



WORKING PAPERS

LAW 2015/07
Department of Law

Pretending There Is No Union:
Non-Derivative *Quasi*-Citizenship Rights
of Third-Country Nationals in the EU

Dimitry Kochenov and Martijn van den Brink

European University Institute
Department of Law

**PRETENDING THERE IS NO UNION: NON-DERIVATIVE
QUASI-CITIZENSHIP RIGHTS OF THIRD-COUNTRY NATIONALS
IN THE EU**

Dimitry Kochenov and Martijn van den Brink

EUI Working Paper **LAW** 2015/07

This text may be downloaded for personal research purposes only. Any additional reproduction for other purposes, whether in hard copy or electronically, requires the consent of the author(s), editor(s). If cited or quoted, reference should be made to the full name of the author(s), editor(s), the title, the working paper or other series, the year, and the publisher.

ISSN 1725-6739

© Dimitry Kochenov and Martijn van den Brink, 2015

Printed in Italy
European University Institute
Badia Fiesolana
I-50014 San Domenico di Fiesole (FI)
Italy
www.eui.eu
cadmus.eui.eu

Authors' Contact Details

Dimitry Kochenov
University of Groningen
d.kochenov@rug.nl

Martijn van den Brink
European University Institute
marinus.vandenbrink@eui.eu

Abstract

The enjoyment of some rights by third-country nationals in the EU is not dependent on the primary beneficiary of rights (be it a person or a company), thereby connecting the third-country nationals with the law of the Union directly, without any proxy. Moreover, in essence some of such rights are remarkably similar to the rights that EU citizens enjoy. Such directly enjoyable quasi-EU citizenship rights and their holders – many a category of third country nationals – constitute the key focus of this contribution, which aspires to walk through all the main statuses of third country nationals in the EU enjoying direct – as opposed to derivative – quasi-citizenship rights in the Union. Concluding such overview three significant interrelated problems with the way how third country nationals are treated in the EU are outlined:

1. EU migration regulation assumes the denial of the legal political reality of the Union;
2. EU migration regulation bars rationality from being taken into account when third country nationals' rights are at stake;
3. EU migration regulation sends a problematic signal that the goals and principles of the Union can be consistently ignored.

We argue that such treatment of the legal-political reality of the European integration project is most unhelpful and has to be changed.

Keywords

Third-country nationals, EU citizenship, EU citizenship rights

Table of Contents

INTRODUCTION 1

AN ASIDE: THIRD-COUNTRY NATIONALS AND THE SCOPE OF ARTICLE 45 TFEU 4

THIRD-COUNTRY NATIONALS AND EUROPEAN CITIZENSHIP RIGHTS 6

 ‘Any Person’ 6

 Third-country Nationals Who are Long-term Residents 6

 Sectoral Legislation 11

 Commonwealth Citizens Residing in the UK 16

 Third-country Nationals’ Rights under International Agreements 18

TO RENDER THE INVISIBLE VISIBLE (AS A CONCLUSION) 23

Introduction

The European citizenship rights, which, alongside the rising importance of the status of EU citizenship¹ as such came to play a vital role in the context of European constitutional architecture,² are not necessarily marked by exclusivity.³ Some such rights can be enjoyed by groups of third-country nationals and are thus not directly connected to the idea of possession of a European citizenship status. From the simple enumeration of different classes of persons who are not in possession of European citizenship and yet able to enjoy certain rights in the EU that can be characterised as genuinely similar – to some extent at least – to European citizenship rights in the Treaties,⁴ it becomes clear that Union law as it stands provides for a number of at times overlapping statuses for non-citizens of the Union, forming a highly sophisticated web of entitlements and obligations.⁵ For instance, a Turkish national covered by the Ankara agreement⁶ can also derive rights stemming from EU law as partner of an European citizen exercising free movement rights⁷ and, at the same time, enjoy the status of a long-term resident in the territory of the Community under the Directive 2003/109/EC on the status of third-country nationals who are long-term residents.⁸

¹ For analyses of the notion, see, Dimitry Kochenov, ‘The Essence of EU Citizenship Emerging from the Last Ten Years of Academic Debate: Beyond the Cherry Blossoms and the Moon?’ (2013) 62 *IntCompLQ* 97; Ferdinand Wollenschläger, ‘A New Fundamental Freedom beyond Market Integration: Union Citizenship and Its Dynamics for Shifting the Economic Paradigm of European Integration’ (2011) 17 *ELJ* 34; Koen Lenaerts, “‘*Civis europaeus sum*’”: From the Cross-border Link to the Status of Citizen of the Union’ (2011) 3 *Online J. Free Movement of Workers within the Eur. Community* 6.

² See, Dimitry Kochenov (ed), *EU Citizenship and Federalism: The Role of Rights* (CUP 2015) (forthcoming); Dimitry Kochenov, ‘The Right to Have *What* Rights? EU Citizenship in Need of Clarification’ (2013) 19 *ELJ* 502.

³ That citizenship rights in the Treaty are not reserved uniquely to citizens has been underlined on a number of occasions. See e.g. Vlad Constantinesco, ‘La cittadinanza dell’Unione: Una “vera” cittadinanza?’ in Lucia S Rossi (ed.), *Il progetto di Trattato-Costituzione: Verso una nuova architettura dell’Unione Europea* (Giuffrè 2004) 223, 227, focusing on the analysis of the exclusivity of citizenship rights in the Treaty Establishing a Constitution for Europe (which never entered into force), and Roy W Davis, ‘Citizenship of the Union ... Rights for All’ (2002) 27 *ELRev* 121, 136, focusing on the analysis of the exclusivity of citizenship rights in the Charter of Fundamental Rights of the European Union.

⁴ I.e. finding parallels with the rights listed in Part II TFEU.

⁵ Pavlos Eleftheriadis, ‘Citizenship and Obligation’ in Julie Dickson and Pavlos Eleftheriadis (eds), *Philosophical Foundations of European Union Law* (OUP 2012) 159; Dimitry Kochenov, ‘EU Citizenship without Duties’ (2014) 20 *ELJ* 482.

⁶ OJ 1963 3687; OJ 1977 L361/1. See, for the evolution of the complex relationship as applied to persons, Daniel Thym, ‘The European Court of Justice, Law, Politics and the EEC-Turkey Association Agreement’, in this volume and Kees Groenendijk, ‘The Court of Justice and the Development of EEC-Turkey Association Law’, in this volume.

⁷ ECJ, *Singh*, C-370/90, EU:C:1992:296; ECJ, *Metock*, C-127/08 EU:C:2008:449; ECJ, *O&B*, C-456/12 EU:C:2014:135. Steve Peers, ‘Free Movement, Immigration Control and Constitutional Conflict’ (2009) 5 *EuConst* 173; Alina Tryfonidou, ‘Family Reunification Rights of (Migrant) Union Citizens: Towards a More Liberal Approach’ (2009) 15 *ELJ* 634; Peter Van Elswege and Dimitry Kochenov, ‘On the Limits of Judicial Intervention: EU Citizenship and Family Reunification Rights’ (2011) 13 *EJML* 443.

⁸ Directive 2003/109/EC (OJ 2004 L 16/44). This Directive is the first significant step towards a certain harmonization of the treatment of the third-country nationals in the Community not based on derivative rights or international agreements with the third countries. Arguably, the Directive continued the process started with the Commission’s 1985 White Paper on Completing the Internal Market: European Commission, White Paper on Completing the Internal Market (COM(85) 310) para 55. For a compelling and meticulous analysis of the Directive, see Diego Acosta Arcarazo, *The Long-Term Residence Status as a Subsidiary Form of EU Citizenship* (Brill 2011); Anja Wiesbrock, *Legal Migration in the European Union* (Brill 2010).

Before the adoption of the Directive, the third-country nationals⁹ residing in the EU were mainly in possession of EU rights stemming from three sources: their connection with an EU citizen, resulting in a number of derivative rights;¹⁰ an employment relationship with a company using its right to provide services in the Member State other than its own, equally resulting in a number of derivative rights;¹¹ and international agreements concluded by the Union and the Member States with their countries of nationality.¹² The dynamic development of secondary Union law, from the Directive 2003/109/EC on, has greatly extended the set of rights enjoyed by third-country nationals, creating a picture of at times astonishing sophistication.¹³

⁹ For the assessment of the legal position of the third-country nationals in the EU *see e.g.* Wiesbrock (n 8); Georgia Papagianni, 'Free Movement of Third Country Nationals on the Eve of 1 May 2004: Another Missed Deadline?' in Domink Hanf and Rodolphe Muñoz (eds), *La libre circulation des personnes: États des lieux et perspectives* (Peter Lang 2007) 145; Martin Hedemann-Robinson, 'An Overview of Recent Legal Developments at Community Level in Relation to Third-country Nationals Resident within the European Union, with Particular Reference to the Case-law of the European Court of Justice' (2001) 38 CMLRev 525; Helen Staples, *The Legal Status of Third-country Nationals Resident in the European Union* (Kluwer Law International 1999); Ian Ward, 'Law and the Other Europeans' (1997) 35 JCommMrktStud 79; Steve Peers, 'Towards Equality: Actual and Potential Rights of Third-Country Nationals in the European Union' (1996) 33 CMLRev 8; Andrew Evans, 'Third-country nationals and the Treaty on European Union' (1994) 5 EJIL 199; Peter Oliver, 'Non-Community Nationals and the Treaty of Rome' (1985) 5 YbEuL 57; Sonia Morano-Foadi and Stelios Andreadakis, 'The convergence of the European legal system in the treatment of third country nationals in Europe' (2011) 22 EJIL 1071; Anja Wiesbrock, 'Granting Citizenship-related Rights to Third-Country Nationals: An Alternative to the Full Extension of European Union Citizenship' (2012) 14 EuJML 63; Daniel Thym, 'EU Migration Policy and its Constitutional Rationale: A Cosmopolitan Outlook' (2013) 50 CMLRev 709; Paula García Andrada, 'Privileged Third-country Nationals and Their Right to Free Movement and Residence to and in the EU: Questions of Status and Competence' in Elspeth Guild, Cristina Gortázar Rotaecche, and Dora Kostakopoulou (eds), *The Reconceptualization of European Union Citizenship* (Brill 2014) 111. It has been argued that third-country national permanent residents of one of the Member States of the European Union should be granted European citizenship equalizing their Treaty status with that of the nationals of the Member States: Michael A Becker, 'Managing Diversity in the European Union: Inclusive European Citizenship and Third-Country Nationals' (2004) Yale Hum Rts and Dev 132.

¹⁰ *E.g.* Art. 3 Directive 2004/38. *See* Cédric Chenevièvre, 'Régime juridique des ressortissants d'États tiers membres de la famille d'un citoyen de l'Union', in Domink Hanf and Rodolphe Muñoz (eds), *La libre circulation des personnes: États des lieux et perspectives* (Peter Lang 2007) 125; Van Elsuwege and Kochenov (n 7) Tryfonidou (n 7).

¹¹ ECJ, *Raymond Vander Elst*, C-43/93 EU:C:1994:310, para 21; ECJ, *Rush Portuguesa Lda*, C-113/89, EU:C:1990:142, para 12; ECJ, *Seco SA and Desquenne and Giral*, 62 and 63/81 [1982] ECR 223.

¹² Relevant agreements with a number of countries have been concluded. The most important of them are:

- Association Agreement with Turkey (Ankara Agreement) and an additional protocol to it (OJ 1963 3687; OJ 1977 L361/1); Customs Union with Turkey (OJ 1996 L 35);
- Euro-Mediterranean Agreement establishing an Association with Algeria (OJ 2005 L 265); Egypt (OJ 2004 L 304); Israel (OJ 2000 L 147); Jordan (OJ 2002 L 129); Lebanon (OJ 2006 L143); Morocco (OJ 2000 L 70); Tunisia (OJ 1998 L 97);
- Interim Association Agreement with the Palestinian Authority (OJ 1997 L 187);
- The EEA Agreement (OJ 1997 L1/1);
- EC – Switzerland Agreement (OJ 2002 L114/6);
- Stabilisation and Association Agreements with Macedonia (OJ 2004 L 84/13) Albania (OJ 2009 L 107/166) Bosnia and Herzegovina (OJ 2008 L 1689/13) Montenegro (OJ 2010 L 108/3) Serbia (OJ 2010 L 28/2).

