in ten years. However, since the implementation of the resolution was not binding for member states, monitoring was impossible, thus the resolution had little noticeable effects.

The Commission realised the shortcomings of this non-binding act and initiated the adoption of a Convention regulating the admission of TCNs and their rights in the host country.<sup>64</sup> The proposal placed long-term immigrants in a very favorable position, granting them equal treatment in the fields of employment, residence, education and social care, furthermore provided them the right to move freely between member states. The draft caused debates in the Council, since member states were against the idea of providing the freedom of movement within the EU to immigrants, no matter how long they have been resident there. The European Parliament also did not greet the proposal and stressed that the admission of TCNs to the EU should be regulated separately from their long-term resident status.

With the entry into force of the Amsterdam Treaty the Council of Ministers were granted the competence to adopt legally binding measures in the fields of immigration policy and TCNs' right to reside and move freely within the Union.<sup>65</sup> The Commission in 2000 released a Communication<sup>66</sup> in which they proposed to regulate the issue of immigration on the Community level. By that time it became evident that the legislation concerning the admission and the residence of TCNs will be treated separately, thus the immigration on the

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<sup>63</sup> Council Resolution of 4 March 1996 on the status of third-country nationals residing on a long-term basis in the territory of the Member States, Official Journal C 080, 18/03/1996 P. 0002 - 0004

<sup>64</sup> Proposal for a Council Act establishing the Convention on rules for the admission of third-country nationals to the Member States, OJ C 337, 7.11.1997

<sup>65</sup> See Article 63(3) and 63(4) of the EC Treaty; now. Article 79 TFEU

<sup>66</sup> Communication from the Commission to the Council and the European Parliament on a Community immigration policy, COM (2000) 757

grounds of humanitarian reasons, family reunification and economical reasons will be negotiated in different directive proposals.

After preparing several studies, the Commission introduced the proposal of Directive 2003/109/EC in March 2001. The creators' aim in the first place was to grant long-term residents coming from third countries a more secure status in the EU. They also wanted to attach certain rights to this status, namely the freedom to reside in the host member state and the right to receive equal treatment with the host country's nationals. And last but not least, in order to end immigrants' problem of being 'attached' to one member state, the right to move freely between member states. After two years of long negotiations the Council finally adopted the Directive on 25 November 2003, but with serious modifications which will be described in the following section. It is worth to note that just like its adoption; the implementation of the Directive was not easy at all either. The Commission had to initiate infringement procedures against three member states, including Portugal, Spain and Luxembourg for not implementing the Directive in time.<sup>67</sup>

### ***3.3 Scholars' responds to the Directive***

Comparing the text of the Commission's proposal with the actually adopted Directive, one can see that once again member states' hesitation to agree on a piece of legislation placing restrictions on their autonomy prevailed over their will to act on the Community level, therefore objected to pass the Directive in its original form. "In the end the final version was passed in a rather diluted form"<sup>68</sup> and reflected member states' stance to follow a restrictive, reactive immigration policy. According to certain radical opinions, even the proposal drafted

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<sup>67</sup> Judgement of the Court of 27 September 2007 in case C-5/07 Commission v. Portugal; Judgement of the Court of 15 November 2007 in case C-59/07 Commission v. Spain; Judgement of the Court of 29 November 2007 in case C-34/07 Commission v. Luxembourg

<sup>68</sup> Carrera *ibid*, p173.

by the Commission did not live up to the expectations previously attached to it, since the proposal only extended the freedom of movement provided by EU law to TCNs, strengthening their legal status, but did not take into consideration the initial aim, which was to stimulate the integration of long-term residents by providing equal treatment to them in the host state.<sup>69</sup>

Halleskov<sup>70</sup> and Kocharov<sup>71</sup> are on the same opinion, when stressing that the Directive once again proved "Member States' distinct lack of willingness to surrender sovereignty in the sensitive area of immigration policy".<sup>72</sup> The extra criteria required from TCNs in order to practice their freedom of movement showed that member states refrained to place them on equal basis with EU citizens, who were granted this right before in the 2004/38/EC Directive. Carrera however was a little bit more optimistic and tried to look at the positive side of the adoption of the Directive. In his opinion "although the Directive only creates the minimum standards for member states, at least it turns TCNs into 'visible members' of the host country's society".<sup>73</sup>

In the proceeding sections the paper will examine whether making TCNs 'visible' in the member states was the only benefit of the Directive or if it managed to fulfill its goals set up in its Preamble, thus "constitute a genuine instrument for the integration of long-term residents into society in which they live, long-term residents should enjoy equality of treatment with citizens of the Member State in a wide range of economic and social matters, under the relevant conditions defined by this Directive".<sup>74</sup>

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<sup>69</sup> See inter alia Groenendijk *ibid*, p434. and Kees Groenendijk: Legal Concepts of Integration in EU Migration Law, In: European Journal of Migration and Law, Volume 6, Number 2 2004, p111.

<sup>70</sup> Halleskov, Louise: The Long-term Residents Directive: A Fulfilment of the Tampere Objective of Near. Equality? In: European Journal of Migration and Law 7/2005, p181-201.

<sup>71</sup> Kocharov, Anna: What intra-Community Mobility for Third-Country Workers? In: European Law Review, Vol. 33, No. 6 December 2008, p913-926

<sup>72</sup> Halleskov *ibid*, p181.

<sup>73</sup> Carrera *ibid*, p183.

<sup>74</sup> Preamble of Council Directive of 2003/109/EC, point 12.

