Long-term Residents Directive: can it achieve the Tampere Programme's objectives?

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Abstract

The Long-term Residents Directive (LTR Directive) concerning the status of third-country nationals (TCNs) who are long-term residents (LTRs) in the European Union was adopted by the Council of the Union in 2003. Given that the Directive was promulgated, inter alia, in order to implement the objectives of the Tampere Programme, the Directive's provisions would be expected to be in line with the Programme's objectives. This thesis is concerned with the question of whether the LTR Directive is capable of achieving the objectives set for the Union in the Tampere Programme. This thesis is also a plea for the approximation of the rights and status of LTRs and EU citizens, as recommended by the Tampere Programme. Although such an approximation has been explored in a number of studies, the literature has paid little attention to what benefits this might have for the Union. This thesis, therefore, seeks to do this by analysing the benefits of the approximation of the rights and status of LTRs to EU citizens extension of rights and status of LTRs to EU citizens from the point of view of the Union.

Analysing the Tampere Programme shows that the Programme intended to enhance the integration of LTRs into the EU's society by giving LTRs rights and obligations comparable to the rights and obligations of EU citizens. Nevertheless, the analysis in this thesis demonstrates that i) the approach of the LTR Directive to the integration of LTRs into the EU's society is different from what the Tampere Programme recommended; ii) the Directive fails to give LTRs rights and obligations comparable to the rights enjoyed by EU citizens, and the obligations imposed on them; iii) the status of long-term residence granted to LTRs by the Directive is far from EU citizenship. Thus, the LTR Directive is not capable of achieving the main objectives of the Tampere Programme with regards to LTRs. In this thesis, it will also be illustrated that approximating the rights and status of LTRs to EU citizens will i) enhance the integration of LTRs into the EU's society; ii) contribute to the effective attainment of the EU's internal market objectives; iii) improve the EU's democratic legitimacy.

I confirm that this is my own work and the use of all material from other sources has been properly and fully acknowledged.

Behnam Balali

List of Abbreviations

The following abbreviations are used within this thesis.

AFSJ	Area of freedom, security and justice
Charter	Charter of Fundamental Rights of the European Union
EC	European Communities
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECJ	European Court of Justice
EEA	European Economic Area
EP	European Parliament
EU	European Union
JHA	Justice and Home Affairs
LTR	Long-term resident
LTR Directive	Directive 2003/109/EC concerning the status of third-country nationals who are long-term residents in the European Union
MEP	Member of the European Parliament
OJ	Official Journal of the European Union
TEU	Treaty on European Union ('Maastricht Treaty')
TFEU	Treaty on the Functioning of the European Union
TCN	Third-country National – a national of a state that is not a Member State of the European Union

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Chapter 1 - Introduction

1. Introduction

Directive 2003/109/EC (LTR Directive) concerning the status of third-country nationals (TCNs) who are long-term residents (LTRs) in the European Union (EU) was adopted by the Council of the EU (the Council) on 25 November 2003.[1] The LTR Directive grants certain rights to those TCNs who have resided in a Member State for a period of, at least, five years.[2] The LTR Directive was adopted based, inter alia, on the objectives set by the Member States for the Union in the Tampere summit, namely to i) grant TCN residents the rights which are comparable to those enjoyed by EU citizens; ii) facilitate the integration of TCN residents into the receiving society; iii) approximate the status of TCN residents in the Union to the status of citizens of the Union.[3] The principle underpinning the LTR Directive is that for the first time, domicile generates entitlements to security of residence in the host State, the right to equal treatment with nationals of the host State, and the rights to move and reside in a second Member State.[4]

This thesis is concerned with the capability of the LTR Directive to achieve the above objectives set for the Union in the field of EU migration policy in the Tampere summit The ultimate aim of this thesis is to examine the capability of the LTR Directive to facilitate the integration of LTR into the EU society. Various definitions have been provided for the term 'integration' of migrants into the host society, and different models of integration have been recommended. The term will be defined in detail in chapter 2, nevertheless, it is worth it to clarify here at the beginning of the thesis what this term means and which method of integration I advocate.

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[1] Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents. OJ L 16, 23 January 2004. The Directive entered into force on the day of its publication in the Official Journal of the European Union.

[2] The scope of the LTR Directive is geographically limited. It does not apply to the UK, Ireland, and Denmark.

[3] Tampere European Council, 15-16 October 1999, Presidency Conclusions, SN 200/99, Brussels.

[4] T Kostakopoulou, 'Long-Term Resident Third Country Nationals in the European Union: Institutional Legacies and Evolving Norms' in R Craufurd Smith (ed), *Culture and European Union Law* (2004) 318. Host State here refers to the Member State which grants the status of long-term residence for the first time to a TCN. Second Member State refers to the State to which an LTR moves, after acquiring the status in another Member State.

The integration of migrants, or 'the integration of immigrants into the institutional and social fabric of receiving societies',[5] does not have a single, clear and comprehensive definition. Nevertheless, it is widely accepted that the integration of migrants in the receiving society is the process of facilitating the inclusion of newcomers in the native society, so they can get together as the members of the same society.[6] This process is a two-way process, with the migrants being on the one side, and citizens, residents and the government of the receiving society on the other side.

In this thesis, two methods of integration will be presented, namely, the civic integration method, and the inclusion of migrants in the receiving society. The former method utilises tests and courses which have their aim to educate the migrants on the history and language of the host state. The latter relies on providing a welcoming environment for migrants and ensuring that migrants are treated equally with other members of the receiving society. In this thesis, it will be demonstrated that it is neither necessary nor justified to adopt the civic integration method for TCNs who apply for the status of long-term resident.[7] Their integration will, rather, be enhanced by adopting the inclusion method of integration. This will be discussed further in sections 4, 5, and 6 of chapter 2.

It should also be pointed out here that the term 'integration' in this thesis refers to the inclusion of LTRs in the European society, and *not just* their inclusion in the host Member State.

2. EU and immigration

It is a generally accepted rule of international law that each state can decide who enters its territory, for how long, and under what conditions and limitations.[8] Accordingly, each state in the world has the exclusive competence to control migration of foreigners (non-nationals) to its territory. Anyone who does not hold the nationality of a state may not enter into and reside

[5] C Murphy, 'Immigration, Integartiona and Citizenship in European Union: The Position of Third Country Nationals' 8 Hibernian Law Journal 155, 155.
[6] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Immigration, Integration and Employment (Brussels, COM (2003) 336) 17; M Jesse, The Civic Citizens of Europe : The Legal Potential for Immigrant Integration in the EU, Belgium, Germany, and the United Kingdom (Brill 2017) 24.
[7] Other categories of migrants are out of the scope of this thesis, thus, it will not be discussed which method of integration is more suitable for those migrants.
[8] C Dauvergne, 'Sovereignty, Migration and the Rule of Law in Global Times' (2004) 67 The Modern Law Review 588, 595–6.

in that country, unless (s)he holds a right of abode or has been granted a permission to do so in a form of visa or a permission to enter at the border.[9]

Nevertheless, in respect of EU Member States, this general rule does not apply, at least to some extent. Control over the conditions of entry and residence of non-nationals to an EU Member State has been significantly overtaken by EU law, in situations involving a Member State national. Moreover, even when the migrant is not a Member State national (i.e. (s)he is a TCN), the host Member State only has the full power to act and apply its national immigration law if there is no EU legislation regulating the conditions of entry and residence of the TCN.