¹³ Council Directive 2004/114/EC of 13 December 2004 on the conditions of admission of third-country nationals for the purposes of studies, pupil exchange, unremunerated training or voluntary service (OJ 2004 L 375/12); Council Directive 2005/71/EC of 12 October 2005 on a specific procedure for admitting third-country nationals for the purposes of scientific research (OJ 2005 L 289/15); Council Directive 2009/50/EC of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purposes of highly-qualified employment (OJ 2009 L 155/17); Directive 2011/98/EU of the European Parliament and of the Council of 13 December 2011 on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State (OJ 2011 L 343/1); Directive 2014/36/EU of the

The implications of this for the third-country nationals have been truly far-reaching, as it only reinforced a long-observable trend in the EU, where several groups of persons not boasting EU citizenship status now nevertheless enjoy the rights also popularly associated with the status of European citizenship. Especially the ‘quasi-citizenship’ rights of third-country nationals with direct, not derivative rights, are of interest here, since their enjoyment is not dependent on the primary beneficiary of rights (be it a person or a company), thereby connecting the third-country nationals with the law of the Union directly, without any proxy.

Such directly enjoyable *quasi*-EU citizenship rights and their holders – many a category of third country nationals, constitute the key focus of this contribution, which aspires to walk through all the main statuses of third country nationals in the EU enjoying *direct* – as opposed to derivative – *quasi*-citizenship rights in the Union. Five such categories are of particular interest when testing the boundaries of the personal scope of application of European *quasi*-citizenship rights.¹⁴ They include: any person, EU citizens and third-country nationals alike; a third-country national who is a short-term resident of the EU under a number of special secondary law instruments adopted over the recent years;¹⁵ a third-country national who is a long-term resident in terms of Directive 2003/109/EC; a Commonwealth citizen with no Member State nationality residing in the United Kingdom; and nationals of the third-countries with which the EU and the Member States concluded special agreements resulting in additional enforceable rights for these individuals.¹⁶

Before discussing each of the groups outlined in some detail, however, this contribution starts with an ‘aside’, first turning to the origins of the notion of a ‘foreigner’ in the context of the Internal Market,¹⁷ by looking at the first steps in the interpretation of the personal scope of EU law by the ECJ to underline that the rights of third-country nationals the EU legislator has been consistently developing over the last decades are meant to fill a gap left open at the commencement of European integration. In addition to providing an overview of the directly enjoyable *quasi*-EU citizenship rights of third-country nationals, this paper offers some criticism of the current system. Based on some of the shortcomings of the different regimes, the paper concludes by providing some meta-criticism of the current system, which is over-complicated, user-unfriendly and fails at the most fundamental level: it falls short of elaborating a truly *European* approach to the status and the rights of those *de facto* Europeans who cannot boast the citizenship of the Union. In this sense, while the creation of the Internal Market and the moulding of an ever more important status of EU citizenship has unquestionably changed the legal reality in Europe, touching the areas both within and outwith the scope of EU competences *sensu stricto*,¹⁸ the approach to third-country nationals in the EU is marked by overwhelming short-sightedness, resulting in a highly fragmented policies, allowing for sometimes arbitrary distinctions between different categories of third-country nationals and EU citizens. Any meaningful approach to third-country nationals in the future is bound – whether we want it or not – to

(Contd.) _____

European Parliament and of the Council of 26 February 2014 on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers (OJ 2014 L 94/375); Directive 2014/66/EU of the European Parliament and of the Council of 15 May 2014 on the conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer (OJ 2014 L 157/1). The fragmented nature of the legislative framework has been criticised in the literature. Sergio Carrera and others, ‘Labour Migration Policy in the EU: A Renewed Agenda for Europe 2020’ (2011) CEPS Policy Brief No 240.

¹⁴ For a brilliant outline of a personal scope of EU law, see Eleanor Spaventa, ‘Seeing the Wood despite the Trees? On the Scope of Union Citizenship and its Constitutional Effects?’ (2008) 45 CMLRev 13.

¹⁵ See note 13 above.

¹⁶ This category includes several different sub-categories, since third-nationals’ rights vary depending on the particular agreement from which they derive their rights.

¹⁷ For general analyses of the interconnections existing between EU citizenship and the Internal Market, see, e.g. Niamh Nic Shuibhne, ‘The Resilience of EU Market Citizenship’ (2010) 47 CMLRev 1597; Dimitry Kochenov, ‘Member State Nationalities and the Internal Market: Illusions and Reality’ in Niamh Nic Shuibhne and Laurence W Gormley (eds), *From Single Market to Economic Union: Essays in Memory of John A. Usher* (OUP 2012).

¹⁸ Dimitry Kochenov, ‘The Citizenship Paradigm’ (2013) 15 CYbEuL 196.

stop pretending that the European Union is not there, overwhelmingly affecting – if not shaping – key policy fields. A fundamental change in mentality of approaching ‘alienness’ in the EU is thus urgently required.

An Aside: Third-country Nationals and the Scope of Article 45 TFEU

Before moving to the European *quasi*-citizenship rights proper, a short overview of the personal scope of application of the workers’ free movement rights to third country nationals should be provided. It can shed light on the intentions of the drafters of the Treaties regarding the granting of rights to third-country nationals. It is also of direct concern to the possible development of the third-country nationals’ *quasi*-citizenship rights in the years to come.

EU citizenship, as a *ius tractum* (or derivative¹⁹) status is intimately connected with the nationalities of the Member States, as one cannot acquire an EU citizenship status without possessing such a nationality.²⁰ The wording of the crucial Treaty provisions on this issue can potentially mislead, however. Notwithstanding that fact that Article 9 TEU states that ‘every national of a Member State shall be a citizen of the Union’²¹ the meaning of ‘nationality’ in this provision is not defined at EU level and is a sovereign competence of the Member States to establish.²² Moreover, in *Kaur* the ECJ clarified that the Member States are free to create special categories of nationals, which would not benefit from EU citizenship.²³ The Court recognised the validity of the unilateral limitations implied in distinguishing ‘nationality’ from a ‘nationality for Community purposes’ in the Declarations appended by some Member States, most notably Germany and the UK to the Treaties.²⁴ As a consequence, only ‘nationals for the purposes of EU law’ became EU citizens.²⁵ The question thus remains open, whether nationals for the purposes of EU law should be Member State nationals at all. The historical examples established by the first UK Declaration seems to be pointing to the fact that such a nationality is not required: non-UK nationals fell within the category of ‘nationals for the purposes of Community law’ based on the UK Declaration.²⁶ While the whole idea of taking such Declarations seriously provoked scholarly criticism,²⁷ this is the law.²⁸

¹⁹ Dimitry Kochenov, ‘*Ius Tractum* of Many Faces’ (2009) 15 ColJEU 169.

²⁰ ECJ, *Rottmann* C-135/08, EU:C:2010:104.

²¹ Art. 9 TEU. For a virtually identical wording, see also Art. 20(1) TFEU.

²² *Rottmann* (n 20); ECJ, *Micheletti*, C-369/90, EU:C:1992:295; ECJ, *Kaur*, C-192/99, EU:C:2001:106. Dimitry Kochenov and Aleksejs Dimitrovs, ‘EU Citizenship for Latvian Non-Citizens: A Concrete Proposal’ (2013) JMWP (NYU Law School) No 14/13; Stephen Hall, ‘Determining the Scope *ratione personae* of European Citizenship: Customary International Law Prevails for Now’ (2001) 28 LIEI 355.

²³ *Kaur* (n 22)

²⁴ Treaty of Accession to the European Communities of the Kingdom of Denmark, Ireland, and the United Kingdom of Great Britain and Northern Ireland, 1st U.K. Declaration (OJ 1972 L 73). It was later updated upon the entry into force of the 1981 British Nationality Act. See, e.g., Andrew C. Evans, ‘Nationality Law and the Free Movement of Persons in the EEC: With Special Reference to the British Nationality Act 1981’ (1982) 2 YbEuL 173, 189; KR Simmonds, ‘The British Nationality Act 1981 and the Definition of the Term “National” for Community Purposes’ (1984) 21 CMLRev 675. See also Ákos G Toth, ‘The Legal Status of the Declarations Attached to the Single European Act’ (1986) 23 CMLRev 803 (on the legal effect of declarations in EU law).

²⁵ See, also, the way how the Court distinguished *Kaur* in *Rottmann*, arguing that Mrs Kaur has never held EU citizenship (*Rottmann* (n 20) para 49), while, as is absolutely clear from the materials in that case, her British Nationality has never been in doubt (*Kaur* (n 22) para 11).

²⁶ 1st UK Declaration (n 24) point (a).

²⁷ Richard Plender, ‘An Incipient Form of European Citizenship’ in Francis G Jacobs (ed), *European Law and the Individual* (North Holland 1976) 39.

²⁸ *Kaur* (n 22).

The situation would have been different would third country national have been included within the personal scope of EU law. Before the formal inclusion of the European citizenship status into the text of the Treaties²⁹ it was far from clear which categories of persons were covered by the free movement right for workers. This right is conferred by Article 45 TFEU on the ‘workers of the Member States’.³⁰ Clearly, having made no reference to the requirement to possess Member State’s nationality, the Treaty could be (and should have been) interpreted in such a way as to cover all the workers legally resident in the Union, not only those in possession of the Member State’s nationality for Union law purposes.³¹ The narrow reading given to the workers’ free movement provisions by the ECJ in all the free movement of persons cases that excluded all the workers who are third-country nationals from the scope of application of Article 45 TFEU is contested in the literature. Andrew Evans in particular has been an outspoken critic of the Court’s approach to the interpretation of the scope of Article 45 TFEU.³² Indeed, to limit the application of the Article to Member State nationals, which has been done both in the secondary law of the Community³³ and the case-law of the ECJ,³⁴ seems ‘inconsistent with the goals of the common market.’³⁵ Agreeing with Blanke and MacGregor, ‘it would seem obvious that a seamless functioning of the Internal Market, given its borderless character, would prescribe the unlimited free movement of EU citizens and legally resident non-EU nationals alike within it’.³⁶

Additionally, an argument can be made that the very wording of the Treaties seemed to be implying that the fundamental freedoms stemming from the supranational law in Europe were to flow from residence and the fact of one’s integration into the labour market – as Article 45 TFEU seems to assume, too – rather than nationality. Should nationality be of relevance for the drafters of the Treaties, explaining some of the provisions – and most notably Article 202 TFEU (which has been in the Treaties since the founding of the EEC), dealing with the possibility to regulate free movement of persons with the Overseas Countries and Territories of the EU (OCTs)³⁷ – would be difficult. Article 202 TFEU presumes that free movement with OCTs is to be based on a separate provision unrelated to Articles 45 and 21 TFEU,³⁸ which is a potentially far-reaching sign of importance of residence, rather than nationality, as the main factor to be taken into account when construing the scope *ratione*

²⁹ Antje Wiener, “*European*” *Citizenship Practice – Building Institutions of a Non-State* (Westview Press 1997); Matthew J Elsmore and Peter Starup, ‘Union Citizenship – Background, Jurisprudence, and Perspective: The Past, Present, and Future of Law and Policy’ (2007) 26 *YbEuL* 57.

³⁰ Art. 45(2) TFEU.

³¹ This would also be in line with Art. 45(1) TFEU which covers ‘free movement of persons’ with no reference to any nationality requirements. The provisions of the Treaties dealing with establishment and free movement of services do not offer such a possibility, making express references to the possession of the nationality of the Member States: Arts. 49 TFEU and 56 TFEU.

³² Evans (n 9) 205. See also Elspeth Guild and Steve Peers, ‘Out of the Ghetto? The Personal Scope of EU Law’ in Steve Peers and Nicola Rogers (eds), *EU Immigration and Asylum Law: Text and Commentary* (Martinus Nijhoff 2006) 81. For a counter-argument see Thym (n 9) 718-719.

³³ Art. 1(1) of Regulation 1612/68/EEC (OJ 1968 L 257/2).

³⁴ E.g. ECJ, *Caisse d’allocations familiales*, 238/83, EU:C:1984:250, para 7.

³⁵ Becker (n 9) 138.