### 3.4 Personal scope of the Directive

The personal scope of the Directive covers all TCNs who have resided legally and continuously within the territory of a member state for five years.<sup>75</sup> However, the Directive does not define what it means by "legal residence", which raised the question whether it is up to member states' national law or the law of the Union to decide the criteria of legal residence. Indeed the issue was important because if it had been up to the member states to declare what they meant by legal residence the Directive could have been interpreted differently in each member state, thus losing its effectiveness. This was not desirable, since the Directive permits long-term residents to move freely across member states; therefore it is in the interest of member states to know how the TCNs were granted the long-term resident status. According to Peers<sup>76</sup> what the Directive means by legal residence has to be determined by the criteria of EU law, otherwise the drafters would have used the term "in accordance with member states' national law", like they did in many other cases<sup>77</sup>.

Using the concept of the Union provides a not so restrictive interpretation of the term "legally resident". If we look at the directive regulating the status of the EU citizens and their family members<sup>78</sup> we can see that it considers residence to be legal even if the person concerned entered the territory of the given member state by infringing its administrative rules of admission and residence<sup>79</sup>. The LTRD also includes a similar article, where it states that "the expiry of a long-term resident's EC residence permit shall in no case entail withdrawal or loss of long-term resident status".<sup>80</sup>

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<sup>75</sup> Article 4 (1) of LTRD

<sup>76</sup> Steve Peers: Implementing Equality? The Directive on long-term resident TCNs , European Law Review Vol. 4, No 29. 2004, p445.

<sup>77</sup> For example: Article 4(3) and 5 (2) of Directive 2003/109/EC

<sup>78</sup> European Parliament and Council Directive 2004/38/EC of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States

<sup>79</sup> See paragraph 11 of Directive 2004/38/EC and Article 9 (3) which states that in the case of EU citizens' TCN family member fails to comply with the host state's administrative formalities can only be sanctioned by "proportionate and non-discriminatory sanctions"

<sup>80</sup> Article 9 (6) of LTRD

The personal scope of the Directive originally was meant to be wider, but following the modifications proposed in the Council, it was decided to exclude several groups of people from falling under the scope of the act, such as TCNs residing in a member state for the purpose of studies or vocational training, refugees, au-pairs and seasonal workers and persons under temporary or subsidiary form of protection.<sup>81</sup> Here again, the will of member states prevailed over the more liberal policy of the Commission. Most of the confusion was around the interpretation of the last phrase of Article 2 (e), which excluded people whose "residence permit has been formally limited". In Peer's opinion it has to be in the EU's competence to determine the definition of a limited residence permit. Letting member states to do that would lead to a stretched definition and would give member states the opportunity to exclude several TCNs from the personal scope of the Directive.<sup>82</sup>

Last but not least it is worth noting that the intention of the TCN when entering the territory of a member state and the grounds of his/her residence are indifferent when acquiring the long-term resident status. The fixation of this requirement is very important due to the fact that this way the EU has 'freed' TCNs from being captured in their legal status they possessed at the time they entered the EU.

### ***3.5 Rules of acquiring the long-term resident status and residence permit***

TCNs in order to acquire the long-term resident status have to fulfill three criteria. First of all the Directive requires a five year long period of legal and continuous residence in one of the member states, immediately prior to the submission of the application.<sup>83</sup> The harmonisation of this time period was not easy in the Council, since before the adoption of the Directive most of the member states required a much longer period of residence from TCNs.

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<sup>81</sup> See Article 3 (2) of LTRD

<sup>82</sup> Peers *ibid*, p 443.

<sup>83</sup> See Article 4 (1) of LTRD



Therefore the acceptance of the five year requirement can be considered as a positive achievement from the third country immigrants' point of view. The two other conditions specify the obligation for TCNs to provide evidence that they have for themselves and for their dependent family members sickness insurance in respect of all risks<sup>84</sup> and "stable and regular resources which are sufficient to maintain [themselves], without recourse to the social system of the Member State concerned"<sup>85</sup>. Comparing these provisions with the ones set out for EU citizens in the 2004/38/EC directive on family reunification, one can see that the conditions are much stricter for TCNs. Firstly, in the case of TCNs member states are "required" to ask for evidence that they have stable and regular resources, however in the case of EU citizens member states "may require" evidence, therefore they have the possibility to decide whether they want such proof or not.<sup>86</sup> Member states' obligation to "evaluate these resources by reference to their natura and regularity", as set up in Article 4 (1) (a) of the Directive provide them an opportunity for wide discretion, which again is discriminatory for TCNs, since in the case of EU citizens these resources do not have to be regular.

The requirement to have "sickness insurance in respect of all risks" is also discriminatory in the opinion of some scholars, since they argue that in a growing number of member states such sickness insurance is only available through a complementary private insurance.<sup>87</sup> Although it is understandable that long-term residents should not constitute a burden on host countries' social security system, the demanding provisions of the Directive seem to be surprising, since long-term residents can be legally residing in a member states without having a job with regular income.

The above mentioned conditions can be criticized but are quite straight forward compared to the provision of article 5 (2) of the Directive, which allows host member states to

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<sup>84</sup> Article 5 (1) (b) of LTRD

<sup>85</sup> Article 5 (1) (a) *ibid*

<sup>86</sup> Article 8 (3) and (4) of Council Directive 2004/38/EC

<sup>87</sup> Gellérné Lukács Éva and Gyulavári Tamás:: A legális és az illegális bevándorlók jogai az Európai Unióban (The rights of legal and illegal migrants in the European Union), In: Európai Tükör. Budapest, 2005. 10 (4), p 65.

require "TCNs to comply with integration conditions, in accordance with national law". The necessity of integration into the host society seems acceptable and forms an important part of the Directive, as it is mentioned twice in the Preamble of the Directive<sup>88</sup>, however giving member states the discretionary power to decide whether a TCN is "integrated" or not in the society has been criticized by many scholars, seen to be a paradox and a 'weak point' of the Directive.