2.1. Control over entry and residence of nationals of other Member States

The power of EU Member States to control 'migration'[10] of EU nationals to their territories has been limited step by step since the creation of the EU.[11] Initially, their power to control the movement of economically active actors was limited, as this category of Member State nationals could freely move between the Member States.[12] Then in the early 1990s, *all* nationals of the Member States became exempt from immigration control as a result of the so called 'Residence Directives'[13] and the introduction of EU citizenship and its affiliated rights for all Member States' nationals by the Treaty of Maastricht. 'Every person holding the nationality of a Member State shall be a citizen of the Union'.[14]

EU citizens enjoy, inter alia, the right to move and reside freely within the territory of the Member States.[15] Border controls between EU Member States have also been abolished,[16]

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[9] In addition to the regular forms of entry permission, a person may enter into the territory of a country of which (s)he is not a national, in order to seek asylum: The 1951 Refugee Convention, Article 31.
[10] Today, movement of EU citizens is not governed by EU immigration policy, therefore, it may not be referred to as migration.
[11] Formerly, the European Communities. In this thesis, the term 'EU' will also be used instead of European Communities or 'EC'.
[12] TEEC [1957], Article 39 (ex 48). Initially, since the Communities had a mainly economic aim, only economically active Member State nationals enjoyed free movement rights
[13] Directive 90/364/EEC on the right of residence [1990] OJ L180/26, Directive 90/365/EEC on the right of residence for employees and self-employed persons who have ceased their occupational activity [1990] OJ L180/28, Directive 93/96/EC on the right of residence for students [1993] OJ L317/59.
[14] TFEU, Article 20.
[15] TFEU, Article 21.
[16] As a result of the implementation of the Schengen Acquis into EU law: Council Decision 1999/435/EC, [1999] OJL176/1. A minimum level of control still exists in a few Member State which either have opted-out of the Schengen acquis or have not yet implemented it, but still this control is limited to requiring EU citizens to produce a passport or ID card at the entry border. The movement of EU citizens to another Member States may not be limited; EU Member States may restrict the entry of an EU citizen to their territory only in very limited, circumstances on the grounds of public health, public security and public policy. This will be discussed further in chapter 3.

and any EU citizen may freely move within the territory of the Union without being subject to immigration control.

Additionally to the right to move and reside in other Member states, EU citizens enjoy a general protection in the host State against discrimination on the grounds of nationality, within the scope of application of the Treaties.[17] This protection against discrimination on the grounds of nationality gives the mobile EU citizen an equal opportunity with the host State's nationals in any aspect of life, particularly in access to the labour market.

In addition to the above primary rights which EU citizens derive from the Treaty, family members of an EU citizen who exercises their free movement rights can derive – through the EU citizen – the right to join the EU citizen in the host State.[18] The right of family members to accompany or join their EU citizen family member is laid down in the Treaties, nevertheless, EU secondary legislation covers all family members who fall within the definition of family members,[19] regardless of their nationality. In other words, those, including TCNs, who are affiliated with an EU citizen, enjoy the right to move and reside in the Member State where their EU citizen family member resides.

2.2. Control over the migration of TCNs and conditions of their residence

As we saw, the control of EU Member States on the conditions of entry and residence of EU citizens has been gradually, but significantly, curbed by EU law.[20] The extent of EU competence governing the migration of Member State nationals and TCNs has not developed simultaneously. Unlike the domain of movement of Member State nationals in which the EU has always had the competence to intervene,[21] until recently migration of TCNs had been an exclusive Member State competence. Due to this lack of competence, the EU was not involved in this field for decades. The involvement of the EU in this field may be divided to three main eras: (1) before the Treaty of Maastricht; (2) between the Treaty of Maastricht and the Treaty of Amsterdam; (3) after the Treaty of Amsterdam.

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[17] TFEU, Article 18.
[18] Articles 5, 6, 7, 16 Directive 2004/38 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States [2004] OJ L158/77.
[19] Directive 2004/38, Article 2(2).
[20] For a more detailed analysis of the impact of EU law on control of Member States on migration of EU citizens to their territories, see: A Tryfonidou, 'The Impact of EU Law on Nationality Laws and Migration Control in the EU's Member States' (2011) 25 Journal of Immigration, Asylum and Nationality Law 358.
[21] Initially, the competence did not include all Member State nationals, however, the EU's competence in the field of movement of Member State nationals has been gradually expanded. Free movement of persons has always been at the core of the European integration project.

2.2.1. Before the Treaty of Maastricht, and between Maastricht and Amsterdam

Traditionally, immigration and the treatment of TCNs were considered as sovereignty-sensitive areas and fell within the exclusive competence of the receiving State. The Member States of the Union could enter an agreement with one or more states, either in the Union or elsewhere, to collaborate in immigration matters, but this type of collaborations were usually ad hoc, informal, and limited. An example for such collaborations is the Schengen Convention 1990 (before being implemented into EU law), in which five Contracting States[22] agreed to abolish checks at their common borders, adopt a common visa policy, and set up a database to exchange information on the foreigners who may pose a threat to the security of the signatory states.[23]

The informal intergovernmental cooperation in the field of immigration of TCNs was formalised following the entry into force of the Treaty of Maastricht in 1993. The Treaty of Maastricht declared that developing a common policy on the immigration of TCNs, particularly the conditions of their entry and residence in the territory of the Member States, is of 'common interest' to the Union.[24] Cooperation in managing migration and adopting common immigration policy and visa standards at EU level seemed to be logical and inevitable prerequisites for the abolition of internal border controls between the Member States, as a TCN once admitted to a Member State could freely move to the others where there is no border control between the Member States.[25]

The Treaty of Maastricht built the Union on three 'pillars' and brought immigration of TCNs under Title VI of the 'third pillar', namely, Justice and Home Affairs. Actions in matters falling within the 'third pillar' could take the form of coordination, possibly resulting in intergovernmental measures, such as a common position, taking a joint action or adoption of a Convention by the Council. Community measures, such as Directives, Decisions or Regulations, could also be adopted following a Commission proposal if all the Member States unanimously endorsed the proposal. The European Parliament (EP) would only be consulted on adopting the intergovernmental measures,[26] and the European Court of Justice

[22] Belgium, West Germany, France, Luxembourg and the Netherlands.
[23] The Schengen Acquis, OJL 239, 22/09/2000 p 0013.
[24] Treaty of Maastricht, Article K1.
[25] As a result of the implementation of the Schengen Acquis to EU law, with the exception of the UK and Ireland.
[26] Treaty of Maastricht, Article G.

(ECJ) would only have powers as regards Conventions and any Community measures adopted in the area of Justice and Home Affairs.[27]

After the Treaty of Maastricht, the cooperation between the Member States on the migration of TCNs into the EU was strengthened compared to the pre-Maastricht era, however, the cooperation under Title VI TEU was still at the 'intergovernmental' level rather than the 'supranational' level.[28] In other words, the locus of the competence in the policy area was still with the Member States and not the EU. The adopted Conventions and Decisions were merely instruments of international law and, thus, while they were binding under international law, they did not have direct effect and, thus, could not be relied on before national courts.[29]

The results of the intergovernmental cooperation under the Maastricht regime were rather poor, particularly due to the structural deficit of third pillar decision-making.[30] The absence of the EP in the decision-making process, the lack of clearly defined aims, and the absence of judicial supervision resulted in the cooperation which was formed following the Treaty of Maastricht becoming ineffective, undemocratic, and inconsistent.[31] Instead of developing a principled, coherent and integrated policy for controlling migration in line with the Union's interests, this cooperation focused on *restricting* migration from outside the Union.[32] The essential parts of a comprehensive common immigration policy - who can enter from outside the EU, reside in the Member States and what rights they have under EU law – were missing from EU immigration policy.

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[27] For a more detailed analysis of the function of the 'third pillar' see: S Peers, *EU Immigration and Asylum Law* (S Peers and N Rogers eds, Martinus Nijhoff Publishers 2006).

[28] The border between these two levels of institutional cooperation is not clear. Whether cooperation in a policy area is intergovernmental or supranational depends on a number of factors. For instance, the right of initiative (Member State or Commission); decision-making procedure (unanimous agreement of all Member States or their consensus); locus of the competence in the policy area (exclusive to the Member States, shared between the EU and Member States, or exclusive to the EU); the nature of the laws adopted in the policy area (soft law or hard law); monitoring level by the European Court of Justice (ECJ); the extent to which the European Parliament can influence a legislation in the policy area. See Neil Walker (ed), *Europe's Area of Freedom, Security, and Justice* (Oxford University Press 2004) 16.

[29] On the concept of direct effect see: P Craig and G de Burca, *EU LAw: Text, Cases, and Materials* (6th edn, Oxford University Press 2015) 185.

[30] See Report of Justice and Home Affairs Council to the European Council of 11/12 December 1993, 10655/93 JAI 11; the Communication from the Commission to the Council and the European Parliament of 23 February 1994, COM (94) 23 final.

[31] J Monar, *Justice and Home Affairs in the European Union. The Development of the Third Pillar* (Peter Lang 1995); D O'Keeffe, 'The Emergence of a European Immigration Policy' (1995) 20 ELR 20.