³⁶ Gordon Blanke and Anne MacGregor, ‘Free Movement of Persons within the EU: Current Entitlements of EU Citizens and Third-country Nationals – A Comparative Overview’ (2002) 8 *IntTrLRev* 173. See also Martin Hedemann-Robinson, ‘Third-Country Nationals, European Union Citizenship, and Free Movement of Persons: a Time for Bridges rather than Divisions’ (1996) 1 *YbEuL* 321; Thomas Hoogenboom, ‘Integration into Society and Free Movement of Non-EC Nationals’ (1992) 3 *EJIL* 36, 39 *et seq.* Dimitry Kochenov (n 17).

³⁷ Cf. Dimitry Kochenov (ed.), *EU Law of the Overseas* (Kluwer Law International 2011).

³⁸ Article 202 TFEU refers to a necessity to use the Article 203 TFEU procedure to establish free movement for OCT residents.

personae of EU law.³⁹ The fact is that the OCTs are undoubtedly inhabited by Member State nationals (now EU citizens) is well known,⁴⁰ just as the fact that residence outside of the Union does not disqualify EU citizens from a possibility to benefit from the rights established by EU law⁴¹ – free movement included.

These observations should make clear at least that the link between benefiting from EU law and nationality is not – legal-historically at least – as straight-forward, as we now tend to assume. Consequently, on a closer scrutiny, Directive 2003/109/EC – just as the Blue Card Directive – granting limited free movement rights to third-country nationals seems to be an attempt of the EU legislator to deal with the Court’s narrow reading of the Treaties, whose record in the field of protection of the rights of the third-country nationals has been quite dubious at times.⁴²

Third-country Nationals and European Citizenship Rights

Many third-country nationals within the EU are provided with directly enjoyable *quasi*-EU citizenship rights. This section distinguishes five such *quasi*-citizenship categories, namely: any person; third-country nationals who are long-term residents; short-term resident third-country nationals; a Commonwealth citizen with no Member State nationality residing in the United Kingdom; and nationals of the third-countries with which the EU and the Member States concluded special agreements resulting in additional enforceable rights for these individuals.

‘Any Person’

European Union citizenship rights are drafted in such a way that two of them can be enjoyed by ‘any person’, EU citizens and third-country nationals alike. Although this is not stated directly in the text of Article 24 TFEU, the wording of this provision contains references to Articles 227 and 228 TFEU and Articles 43 and 44 of the Charter of Fundamental Rights, spelling out the same right in a broader context. Given the scope of their application, it is puzzling why the rights to petition the EP and to apply to the Ombudsman are actually included among the citizenship rights of the Treaty.

Third-country Nationals Who are Long-term Residents

Council Directive 2003/109/EC concerning the status of third-country nationals who are long term residents was a response to the Tampere European Council Presidency Conclusions.⁴³ While this

³⁹ For an analysis, see, Dimitry Kochenov, ‘The Puzzle of Citizenship and Territory in the EU: On European Rights Overseas’ (2010) 17 MJ 230.

⁴⁰ Ibid.

⁴¹ ECJ, *Eman and Sevinger*, C-300/04 EU:C:2006:545.

⁴² Joseph HH Weiler, ‘Thou Shalt Not Oppress a Stranger: On the Judicial Protection of the Human Rights of Non-EC Nationals – A Critique’ (1992) 3 EJIL 65, discussing especially ECJ, *Demirel*, 12/86, EU:C:1987:400 and ECJ, *Diatta*, 267/83, EU:C:1985:67. The Court has been criticised, however, for failing EU citizens too, at times: Niamh Nic Shuibhne, ‘(Some of) The Kids Are Alright: Comment on *McCarthy* and *Dereci*’ (2012) 49 CMLRev 349; Gareth Davies, ‘The Family Rights of European Children: Expulsion of Non-European Parents’ (2012) EUI Working Papers, RSCAS 2012/04; Dimitry Kochenov, ‘Citizenship Without Respect’ (2010) JMWP (NYU Law School) No 08/10.

⁴³ Presidency Conclusions, Tampere European Council 15, 16 October 1999. A reference to the Presidency Conclusions is provided in the Preamble to Directive 2003/109/EC, rec. 2. Para 21 of the European Council Presidency Conclusions reads as follows:

‘The legal status of third-country nationals 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; e.g. the right to reside, receive education, and work as an employee or self-employed

Directive was a veritable breakthrough in the legal position of the third-country nationals who are long term residents, this breakthrough appears to be somewhat timid and fails to solve a number of outstanding problems.⁴⁴ The weak points of the Directive are mostly related to the limited nature of the free movement right provided, the link made between the residence in one Member State and the acquisition of the long-term resident status in the EU, the limited geographical scope of application of the Directive, and a total lack of any guarantees of political rights to be by the third-country nationals who are long-term residents.

While providing for the right to free movement,⁴⁵ which is not, in theory at least, essentially different from that enjoyed by the European citizens,⁴⁶ the Directive failed to provide for an indispensable and essential guarantee of EU nature of the long-term residence of third-country nationals benefitting from it. Namely, it failed to fully detach the acquisition of a long term resident status in the EU from the permanent residence status of one of the Member States. The Directive thus simply disregards the very rationale of the internal market. Those third-country nationals, who resided five years in *one* Member State become entitled to a right to be issued with a long-term residence permit.⁴⁷ It is unfortunate that those who resided in the EU for the same period and moved from one Member State to another are not covered by the Directive at all.⁴⁸ Given the current state of EU integration, such re-division of the EU into the Member States under the Directive is made for no apparent reason and leads, at the same time, to the exclusion of a number of actual long-term residents from the status. It is ill-suited and harmful for the cause of integration of the third-country nationals in the EU, as it automatically punishes those who are most active across the borders and most mobile. Once an EU right is at stake, it should be acquired on the basis of the residence in the *Union*, not in its constituent parts, the Member States.

Changing the territorial logic of the Directive would not be difficult from a technical point of view: all it would take is to allow time of legal residence in the various Member States to be cumulated, thus recognising the legally and politically consequential nature of the emerging notion of EU territory⁴⁹ – a single living and working space⁵⁰ – as opposed merely to a sum of the territories of the Member States.⁵¹ That such aggregation of periods of residence in different Member States is administratively very well possible is demonstrated by secondary legislation allowing for such in other fields.⁵² The flipside of the coin of acquisition of long-term resident's status under the Directive is the loss of this status. Unfortunately, the Directive allows for the loss of the status upon a 12 consecutive

(Contd.)

person, as well as the principle of non-discrimination vis-à-vis the citizens of the state of residence. The European Council endorses the objective that long-term legally resident third-country nationals be offered the opportunity to obtain the nationality of the Member State in which they are resident'.

⁴⁴ See Commission's Common Agenda for Integration Framework for the Integration of Third-country Nationals in the European Union, COM(2005) 389 final. See also the criticism by Acosta Arcarazo (n 8) and Wiesbrock (n 8) Thym (n 9) 734-735.

⁴⁵ Art. 14(1), Directive 2003/109/EC.

⁴⁶ Notwithstanding the fact that the exercise of such right is made dependent on administrative procedures, such as an exchange of a residence permit provided by the previous Member State of residence to that of the new state of residence: Art. 15(4), Directive 2003/109/EC.

⁴⁷ Art. 4(1), Directive 2003/109/EC.

⁴⁸ Unlike the Blue Card Directive, analysed below.

⁴⁹ The importance of the notion has been emphasised in *Ruiz Zambrano*. See also Dimitry Kochenov, 'A Real European Citizenship: A New Jurisdiction Test; A Novel Chapter in the Development of the Union in Europe' (2011) 18 ColJeuL. 56; See also Loïc Azoulai, 'La citoyenneté européenne, un statut d'intégration sociale' in *Mélanges Jean Paul Jacqué. Chemins d'Europe* (Daloz 2010).

⁵⁰ Oxana Golynger, 'European Union as a Single Working-Living Space: EU Law and New Forms of Intra-Community Migration' in Andrew Halpin and Volker Roeben (eds), *Theorising the Global Legal Order* (Hart 2009) 145, 151.

⁵¹ Teresa Pullano, *Citoyenneté européenne: Un espace quasi étatique* (Sciences Po 2014).

⁵² Regulation 883/2004 EC, on the coordination of social security systems (2004 OJ L 166/1).

months' absence from the EU:⁵³ the stability of the status leaves much to be desired and, crucially, bears no logical connection to the acquisition.

Nevertheless, the very possibility of being issued with a long-term residence permit after five years of residence in one of the Member States and the right to exchange it for a similar document in another Member State while exercising free movement right is a veritable breakthrough in the European legal climate. Unfortunately, however, the long-term residents' free movement rights do not fully resemble the rights of Union citizens. Third-country nationals merely enjoy free movement rights on the basis of secondary law, allowing for a more restrictive application of those rights. Whereas Union citizens may derive rights directly from the Treaty, even if this is against the criteria in secondary legislation, 'the fulfilment of the conditions provided for in secondary law is condition sine qua non for the existence of mobility rights for [third-country nationals]'.⁵⁴ In addition, large groups of third-country nationals are excluded from the scope of the Directive,⁵⁵ and Member States may determine the conditions of legal residence.⁵⁶ Article 14(3) of the Directive permits the Member States to apply national requirements regarding the filling of vacancies and exercise of employed or self-employed activities and to give preference to EU citizens and third-country nationals already legally residing in that Member State. Additionally, Article 14(4) allows Member States who had already adopted quotas for the admission of long-term residents at the moment the Directive was adopted to maintain those.

Another detriment for the rights under the Directive is that the Member States are, in accordance with Article 15(3), allowed to submit long-term residents to national integration test, if no such test has been imposed on them in the first Member State. Member States have extensively used this limitation to the free movement rights.⁵⁷ Moreover, integration tests in the first Member State can (and do⁵⁸) function in such a way, that they objectively obstruct the achievement of the goals of the Directive, with a rising number of the Member States adopting identical tests for long-term residence and naturalisation.⁵⁹ Additionally, while long-term residents on grounds of Article 11 of the Directive enjoy equal treatment with nationals, also this right can be restricted.⁶⁰ According to Article 11(4), 'Member States may limit equal treatment in respect of social assistance and social protection to core benefits', but only if the Member States, when implementing the Directive, 'have stated clearly that

⁵³ Art. 9(1)(c), Directive 2003/109/EC.

⁵⁴ Sara Iglesias Sánchez, 'Free Movement of Third Country Nationals in the European Union? Main Features, Deficiencies and Challenges of the new Mobility Rights in the Area of Freedom, Security and Justice' (2009) 15 ELJ 791, 800. See also Anja Wiesbrock, 'Free movement of third-country nationals in the European Union: the illusion of inclusion' (2010) 35 ELRev 455, 459.

⁵⁵ Art 3(2), Directive 2003/109/EC.

⁵⁶ *Singh* (n 7) para 40; Case C-40/11 *Iida* (nyr) par 36.

⁵⁷ Wiesbrock (n 55) 462-464.

⁵⁸ See, e.g., Kochenov and Dimitrovs (n 22): because of the strictness of the test, the permanent residents of Latvia belonging to the ethnic minorities do not fall within the scope of the Directive, creating an absurd situation, where, under Latvian law, even being born in the country is not enough to qualify as a 'Long Term Resident'. Implementation like this fully strips the Directive of *effet utile* in the country.

⁵⁹ For overviews, see, eg, Christian Joppke, 'Beyond National Models: Civic Integration Policies for Immigrants in Western Europe' (2007) 30 West European Politics 1; Ricky van Oers, Eva Ersbøll, Eva and Dora Kostakopoulou (eds), *A Re-definition of Belonging?* (Brill 2010); Dimitry Kochenov, 'Mevrouw de Jong Gaat Eten, EU Citizenship and the Culture of Prejudice' (2011) EUI RSCAS Working Paper.