According to Carrera, the most problematic factor is that the Directive itself does not provide any methods on how the integration clause should be applied.<sup>89</sup> Therefore it is absolutely up to member states to decide who can be considered "integrated", placing regulations of their national law above EU law and legitimizing their discriminative requirements, which are often used as means of migration control.<sup>90</sup> Letting member states to define the conditions of integration therefore may harm the effectiveness and aim of the Directive

It should not be a surprise that the proposal of the Directive did not include Article 5 (2), however due to the pressure coming from Austria, Germany and The Netherlands it was included in the final version. At the same time these countries' effort to require long-term residents to pass the integration test in other member states in case of moving was not included in the end, which is a great achievement in the opinion of Carrera. He considers this to be a sign of member states' mutual recognition of each others integration tests.<sup>91</sup>

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<sup>88</sup> Point 4 of the Preamble: "The integration of TCNs who are long-term residents in the Member States is a key element in promoting economic and social cohesion, a fundamental objective of the Community stated in the Treaty " and point 12 of the Preamble: "In order to constitute a genuine instrument for the integration of long-term residents into society in which they live, long-term residents should enjoy equal treatment with citizens of the Member State in a wide range of economic and social matters..."

<sup>89</sup> Carrera *ibid*, p193.

<sup>90</sup> See *inter alia*: Guild – Groenendijk – Carrera: Understanding the Contest of Community Illiberal Practices in the EU? p1-28 and Kostakopoulou – Carrera – Jesse: Doing and Deserving: Competing Frames of Integration in the EU , p167-186 In: Guild et al (ed): Illiberal Liberal States. Immigration, Citizenship and Integration in the EU, Ashgate 2009 p1-28; Carrera – Wiesbrock: Civic Integration of TCNs. Nationalism versus Europeanisation in the Common EU Immigration Policy, CEPS working papers, 2009 <http://www.ceps.eu/ceps/download/2179>; Halleskov *ibid*.

<sup>91</sup> Carrera – Wiesbrock *ibid*.

The question of who should be responsible for setting up the integration conditions, the member states or the EU has been on the agenda for quite a while. The Commission has always been fighting for a common integration policy, applicable in all twenty-seven member states in the same way. In 2000 it already released its integration policies<sup>92</sup>, emphasizing the necessity for immigrants to be self-supporting, but also the importance of treating them according to the principles set up by the international conventions on human rights. After the Thessaloniki Council meeting the Council adopted the so-called common integration principles<sup>93</sup>, which again emphasized that integration has to aim at including immigrants in the host country's job market and for them to become active citizens, but not mentioning the importance of democratic values and human rights.

The European Pact on Immigration and Asylum<sup>94</sup> adopted at the end of the French presidency in 2008 also wanted to create a more harmonized integration policy on the EU level, especially for the sake of long-term residents. However, in the opinion of Carrera and Guild the Pact is driven by the guiding principles of nationalism and intergovernmentalism. They argue that "while [the Pact] has been presented as 'European' (...) its adoption will weaken the possibilities for the EU to fully accomplish a 'common' and harmonized immigration and asylum policy that is coherent, global and integrated. The Pact is very much oriented towards member states' interest and it is driven by a predominantly intergovernmental logic, prioritizing the competences of the member states over those of an EU at 27".<sup>95</sup> Currently, their point of view seems to guide the integration policy of member states, providing them the discretion to decide the conditions of integration and keeping control over whom they grant the long-term residence permit.

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<sup>92</sup> Commission Communication on a Community immigration policy, COM (2000) 757, 22 November 2000.

<sup>93</sup> Common Basic Principles for Immigrant Integration Policy in the European Union, 2004

<sup>94</sup> European Pact on Immigration and Asylum, European Council, 15-16 October 2008

<sup>95</sup> Carrera, Sergio – Guild, Elspeth: The French Presidency's European Pact on immigration and Asylum: Intergovernmentalism vs. Europeanisation? Security vs. Rights? CEPS Policy Brief 2008.

Member states also have the right "to refuse to grant long-term resident status on grounds of public policy or public security"<sup>96</sup>, which again provides them the opportunity to practice their discretionary power when deciding whom they give the long-term resident status. According to the provisions of the Directive member states have to judge each case separately, based on the severity of the offence and with "proper regard to the duration of residence and to the existence of links with the country of residence".<sup>97</sup>

Other than the above described, no further conditions can be set up by the member states. Therefore if the TCN fulfills the described requirements and hands in its application according to the Directive, becomes eligible to acquire the long-term resident status and the supplementary long-term resident's EC residence permit.<sup>98</sup> According to Guild it would be impossible that after the obligation to meet so many criteria and with member states having so much discretion, to give further powers to the host country in deciding whether or not they grant the long-term resident status to the TCN.<sup>99</sup>

After lodging the application and the necessary documents proving the fulfillment of the required conditions to the competent authorities, member states have no more than six month to notify the applicant of their decision. However the Directive does not regulate the consequences if member states fail to decide, it just refers to the law of the relevant states. Groenendijk criticizes the Directive for not letting long-term residents fulfilling the criteria of the Directive to refer to their rights directly until they do not get the residence permit.<sup>100</sup> Here again, TCNs are disadvantaged compared to EU citizens, who can *ipso iure* exercise their rights provided by the 2004/38/EC Directive, if they fulfill its requirements, given that their residence permit has only declaratory effect.