[32] The Dublin Convention 1990 which regulates the asylum claims made to EU Member States is an example.

2.2.2. The Treaty of Amsterdam – a new era

The Amsterdam Treaty, which came into force in May 1999, was a turning point in the EU's competence on migration of TCNs and its relevant issues. It brought this area of EU law within the shared competence of the EU and the Member States, by moving it from the Third Pillar to the First Pillar of the EU.[33] Unlike the Third Pillar, within which cooperation between the Member States was intergovernmental, in the sphere of the First Pillar, the EU could promulgate supranational legislation in the field of migration of TCNs.

The Treaty of Amsterdam set a five-year deadline for the EU to adopt a common policy on the conditions of entry and residence of TCNs in the Member States.[34] Consequently, the status of having a common policy on immigration was changed from a *common interest* – as declared by the Treaty of Maastricht – to a *mandate* for the EU.

In addition to requiring the Council to adopt measures defining the conditions of entry and residence of TCNs in a Member State, the Amsterdam Treaty required the Council to establish an area of freedom, security and justice (AFSJ) in the EU, where TCNs could freely move between Member States. Article 73J of the Amsterdam Treaty obliged the EU to abolish the internal border controls for TCNs. This, as mentioned before, was inevitable once border controls for EU citizens were abolished as one could not distinguish TCNs from EU citizens and enforce the controls on TCNs only. Paragraph 4 of Article 73K of the Treaty of Amsterdam also required the EU to adopt measures defining the conditions under which TCNs who were legally resident in a Member State, might reside and possibly settle in other Member States. Setting such an objective for the EU signalled a change in the EU's attitude that the freedom of movement for persons is limited to EU citizens and those TCNs who are somehow affiliated to an EU citizen. This could lead to the creation of a new privileged group of TCNs under EU law, based on the person's residence. TCNs would be able to directly derive free movement rights from EU law; they would not be required any more to be either a family member of an EU citizen, or employee of an EU company or a national of a country with association agreement with the EU,[35] to be able to move and reside freely across

[33] Title IV of TEU was transferred to the Title IV TEC (now TFEU), which received the title of 'Visas, asylum, immigration and other policies related to free movement of persons'
[34] Treaty of Amsterdam, Article 73O.
[35] Article 217 TFEU allows the Union to enter an association agreement with a third country. Such agreements provide nationals of that state with certain rights under EU law, particularly the rights of residence and equal treatment with EU citizens. A famous example of an agreement between the Union and a third country is the EU-Turkey Association Agreement: Council Decision of 23 December 1963 on the conclusion of the Agreement establishing the Association between the European Economic Community and Turkey OJ 1964 217/3685.

the EU. The changes brought by the Treaty of Amsterdam to EU law indeed constituted a significant progress towards the extension of the freedom of movement within the EU to TCNs.

The new objectives defined by the Treaty of Amsterdam for the EU were not limited to ensuring the free movement of TCNs in the EU, but also included *ensuring protection of the rights* of TCNs in the second Member State. In other words, the EU was required to adopt measures for safeguarding the rights of TCNs in the host Member State. This was an entirely new mandate for the Union.

The structural changes brought to EU migration law by the Amsterdam Treaty enabling the EU to adopt supranational laws, and the mandate to ensure the free movement of TCNs and the protection of their rights in the host State, envisaged the expansion of EU citizenship to TCNs, at least to those TCNs who are regular residents in the Member States. This will be discussed further in chapter 5.

3. The Tampere Programme: ambitious but ambiguous

The changes that the Treaty of Amsterdam brought to EU law, in terms of the legal basis for adopting legislation on the conditions of residence and rights of TCNs in the EU, marked a significant progress in the legal status of TCNs, especially resident TCNs. Their position may be still far from the legal status of EU citizens, but to give a clear understanding of the impact of the Treaty of Amsterdam on the legal status of TCNs, their position in EU law after the Amsterdam Treaty must be evaluated against their position in the pre-Amsterdam era, when TCNs were generally excluded from the EU framework governing the free movement of persons.[36]

However, these changes did not include a comprehensive and coherent strategic plan for the EU in achieving the objectives that the Treaty set for the EU. The Treaty of Amsterdam solely set the objectives, marked the areas that the EU should get involved in, and gave the necessary competence to the EU to do so, but left it entirely to the Council to adopt 'appropriate' measures in order to establish progressively an area of freedom, security and justice in the EU.[37] Further, specific actions were necessary by the European Council to direct

[36] Unless they were somehow linked to an EU citizen or EU company or a country with a special agreement with the EU.
[37] Treaty of Amsterdam, Article 73I.

the EU institutions in achieving the aim. Therefore, a few months after the Treaty of Amsterdam came into force the European Council held a special meeting in the city of Tampere, Finland, and agreed a five- year plan, known as the Tampere Programme or Tampere Agenda.[38] The Programme was in the form of a policy guidance highlighting the priorities that would define the EU's actions in the field of Justice and Home Affairs between 1999 and 2004.[39]

3.1. The analysis of the objectives of the Tampere Programme

The meeting was exclusively dedicated to the new mandate which was set for the EU by the Treaty of Amsterdam to create an area of freedom, security and justice in the EU; the conclusions of the meeting (the Programme's objectives) were also in line with this mandate. The European Council declared the development of the Union 'as an area of freedom, security and justice by making full use of the possibilities offered by the Treaty of Amsterdam' as an objective at the very top of the political agenda.[40]

The European Council in moving towards 'a Union of freedom, security and justice' adopted milestones under four main titles:[41]

1. Pursuing a common EU asylum and immigration policy: 'the separate but closely related issues of asylum and migration call for the development of a common EU policy to include the following elements'.
2. Establishing a genuine European area of justice: the European Council recognised that 'in a genuine European Area of Justice individuals and businesses should not be prevented or discouraged from exercising their rights by the incompatibility or complexity of legal and administrative systems in the Member States'.
3. Developing a union-wide fight against crime: The European Council is deeply committed to reinforcing the fight against serious organised and transnational crime. The high level of safety in the area of freedom, security and justice presupposes an efficient and comprehensive approach in the fight against all forms of crime. A balanced development

[38] Tampere European Council, 15-16 October 1999, Presidency Conclusions, SN 200/99, Brussels.
[39] European commission, Justice and Home affairs Fact Sheet - Tampere Kick-start to the EU's policy for justice and home affairs, <http://ec.europa.eu/councils/bx20040617/tampere_09_2002_en.pdf>, accessed 12 October 2014.
[40] The Tampere Programme, paras 2-3.
[41] The scope of this research is narrowed to the examination of Directive 2003/109/EC – which regulates the status of long-term residents – from the lens of the Tampere Programme. Therefore, the analysis of the Tampere Programme in this chapter will be limited to the part of the Programme which deals with the rights of long-term residents.

of union-wide measures against crime should be achieved while protecting the freedom and legal rights of individuals and economic operators.

4. Taking stronger external actions in Justice and Home Affairs.

Among the 62 primary objectives for a plan to make the EU an area of freedom, security and justice for *everyone*, three objectives were exclusively related to the status and treatment of third country nationals who reside legally in the EU.[42] These objectives are objective, 18, 20, and 21. In objective 18, the heads of State defined a mandate for the Union to ensure fair treatment of TCN residents in the Union:

> European Union must ensure fair treatment of third country nationals who reside legally on the territory of its Member States.

Moreover, in the same objective, the European Council recommended adoption of an integration policy at the Union level which is based on granting rights to facilitate integration – different models of integration of migrants will be discussed further in chapter 2:

> A more vigorous integration policy should aim at granting them rights and obligations comparable to those of EU citizens. It should also enhance non-discrimination in economic, social and cultural life and develop measures against racism and xenophobia.[43]

The European Council also called for a legal status for TCNs after certain period of residence in a Member State:

> 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 person, as well as the principle of non-discrimination vis à vis the citizens of the State of residence.[44]

In this objective, the European Council made a particular reference to long-term residents and suggested that they should enjoy a set of rights similar to what EU citizens enjoy in the host

[42] The focus and scope of other milestones was on TCNs who immigrate to the Union from a third country or seek asylum in a Member State.
[43] Tampere Programme, objective 18
[44] ibid, objective 21.