⁶⁰ Article 18 TFEU, the right to non-discrimination on the basis of nationality, is unlikely to be of any relevance. According to the ECJ, this provision 'is not intended to apply to cases of a possible difference in treatment between nationals of Member States and nationals of non-member countries'. ECJ, *Vatsouras and Koupatantze*, C-22/08 and C-23/08, EU:C:2009:344. For criticism see: Bruno de Witte, 'National, EU Citizens and Foreigners: Rethinking Discrimination on Grounds of Nationality in EU Law' in André Alen and others (eds), *Liberae Cogitationes. Liber Amicorum Marc Bossuyt* (Intersentia 2013) 229.

they intended to rely on that derogation'.⁶¹ Also the family reunification rights of the long-term residents do not match those of the Union citizens. While Union citizens who exercise their free movement rights are allowed to be accompanied by their family members irrespective of where the family ties were established,⁶² family members of moving long-term residents are allowed to accompany them 'when the family was already constituted in the first Member State'.⁶³

While Directive 2003/109 has significantly improved the rights for third-country nationals, it has not to the fullest extent implemented the internal market, which is 'an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured...'.⁶⁴ Remnants of previously existing borders still remain – indeed, borders between the Member States are a towering presence in the legal reality shaped by the directive.⁶⁵

If the Directive is to approximate the status of third-country nationals to that of EU citizens,⁶⁶ the limited geographical scope undermines this objective. It is unfortunate that the Directive does not apply to the UK and Ireland on the one hand and to Denmark on the other: these Member States opted out by virtue of Articles 1 and 2 of the Protocol on the Position of the UK and Ireland annexed to the Treaties⁶⁷ and Articles 1 and 2 of the Protocol on the Position of Denmark⁶⁸ respectively.

Contrary to the objectives the EU set itself, the Directive failed to abolish the inferior position of long-term resident third-country nationals vis-à-vis EU citizens. Being so fortunate to be born with a Member State nationality thus continues to make a tremendous difference in present-day Europe. This is further reinforced by the limited political rights of the third-country national long-term residents of the EU.⁶⁹ Not only can they not vote in national elections in their Member State of residence,⁷⁰ but they are also deprived of European voting rights and hence do not take part in the elections to the EP.⁷¹ Neither does European law require the Member States to allow the third-country national long-term residents in their territories to vote in local elections. Although the majority of the Member States have adopted legislation allowing third-country nationals to vote in some elections,⁷² the general rule remains that the absolute majority of third-country nationals residing in the Community do not enjoy

⁶¹ ECJ, *Kamberaj*, C-571/10, EU:C:2012:233, para 84. For an analysis see: Karin de Vries, 'Towards integration and equality for third-country nationals? Reflections on *Kamberaj*' (2013) 38 ELRev 248.

⁶² *Metock* (n 7); *O&B* (n 7).

⁶³ Art. 16(1), Directive 2003/109/EC.

⁶⁴ Art. 26(2) TFEU.

⁶⁵ On how truth is created by law, see, Jack M Balkin, 'The Proliferation of Legal Truth' (2003) 26 HarvJLPubPol 5.

⁶⁶ Recital 2, Directive 2003/109/EC.

⁶⁷ Preamble to Directive 2003/109/EC, rec. 25.

⁶⁸ Preamble to Directive 2003/109/EC, rec. 26.

⁶⁹ The issue of a new status for the third-country nationals who reside in the EU has been on the EU's agenda for a very long time. See e.g. the EP's proposal to grant the third-country nationals permanent residents the right to vote in municipal elections which dates back to 1988: *Bull EC Supp.* 1988-2, 29, as cited in Becker (2004) (n 14), 147 and fn. 73. This issue has also been discussed at the 1996 IGC: Kostakopoulou, Theodora, 'Nested "Old" and "New" Citizenships in the European Union: Bringing out the Complexity', 5 *Colum. J. Eur. L.*, 1999, 389, 409, 410.

⁷⁰ This is an acute problem also in the context of EU citizenship: Federico Fabbrini, 'The Political Side of EU Citizenship in the Context of EU Federalism' in Dimitry Kochenov (ed), *EU Citizenship and Federalism: The Role of Rights* (CUP 2015) (forthcoming); Dimitry Kochenov, 'Free Movement and Participation in the Parliamentary Elections in the Member State of Nationality: An Ignored Link?' (2009) 16 MJ 197.

⁷¹ For a recent argument in support of the extension of voting rights for the EP to third-country nationals see: Annette Schrauwen, 'Granting the Right to Vote for the European Parliament to Resident Third-Country Nationals: Civic Citizenship Revisited' (2013) 19 ELJ 201.

⁷² At present 'fifteen [Member States] confer some electoral rights on at least some third-country nationals': Jo Shaw, *The Transformation of Citizenship in the European Union: Electoral Rights and the Restructuring of Political Space* (CUP 2007) 13. Needless to say, such rights, when given, have nothing to do with the functioning of the EU legal order.

such rights.⁷³ Directive 2003/109/EC offered a unique opportunity to extend the franchise (in European and local elections at least) to the third-country nationals permanent residents of the EU, but it was left unused.⁷⁴ This is notwithstanding the fact that the main political science theories underline the importance of integration through voting, as Lardy has demonstrated.⁷⁵

National law of the Member States could be deployed to remedy this situation. Given that the possibility of introducing an all-European procedure for the EP elections spelled out in Article 223 TFEU has not yet been used, it is up to the Member States themselves to decide who qualifies to take part in such elections. As long as this right is not used by the Member States in breach of the right of Union citizens residing in a Member State of which he is not a national to vote and stand as candidate for EP elections under the same conditions as the nationals of that state, as laid down in Article 22(2) TFEU,⁷⁶ the Member States are free to extend the voting right to any person in their territory.⁷⁷ The ECJ has been clear on this issue, underlining the fact that the Union citizenship rights are not exclusive and can thus be granted to those who are not in possession of this status.⁷⁸

Regarding the extension of national and local franchise, the Member States seem to retain even more sovereignty, perfectly able to include third-country nationals in the democratic process.⁷⁹ Examples are already numerous: Commonwealth citizens residing in the UK may vote in the UK elections at all levels, subject to reciprocity;⁸⁰ Brazilian citizens residing in Portugal can vote at national and municipal level there;⁸¹ a large number of Member States offer third-country nationals a vote at the municipal level. It is regrettable, however, that there is no common approach in all EU Member States to this issue. It is not possible but to agree with Jo Shaw that ‘the lack of competence is often raised as

⁷³ This is due to a number of factors, ranging from the lengthy national residence requirements which have to be met in order to qualify for enfranchisement to the simple fact that the third-country nationals are mostly enfranchised in the smallest Member States while in Italy, Poland, France and Germany, where the majority of them reside, they have no right to vote. See Shaw (n 72), 13. For an overview of non-citizens’ voting rights in the Member States see *ibid.* Tables 3.1 and 3.2 at 78–80.

⁷⁴ Shaw argued that the legal basis of the Directive (now Art. 79 TFEU) did not allow for the grant of political rights to the third-country nationals: Shaw (n 72) 14. Given the all-encompassing scope of Directive 2003/109/EC and the importance of political representation for the long-term residents the claim of lacking legal basis for the enfranchisement of the third-country nationals seems over-pessimistic. The Commission, however, was of the same opinion: there is no legal basis for enfranchising third-country nationals in the Treaties (*See Proposal for a Council Directive Concerning the Status of Third-country nationals Who Are Long-Term Residents*, COM(2001) 127 final, para 5.5 of the Explanatory Memorandum (OJ 2001 C 240E/79). For discussion see Shaw (n 72), 222–227. A new legal basis has appeared in the Lisbon Treaty. According to Art. 79(4) TFEU, the Union will be able to adopt ‘measures to provide incentives and support for the action of the Member States with a view to promoting the integration of third-country nationals residing legally in their territories’.

⁷⁵ Heather Lardy, ‘Citizenship and the Right to Vote’ (1997) 17 *OxJLSt* 75, 97, 98.

⁷⁶ ECJ, *Spain v. UK*, C-145/04, EU:C:2006:543, para 66.

⁷⁷ Also in the US arguments have been made in the literature that the States should legally be able to extend the franchise also to the persons who are not in possession of a US citizenship status: Elise Brozovich, ‘Prospects for Democratic Change: Non-citizen Suffrage in America’ (2002) 23 *Hamline J. Pub. L. and Pol’y* 403. It has even been argued that non-citizens’ suffrage is a requirement following from the Equal Protection Clause of the Fourteenth Amendment: Gerard M Roseberg, ‘Aliens and Equal Protection: Why not the Right to Vote?’ (1977) 75 *MichLRev* 1092, 1112.

⁷⁸ *Spain v. UK* (n 76) para 78.

⁷⁹ The Member States of the CoE have been ‘recommended’ to move in this direction by a PACE Report: PACE Report (Manuela Aguiar and Ana Guirado, Rapporteurs), ‘Links between Europeans Living Abroad and their Countries of Origin’, PACE Doc. 8339 of 5 March 1999, point 5(v)(d)(v) (about local elections in the host country). The possibility to allow resident non-nationals to vote in national elections has also been seriously discussed, especially in the States traditionally granting foreigners political participation rights at the national level. See e.g. Ko-Chih R Tung, ‘Voting Rights for Alien Residents – Who Wants It?’ (1985) 19 *Int Migration Rev* 451 (discussing the Swedish case).

⁸⁰ For an analysis, see section III(d) *infra*.

⁸¹ PACE Report (Manuela Aguiar and Ana Guirado, Rapporteurs), ‘Links between Europeans Living Abroad and their Countries of Origin’, PACE Doc. 8339 of 5 March 1999, para 78.

the argument for the failure to adopt measures, but it is clear that in this area it is the absence of political will to enact such measures which is just as great a problem'.⁸²

While Directive 2003/109/EC succeeded in introducing the first, albeit limited, free movement right to be enjoyed by the third-country nationals who are long term residents of the Union, it is up to the Member States to continue on the path of inclusion of this group of EU residents. At present, third-country nationals are still '*une population infériorisée en droits, donc aussi en dignité*'.⁸³ In doing so, the EU ignores the goals it set for itself and applies an entirely different *legal reality* to long-term resident third-country nationals, ignoring the requirements of the internal market, thereby bringing about a diminished importance of the European Union. Most importantly, a large group of Europeans, who have resided most if not all their lives within the EU, are still not treated as such by the EU, simply because they happen to lack EU citizenship status.

Sectoral Legislation

Other than the long-term residents Directive, which produces a more or less overall policy approach to third-country nationals residing within the EU, the Union has also adopted sectoral legislation on the admission and free movement of specific groups of third-country nationals. This legislation may be divided into two subcategories. The first concerns legislation on the admission and free movement of students and researchers and the second – ordinary labour migration. What all sectoral legislation shares is that it extends (to a limited extent) particular rights possessed by Union citizens to certain limited categories of third-country nationals. Not all Member States have decided to partake in the legislation, unfortunately. The geographical scope of the Directives is limited. The United Kingdom and Denmark have decided to opt out from the application of all Directives. Ireland has decided to participate only in the adoption and application of the Researchers Directive⁸⁴ and opted out from all other Directives.

Directive 2004/114/EEC, the 'Students' Directive',⁸⁵ offers a right to free movement to third-country nationals who have been admitted as a student by a first Member State. This right is subject to numerous conditions however.⁸⁶ Not only does the student from a third country again have to fulfil the same conditions which also had to be fulfilled for access in the first Member State,⁸⁷ the student also has to participate in a community or bilateral exchange program or has to have been 'admitted as a student in a Member State for no less than two years',⁸⁸ unless 'the student (...) is obliged to attend a part of his/her courses in an establishment of another Member State'.⁸⁹ A Commission assessment has demonstrated that third-country national students often face difficulties when exercising their right to free movement.⁹⁰

⁸² Shaw (n 72) 232.

⁸³ Etienne Balibar, *Nous, citoyens d'Europe? Les frontières l'État, le peuple* (La découverte 2001) 192.

⁸⁴ Recital 27 of Directive 2004/114/EC.

⁸⁵ Council Directive 2004/114/EC.

⁸⁶ See for analysis also Yves Pascouau, 'Intra-EU Mobility: The "Second Building Block" of EU Labour Migration Policy' (2013) EPC Paper No 74; Wiesbrock (n 55) 465-468.

⁸⁷ See Art. 6 and 7 of Directive 2004/114/EC.

⁸⁸ Art 8(1c) of Directive 2004/114/EC.

⁸⁹ Art 8(2) of Directive 2004/114/EC.