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<sup>96</sup> Article 6 (1) of LTRD

<sup>97</sup> See *ibid*

<sup>98</sup> Halleskov *ibid*, p187.

<sup>99</sup> Guild, Elspeth.: Discretion, Competence and Migration in the European Union, In: European Journal of Migration and Law Volume 1, Number 1, 1999 , p. 61-87

<sup>100</sup> Groenendijk *ibid*, p436-37.

If the applicant's long-term resident status is rejected, "the person concerned shall have the right to mount a legal challenge in the Member State concerned".<sup>101</sup> That is all what the Directive says about the TCN's right to legal remedy, which is very problematic in the opinion of Carrera, considering the significance and importance of the matter. According to him, such an essential issue should not be left to the domestic law of the member state, but regulated by EU law.<sup>102</sup> However, concerning the aims of the Directive, it is presumable, that the applicant can lodge its application again, if it was rejected in the first place.

It is very important to note that once the long-term residence permit is granted, other member states have to recognize it and can not reject it on the grounds that it was issued by another state. Of course, under extraordinary circumstances this rule can be neglected. This principle of mutual recognition was followed by the ECJ in the Defaki case, when the Court ruled that "in proceedings for determining the entitlements to social security benefits of a migrant worker who is a Community national, the competent social security institutions and the courts of a Member State must accept certificates and analogous documents relative to personal status issued by the competent authorities of the other Member States, unless their accuracy is seriously undermined by concrete evidence relating to the individual case in question".<sup>103</sup>

Finally, according to the Directive the status of a long-term resident is permanent, although the residence permit is only valid for five years but automatically renewable upon application.<sup>104</sup> Cases of withdrawal and loss of the status are listed in Article 9 of the Directive. The cases described in Article 9 (4), which state that the long-term resident is not entitled to keep its long-term resident status in one member state, if he/she is granted such status in another member state or also loses the status "after six years of absence from the

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<sup>101</sup> See Article 10 (2) of LTRD

<sup>102</sup> Carrera *ibid*, p187

<sup>103</sup> Judgement of the Court of 2 December 1997 in case C-336/94 Eftalia Dafeki v. Landesversicherungsanstalt Württemberg

<sup>104</sup> Article 8 (1) and (2) of LTRD

territory of the member state which granted the long-term resident status " restricts the long-term resident's freedom to move and reside across member states, raising a lot of issues, which will be analysed later below.

### **3.6 The rights attached to the long-term resident status**

#### **3.6.1 The right to enjoy equal treatment with host country nationals**

Long-term residents are granted the right to reside permanently in the host country and enjoy equal treatment with its nationals in cases listed by the Directive.<sup>105</sup> Even though the second paragraph of Article 11 provides member states the option to restrict some of these rights in certain cases<sup>106</sup>, the inclusion of the equal treatment principle is a great achievement of the Directive and brought a huge change in the status of TCNs who have been residing in one of the member states for a long period.

According to Groenendijk the Directive serves as a *standstill clause* in the listed fields, and protects TCNs from the provisions of the national law, which would restrict their rights. In his opinion Article 11 and 21, granting long-term residents the equal treatment with nationals of the host country compliment the provisions of Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin. While the latter directive provides the prohibition of discrimination on the grounds of race, the Long-term Resident Directive prohibits discrimination of long-term residents on the grounds of their nationality.<sup>107</sup> Halleskov, on the other hand is not so satisfied with the Directive. In her opinion the phrasing of the equal treatment article may lead to some doubts,

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<sup>105</sup> See Article 11 (1) of LTRD

<sup>106</sup> Such cases include: educational and vocational training, including study grants; social security, social assistance and social protection; tax benefits; access to goods and services and the supply of goods and services made available to the public and to procedures for obtaining housing; freedom of association and affiliation.

<sup>107</sup> Gronendijk *ibid*, p434.

whether the Union itself really believes that after legally residing in one of the member states for at least five years and fulfilling the conditions set up in the Directive, TCNs will have the right to total equal treatment.<sup>108</sup>

If one compares Article 24 of the Directive on the right of citizens of the Union and their family members<sup>109</sup> with the provisions of the Long-term Resident Directive, one can see that in the case of EU citizens and their family members the right to equal treatment can be applied in a much wider scope, basically it covers the whole scope of the Treaty, whereas in the case of long-term residents the Directive lists the fields where equal treatment has to be provided and does not require its general application. In the opinion of Gyeney, no matter how restrictive the Long-term resident directive might be in providing equal treatment, it still covers the most important and sensitive aspects of long-term residents' daily life, including their right to reside and work freely in the host country, which should definitely be regarded as a positive change<sup>110</sup>. Of course this does not mean that further changes and the wider application of the principle of equal treatment would not be necessary.

However satisfied some scholars may be with the outcome of the Directive, it is true that the draft of the Commission proposed a much more liberal concept, but during the negotiations in the Council's Working Group, member states aiming at a more stricter policy towards immigrants achieved to cut back certain proposals by the Commission, therefore accepting the principle of equal treatment in a restrictive manner. Signs of this restrictive policy can be seen almost at the end of every provision, signaled by the terms "in accordance with national law" or "in accordance with the relevant national procedures". But the biggest "achievement" of the restrictive member states was the adoption of paragraph two of Article

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<sup>108</sup> See: Halleskov *ibid*, p189.