State, and the legal status of the former should be approximated to that of the latter. The European Council also suggested that the principle of non-discrimination vis-à-vis the citizens of the State of residence should be extended to LTRs.[45] It drew a parallel between the rights of LTRs with those of EU citizens', as the latter enjoy equality of treatment with the nationals of the host State. The Tampere Programme signalled a change in the EU's approach to the treatment of EU TCN residents indicating they should not be treated as second-class citizens and that they are entitled to equal treatment, secure residence rights, and the option of full citizenship.[46]

Creating a legal status for TCNs who are regular residents in the Member States and granting them rights similar to those that EU citizens enjoy, could mark a significant improvement in their rights and encourage them to move and reside in other Member States. Granting long-term residents such a legal status and encouraging them to move, is not only in the interest of long-term residents, but also in the interest of the EU. The movement of long-term residents to the host State and their right to take-up employment there can, also, be beneficial from the EU's perspective: it could contribute to the effective attainment of the EU's internal market objectives, by filling the shortages in the labour market of that Member State.

In addition to the above objectives which were exclusively related to TCN residents, the European Council pointed out in the Tampere Programme that 'the area of freedom, security and justice should be based on the principles of transparency and democratic control' and an open dialogue should be developed with civil society on the aims and principles of this area. From this statement, it could be understood that a possible feature of the rights that the Tampere Programme intended to grant long-term residents would at least include the political right that any member of a democratic society would have: the right to vote, if not the right to stand in the elections. Creating an area of freedom, security and justice in the EU would not be democratic if those who are living in the area on a long-term basis and thus their lives are affected by EU law, do not have the right to vote in the European Parliament elections – a point to which we will return in chapter 4 of the thesis.

The European Council in the Tampere Programme emphasised that the EU freedoms given to EU citizens to freely move and reside in any Member State, should be extended to TCNs and

[45] S Peers, 'Implementing Equality ? The Directive on Long Term Resident Third Country Nationals' [2004] European Law Review 1. Page 21.
[46] K Groenendijk, 'Security of Residence and Access to Free Movement for Settled Third Country Nationals under Community Law' in E Guild and C Harlow (eds), *Implementing Amsterdam* (Hart Publishing 2001) 226.

the EU should become an area of freedom, security and justice for everyone who is legally in the territory of the EU.[47] Setting such an objective for the EU in the domain of Justice and Home Affairs was rather revolutionary. It illustrates a significant alteration in the EU's approach for the rights derived from EU law by TCNs. In particular, the European Council in the meeting called for the extension of the freedom of movement of persons to all TCNs who are already admitted to an EU Member State. Given that, until then it was only EU citizens, TCNs related to EU citizens, and nationals of those countries with special agreements with the EU that could enjoy such rights under EU law, the extension of the free movement rights to all TCNs in the EU territory seemed to be a necessary element of a genuine area of freedom, security and justice for *everyone*.

One might say that such extension had already been enacted via the Schengen acquis. Others might say that the inclusion of TCNs in the freedom of movement was inevitable; when there is no border control between the Member States, it is not practically possible to distinguish TCNs from EU citizens and restrict the movement of TCNs only. Once they are in the EU, they may move to the other Member States.[48] However, controlling TCNs who move to another Member State for a short time, for instance when they visit as a tourist, may be impractical, but controlling those TCNs who move for the purpose of work, study or simply residence, does not seem to be impossible. Without a recognised legal status in the receiving Member State, a TCN may not undertake employment or enrol in a course of study. Their access to accommodation and basic services may also be limited. Therefore, the possibility to move did not seem to be sufficient for TCNs to move and reside for a long time in a Member State other the one to which they were already admitted. The movement of TCN residents within the Union will be discussed in detail in chapter 3.

The European Council in the Tampere Programme reiterated the Amsterdam Treaty aims, however, it adopted a more liberal approach. As discussed earlier, the Treaty of Amsterdam did not prohibit discrimination against TCNs (including long-term residents) based on their nationality, while the Tampere Programme prescribed the prohibition of discrimination on the grounds of nationality and aimed at making the EU an area of freedom, security and justice

[47] Tampere Programme, para 2.
[48] Except those EU Member States which are not participating in the Schengen acquis.

for all, whatever is their nationality. The Tampere Programme was premised on the principle of equality under EU law regardless of nationality.[49]

As Anderson and Apap suggest, 'good policy-making in Justice and Home Affairs requires that decision-makers are given a clear mandate and that those agencies charged with policy implementation are well managed'.[50] In this regard, the Tampere Programme seemed to meet these 'requirements'. It set a clear mandate for the EU, fixed a clear deadline and listed the tasks for the organisations in charge. The Commission was invited to closely cooperate with the European Council and the European Parliament in the full and immediate implementation of the Treaty of Amsterdam, propose measures after considering the possibilities for the Treaty's implementation, and report the progress of the implementation to the European Council and the European Parliament. The European Council in the Programme also defined obligations for itself: placing and maintaining the establishment of an AFSJ in the EU at the very top of the political agenda, considering and adopting the proposed measures by the Commission, and keeping the progress made towards the adopted measures for meeting the Amsterdam Treaty's deadlines under constant review.

However, the terms used in the objectives of the Tampere Programme on the legal status of long-term residents were ambiguous. **First**, the terms 'comparable' and 'as near as possible' were not clear. The Programme did not provide any clarification on the extent to which the rights of long-term residents should be approximated to those of EU citizens. As a result, 'as near as possible' might be interpreted widely. It may be in favour of long-term residents as the ambiguity would enable the ECJ and national courts to interpret the provisions in favour of long-term residents. On the other hand, the Member States could have different and restrictive interpretations of this term. **Secondly**, no definition for 'fair treatment' exists in EU law. It might be even fair to treat TCNs completely differently from EU citizens as the legal status of the two are different under EU law. It has been established by the ECJ that being in a different legal position, could justify different rights and treatments.[51] Holding a legal status 'as near as' the legal status of EU citizens still puts long-term residents in a different legal position from the EU citizens and could justify different treatment for these two groups under EU law.

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[49] Peers, 'Implementing Equality ? The Directive on Long Term Resident Third Country Nationals' (n 45).
[50] M Anderson and J Apap, *Striking a Balance between Freedom, Security and Justice in an Enlarged European Union* (CEPS 2002).
[51] Case C-148/02 *Avello v Belgium* [2003] ECR I-11613.

It can be argued that policy guidance is expected to give clear directions rather than creating new ambiguities. A policy guidance should set clear steps for the Union and its Member States and should not be vague itself. On the other hand, first, the Tampere Programme was a political guideline rather than an instrument imposing legal obligations.[52] It might be unnecessary for a political document to define the legal terms precisely. The Programme was expected to just set the direction for the Union and although the terms of the document appear to be vague and unclear, the direction set by the Programme was clear, i.e. enhancing the integration of TCN residents in the Union by approximating their rights to what Union citizens enjoy. Secondly, these ambiguities in the objectives of the Programme could bring adequate flexibility to the legal framework the Programme created, which would make it more dynamic.

Another weakness of the Tampere Programme, which was rooted in the Treaty of Amsterdam, was the geographical limitation of the Programme. The Treaty of Amsterdam extended the opt-out Protocol of the UK, Ireland and Denmark from the domain of JHA; these countries were not obliged to participate in reaching the Programme's milestones.[53] This means that these Member States continued to enjoy an a la carte menu of European project of JHA,[54] which would be a clear obstacle to creating an 'EU-wide' immigration policy. The impact of these weaknesses will be analysed in the subsequent chapters.