⁹⁰ Report from the Commission to the Council and the European Parliament on the application of Directive 2004/114/EC on the conditions of admission of third-country nationals for the purposes of studies, pupil exchange, unremunerated training or voluntary service (COM(2011) 587 final) 16.

A largely identical picture emerges from Directive 2005/71/EC, the ‘Researchers’ Directive’.⁹¹ This Directive lays down the admission conditions for researchers from third countries. Article 13 of the Researchers’ Directive offers the researchers falling within its scope the right to move to a second Member State to carry out part of the research there, but no general mobility right. In addition, not all Member States have transposed the researchers’ right to free movement in national legislation, potentially further weakening this right.⁹² Researchers from third countries also enjoy the right to equal treatment as regards the recognition of diplomas, working conditions, certain social benefits, tax benefits, and access to goods and services.⁹³

To overcome some of the deficiencies, related amongst others to the lack of enforcement, clarity, and restrictive free movement rights, and to bring the legislation in line with the Europe 2020 Strategy, which aim is to foster ‘smart, sustainable and inclusive growth in the EU’,⁹⁴ the Commission has presented a proposal for a new Directive, which would cover those falling within the scope of both existing Directives as well as au pairs and remunerated trainees.⁹⁵ Although it is uncertain what the outcome of the negotiations will be, the proposal contains several aspects which will improve the position of those covered by the Directive. The Commission intends to strengthen the free movement rights of researchers and students. The requirement for students to have to participate in an exchange program or to have been admitted as student for over two years, to give an example, is dropped in the proposal.⁹⁶ The proposal also improves the family rights of researchers.⁹⁷ The Commission additionally intends to create the right for researchers and students to stay in the Member State for another year after the completion of the studies or research in order to find a job or set up a business.⁹⁸ The position of students and researchers would thus be considerably improved should these proposals be adopted. That the Commission has chosen for a more uniform legislation covering multiple groups instead of the current sectoral approach is in itself to be welcomed.

Just like in the case of students and researchers, the labour migration legislation is characterised by its sectoral character. The Member States have always been hesitant about the adoption of a uniform labour migration policy.⁹⁹ Although the Treaty of Lisbon has brought migration policy within the scope of the ordinary legislative procedure, no longer mandating unanimous agreement for the adoption of legislation,¹⁰⁰ the economic crisis, anti-migration tendencies, and institutional issues have made it difficult to develop one coherent policy.¹⁰¹ In recent years, nonetheless, new legislation has been adopted, expanding the reach of the EU’s labour migration policies.

⁹¹ Council Directive 2005/71/EC.

⁹² Report from the Commission to the Council and the European Parliament on the application of Directive 2005/71/EC on a specific procedure for admitting third-country nationals for the purposes of scientific research (COM(2011)901) 7.

⁹³ Art. 12 of Directive 2005/71/EC.

⁹⁴ Communication from the Commission on Europe 2020, a strategy for smart, sustainable and inclusive growth (COM(2010)2020).

⁹⁵ Proposal for a Directive of the European Parliament and of the Council on the conditions of entry and residence of third-country nationals for the purposes of research, studies, pupil exchange, remunerated and unremunerated training, voluntary service and au pairing (COM(2013) 151 final).

⁹⁶ See Art. 26 of the Proposal.

⁹⁷ See Art. 28 of the Proposal.

⁹⁸ See Art. 24 of the Proposal.

⁹⁹ The Member States rejected the Proposal for a Council Directive on the conditions of entry and residence for the purpose of paid employment and self-employment activities (COM(2001) 386 final). For that reason, the Commission decided to focus on specific groups of economic migrants in its 2005 Policy Plan on Legal Migration. Communication from the Commission, Policy Plan on Legal Migration (COM(2005) 669 final). Carrera and others (n 13); Pascouau (n 86) 1.

¹⁰⁰ Art. 79 TFEU.

¹⁰¹ Pascouau (n 86) 5-6.

The first piece of legislation to be adopted in the field of labour migration was the so-called ‘Blue-Card Directive’ in 2009, establishing rules on the entry and residence of highly qualified employees.¹⁰² Those in the possession of a valid work contract for highly qualified work of at least one year can apply for a Blue Card.¹⁰³ The Directive grants those in possession of a Blue Card a number of rights. Blue Card holders have the right to be treated equally with regard, for example, to working conditions, educational and vocational training, and certain branches of social security.¹⁰⁴ The Blue Card Directive also allows Blue Card holders to take up residence in another Member State after 18 months of residence in the first Member State¹⁰⁵ and to be joined by their family members there.¹⁰⁶ The Blue Card Directive makes the family reunification Directive and the long-term residents Directive applicable to Blue Card holders, with certain derogations.¹⁰⁷ Because of those derogations, Blue Card holders at times find themselves in a better position than ‘ordinary’ third-country nationals. Most importantly, contrary to ‘ordinary’ third country nationals, Blue Card holders can accumulate the periods of residence in different Member States for the calculation of the residence terms required in order to benefit from both Directives.¹⁰⁸ While the Blue Card Directive is, thus, more in line with the general rationale of EU integration and the creation of a single working and living space in Europe – in the memorable terminology of Oxana Golynger¹⁰⁹ – than those two Directives,¹¹⁰ one might wonder whether there is any legitimate justification for such different treatment between Blue Card holders and other legally residing third-country nationals other than the market value of the Blue Card holders.¹¹¹ While it might from an economic perspective appear reasonable to provide economically more valuable persons with more advantageous rights, to privilege this group over third-country nationals that have resided within the EU for a lengthy period, if not most of their lives, is to send a negative signal to this group.

Despite its expansive scope, a recent Commission report highlighted many shortcomings.¹¹² In the majority of the Member States, only very little use has been made of the Blue Card, which can be explained by the fact that Member States have maintained the right to adopt national policies for attracting highly qualified migrants.¹¹³ Some Member States have also made use of the possibility, provided by the Blue Card Directive, to set restrictions on the volumes of admission.¹¹⁴ Article 5(3) of the Directive, in addition, determines that the gross salary of highly qualified employees ‘shall be *at least* 1.5 times the average gross annual salary in the Member State concerned’. This provision poses a significant obstacle to the attraction of highly skilled young workers, who have not yet

¹⁰² Council Directive 2009/50/EC. For an elaborate analysis of the Directive see Steve Peers, ‘Legislative Update: EC Immigration and Asylum Law. Attracting and Deterring Labour Migration: The Blue Card and the Employer Sanctions Directive’ (2009) 11 *EuJML* 387.

¹⁰³ Art. 5(1)(a) of Directive 2009/50/EC.

¹⁰⁴ Art. 14 of Directive 2009/50/EC.

¹⁰⁵ Art. 18 of Directive 2009/50/EC.

¹⁰⁶ Art. 19 of Directive 2009/50/EC.

¹⁰⁷ Art. 15 and 16 of Directive 2009/50/EC.

¹⁰⁸ Art. 15(7) and 16(2) of Directive 2009/50/EC.

¹⁰⁹ Golynger (n 52).

¹¹⁰ See the analysis of the Long-Term Residents Directive above, particularly footnote 49.

¹¹¹ Carrera and others (n 13) 4.

¹¹² Communication from the Commission to the Council and the European Parliament on the implementation of Directive 2009/50/EC on the conditions of entry and residence of third-country nationals for the purpose of highly qualified employment (COM(2014) 287 final).

¹¹³ Art. 3(4) of Directive 2009/50/EC. See also Communication from the Commission on the implementation of Directive 2009/50/EC, 4.

¹¹⁴ Art. 6 of Directive 2009/50/EC. See also Communication from the Commission on the implementation of Directive 2009/50/EC, 4-5.

obtained such salary levels.¹¹⁵ Several Member States have implemented the option for performing a labour market test,¹¹⁶ which allows them to examine whether vacancies cannot be filled by their nationals or other EU citizens. Additionally, the standard period of validity of the Blue Card has been set at, or close to, the absolute minimum in most Member States¹¹⁷ and several Member States have used the derogation possibilities provided for in the Directive to limit the right to equal treatment as regards study loans and grants and access to University and post-secondary education.¹¹⁸ Several Member States seem to have implemented the Blue Card Directive in such a way as to make applications as unattractive as possible. While it might be too early to draw final conclusions about the impact of the Blue Card Directive, the currently existing disparities between the Member States as well as the information available about the applications for a Blue Card make one wonder whether the Directive in its current form can contribute at all to making the Union ‘the most competitive and dynamic knowledge-based economy in the world’.¹¹⁹

The proposal for a Blue Card Directive was accompanied by a proposal for a ‘Single Permit Directive’,¹²⁰ which was adopted in 2011.¹²¹ The Single Permit Directive lays down the most general rules on labour migration.¹²² The Directive applies to third-country nationals who have been admitted to a Member State for the purpose of work, or who apply to reside in a Member State for the purpose of work.¹²³ Those covered by other sectoral legislation are excluded from the scope of the Single Permit Directive. Those covered by the Directive are enabled to obtain residence permits via a single procedure and provided with a common set of rights,¹²⁴ such as the right to enter and reside in and move throughout the territory of the Member State, as well as the right to exercise the concrete employment activity.¹²⁵ Additionally, the Directive provides the third-country nationals with equal treatment rights in the areas of, for example, working conditions, educational and vocational training, certain branches of social security, and tax benefits.¹²⁶ It is too early to assess the effects of the Directive, also because most Member States have failed to adopt the Directive in time.¹²⁷ Looking at the Directive’s provisions and considering the experience with the Blue Card Directive, however, one may wonder how effective it will be. Also this Directive ‘is without prejudice to the Member States’ powers concerning the admission of third-country nationals to their labour markets’.¹²⁸ Member States may thus adopt national policies on the admission of workers from third countries. The interest in the

¹¹⁵ Peers (n 101) 407.

¹¹⁶ Art. 8(2) of Directive 2009/50/EC. See also Communication from the Commission on the implementation of Directive 2009/50/EC, 7.

¹¹⁷ According to Art. 7(2) of Directive 2009/50/EC, ‘Member States shall set a standard period of validity of the EU Blue Card, which shall be comprised between one and four years’. Most Member States set the period of validity at one or two years. Communication from the Commission on the implementation of Directive 2009/50/EC, 6.

¹¹⁸ Art. 14(2) of Directive 2009/50/EC. See also Communication from the Commission on the implementation of Directive 2009/50/EC, 9.

¹¹⁹ Which is according to recital 3 one of the reasons for the adoption of the Blue Card Directive.

¹²⁰ Proposal for a Council Directive on a single application procedure for a single permit for third- country nationals to reside and work in the territory of a member state and on a common set of rights for third-country workers legally residing in a member state (COM(2007) 638 final).

¹²¹ Directive 2011/98/EU.

¹²² Steve Peers, *EU Justice and Home Affairs Law* (OUP 2011) 434.

¹²³ Art. 3 of Directive 2011/98/EU.

¹²⁴ Art. 1(1) of Directive 2011/98/EU.

¹²⁵ Art. 11 of Directive 2011/98/EU.

¹²⁶ Art. 12 of Directive 2011/98/EU.

¹²⁷ http://ec.europa.eu/dgs/home-affairs/what-is-new/eu-law-and-monitoring/infringements_by_policy_immigration_and_integration_en.htm (last visited: 19-08-2014).

¹²⁸ Art. 1(2) of Directive 2011/98/EU.

EU Single Permit might, therefore, be limited. Third-country nationals who are allowed to enter the EU on the basis of a Single Permit are, in addition, given fewer rights than Blue Card holders. Contrary to the Blue Card Directive, the Single Permit Directive does not grant the right to move to another Member State, nor a right to family reunification. Family reunification is thus only open for Permit Holders if they fulfil the conditions set in Directive 2003/86/EC on family reunification, which, as discussed above, are more restrictive than the conditions for Blue Card Holders. Whether much use will be made of the Single Permit thus appears uncertain.