<sup>109</sup> Article 24 (1) of Council Directive 2004/38/EC: "Subject to such specific provisions as are expressly provided for in the Treaty and secondary law, all Union citizens residing on the basis of this Directive in the territory of the host Member State shall enjoy equal treatment with the nationals of that Member State within the scope of the Treaty. The benefit of this right shall be extended to family members who are not nationals of a Member State and who have the right of residence or permanent residence. "

<sup>110</sup> Gyeney *ibid*, p 335.

11, which lets member states restrict equal treatment in cases when the registered or usual residence of the long-term resident is in the concerned member state.

This geographical restriction concerns long-term residents who reside in another member state, in accordance with their right to move freely across member states, but without acquiring the long-term residence permit in that second state. In cases like this, the member state who issued the long-term residence permit can restrict the equal treatment of this resident, since physically he or she does not live on its territory, but enjoys the benefits provided by it.<sup>111</sup> This provision seems to reflect the general idea of the necessity to integrate TCNs and long-term residents into the host member state's society and excluding the possibility of having relations with more than one member state at once, as mentioned in Chapter one.

### 3.6.2 The right to access employment and self-employed activity

The rules regarding long-term residents' right to access employment and self-employed activity are very similar to the ones applied in the case of EU citizens. EU law only accepts exceptions under the principle of non-discrimination on the grounds of public order, public safety and public health or if language proficiency is necessary to do the job. The only difference in the case of long-term residents is that they can not exercise public authority, not even occasionally.<sup>112</sup>

The Directive, in a separate paragraph<sup>113</sup> enables member states a discretionary option to restrict access to employment by reserving certain activities to their own nationals, EU or EEA citizens in accordance with existing national or Community legislation. This provision –

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<sup>111</sup> Halleskov *ibid*, p193.

<sup>112</sup> See Article 11 (1) (a) of LTRD

<sup>113</sup> See Article 11 (3) (a) of LTRD



again - lets member states to discriminate between TCNs and EU citizens, which is quite problematic, considering the fact that what the Directive means by "in accordance with existing national or Community legislation" and the circle of activities which can be reserved is not defined, therefore member states can refer to this exemption on a wide basis.<sup>114</sup>

### 3.6.3 Education, vocational training and study grants

The Directive provides long-term residents the rights to education, vocational training and study grants in accordance with the national law of the host member state.<sup>115</sup> The Commission in its proposal wanted to grant these rights without any limitations, however, according to the actual Directive member states can ask for a language proficiency to allow long-term residents to access education and training.<sup>116</sup> This requirement is justifiable, until host member states start using it without applying any proportionality test.

Nevertheless, TCNs may be required to attend language courses as a condition of integration. Even taking into consideration all the above mentioned facts it can still be argued that long-term residents are not disadvantaged to EU citizens, whose right to access financial support in other member states can be restricted by the host state as well. The Court ruled for example in the *Bidar* and *Förster* cases conditions set up by host member states to restrict access to financial support for EU citizens can be considered justifiable and not violating the principle of equal treatment .<sup>117</sup>

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<sup>114</sup> Placing this provision in a separate paragraph was probably due to the upcoming enlargement in 2004, thus the EU wanted to "protect" the new member states' citizens from having to compete with TCNs.

<sup>115</sup> See Article 11 (1) (b) of LTRD

<sup>116</sup> See Article 11 (3) (b) of LTRD

<sup>117</sup> In the *Bidar* case the Court rules that if a student's financial position changes with the passage of time, this cannot automatically have adverse effects upon his right of residence. However at the same time it is legitimate for a Member State to grant such assistance only to students who have demonstrated a certain degree of integration into the society of that State. (Case C-209/03 *Bidar*). In the *Förster* case it also decided that it is legitimate for a Member State to grant assistance covering maintenance costs only to students who have demonstrated a certain degree of integration into the society of that State. In that regard, the existence of a certain degree of integration may be regarded as established by a finding that the student in question has resided in the host Member State for a certain length of time. (Case C-158/07 *Förster*)

### 3.6.4 Recognition of professional diplomas, certificates and other qualifications

Before the Directive was adopted, when TCNs arrived to the EU in the possession of a professional diploma or other qualifications they often bumped into the fact that the host member state did not recognize these certificates, therefore restricting immigrants to access any professional jobs. The Commission recognized this issue and proposed that long-term residents' diplomas should be acknowledged in the host country similarly in the case of EU citizens. The Court during the 1990s already ruled in favor of the EU citizens.<sup>118</sup> However, member states achieved to place the term "in accordance with the relevant national procedures" in the paragraph, granting discretionary competence to the host country's authorities.<sup>119</sup>

A positive sign for a change for long-term residents can be the Court's recent case law. While in the Haim case the ECJ ruled that member states when recognizing qualifications awarded by non-member states only have to follow rules of their own national law<sup>120</sup>, the Court changed its opinion in the Hocsman case, where it dealt with diplomas acquired in a non-member state. In the case French authorities did not want to recognize Mr. Hocsman's diploma in medicine acquired in Argentina, although the Spanish authorities did so previously. The Court ruled that according to the case-law, which "is the expression of a principle inherent in the fundamental freedoms of the Treaty" national authorities have to "take into account, where practice of the specialisation in question depends on possession of a diploma

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<sup>118</sup> See Judgement of the Court of 31 March 1993 in case C- 19/92 Dieter Kraus v. Land Baden- Württemberg point 23 where the Court ruled that "the situation of a Community national who holds a postgraduate academic title which, obtained in another Member State, facilitates access to a profession or, at least, the pursuit of an economic activity, is governed by Community law, even as regards the relations between that national and the Member State whose nationality he possesses."