4. The existing literature on the LTR Directive

The LTR Directive has been the subject of a number of studies.[55] The scholarly work around the Directive has generally emphasised the importance of extending the rights granted to EU

[52] Tampere Programme, para 9
[53] TEU, Protocol 19.
[54] For a detailed analysis of opt-outs from the JHA S Peers, 'In a World of Their Own? Justice and Home Affairs Opt-Outs and the Treaty of Lisbon' 10 Cambridge Yearbook of European Legal Studies 383.
[55] Sergio Carrera, *In Search of the Perfect Citizen?* (1st edn, Martinus Nijhoff 2009) 171–196; Peers, *EU Immigration and Asylum Law* (n 27) 615–660; D Acosta, *The Long-Term Residence Status as a Subsidiary Form of EU Citizenship* (Martinus Nijhoff Publishers 2011); L Halleskov, 'The Long-Term Residents Directive: A Fulfilment of the Tampere Objective of Near-Equality?' (2005) 7 European Journal of Migration and Law 181; A Skordas, 'Immigration and the Market: The Long-Term Residents Directive' (2006) 13 Columbia Journal of European Law 201; T Kostakopoulou, 'Long-Term Resident Third Country Nationals in the European Union: Institutional Legacies and Evolving Norms' in R Craufurd Smith (ed), Culture and European Union Law (2004) 318; Peers, 'Implementing Equality ? The Directive on Long Term Resident Third Country Nationals' (n 45); K Groenendijk, E Guild and R Barzilay, *The Legal Status of Third Country Nationals Who Are Long-Term Residents in a Member State of the European Union* (University of Nijmegen 2001); D Acosta, 'Civic Citizenship Reintroduced? The Long-Term Residence Directive as a Post-National Form of Membership' (2015) 21 European Law Journal 200; MA Becker, 'Managing Diversity in the European Union: Inclusive European Citizenship and Third-Country Nationals' (2004) 1 Yale Human Rights & Development Law Journal.

citizens to all those who are regularly and lawfully residents of the EU.[56] Moreover, it has been suggested that promoting free movement of LTRs may contribute to the effective attainment of the cardinal economic EU objective, that of creating an internal market.[57]

There are scholars who have criticised the Directive for not genuinely granting LTRs the rights they should enjoy as regular residents in the EU, such as the right to move freely between Member States, or enjoying equal treatment with migrant EU nationals in the host State.[58] On the other hand, there is a study – by Acosta - suggesting the LTR Directive has had a significant impact on the development of the concept of EU civic citizenship.[59] The author, for instance, argues that the Directive creates a privileged category of TCNs and by giving them direct access to rights similar to those attached to EU citizenship, it has potentially created a subsidiary form of EU citizenship for TCNs.[60] The study also concludes that this subsidiary form of EU citizenship has the potential to escape Member States' direct control on access to rights under EU law.[61]

Despite the number of books and journal articles on the LTR Directive, which in some cases significantly contradict each other, there are some gaps that this thesis intends to fill. The existing literature on the LTR Directive has generally considered the Directive from the perspective of its *beneficiaries* (LTRs), and not from the perspective of its *creator* (the Union). This thesis, therefore, mainly focuses on the benefits the extension of rights of EU citizens has for the Union. Moreover, it is yet to be investigated to what extent the provisions of the LTR Directive are capable of achieving the aims laid down in the Tampere Programme. Thus, this thesis seeks to fill this gap in the literature.

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[56] For instance: A Wiesbrock, 'Granting Citizenship-Related Rights to Third-Country Nationals: An Alternative to the Full Extension of European Union Citizenship?' (2012) 14 European Journal of Migration and Law 63; Becker (n 55); M Bell, 'Civic Citizenship and Migrant Integration' (2007) 13 European Public Law 311.

[57] Skordas (n 55); Peers, 'Implementing Equality ? The Directive on Long Term Resident Third Country Nationals' (n 45).

[58] See for example: S Boelaert-Suominen, 'Non-EU Nationals and Council Directive 2003/109/EC on the Status of Third-Country Nationals Who Are Long-Term Residents: Five Paces Forward and Possibly Three' [2005] Common Market Law Review 1011; A Bocker and T Strik, 'Language and Knowledge Tests for Permanent Residence Rights: Help or Hinderance for Integration?' (2011) 13 European Journal of Migration and Law 157; Skordas (n 55).

[59] D Acosta, *The Long-Term Residence Status as a Subsidiary Form of EU Citizenship* (Martinus Nijhoff Publishers 2011).

[60] ibid.

[61] ibid 227.

5. Hypothesis, aims, and the questions at stake

The provisions of the LTR Directive would be expected to be in line with the objectives of the Tampere Programme. First, because the Directive was adopted during the time that the Programme was in place - 1999 to 2004 - and any action in the project of creating AFSJ in the EU was supposed to be in line with the objectives of the Programme as the policy guidance for the project. Secondly, according to the preamble to the LTR Directive, one of the purposes of the Directive was achieving the objective of the Programme to approximate the rights of TCN long-term residents to the rights of EU citizens.[62] However, there is evidence suggesting that the Directive has failed to fulfil the Programme's objectives.[63] For instance, it did not create a genuine legal status for LTRs comparable to the status of EU citizens as required by the Programme. The level of this gap between the initial plan (the Programme) and the final product (the Directive), and the reason(s) behind this gap, have not been explored in detail, and therefore this thesis seeks to do this.

As observed by Carrera, during negotiations on the text of the LTR Directive, the amendments made by the Member States to the proposal, changed the role of integration from 'the premises advocated at Tampere' toward 'a more restrictive tone'.[64] The inclusive rights-based approach to integration in the Tampere Programme,[65] was replaced by an exclusionary conditions-based approach in the LTR Directive. The Member States managed to, first, protect pre-existing norms of national legislation, and secondly, introduce plenty of derogations and custom-made exceptions.[66] The hypothesis underlying this study is that there are fundamental differences between the LTR Directive's approach to the integration of TCN residents and the approach adopted in the Tampere Programme. These differences seem to have caused the LTR Directive to become incapable of achieving the Programmes' objectives.

Two main questions that this this thesis seeks to answer are:

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[62] Commission proposal for Directive on the status of long-term resident third-country national, COM (2001) 127, 13 March 2001.
[63] D Kochenov and M van den Brink, 'Pretending There Is No Union : Non-Derivative Quasi-Citizenship Rights of Third-Country Nationals in the EU', *Degrees of Free Movement and Citizenship* (Martinus Nijhoff 2015).
[64] Carrera, *In Search of the Perfect Citizen?* (n 55) 6.
[65] S Morano-Foadi and M Malena (eds), *Integration for Third-Country Nationals in the European Union* (1st edn, Edward Elgar 2012) 62.
[66] M Jesse, 'The Value of "Integration" in European Law-The Implications of the Förster Case on Legal Assessment of Integration Conditions for Third-Country Nationals' (2011) 17 European Law Journal 172, 183.

1. To what extent are the provisions of the LTR Directive are capable to achieve the objectives of the Tampere Programme?
2. Why is it in the Union's interest to follow the approach recommended by the Member States in the Tampere Programme and enhance the integration of LTRs into the receiving society by giving LTRs the rights and obligation of EU citizens?

A number of sub-questions that should be answered in order to have clearer answers for the two above main research questions are as follows:

1. Is the LTR Directive capable of establishing a common approach by the Member States to the integration of TCN residents?
2. To what extent are the provisions of the LTR Directive capable of giving LTRs rights and obligations comparable to those of EU citizens?
3. Why is it in the Union's interest to extend the right to vote of EU citizens to LTRs?
4. To what extent does the LTR Directive approximate the legal status of TCN residents to that of EU citizens? And, why is it in the Union's interest to approximate the status of LTRs to the status of EU citizens?
5. In the light of the Tampere Programme and the mandate of the Amsterdam Treaty to make the Union an area of freedom, security and justice for *everyone*, is it justified or necessary to treat those who have the status of EU citizenship and those who do not have the status but have the status of EU permanent resident differently?

The research focuses on those objectives of the Programme which were related to the legal status of long-term residence. Moreover, I will not make any comment on the treatment of LTRs in matters which are outside the scope of EU law, though that would be desirable, however, 'purely internal matters' are not the subject of this thesis.

The originality of this thesis lies in the point of view from which it examines the rights of LTRs. It examines LTRs rights from the point of view of the Union, rather than from the point of view of LTRs themselves. The other distinctive feature of this thesis is the lens from which it examines the status and rights of LTRs. The objectives of the Tampere Programme, mainly the enhancement of non-EU citizens' integration by granting rights and status as near as possible to EU citizens are the yardsticks for this examination. The objectives of the Programme play the role of initial plan for the Directive. The provisions of the Directive are compared with the initial plan, to examine the extent to which the Directive is in line with the initial plan and capable to achieve the objectives of the plan.