Two new Directives were added to the existing secondary law on labour migration in 2014. The first is the Seasonal Workers' Directive,¹²⁹ which sets out rules as regards entry and stay of seasonal workers from third countries. Chapter II of this Directive determines the conditions for admission as well as grounds for rejection of a request for or withdrawal of an authorisation to work. Member States may still determine the volumes of admission, which can be a ground for rejection of the application for an authorisation for the purpose of seasonal work.¹³⁰ Member States are also allowed to give preference to Union citizens or third-country nationals legally residing within the EU when filling vacancies.¹³¹ Holders of an authorisation to stay enjoy the right to enter and stay in and move throughout the territory of the Member State, as well as the right to exercise the concrete employment activity.¹³² Seasonal workers also enjoy the right to equal treatment as regards specific areas, such as the terms of employment, certain branches of social security, educational and vocational training, and recognition of diplomas.¹³³ Member States are, however, allowed to limit equal treatment by excluding family benefits and unemployment benefits,¹³⁴ limiting access only to training which is directly linked to the job and by excluding study and maintenance grants and loans.¹³⁵ Seasonal workers do not have the right to move to another Member State or the right to bring their family. The rights enjoyed by seasonal workers are thus in no way comparable with those enjoyed by Union citizens. Since seasonal workers are allowed to stay for a maximum period of five to nine months, to be determined by the Member States individually,¹³⁶ they will also never be able to fulfil the conditions for becoming a legally residing long-term resident. Of all those third-country nationals legally residing within the EU, seasonal workers find themselves at the bottom of the hierarchy.

This is not the case for those persons falling within the scope of the intra-corporate transferees Directive,¹³⁷ which sets out rules on the entry and residence of third-country nationals in the framework of an intra-corporate transfer. Most of the Directive is devoted to outlining the admission conditions, grounds for rejection and withdrawal, and application procedures. An analysis of the rights demonstrates that intra-corporate transferees are in the possession of rights much more beneficial than those of seasonal workers and Single Permit holders. Also intra-corporate transferees enjoy the right to enter and stay in and move throughout the territory of the Member State, the right to exercise the concrete employment activity,¹³⁸ and the right to equal treatment with Member State nationals in certain areas.¹³⁹ In addition, intra-corporate transferees enjoy family reunification rights which are more beneficial than those enjoyed by other third-country nationals, including Single Permit holders,

¹²⁹ Directive 2014/36/EU.

¹³⁰ Art. 7 of Directive 2014/36/EU.

¹³¹ Art. 8(3) of Directive 2014/36/EU.

¹³² Art. 22 of Directive 2014/36/EU.

¹³³ Art. 23 of Directive 2014/36/EU.

¹³⁴ Art. 23(1) of Directive 2014/36/EU.

¹³⁵ Art. 23(2)(i) of Directive 2014/36/EU.

¹³⁶ Art. 23(2)(ii) of Directive 2014/36/EU.

¹³⁷ Directive 2014/66/EU.

¹³⁸ Art. 17 of Directive 2014/66/EU.

¹³⁹ Art. 18 of Directive 2014/66/EU.

under the family reunification Directive.¹⁴⁰ The Directive also grants mobility rights to intra-corporate transferees. Third-country nationals in the possession of an intra-corporate transferee permit enjoy, subject to certain conditions, short-term mobility rights, which entitles them to reside and work in another Member State ‘for a period of up to 90 days in any 180-day period per Member State’.¹⁴¹ Intra-corporate transferees also enjoy the right to stay and work in a second Member State for a period exceeding 90 days.¹⁴² The second Member States, however, may decide to apply procedures whereby it can check the intention of those using the mobility rights.¹⁴³ Would Member States decide to adopt those procedures, it would impose serious constraints on the right to free movement of intra-corporate transferees.

This brief overview demonstrates that there is huge variation between the sectoral legislation granting rights to third-country nationals. The complexity is further aggravated by the room for manoeuvre left to the Member States when implementing the legislation and the overlap with other secondary legislation setting out entitlements for third-country nationals. Such an intricate system of rights and entitlements not merely undermines the clarity but likely also the effectiveness of the policies. While policies have to be tailored to different categories of third-country nationals, allowing for certain differences between the different regimes, one may wonder what justifies current variations, other than the perceived need by the Member States to limit a common EU approach to such issues to the furthest extent. Why should Blue Card holders be entitled to better family reunification rights than Single Permit holders and, possibly even worse, those third-country nationals who are long-term residents? Reasons for making a distinction between different groups of persons may exist, but some of the current distinctions raise a legitimate suspicion that the legislation in question seems to be motivated mainly by economic and anti-migration considerations.¹⁴⁴

Commonwealth Citizens Residing in the UK

Commonwealth citizens residing in the UK represent a unique group of third-country nationals in the EU as far as rights of political participation are concerned.¹⁴⁵ Although free movement rights do not apply to them,¹⁴⁶ they enjoy more rights in the field of democratic representation than European citizens from the continent who moved to the UK in exercise of their Article 21 TFEU free movement right. Given that Article 22 TFEU does not provide for political participation of European citizens residing in a Member State other than their own at the level of the national parliaments, the unique position of the qualifying Commonwealth citizens who can elect and be elected to the House of Commons becomes clear. Moreover, Commonwealth citizens residing in the UK also participate in local and European elections. Regarding the latter, the ECJ has been explicit in dismissing the claims that enfranchising those persons who are not in possession of European citizen status is contrary to Community law. In *Spain v. UK* the Court supported the UK’s constitutional tradition of enfranchising

¹⁴⁰ See Art. 19 of Directive 2014/66/EU, in particular all derogations from the family reunification Directive contained therein.

¹⁴¹ Art. 21(1) of Directive 2014/66/EU.

¹⁴² Art. 22 of Directive 2014/66/EU.

¹⁴³ Art. 21(2-9) and Art 22(1-7) of Directive 2014/66/EU.

¹⁴⁴ See for this argument also Thym (n 9) 731-732.

¹⁴⁵ Maltese and Cypriot nationals residing in the UK enjoy a special status by virtue of being both Commonwealth citizens and EU citizens, hence being able to enjoy the best of both worlds. The same also applies to Irish nationals, who, although not Commonwealth citizens, enjoy a special status when residing in the UK. This section focuses exclusively on the discussion of the legal position of those Commonwealth citizens residing in the UK who are not also European citizens.

¹⁴⁶ Preamble to Directive 2003/109/EC, rec. 25.

the Commonwealth citizens, including their right to be elected to the EP.¹⁴⁷ In other words, the ECJ made it clear that the scopes of European citizens and voters in the EP elections differ:¹⁴⁸ a formal European citizenship status is not necessary to be enfranchised.¹⁴⁹

There is no strong argument available in the literature on the topic for the exclusion of those who are not in possession of EU citizenship status from the right to participate in EP elections. Davis reasonably called for the extension of the right to vote in all elections all persons meeting certain residency requirements.¹⁵⁰ In fact, although Spain, making an argument in *Spain v. UK* seemed to presume that a strong link exists between nationality and the right to vote in national and European elections,¹⁵¹ the history of the development of the concept of citizenship does not support this point of view.¹⁵² Even when the view that ‘foreigners’ should not be entitled to vote prevails, there is always a possibility of creating a legal status that would fit in-between being a citizen and an alien. In the UK, where the English Parliament prohibited foreigners from voting as early as in 1698,¹⁵³ a category of Commonwealth citizens and Irish nationals¹⁵⁴ falls outside that of aliens, thus qualifying these groups of people, when residents in the UK,¹⁵⁵ for the franchise. A similar practice also existed in the US.¹⁵⁶ In the European context it would be reasonable to link such status to a particular period of residence in the EU as a whole, not in one particular Member State.

The legal situation of Commonwealth citizens who are not nationals of Malta or Cyprus residing in the UK in the fields other than democratic representation is, because of British opt outs, very weak. Unlike third-country national long-term residents residing in other Member States, they cannot rely on the free movement provisions of Directive 2003/109/EC, or, indeed, benefit from any sectoral legislation discussed above. Also, once a Commonwealth citizen transfers residence from the UK to another Member State, he or she loses the democratic representation rights which he or she used to enjoy in the UK, losing the right to vote in all elections in the new state of residence.

¹⁴⁷ *Spain v. UK* (n 76) para 78: ‘In the current state of Community law, the definition of the persons entitled to vote and to stand as a candidate in elections to the European Parliament falls within the competence of each Member State in compliance with Community law, [...] Articles 189 EC, 17 EC and 19 EC do not preclude the Member States from granting that right to vote and to stand as candidate to certain persons who have close links with them, other than their own nationals or citizens of the Union resident in that territory’.

¹⁴⁸ For details see, e.g., Fabbrini (n 70).

¹⁴⁹ This decision of the ECJ echoes the famous ruling of the US Supreme Court in *Pope v. Williams*: ‘the privilege to vote in a state is within the jurisdiction of the state itself, to be exercised as the state may direct, and upon such terms as to it may seem proper, provided, of course, no discrimination is made between individuals, in violation of the Federal Constitution. The state might provide that persons of foreign birth could vote without being naturalized...’ *Pope v. Williams*, 193 U.S. 621, 632 (1904).

¹⁵⁰ Davis (2002) (n 3) 132.

¹⁵¹ *Spain v. UK* (n 76) para 37.

¹⁵² Lardy (n 75).

¹⁵³ *Ibid* 75 and fn. 2.

¹⁵⁴ Irish nationals are not ‘alien’ just as Ireland is not a ‘foreign country’ under the 1949 Ireland Act. Consequently, Irish citizens enjoy more rights than ‘foreigners’ would. So Irish citizens residing in the UK can both elect and be elected to the national legislature: Electoral Administration Act 2006, Art. 18(1)(b); Representation of People Act 2000, Art. 6(3)(e). To reciprocate this right, Ireland allowed UK nationals residing there to vote for the lower house of parliament (*Dáil*): Shaw (n 72) 13.

¹⁵⁵ Neither Commonwealth citizens nor Irish nationals can register in the UK as overseas voters, meaning that moving their residence outside the UK terminates their voting rights in that country, including, in the case of the Commonwealth citizens, EP voting rights.

¹⁵⁶ Several States used to allow those residents, who registered their intention to become US citizens to vote, while other aliens were not given that privilege. See Jamin B Raskin, ‘Legal Aliens, Local Citizens: The Historical, Constitutional and Theoretical Meanings of Alien Suffrage’ (1993) 141 *UPaLRev* 1391, 1418.

Yet, the political rights enjoyed by the Commonwealth citizens residing in the UK are very telling in many respects. Most importantly, they permit examination of the ties between the Member States of the EU from a fresh perspective. Is it not problematic, for instance, that for the purpose of voting in national elections the ties between the UK and the countries of the Commonwealth appear stronger than between the UK and other Member States of the EU¹⁵⁷? It is difficult to justify from the point of view of common sense that a Dutchman residing permanently in London has fewer political rights in the UK than a citizen of Mozambique residing next door, none of the two nations having any historical ties with the Crown. Most importantly, however, the political rights of the Commonwealth nationals in the UK show with all clarity that enfranchisement of non-citizens is possible and that no Community action is required for this.¹⁵⁸

Third-country Nationals' Rights under International Agreements

Although the international agreements with their countries of nationality provide third-country nationals with certain rights,¹⁵⁹ it is difficult to speak of “citizenship” rights in such a context – should one have all the richness of the palette of the existing agreements in mind. This is because the majority of agreements concluded by the Community and the Member States with the third countries do not contain any provisions related either to free movement of the nationals of those states residing in the EU, or to the rights to participate in the political life of the Union, or the Member States. However, there are a number of agreements that contain provisions somewhat comparable to the European citizenship rights. Three agreements are particularly relevant in this respect: the EEA (European Economic Area) Agreement,¹⁶⁰ covering Iceland, Liechtenstein and Norway; an Agreement on the free movement of persons with Switzerland;¹⁶¹ and the Association Agreement with Turkey (Ankara Agreement).¹⁶² None of these provide for any political participation rights. As far as free movement rights are concerned, however, the picture is quite different.

The agreement concluded with the EEA States is the most advanced in this regard. The purpose of the agreement, as explained by the ECJ in *UK v. Council*, ‘is to provide for the fullest possible realisation of the free movement of goods, persons, services and capital within the whole EEA, so that the internal market established within the European Union is extended to the EFTA States’.¹⁶³ The EEA agreement is based on the principle of homogeneity. Therefore, as soon as relevant EU legislation has

¹⁵⁷ Except Ireland, Malta and Cyprus.