<sup>119</sup> Article 11 (1) (c) of LTRD

<sup>120</sup> Judgment of the Court of 9 February 1994 in case C-319/92 Salomone Haim v Kassenzahnärztliche Vereinigung Nordrhein, "the recognition by a Member State of qualifications awarded by non-member States, even if they have been recognized "

or on professional experience, all the diplomas, certificates and other evidence of formal qualifications of the person concerned, and his relevant experience, and carry out a comparison between the specialised knowledge and abilities attested by those qualifications and that experience and the knowledge and qualifications required by the national rules".<sup>121</sup>

In the opinion of Craig and De Burca this means that member states are obliged to recognise professional certificates in the above mentioned cases, even if they were acquired outside the EU<sup>122</sup>, which is a positive change for long-term residents.

### 3.6.5 The right to access social protection

According to the Directive long-term residents shall enjoy equal treatment with host country nationals in accessing "social security, social assistance and social protection as defined by national law"<sup>123</sup>, but "Member States may limit equal treatment in respect of social assistance and social protection to core benefits".<sup>124</sup>

The original draft of the Commission was, not surprisingly, more generous with long-term residents and basically wanted to put them in an equal place with EU citizens, but member states refrained from accepting the Directive in its original form. They only agreed to add a paragraph, which provided them the possibility to grant equal treatment in areas not covered by the Directive.<sup>125</sup>

Nevertheless, regulations accepted afterwards, coordinating the social security systems of member states extended the application of social security schemes to TCNs residing legally on the territory of a member state, strengthening and broadening the rights enjoyed by long-

<sup>121</sup> See Judgement of the Court of 14 September 2000 in case C-238/98 *Hugo Fernando Hocsman v. Ministre de l'Emploi et de la Solidarité* and Press Release No. 59/00 of the Court

<sup>122</sup> Paul Craig and Grainne de Burca: *EU Law* 3rd edition, Oxford University Press 2002., p780-781.

<sup>123</sup> Article 11 (1) (d) of LTRD

<sup>124</sup> Article 22 (4) *ibid*, as for what the Directive means by "core benefits" paragraph 13 of the Preamble can provide help, where it states that core benefits have to cover at least minimum income support; assistance in case of illness, pregnancy, parental assistance and long-term care

<sup>125</sup> Article 11 (5) *ibid*.

term residents.<sup>126</sup> These regulations were in accordance with Article 34 (2) of the Charter of Fundamental Rights, which declares that "Everyone residing and moving legally within the European Union is entitled to social security benefits and social advantages in accordance with Community law and national laws and practices."

However, some scholars are still not satisfied with the rights provided by the Directive, arguing that member states will do everything to restrict long-term residents' access to social benefits, which does not help the integration of the long-term residents and will not enhance the cohesion of the society.<sup>127</sup> According to others, these critics are quite harsh and exaggerated, considering the fact that member states' will to decrease their public expenditures is understandable, but when member states decide what social benefits they grant to non-nationals they should look at the fact, what did TCNs during their long stay in the given state add to the country's economic growth.<sup>128</sup>

### ***3.7 The right of long-term residents to reside in other member states***

With the adoption of the immigration policy directives, the EU proved that it wants to attract workers to the EU, to enhance its competitiveness on the labour market.<sup>129</sup> However, it also noticed that restricting the mobility of legally resident TCNs across member states constraints this goal. Before the directives were adopted, if TCNs who were legally residing in one member, wanted to move to another member state for more than three months had to

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<sup>126</sup> Council Regulation (EC) No 859/2003 of 14 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 those provisions solely on the ground of their nationality;  
Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems.; and  
Regulation (EU) No 1231/2010 of the European Parliament and of the Council of 24 November 2010 extending Regulation (EC) No 883/2004 and Regulation (EC) No 987/2009 to nationals of third countries who are not already covered by these Regulations solely on the ground of their nationality.

<sup>127</sup> Halleskov *ibid*, p197.

<sup>128</sup> Gyeney *ibid*, p344.

<sup>129</sup> Gyulavári – Gellérné *ibid*, p47-75.

go over the same procedure as if they were entering the EU for the first time and coming from a third country. This was absolutely against the concept of enhancing the free movement of workers on the single market and at the same time increased the chance of illegal migration in the Union without inner borders.<sup>130</sup>

Taking into account these deficiencies the Council adopted directives granting not all TCNs, but only to certain groups<sup>131</sup> the right to move freely across member states and in case of fulfilling certain conditions, to reside in another member state for more than three months. With these provisions the EU aimed at converging TCNs' right to free movement within the EU to those granted to EU citizens.

However, the final versions of the adopted directives received several criticism from scholars, who argued that there are several potential advantages lying in these directives, but the rights granted to TCNs are not even close to the rights of EU citizens and do not fulfill the requirements of converging the status of these two groups set up in the Tampere Programme.<sup>132</sup> The main points of criticism of the Long-term Residents Directive can be grouped around two main issues. Firstly, the administrative procedures set up by the second member states and secondly the question of whether the long-term residents enjoy equal treatment in the second member state, especially when wanting to access the labour market of this second state. These two issues will be examined in the following sections. According to the first group of criticism, the main advantage of granting the freedom of movement across member states should be the abolition of the administrative procedures that TCNs have to pass when moving to another member state and which is granted to EU citizens and their family members by directive 2004/38/EC, but this does not appear in the Long-term Resident

<sup>130</sup> Anja Wiesbrock and SergioCarrera: Whose citizenship to empower in the Area of freedom, security and Justice?, CEPS Working Document, 2010, p22.