6. Structure, methodology

This thesis is composed of the following 6 chapters. Chapter 1, which provides a background to the thesis and analyses the Tampere Programme's objectives. It also outlines the research questions, key terms and methodology. Chapter 2 will focus on the integration of LTRs into the receiving society. Those objectives of the Tampere Programme which are particularly relevant to the integration of LTRs into the receiving society (particularly at EU level) will be analysed and compared with the provisions of the LTR Directive, in order to answer the following questions: i) to what extent are the provisions of the Directive capable to further the integration objectives of the Programme (EU's policy guidance in the area of JHA when the Directive was adopted)? 2) does the LTR Directive follows the same approach to integration as adopted in the Tampere Programme?

Chapters 3 and 4 will focus on objectives 18 and 21 of the Tampere Programme, which called for granting LTRs rights which are 'comparable' and 'as near as possible' to what EU citizens enjoy. In these chapters, the core rights of EU citizens, and what the LTR Directive bestows on LTRs, will be analysed. The first set of core rights of EU citizens (free movement within the Union, residence in any Member State, and equal treatment with the host State nationals), will be the subject of chapter 3, and the second set of EU citizens' core rights (political rights) will be the subject of chapter 4.[67]

Chapter 5 will focus on the Tampere objective to 'approximate the status of TCN residents to EU citizenship'. This chapter will also deal with that part of the literature which consider the status of long-term resident as a subsidiary form of EU citizenship. Concluding observations are set out in chapter 6. This chapter will provide possible solutions to correct the deviation of the LTR from the initial plan set out in the Tampere Programme.

As regards methodology, this thesis follows an inter-disciplinary approach. It focuses on EU law, while using academic sociology sources, particularly on the integration of migrants into the receiving society, as well as political documents such as the Tampere Programme.

[67] The core rights of EU citizens are those listed in the citizenship provisions of the Treaty, in part two, entitled Non-discrimination and Citizenship of the Union.

Chapter 2 - Directive 2003/109: help or hindrance for LTRs' integration?

1. Introduction

This chapter intends to assess the extent to which the approach to integration adopted in the 2003 Long-term Residents Directive (LTR Directive),[1] first, is in line with the Tampere Programme objectives in general,[2] and secondly, is capable of achieving the Programme's main objective, namely, facilitating the integration of long-term residents (LTRs). The Programme was the EU's overarching immigration policy at the time the Directive was adopted; nevertheless, it seems that the mandatory character of the integration conditions included in the Directive caused a deviation of the Directive from the Tampere objectives. The new approach to integration adopted in the Directive appears to be not as constructive and effective as the approach used in Tampere. The former appears to be civic integration and condition-based, and the latter seems to be inclusive and right-based.

The scholarly work on the integration measures of the LTR Directive has mainly criticised the Directive for not genuinely granting LTRs free movement rights and equal treatment in the host State, and for failing to promote integration.[3] This chapter will contribute to the existing literature by examining the deviation of the Directive from the initial plan (the Tampere Programme), in terms of facilitating the integration of LTRs.

The structure of the chapter will be as follows. First, the concept of integration of migrants will be explained, followed by an analysis of different approaches to the integration of migrants. Secondly, the evolution of the integration and immigration policies of the Union with regards to TCN residents will be reviewed, particularly, the changes in the EU's competence in the fields of migration and the treatment of migrant residents. Thirdly, the Tampere Programme will be analysed, and those objectives of the Programme which are particularly relevant to the integration of LTRs in the EU's society will be identified and compared with the Directive, in order to benchmark the extent to which the Directive is in line with the objectives of the Programme with regards to the integration of TCN residents.

[1] Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents. OJ L 16, 23 January 2004.
[2] Tampere European Council, 15-16 October 1999, Presidency Conclusions, SN 200/99, Brussels
[3] S Boelaert-Suominen, 'Non-EU Nationals and Council Directive 2003/109/EC on the Status of Third-Country Nationals Who Are Long-Term Residents: Five Paces Forward and Possibly Three' [2005] Common Market Law Review 1011, 1023; W Maas, 'Migrants, States, and EU Citizenship's Unfulfilled Promise' (2008) 12 Citizenship Studies 583.

Finally, having concluded that the provisions of the LTR Directive are not capable of achieving those objectives of the Tampere Programme with regards to the integration of TCN residents in the receiving society, I will discuss why the approach to integration recommended in the Tampere Programme was more effective, and that the Union should follow that approach. A number of reasons to support this claim will be discussed in section 6. For instance, it will be argued that TCN residents not only reside in the society of the host State, but they are also part of the society of the Union; the Union should do its part in creating a link between LTRs and the Union. It is in the EU's interest to protect the effectiveness of its immigration policy by limiting the use of disproportionate and discretionary integration conditions for the applicant of an EU legal status.

Moreover, any LTR may become an EU citizen by acquiring nationality of their host State. It is in the EU's interest to start the process of inclusion (e.g. the sense of belonging to the Union) of LTRs in the EU's society as soon as possible (e.g. once a TCN becomes a long-term resident in the Union). By the time they become EU citizens, it may be too late for starting that process.

Thirdly, the enhancement of TCN residents' integration into the Union society has social and economic benefits for the Union.

Lastly, in the EU immigration policies adopted after Tampere, the Member States keep defining priorities similar to those of the Tampere Programme. The objectives being repeated for almost two decades now, show that the LTR Directive and similar pieces of legislation that have been adopted, concerning, inter alia, the integration of TCN residents, have failed to address the issue and this matter is still on the priority list of EU immigration policy.

2. The Concept of Integration

The integration of migrants, or 'the integration of immigrants into the institutional and social fabric of receiving societies',[4] does not have a single, clear and comprehensive definition. In the words of Murphy 'integration is a chaotic concept: a word used by many but understood differently by most'.[5] The concept has been described as 'the process of economic mobility

[4] C Murphy, 'Immigration, Integartiona and Citizenship in European Union: The Position of Third Country Nationals' 8 Hibernian Law Journal 155, 155.
[5] C Murphy, *Immigration, Integration and the Law : The Intersection of Domestic, EU and International Legal Regimes* (Ashgate 2013) 11.

and the social inclusion of newcomers'.[6] Moritz Jesse provides a similar definition: 'integration in the context of immigration means nothing more than the inclusion of immigrants into the receiving societies'.[7] Jesse defines the integration of migrants in very simple terms as dealing 'with the question how to organise, administer, and include newcomers into an existing group, which forms the receiving society'.[8]

What is shared between all these definitions is that integration is a two-sided process – the migrants, on the one side, and the receiving society, on the other side. Thus, the two-sided nature of integration should be considered in any integration policy, taking into account that both sides have an interest to protect and both sides are part of the process of integration and hence they have a responsibility in the process. As a result, an effective integration policy must facilitate newcomers and the native society to get together as the members of the same society, in a mutually respectful and fruitful way, by which the interests of both sides are protected. [9] However, as will be explained below, states adopt different models and approaches to the integration of migrants into the receiving society.

2.1. Models of integration

2.1.1. First model of integration: Civic Integration

The first model of integration is built on conditions, tests, and formal integration trajectories.[10] Migrants are required to meet certain conditions to *earn* certain rights. The migrants will usually be denied those rights until they satisfy the conditions specified by law.[11] Several problems can be identified in this model of integration.

First, in this model of integration, rights are the prize for integration, rather than rights being a tool for integration.[12] Those states which adopt this model of integration assume that integration is a concept which can be taught and tested, and being included and involved in the society is not a necessity for the integration of migrants. This method of integration is entirely built upon satisfying certain integration conditions such as multiple-choice questions.

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[6] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Immigration, Integration and Employment (Brussels, COM (2003) 336) 17.
[7] M Jesse, *The Civic Citizens of Europe : The Legal Potential for Immigrant Integration in the EU, Belgium, Germany, and the United Kingdom* (Brill 2017) 24.
[8] ibid 14.
[9] ibid 25.
[10] ibid 15.
[11] For instance, sitting a multiple-choice test.
[12] S Carrera, 'Integration of Immigrants in EU Law and Policy: Challenges to Rule of Law, Exceptions to Inclusion' in L Azoulai and K De Vries (eds), *EU Migration Law - Legal Complexities and Political Rationales* (Oxford University Press 2014) 149-186.

It ignores other elements of integration,[13] such as legal status, rights, equal treatment with the host state nationals, and a welcoming society.