¹⁵⁸ Especially given the ‘green light’ to such practice in *Spain v. UK* (n 75).

¹⁵⁹ See generally Hedemann-Robinson (n 9); García Andrada (n 9).

¹⁶⁰ OJ 1994 L1/3. For analysis, see, Harvard Haukeland Fredriksen, ‘Bridging the Widening Gap Between the EU Treaties and the Agreement on the European Economic Area’ (2012) 18 ELJ 868; M Elvira Méndez-Pinedo, *EC and EEA Law: A Comparative Study of the Effectiveness of European Law* (Europa Publishing 2009); Carl Baudenbacher (ed), *Judicial Protection in the European Economic Area* (German Law Publishers 2012); Adam Łazowski, ‘Enhanced Multilateralism and Enhanced Bilateralism: Integration Without Membership in the European Union’ (2008) 45 CMLRev 1433.

¹⁶¹ OJ 2002 L114/6. For analysis, see, Steve Peers, ‘The EC-Switzerland Agreement on Free Movement of Persons: Overview and Analysis’ (2000) 2 EuJML 127; Marius Vahl and Nina Grolimund, *Integration Without Membership: Switzerland’s Bilateral Agreements With the European Union* (CEPS 2006); Francesco Maiani, Roman Petrov, and Ekatarina Mouliarova (eds), ‘European Integration Without EU Membership: Models, Experiences, Perspectives’ (2009) EUI Working Papers, RSCAS 2009/10, 103-135; Łazowski (n 158).

¹⁶² OJ 1973 C113/2. See also the Additional Protocol of 1970 (OJ 1972 L 293) and the Association Council Decisions 1/80 and 3/80. Nicola Rogers, ‘Movement of Persons (Association Agreement with Turkey)’ in Andrea Ott and Kirstyn Inglis (eds), *Handbook on European Enlargement: A Commentary on the Enlargement Process* (T.M.C. Asser Press 2002), 495; Narin Tezcan-Idriz, ‘Free Movement of Persons Between Turkey and the EU: To Move or not to Move? The Response of the Judiciary’ (2009) 46 CMLRev 1621.

¹⁶³ ECJ, *United Kingdom v Council*, C-431/11, EU:C:2013:589, para 50. For an analysis see Nicolas Rennuy and Peter Van Elsuwege, ‘Integration without membership and the dynamic development of EU law: *United Kingdom v Council (EEA)*’ (2014) 51 CMLRev 935.

been adopted, the EEA Joint Committee must decide how to amend the EEA agreement, to permit ‘a simultaneous application’ of the Union legislation and the EEA agreement.¹⁶⁴ Additionally, the principle of homogeneity establishes the requirement ‘to arrive at as uniform an interpretation as possible of the provisions of the Agreement and those provisions of Community legislation’.¹⁶⁵ By virtue of this agreement, EEA nationals have free movement rights which are almost identical to those of European citizens, yet, as they clearly do not hold nationalities of any of the Member States, they are not EU citizens. EEA nationals can work and reside freely in any Member State of the EU if they fall within the EU meaning of the notion of “workers”,¹⁶⁶ are self-employed,¹⁶⁷ provide services,¹⁶⁸ or are students, pensioners, or persons of independent means. The homogeneous application of the law on the free movement of persons is somewhat undermined by the non-application of the EU citizenship provisions to the EEA states. Articles 20 TFEU and 21 TFEU have not been reproduced in the EEA agreement. Consequently, of the provisions of Directive 2004/38/EC (the Citizenship Directive), only those dealing with the free movement of workers are incorporated into the EEA agreement.¹⁶⁹ It might be difficult, however, to separate the free movement provisions for the economically active from the ‘EU citizenship’ provisions. It is thus likely that EEA nationals will also benefit to some extent from the more beneficial rules for EU citizens.¹⁷⁰ The free movement rights of the EEA nationals are thus likely to be almost as substantive as those of European citizens, making them a very special and the most privileged group of third country nationals known to EU law.

The same largely applies to the EC-Switzerland Agreement. The bilateral agreements do not extend the application of all four freedoms to Switzerland.¹⁷¹ With regard to the free movement of persons, to be found in Annex I, however, not many differences can be detected between the EC-Switzerland Agreement and the EEA Agreement. The former expresses the intention ‘to bring about the free movement of persons between them on the basis of the rules applying in the European Community’.¹⁷² The EC-Switzerland Agreement is, however, slightly narrower in scope. This is mostly due to the static nature of the Agreement. Due to the absence of a principle of homogeneity, Switzerland is not under an obligation to incorporate legislative amendments or take into account the case law of the ECJ delivered after the signing of the Agreement.¹⁷³ The ECJ confirmed in *Xhymshiti* that legislative amendments not mentioned in the Annexes of the EC-Switzerland Agreement do not apply to German residents working in Switzerland.¹⁷⁴ Also the provisions on the freedom to provide services in Annex I are of a limited nature. The Agreement protects only the provision of cross-border services for a period not exceeding 90 days per calendar year.¹⁷⁵ Nationals of contracting states carrying out cross-border services for a period exceeding 90 days may, therefore, ‘not derive any rights on the provision

¹⁶⁴ Art. 102(1) EEA.

¹⁶⁵ Art. 105(1) EEA.

¹⁶⁶ Art. 28 EEA, Annexes V and VI.

¹⁶⁷ Art. 31 EEA.

¹⁶⁸ Art. 36 EEA.

¹⁶⁹ Decision of the EEA Joint Committee 158/2007 amending Annex V (free movement of workers) and Annex VIII (Right of establishment) to the EEA Agreement (OJ 2008 L124/20). For an analysis see Marc Mareseau, ‘On the external dimension of Directive 2004/38/EC’ in Inge Govaere and Dominik Hanf (eds), *Scrutinizing Internal and External Dimensions of European Law* (Peter Lang 2013). See also Renuy and Van Elsuwege (n 161) 948-949.

¹⁷⁰ See to this also the EFTA-Court cases E-4/11 *Arnulf Clauder* [2013] and E-15/12 *Jan Anfinn Wahl* [2013].

¹⁷¹ The bilateral law, for example, do not cover the free movement of capital. The ECJ has, therefore, explicitly classified Switzerland as a third country with regard to this freedom. ECJ, *Fokus Invest*, C-541/08, EU:C:2010:74, para 49.

¹⁷² Preamble to the EC-Switzerland Agreement, second recital.

¹⁷³ Art. 16(2) and 17 EC-Switzerland Agreement.

¹⁷⁴ ECJ, *Xhymshiti*, C-247/09 EU:C:2010:698, paras 35-39. See also ECJ, *Hliddal and Bornand*, C-216/12 & C-217/12, EU:C:2013:568, para 38.

¹⁷⁵ Article 17 Annex I EC-Switzerland Agreement.

of services from the provisions of the Agreement'.¹⁷⁶ The limited scope of the right to non-discrimination on the basis of nationality further diminishes the protection cross-border service providers may derive from the Agreement. In *Hengartner*, the ECJ confirmed that Article 2 of the Agreement only prohibits such discrimination 'where the situation of those nationals falls within the material scope of the provisions of Annexes I to III to the Agreement'.¹⁷⁷ Since the Annexes do not contain 'any specific rule intended to allow recipients of services to benefit from the principle of non-discrimination in connection with the application of fiscal provisions relating to the commercial transactions',¹⁷⁸ the Austrian authorities were allowed to impose higher taxes on Swiss nationals receiving services in Austria than on EU citizens doing so.

Employed and self-employed persons enjoy a far more extensive right to non-discrimination on the basis of nationality, which is very similar if not equal to the same right enjoyed by Union citizens residing in other Member States. In *Graf and Engel*, the ECJ held the case law prohibiting both direct and indirect discrimination to be applicable to the Agreement.¹⁷⁹ In *Bergström and Ettwein*, this right was further extended. The German authorities did not allow Mr and Mrs Ettwein, German nationals residing in Switzerland and working on a self-employed basis in Germany, to benefit from the same tax benefits as German nationals residing in Germany. Contra the advice of the Commission¹⁸⁰ and the Advocate General,¹⁸¹ the ECJ held that self-employed frontier workers 'may also claim rights under the Agreement against their own country'.¹⁸² Mr and Mrs Epstein were, therefore, allowed to invoke the right to equal treatment against the German authorities. In *Bergström*, the applicant was allowed to invoke the Agreement's provisions on social security as well as Regulation 1408/71/EEC on the application of social security schemes to employed persons and their families moving within the Community¹⁸³ against Sweden, her country of origin, in order to ensure that the Swedish authorities would take into account the period of employment in Switzerland in the calculation of parental benefits. There was nothing in these provisions which precluded such an application.¹⁸⁴ In addition, the 'freedom of movement would be impeded if a national of a Contracting Party were to be placed at a disadvantage in his country of origin solely for having exercised his right of movement'.¹⁸⁵ It appears that the ECJ is increasingly equating the Agreement's provisions on employed and self-employed persons with the interpretation given to corresponding Treaty provisions. The free movement rights of the employed and self-employed persons falling within the scope of the Agreement have thus become very similar to those of economically active European citizens.

Due to the recent outcome in a Swiss referendum on immigration, demanding absolute control over immigration by Switzerland and the renegotiation of international agreements contravening this goal, all of this has become uncertain.¹⁸⁶ The EU has already indicated that it is not pleased by the outcome and is unlikely to accept a renegotiation of the bilateral agreement on the free movement of persons on

¹⁷⁶ ECJ, *Grimme*, C-351/08, EU:C:2009:697, para 44.

¹⁷⁷ ECJ, *Hengartner* C-70/09, EU:C:2010:430, para 39.

¹⁷⁸ *Ibid* para 40.

¹⁷⁹ ECJ, *Graf and Engel*, C-506/10, EU:C:2011:643 para 26.

¹⁸⁰ ECJ, *Ettwein*, C-428/11, EU:C:2012:651, para 33.

¹⁸¹ ECJ, *Ettwein*, C-428/11, EU:C:2012:651, Opinion of Advocate General Jääskinen, paras 41-42.

¹⁸² *Ettwein* (n 178) para 33.

¹⁸³ Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community (OJ 1971 L149/2).

¹⁸⁴ ECJ, *Bergström*, C-257/10, EU:C:2011:839, paras 29-34.

¹⁸⁵ *Ibid*, para 28.

¹⁸⁶ The Economist, 'Switzerland's Crossbow' (2014) <<http://www.economist.com/news/europe/21596567-referendum-europes-freedom-movement-will-have-big-consequences-switzerlands-crossbow>>.

the terms of the outcome of the referendum.¹⁸⁷ The referendum, thus, has possible far-reaching consequences. Particularly since the ‘guillotine clause’ in the agreement stipulates that all other EU-Swiss bilateral agreements will cease to apply if the Agreement on free movement of persons is terminated.¹⁸⁸ Whether the position of Swiss nationals will in the future remain as aligned to the status of EU citizens as is the case presently, has thus become uncertain as a consequence of the referendum.

In contrast with the EEA and EC-Switzerland Agreements, the EC-Turkey Association looks relatively modest as far as free movement rights are concerned. The Member States fully control the admission of Turkish workers and their families to their territories.¹⁸⁹ This prerogative is not unlimited though. The so-called ‘standstill clause’ in Article 41(1) of the Association Agreement ‘precludes a Member State from adopting any new measure having the object or effect of making the establishment and, as a corollary, the residence of a Turkish national in its territory subject to stricter conditions than those which applied at the time when the Additional Protocol entered into force with regard to the Member State concerned’.¹⁹⁰ While the standstill clause does not alter the principle that the first admission is governed exclusively by Member State law,¹⁹¹ Member States are not allowed to introduce new substantive and/or procedural restrictions to the first admission.¹⁹² On the basis of this standstill clause, newly introduced administrative¹⁹³ and language¹⁹⁴ requirements for Turkish nationals have been struck down. Would the standstill be unlimited and unconditional, Turkish nationals would in certain areas enjoy a more beneficial rights regime than the Union citizens. This would be contrary to Article 59 of the Association Agreement, according to which ‘Turkey shall not receive more favourable treatment than that which Member States grant to one another pursuant to the Treaty’. Consequently, the imposition of new rules is not always prohibited. The ECJ has decided that ‘the adoption of measures which apply in the same way to both Turkish nationals and citizens of the Union is not inconsistent with the standstill rules’.¹⁹⁵ In addition, Member States are still allowed to adopt more stringent measures against Turkish citizens who are not lawfully present,¹⁹⁶ as long as those measures do not redefine the criteria for lawfulness itself.¹⁹⁷ So while Member States remain competent to decide on first entry, the standstill clause places limitations on what Member States are allowed to do.