<sup>131</sup> The right is granted to long-term residents according to LTRD, to TCNs with student status or researchers according to Council Directives 2004/114/EC and 2005/71/EC and to highly qualified third country employees holding the blue card according to Council Directive 2009/50/EC

<sup>132</sup> Inter alia: Sara Iglesias Sanchez: Free movement of TCNs in the European Union? Main features, deficiencies and Challenges of the new mobility right sin the Area of Freedom, Security and Justice, European Law Journal, Volume 15 Issue 6 November 2009, p791-805.

Directive.<sup>133</sup> Thus, currently if long-term residents wish to reside in another member state for more than three months they have to acquire a residence permit in that member state as well. When issuing the residence permit the Directive grants second member states several opportunities to restrict the number of TCNs entering their territory, which in reality makes the long-term residents' freedom of movement within the EU questionable.

Member states have the possibility to require evidence from long-term residents wanting to reside on their territory proof that they have stable and regular income and sickness insurance<sup>134</sup> and they can refuse to issue the residence permit on the grounds of public security, public policy and in addition on the grounds of public health.<sup>135</sup> This latter condition is not new, since it can be found in the 2004/38/EC directive concerning the status of EU citizens and their family members, however it is surprising that it is not provided for member states who issue the long-term residence permit for the first time<sup>136</sup>, but in the case when the TCN has already been granted long-term resident status in one member state and wants to move to another one.

Even if long-term residents would pass these conditions member states have two other means provided by the Directive, which they can use in order to control the number of incoming TCNs. They can require TCNs to comply with integration measures set up by their national law and can limit the number of TCNs wanting to exercise economic activity on their territory on the basis of their labour market situation.<sup>137</sup> These provisions grant member states huge discretionary power and constitute limitations on achieving the aim of the Directive to abolish the inner borders for long-term residents as well, thus enhancing the mobility of people in the EU.

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<sup>133</sup> Guild, Elspeth: Citizens Without a Constitution, Borders Without a State: EU Free Movement of Persons?, In: A. Baldaccini, E. Guild and H. Toner (eds.): *Whose Freedom, Security and Justice, EU Immigration and Asylum Law*, Oxford Hart 2007, p26.

<sup>134</sup> Article 15 (2) of LTRD

<sup>135</sup> See Article 17 and 18 of LTRD

<sup>136</sup> See Article 6 (1) of LTRD which only mentions: "Member States may refuse to grant long-term resident status on grounds of public policy or public security."

<sup>137</sup> See article 15 (3) and 14 (3) of LTRD

The optional nature of the conditions required by member states and their inconsistent interpretation results in the fact that the circle of grantees vary across member states and stands in the way of a unified and common policy in the EU.<sup>138</sup> If member states would like to have a common understanding in this field, EU citizens' unified right to move and reside freely in the Union should be followed. With the present conditions long-term residents are not motivated to move across member states, since the chance for them to acquire residence permit in another member state is very little. It is up to member states if they will exercise these means to control the inflow of long-term residents, but knowing the fears of national governments, the chance of changing the present regulations are very minimal.

Another sensitive issue is whether long-term residents moving to other member states are granted equal treatment in that member state or not. In Groenendijk's opinion the Directive just took over the already existing principle of freedom of movement and applied it to TCNs resident in one of the member states without actually providing them the right to equal treatment in the second one.<sup>139</sup> The non-coherent approach towards TCNs' right to move freely across the Union therefore is not helpful but harms their rights attached to the resident status.

Although the Directive states that if the long-term resident complies with the negative and positive criteria, the second member state will issue the long-term resident and its family members the renewable residence permit;<sup>140</sup> it also states that long-term residents will only enjoy equal treatment with nationals of that second member state after they have received the permit.<sup>141</sup> This paragraph raises the question and concerns about long-term residents' status in the second member state, before acquiring the residence permit, since if we take the provision

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<sup>138</sup> See Halleskov *ibid*, p186 and Groenendijk: The Long-Term Residents Directive...*ibid*, p429 and 438.

<sup>139</sup> Groenendijk *ibid*, p434.

<sup>140</sup> Article 19 (2) and (3) of LTRD

<sup>141</sup> Article 21 (1) of LTRD: "As soon as they have received the residence permit provided for by Article 19 in the second Member State, long-term residents shall in that Member State enjoy equal treatment in the areas and under the conditions referred to in Article 11."

word for word it means that until the residence permit is not granted long-term residents do not enjoy equal treatment with the host country nationals. This is very alarming, considering the fact that in case of EU citizens the 2004/38/EC directive explicitly states that certificates of residence are not a precondition to exercise the rights attached to it.<sup>142</sup>

Taking into account the initial goals of the Commission, namely to increase the mobility of workers, and to remedy the temporary scarcity of labour support in member states, the final version of the Directive is not able to fulfill these goals. The actual provisions of the Directive reach the opposite effect and retain long-term residents to move within the EU. The provisions of the Directive provide member states several means to limit long-term residents' access to their labour market. Article 14 (3) lets member states to "examine the situation of their market" and may refuse the long-term resident's application for the residence permit on this ground, which undermines the principle of equal treatment.

Member states may also restrict access to employed activities different than those for which long-term residents of one member states have been granted their residence permit for a period not exceeding twelve months.<sup>143</sup> These provisions also constitute a limitation on an effective European labour market, since in the current system accessing labour depends on the sole decision of member states' authorities.