Jesse argues that civic integration which is achieved by testing, imposing conditions, and penalising the failure to comply with the conditions may not contribute to the inclusion of migrants, and even will eventually lead to disintegration by fostering intolerance, divisions, and fragmentation within society.[14]

It is interesting that migrants may even be required to prove that they are integrated into the society of a state *before* their arrival. This means that migrants may need to prove their integration into a society in which they have never been.[15] Such an approach to the integration of migrants into the society is problematic, as it demonstrates that states may use integration conditions as part of the process of application for a residence permit, as a way to control immigration, rather than to enhance the inclusion of migrants.[16]

The second problem with this model of integration is that the focus of civic integration method is entirely on law and enforcement. The states which deploy this model of integration assume that inclusion of migrants can be ordered and enforced by law. [17] It is, of course, correct to say that law is central in the process of integration because law can determine who the 'others' are by defining who 'belongs' in law to the state and its society.[18] Nevertheless, law, on its own, cannot also create a welcoming society.

One might argue that obligatory integration conditions such as requiring migrants to learn the language of the host state will be beneficial to the migrants themselves. This is logical, as first, not being familiar with the local language affects the attitude of locals towards the migrants;[19] and secondly, language proficiency is likely to improve the migrants' employability, and thus to increase their chance of economic mobility and social inclusion. Nevertheless, the logic should not be extended to other life aspects, such as the knowledge of

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[13] Jesse, (n 7) 15.
[14] ibid. Jesse reaches this conclusion based on the findings of Kostakopoulou in D Kostakopoulou, 'The Anatomy of Civic Integration' (2010) 73 The Modern Law Review 933.
[15] Wet inburgering in het buitenland (Integration Abroad Act) 2006 (The Netherlands); Loi no 2007 - of 20 November 2007 (France); Gesetz zur Umsetzung aufenthalts - und asylrechtlicher Richtlinien Europaische BGB1. 1, 1970 (Germany 2007). LTRs will never be in such a situation. For further discussion on integration requirement before arrival see: K De Vries, *Integration at the Border: The Dutch Act on Integration Abroad and International Immigration Law* (Bloomsbury Publishing 2013).
[16] Jesse (n 7) 26.
[17] ibid 15.
[18] E Guild, *The Legal Elements of European Identity* (Kluwer Law International 2004) 4.
[19] Jesse (n 7) 17.

the society and its values. These are concepts and matters with which migrants will inevitably become familiar, if provided with a sufficient opportunity of inclusion; a migrant is not needed to be *forced* to learn about life aspects in a society in which they live. They can learn about life aspects in a state in the same way citizens learnt them. Moreover, forcing migrants to *prove* their language proficiency damages the relationship of trust and acceptance between the migrants and the receiving society, which can consequently have a negative impact on the inclusion of migrants.[20]

The third problem with the model of civic integration is the balance of responsibility. The migrants are responsible for *acquiring* integration. It is the migrants who must ensure that they satisfy the integration conditions, *or* they will be denied rights. So this model of integration ignores the crucial part of any integration policy identified earlier (i.e. that integration is a two-way process, on the one side is the migrant and the other side the state and a welcoming society). The balance of responsibility to facilitating/acquiring integration will be discussed further in the context of Tampere Programme and the LTR Directive on page 33.

Due to the above problems, I recommend the second model of integration which I now discuss in detail.

2.1.2. Second model of integration: Inclusion

The second approach to integration of migrants is facilitating the *inclusion* of migrants into the receiving society. This approach to integration has as its point of departure that it is not possible to *order* newcomers to become ‘one of us’; integration is achieved by treating them like ‘one of us’. This model of integration focuses on providing migrants with equal opportunities with citizens to participate in the host society.[21] The wider the range of areas available to them to participate, the higher the level of inclusion. This approach to integration is built on the notion of being accepted in the society, and accept the rules and values of that society.

Jesse compares the inclusion of migrants in the receiving society with joining a circle of friends. A potential member would want to be accepted and respected by the members of the group and become a friend amongst friends. This will mostly depend on the circle to open up

[20] Jesse (n 7) 17–18.
[21] B Gosh, ‘The Challenge of Integration: A Global Perspective’ in R Süssmuth (ed), *Managing Migration: The European Union’s Responsibilites Towards Immigration* (Gütersloh 2005) 19–20.

a bit and make room for the newcomer. Without the willingness of the members, the newcomer will never become a member, not even by unilaterally learning the language nor by unilaterally adhering to their culture.[22] This comparison made by Jesse has some shared factors with social cohesion, which has been defined as 'the willingness of people in a society to cooperate with each other in the diversity of collective enterprises that members of a society must do in order to survive and prosper'.[23] Putting it differently, social cohesion, or willingness of the members of the society to accept and welcome the newcomers is a necessity for the inclusion of migrants.

Of course, an integration policy cannot socially include migrants into the society or force members of the society to accept the migrants, nevertheless, it creates the 'potential for inclusion' of migrants.[24] Legislation can reduce the factors of 'otherness' and enhance the inclusion of individuals into the host society by providing more opportunities for migrants, regardless of their nationality, to actively participate equally with other members of that society. If the host state legislation provides migrants with the opportunity to participate in different aspects of life in its society, and their rights, particularly the right to equality, are protected, then there should be no need to *require* migrants to 'integrate' into society.[25]

In the next section I provide a brief review of the key developments in the immigration policy and integration framework of the Union. The changes of EU law in relation to TCNs has already been investigated in a number of studies.[26] Thus I intend to shed some light only on the key developments in EU immigration policy that led to the adoption of the Tampere Programme and, subsequently, the LTR Directive.

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[22] Jesse, (n 7) 30.

[23] D Stanley, 'What Do We Know about Social Cohesion: The Research Perspective of the Federal Government's Social Cohesion Research Network' (2003) 28 The Canadian Journal of Sociology 5, 8.

[24] *M Jesse, The Civic Citizens of Europe: The Legal Potential for Immigrant Integration in the EU, Belgium, Germany, and the United Kingdom* (Brill 2017) 24, 31.

[25] C Murphy, *Immigration, Integration and the Law : The Intersection of Domestic, EU and International Legal Regimes* (Ashgate 2013) 12.

[26] See for example, S Carrera, *In Search of the Perfect Citizen?* (1st edn, Martinus Nijhoff 2009) 21–118; T Kostakopoulou, 'European Citizenship and Immigration after Amsterdam: Openings, Silences, Paradoxes' (1998) 24 Journal of Ethnic and Migration Studies 639; D O'Keeffe, 'The Emergence of a European Immigration Policy' (1995) 20 ELR 20.); E Guild and J Niessen, *The Emerging Immigration and Asylum Law of the European Union* (Kluwer Law International 1996); H Staples, *The Legal Status of Third Country Nationals Resident in the European Union* (Kluwer Law International 1999); E Guild and C Harlow, *Implementing Amsterdam: Immigration and Asylum Rights in EC Law* (Hart Publishing 2001); E Guild, 'Competence, Discretion and Third Country Nationals: The European Union's Legal Struggle with Migration' (1998) 24 Journal of Ethnic and Migration Studies 613.

3. EU integration policy – same goal, two opposite approaches

Facilitating the integration of migrants through granting rights in the host State has been a long tradition in EU law. Since the establishment of the internal market, those Member State national workers (and later all nationals) who moved from one Member State to another were guaranteed a secure residence status, family reunification and equality rights.[27] Both secure residence for workers, even after the end of their professional life, and the right to equal treatment with nationals, were supported by the EC Treaty provisions and secondary legislation complementing them.[28] This approach to integration has also been applicable to the family members, regardless of nationality, who are also granted access to the labour market, to education, and equal treatment with nationals.[29]

Moreover, for this category of migrants (EU citizens and their family members), it is assumed that residence *always* results in their integration into the host State, and no further measure is necessary to facilitate or test their integration. A secure permanent residence status under EU law is automatically acquired by EU citizens after a period of five years of lawful residence in the host State.[30] Acquiring this secure residence status is not subject to additional integration conditions. With regards to EU citizens and their family members (even if they are TCNs), residence is the decisive factor for gaining permanent residence in the host State. There is also a correlation between the length of residence of EU citizens in the host State, and the strength of rights and security of residence in the host State. For instance, the derogation grounds which can be used against a mobile EU citizen who has a 10-year history of residence in the host State are less – and the severity more – than the grounds which can be used against a citizen with only 5 years or a few months residence history.[31]The longer the length of residence, the stronger is the security of residence, which is an essential part of integration of migrants into the host State.[32]