Once admitted to a Member State, Turkish workers are given a set of rights more similar to that of EU citizens, particularly related to non-discrimination at the work-place and the continuation of residence and access to the job-market.¹⁹⁸ The ECJ has further strengthened the rights of Turkish

¹⁸⁷ See, for example, the statement of Commissioner László Andor <http://europa.eu/rapid/press-release_STATEMENT-14-32_en.htm>.

¹⁸⁸ Article 25(4) of the EU-Swiss Agreement on the free movement of persons. Adam Łazowski, ‘The end of chocolate box-style integration? EU-Swiss relations after the referendum’ (2014) CEPS Commentary.

¹⁸⁹ ECJ, *Günaydin*, C-36/96, EU:C:1997:445, para 23; ECJ, *Birden*, C-1/97, EU:C:1998:568, paras 37 & 38.

¹⁹⁰ ECJ, *Savas*, C-37/98, EU:C:2000:224, para 69; ECJ, *Tum and Dari*, C-16/05, EU:C:2007:530, para 49. The same interpretation has been given to the standstill clause in Article 13(1) of Decision 1/80 of the Association Council on rights enjoyed by Turkish workers legally employed in a Member State. ECJ, *Sahin*, C-242/06, EU:C:2009:554, para 65.

¹⁹¹ *Tum and Dari* (n 188) paras 57-58; ECJ, *Oguz*, C-186/10, EU:C:2011:509, para 26; ECJ, *Dereçi*, C-256/11, EU:C:2011:734, para 88.

¹⁹² *Tum and Dari* (n 188) para 69; ECJ, *Soysal*, C-228/06, EU:C:2009:101, para 49.

¹⁹³ *Soysal* (n 190).

¹⁹⁴ ECJ, *Dogan*, C-138/13, EU:C:2014:2066.

¹⁹⁵ ECJ, *Commission v the Netherlands*, C-92/07, EU:C:2010:228, para 62. See also *Sahin* (n 188) para 67.

¹⁹⁶ ECJ, *Abatay and Others*, C-317/01 and C-369/01, EU:C:2003:572, para 85; ECJ, *Demir*, C-225/12, EU:C:2013:725, para 36.

¹⁹⁷ *Demir* (n 194) para 38.

¹⁹⁸ E.g. Art. 2(1)(b) of Decision 2/76 of the EEC/Turkey Association Council (not published in the OJ) and Art. 6(1) of Decision 1/80 of the EEC/Turkey Association Council (not published in the OJ); Rogers (n 160).

workers by interpreting the rights of Turkish workers in line with the ECJ case law on EU workers. The meaning given to the provisions on Turkish workers by the ECJ is such that ‘the principles laid down in [Articles 45 and 46 TFEU] and in [Article 57 TFEU] must be extended, so far as possible, to Turkish nationals’.¹⁹⁹

The far-reaching nature of the similarities between the EU citizen workers’ rights and the rights of the Turkish workers fails to hide a crucial distinction, however: the Turkish workers are only given the right to reside within one Member State and do not have the right to move between Member States. This definitely endows with a sense of irony any statements regarding the ‘free movement’ of Turkish citizens. Notwithstanding the fact that a clear and unquestionable lack of free movement rights has probably been remedied – to some extent at least – by the adoption of Directive 2003/109/EC on third-country nationals who are long term residents,²⁰⁰ it is indispensable to be absolutely clear about the fact that the Turkish workers do not enjoy this *quasi*-citizenship right directly based on the Agreement. It is all the more necessary to make this absolutely clear, given the crucial importance the right enjoys in the context of contemporary EU citizenship law.²⁰¹

All the above does not alter the obvious fact that while the position of Turkish workers still substantially differs from Union citizens, the status of the former has become more similar to the latter compared with other third country nationals out there. This cannot be said for the freedom to provide services. Even though the ECJ believes that ‘the provisions of the Treaty relating to the freedom to provide services, must be extended, so far as possible, to Turkish nationals to eliminate restrictions on the freedom to provide services between the contracting parties’,²⁰² a clear distinction was made between Turkish service providers and Union citizens in *Demirkan*. According to established case law, the freedom to provide services also includes the ‘passive’ freedom to do so, that is, ‘the freedom for recipients of services to go to another Member State in order to receive a service there’.²⁰³ Ms Demirkan relied on these decisions to substantiate the claim that she, as service recipient, would not need a visa to visit her step-father in Germany. This argument was not accepted. The ECJ, first of all, recalled that no substantive measures were adopted under the Association Agreement to liberalise services.²⁰⁴ More importantly, the ECJ found that the aims of the Association Agreement and the Treaty with regard to the freedom to provide services are different. While the Association Agreement has a purely economic aim, it does not establish ‘any general principle of freedom of movement of persons between Turkey and the European Union’,²⁰⁵ analogous to the provisions on Union citizenship. There is, thus, no basis to conclude that the Agreement’s provisions on the freedom to provide services also include the freedom to provide passive services.

A similar distinction between Turkish nationals and Union citizens was made in *Ziebell*. In connection with the criminal offences committed, an expulsion order was issued against Mr Ziebell, a Turkish national. He appealed on the grounds that according to established case law the protection offered to Union workers against expulsion is extended to Turkish nationals²⁰⁶ and that, therefore, he should be allowed to benefit from the extended protection given to Union citizens under the Citizenship Directive.²⁰⁷ Contrary to what some expected,²⁰⁸ the ECJ disagreed. While the Court

¹⁹⁹ ECJ, *Ayaz*, C-275/02, EU:C:2004:570, para 44; ECJ, *Genc*, C-14/09, EU:C:2010:57, para 17.

²⁰⁰ Tezcan/Idriz (n 160) 1644-1645.

²⁰¹ Nic Shuibhne (n 17).

²⁰² *Abatay and Others* (n 194) para 112.

²⁰³ ECJ, *Luisi and Carbone*, 286/82 and 26/83 EU:C:1984:35, para 16; ECJ, *Cowan*, 186/87, EU:C:1989:47, para 15.

²⁰⁴ ECJ, *Demirkan*, C-221/11, EU:C:2013:583, para 46.

²⁰⁵ *Ibid* para 53.

²⁰⁶ ECJ, *Nazli*, C-340/97 EU:C:2000:77, paras 56-64; ECJ, *Dörr and Ünal*, C-136/03, EU:C:2005:340, paras 62-69.

²⁰⁷ ECJ, *Ziebell*, C-371/08, EU:C:2011:809, para 44.

maintained that ‘the Treaty articles relating to freedom of movement for workers must be extended, as far as possible, to Turkish nationals who enjoy rights under the EEC-Turkey Association’,²⁰⁹ the merely economic aim of the Association Agreement have to be contrasted with the concept of Union citizenship, which ‘justifies the recognition, for Union citizens *alone*, of guarantees which are considerably strengthened in respect of expulsion’.²¹⁰ While the ECJ has strengthened the rights of Turkish nationals falling within the scope of the Association Agreement, it has also explicitly maintained the distinction between Turkish nationals and EU citizens. In addition, in the absence of an automatic right to access, the position of Turkish nationals falls short of the one of EEA and Swiss nationals. Yet, Turks in the EU enjoy more rights than other non-EEA third-country nationals.²¹¹

To Render the Invisible Visible (as a Conclusion)

This contribution has identified a number of categories of third-country nationals directly enjoying *quasi*-citizenship rights in the European Union. The specific rights as well as the extent to which non-EU citizens enjoy them vary, just as the nature and sources of such rights do. Some rights – for instance the ones enjoyed by ‘any person’ – stem directly from EU primary law, while the majority of such rights are actually established by secondary law of the Union (free movement rights of Blue Card holders and long-term resident third country nationals), international agreements (the rights of Turkish, Swiss, EEA etc. nationals) and national law (the political rights of the Commonwealth citizens in the UK).

The different nature and the extent of the enjoyment of the rights in question notwithstanding, one fundamental feature of all these rights is of key importance for the analysis of the legal position of the absolute majority of third country nationals in the EU. This feature is most worrisome in the context of the development of EU integration: officially, the EU legal reality barely exists for the third country nationals, numerous EU law instruments tailored to regulate the legal position of this category of persons notwithstanding. To put it in other words, the main element of all the European approaches to third country nationals and their direct *quasi*-citizenship rights consists (bar the EEA and Swiss nationals) in pretending that the European Union is simply not there.

Why is it problematic to pretend that there is no Union? This is not an issue of the amount of rights or ethics of non-discrimination. What is at stake is a consequential approach to the EU’s own achievements and the new legal-political reality being brought to life in Europe. The Balibarean *Apartheid européen* thus works in a much more sophisticated – and, consequently, problematic – way than simply denying citizenship rights to non-citizens. While the latter is any citizenship’s core function: this is a legal status delimiting the boundary of exclusion; the former has to do with the core underlying factors of law in Europe, which are at play. By re-emphasising the importance of the elusive national borders for the most vulnerable group of the population – the migrants and residents without EU citizenship – the European legal context is denying them the very rationale of legal-political thinking underpinning the internal market and the ‘ever closer Union’. This amounts to a constant denial of all what European integration stands for to a large group of Europeans – albeit not enjoy the correct legal status.

While obviously making the lives of third-country nationals more difficult than it would otherwise be, ignoring the achievements of the Union amounts to the denial of the objectives of integration

(Contd.) _____

²⁰⁸ Tezcan/Idriz (n 160) 1657.

²⁰⁹ Ziebell (n 205) para 58.

²¹⁰ Ibid para 73 (Italics added).

²¹¹ Denis Martin, ‘The Privileged Treatment of Turkish Nationals’ in Guild and Minderhoud (eds), *The First Decade of EU Migration and Asylum Law* (Martinus Nijhoff 2012) 75. See also Daniel Thym, ‘The European Court of Justice, Law, Politics and the EEC-Turkey Association Agreement’, in this volume; Thym (n 9) 714.

for a specific group of people and, simultaneously, sends a profoundly misleading message that there is no Internal Market, no Area of Freedom Security and Justice and that the invisible borders between the ever-integrating Member States stand strong for a reason. While it is clear that the message is misleading, the illusion it creates is particularly harmful, as it serves no purpose, goes against what numerous Europeans cherish and thus dehumanises third country nationals in a particularly problematic way: by denying them any possibility to appeal to rationality and common sense, by excluding the very reality they live in every day from the picture, which migration law is framing. There are thus at least three significant interrelated problems with the way how third country nationals are treated in the EU at the moment:

1. EU migration regulation *assumes* the denial of the legal political reality of the Union;
2. EU migration regulation *bars* rationality from being taken into account when third country nationals' rights are at stake;
3. EU migration regulation sends a problematic signal that the goals and principles of the Union can be consistently ignored.

Such treatment of the legal-political reality of the European integration project is most unhelpful and has to be changed. The change can come both at the national level (as the example of the Commonwealth citizens in the UK as well as *Spain v UK* demonstrate) and the EU level, as the timid steps of the limited free movement rights in the problematic secondary legislation demonstrate. Also international agreements can be of assistance here.

While all the three ways are open (theoretically at least), the most optimal among the three should correspond to the leadership role of the EU's institutions and take the shape of the secondary legislation. The Union itself should ensure that its very presence in the world, coupled with its underlying goals and values is not discarded as non-existent (even if only for a group of individuals). A normative position in favour of taking the reality of European integration into account should be adopted: a necessary positive step in the current situation of regulatory chaos and mind-blowing sophistication boasting wrong normative foundations. The denial of reality itself is a secure way to denying justice,²¹² exposing the flawed nature of the EU's migration regime. To pretend that the EU is not there while framing EU law is wrong.

²¹² For more on justice in the context of EU law, see, Dimitry Kochenov, Gráinne de Búrca and Andrew Williams (eds), *Europe's Justice Deficit?* (Hart Publishing 2015).