Long-term residents' right to equal treatment during job seeking is also a debated issue. When looking at the rights of EU citizens in this field one can see that legislation and case-law of the Court grants them a very positive and advantageous position during the period of job seeking. According to the regulation on the freedom of movement for workers within the

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<sup>142</sup> Article 25 of Council Directive 2004/38/EC: "Possession of a registration certificate as referred to in Article 8, of a document certifying permanent residence, of a certificate attesting submission of an application for a family member residence card, of a residence card or of a permanent residence card, may under no circumstances be made a precondition for the exercise of a right or the completion of an administrative formality, as entitlement to rights may be attested by any other means of proof."

<sup>143</sup> Article 21 (2) of LTRD: "Member States may provide that the persons referred to in Article 14(2)(a) shall have restricted access to employed activities different than those for which they have been granted their residence permit under the conditions set by national legislation for a period not exceeding 12 months. "



Community "a national of a Member State who seeks employment in the territory of another Member State shall receive the same assistance there as that afforded by the employment offices in that State to their own nationals seeking employment".<sup>144</sup> Such rights are not provided for long-term residents. However, in the opinion of Peers, they have to enjoy equal rights with nationals of the member states while seeking employment, in order for the freedom of residence not to lose its value and essence.<sup>145</sup>

Concluding the section one can see that the EU citizens' and long-term residents' right to move freely across member states is not equal yet. However, according to Sanchez one should not forget, that the aim of these regulations was different at the time of their adoption. Granting the freedom of movement for EU citizens was supported by member states and the Court of Justice in order to enhance the effectiveness of the single market.<sup>146</sup> On the other hand, member states while regulating long-term residents' legal status were more careful, granted them only functional and temporary rights, concentrating more on regulating their legal status in the first member state, and focusing less on their mobility and rights granted by the second member state.

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<sup>144</sup> Article 5 of Regulation 1602/68/EEC of the Council of 16 October 1968 on freedom of movement for workers within the Community

<sup>145</sup> Peers *ibid*, p455.

<sup>146</sup> Sanchez *ibid*, p799.

## Conclusions

The thesis analysed whether the goals set up by the Tampere Programme, namely to approximate third country nationals' legal status to those of the member states' nationals, thus narrowing the gap between third country nationals and EU citizens has been reached or not. Although several directives were adopted in the field of immigration policy I chose to examine the issue through the provisions of the 2003/109/EC Directive regulating the status of long-term residents in the EU, since it was the main aim of the Tampere Council to grant their group a set of "uniform rights which are as close as possible to those enjoyed by the EU citizens".

The major finding of the thesis is that although the fact itself that the EU has recognised the presence of these long-term resident third country nationals participating in the everyday life of the host member states is a positive step, the actual provisions of the Long-Term Residents Directive provide a very minimal harmonisation in the field, leaving member states several opportunities to exercise their discretionary powers. Going through the set of rights the Directive grants to long-term residents one can see that there is an exhaustive list of the domains where long-term residents can enjoy equal treatment with the nationals of the host member state. This already constitutes a huge difference between them and EU citizens, who according to the provisions of 2004/38/EC Directive on the right of citizens of the Union and their family members, shall enjoy, equal treatment with the nationals of the host Member State within the whole scope of the Treaty.

Although the list of rights granted by the Long-Term Residents Directive covers almost all aspects of the long-term residents' life, thus employment, education, social protection, but the fact that almost every provision makes it possible for member states to create exceptions on the grounds of their national law to grant equal treatment to long-term residents for practicing their rights derogates the effectiveness of the Directive. While

comparing the two groups' rights it can be seen that the long-term residents' biggest disadvantage is their much more limited right to move across member states. It is agreed that these provisions of the Directive need to be modified, since the movement of long-term residents is seriously restrained by the fact that even though they hold a residence permit from one member state they have to fulfill several conditions, possibly even an integration test to be admitted the same status in the second member state. Thus, if the Union wants to motivate the free movement of people within the EU generally, then it should remove these barriers.

The thesis also looked at the dynamics and conflicting interests around the creation of the Directive. Comparing the proposal of the Commission and the actually adopted text of the Directive and taking into account the possible approaches towards immigration policy making described in chapter one, one can conclude that the restrictive, reactive approach of member states prevailed over the more liberal approach of the Commission. These colliding approaches explain the final outcome of the Directive, which follows more the interest of member states to have control over the inflow of people to their territory. This leads to the criticism that if the Union sees itself as a promoter of democratic values and fundamental human rights then its approach towards immigration policy and immigrants should reflect this same outlook, not only on the level of Programmes but in the level of the legislation as well.

As it was pointed out this thesis only aimed at comparing the legal status of long-term residents and EU citizens in a normative perspective, on the level of the adopted pieces of legislation and did not look at the actual implementation of these acts. This can be the topic of future projects, since it would be interesting to see how these directives were implemented by member states and if they reached their aims to facilitate better long-term residents and third country nationals in general into the host society and into the EU. Although the current case-law of the Court on the topic is quite scarce, its future role in enforcing the provisions of the Directive will also be interesting, since if it follows its case-law regarding EU citizens it can

play a huge part in narrowing the gap between the two groups. As I touched upon it, extending the scope of Article 18 TFEU (ex article 12) or using the Charta's article on the principle of non-discrimination may be one way to assert the prohibition of discrimination on the grounds of nationality and the right to equal treatment in the case of third-country nationals residing in the EU.

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