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[27] M Jesse, 'The Value of "Integration" in European Law-The Implications of the Förster Case on Legal Assessment of Integration Conditions for Third-Country Nationals' (2011) 17 ELJ 172, 172.
[28] For instance, the Treaty Establishing the European Community (TEC), Articles 12 and 39, and Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community, Articles 6,7,8.
[29] Family members' integration was one of the aims of Regulation 1612/68. The right to free movement and residence of Union citizens and their family members are now governed by Directive 2004/38 and Regulation 492/2011 on freedom of movement for workers within the Union [2011] OJ L141/1.
[30] Article 16 of Directive 2004/38 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States [2004] OJ L158/77 (the Citizens' Rights Directive).
[31] ibid, Article 28: public health, public policy and public security before 5 years; after 5 years serious grounds of public policy and public security; after 10 years imperative grounds of public security only.
[32] Jesse, (n 7)

The EU has for decades followed this inclusive, rights-based, approach to the integration of mobile EU citizens. The use of this approach, however, is limited to such citizens and their family members. When it comes to the integration of TCN residents who are not family members of EU citizens, this unconditional, rights-based, approach changes to a conditional, sanction-based approach governed by national legislation which vary from one Member State to another.[33] Non-EU citizen migrants are often labelled as 'foreigners' linked to integration problems and crises. Member States usually take for granted that holding nationality of a Member State is the criterion for integration, and those not holding nationality of a Member State face problems of inclusion, identity, and participation in the host society.[34] Each Member State also uses its own integration policy according to its understanding from the integration of migrants.

Since the creation of the EU policy framework for migrants' integration, however, there have been attempts to take the treatment of TCN residents to European level. The first attempts for taking the treatment of TCN residents to European level can be traced back to 1974 when the Commission proposed an Action Programme in favour of TCN Migrant Workers and their Families.[35] In the Action Programme, the Commission called the imbalance between obligations and rights of foreign migrant workers, 'intolerable' and 'dangerous for the Community'. It proposed 'the progressive elimination of all discriminations against them in living and working conditions, once … they have been legally admitted to employment in the Community'. In this document, the Commission also called for a European-level coordination between Member States in adopting 'policies of assimilation or integration of migrant workers and their families'. The Commission named non-discrimination and equal treatment as the essential ingredients for inclusion.[36] Later, the Commission added two other factors to the essential ingredients for the integration of migrants: a welcoming society, and recognising that this welcoming society also plays a role in the process of integration.[37]

The scope of this Action Programme was limited to living and working conditions (not other areas) of TCN *workers* (i.e. not all TCN residents), nevertheless, the Programme was too

[33] Draft Final Synthesis Report of answers received to the Commission questionnaire (MIGRAPOL 9) on policies concerning the integration of immigrants, 6th Immigration and Asylum Committee, 7 April 2003, MIGRAPOL 21 rev1, DG Justice and Home Affairs, Brussels.
[34] S Carrera, '"Integration" as a Process of Inclusion for Migrants? The Case of Long-Term Residents in the EU' (2005) 219 CEPS Working Document 5.
[35] Action programme in favour of migrant workers and their families. COM (74) 2250 final, 14 December 1974, Bulletin of the European Communities, Supplement 3/76.
[36] Jesse, (n 7) 2.
[37] Commission Communication on a Community Immigration Policy, COM 2000 757, 19.

advanced for its time. The Member States were not ready to accept such an advanced approach to the integration of TCNs – integration through equal rights. The Council took note of the Programme in a Resolution;[38] however, the Member States repeated their traditional position on integration, and emphasised that the inclusive approach to integration is reserved for Member State nationals. The Council simply underlined the importance of undertaking appropriate consultation on migration polices in relation to third-countries, while it reiterated that equal treatment is reserved for Member State nationals. At that time, no further steps were taken following the adoption of the above Resolution, apart from a short Directive on the education of the children of migrant workers (Member State nationals only).[39]

After a decade, in 1985, the Commission in a Communication expressed its objective to provide TCN workers and their family members residing in the Community,[40] with the same protection in the field of social security as Community nationals. The Commission also expressed its intention to provide an appropriate framework for a process of information and consultation between the Member States and the Commission, in the field of TCN migration policies. Moreover, the Commission recommended that the policies of Member States to integrate migrants and their families should not focus only on tendencies towards discrimination or racism, but also on 'putting the foreign population on a stable footing':

> the policies of Member States show the gradual development of a determined policy to integrate the immigrant and his family. This policy must not only overcome tendencies towards discrimination, even racism at times, among the population of the host country. It must also overcome certain obstacles to putting the foreign population on a stable footing.[41]

Moreover, the Commission recommended that all migrants and their family members acquire an adequate knowledge of the language of the host country, while the latter also recognises, first, 'the important role … played by the language and culture of origin in the social insertion of immigrant workers and the families, where successful integration depends on the interrelationship between the host culture and the culture of origin'; and secondly, bilingualism and biculturalism as 'a necessary instrument in the integration process and a source of enrichment for local cultures'. Based on this Communication, the Council adopted

[38] Action programme (n 33).
[39] Directive EEC/486/77 - OJL199/32 1977.
[40] Commission Communication, Guidelines for a Community policy on migration, COM (85) 48 final, 7 March 1985. Bulletin of the European Communities. Supplement 9/85.
[41] ibid, para. 27.

a Resolution which confirmed the Commission's desire to give everyone in the Community, 'an equal opportunity of deriving advantages and making a contribution'.[42]

The other action taken at the European level in relation to the integration of TCN migrants was the November 1991 Commission Communication on Immigration.[43] The document acknowledged that security of residence is necessary for any successful integration policy.[44] It also argued for granting rights (including equality of treatment) to migrants, and imposing the obligation on them 'to adapt' to the lifestyle of the host society.[45]

Next, was the Treaty of Maastricht which brought a significant change in EU immigration policy. It built the Union on three 'pillars' and brought immigration of TCNs under Title VI of the newly-introduced 'third pillar'. Actions in matters falling within the 'third pillar', namely Justice and Home Affairs, comprised coordination, possibly resulting in intergovernmental measures, such as a common position, taking a joint action or adopting a convention by the Council. Community measures, such as Directives, Decisions and Regulations could also be adopted following a Commission proposal if all the Member States endorsed the proposal unanimously. The Treaty of Maastricht declared that developing a common policy on the immigration of TCNs, particularly the conditions of their entry and residence on the territory of the Member States, to be of *common interest* to the Union.

After the Treaty of Maastricht, the cooperation between the Member States on the policies regarding migration into the EU was strengthened compared to the pre-Maastricht era, however, the cooperation under Title VI TEU was still at the 'intergovernmental' level rather than the 'supranational' level.[46] The locus of the competence in the policy area was still with the Member States and not the EU. The role of the European Parliament and the power of the ECJ were also limited.[47] The adopted conventions and decisions were 'soft law' and not

[42] The Council Resolution of 16 July 1985 on guidelines for a Community policy on migration Published in OJ C 186.26 1985.
[43] Commission Communication on Integration, SEC (1991)1855 final, 23 October 1991, Brussels.
[44] ibid, paragraph 60.
[45] ibid, paragraph 59.
[46] The border between these two levels of institutional cooperation is not clear. Whether cooperation in a policy area is intergovernmental or supranational depends on a number of factors. For instance, the right of initiative (Member State or Commission); decision-making procedure (unanimous agreement of all Member States or their consensus); locus of the competence in the policy area (exclusive to the Member States, shared between the EU and Member States, or exclusive to the EU); the nature of the laws adopted in the policy area (soft law or hard law); monitoring level by the ECJ; the extent to which the European Parliament can influence a legislation in the policy area. See Neil Walker (ed), *Europe's Area of Freedom, Security, and Justice* (Oxford University Press 2004) p 16.
[47] Treaty of Maastricht, Article G. For a more detailed analysis of the function of the 'third pillar' see: S Peers, *EU Immigration and Asylum Law* (S Peers and N Rogers eds, Martinus Nijhoff Publishers 2006).

binding on the Member States. Nor did they have direct effect and, thus, could not be relied on before national courts. They were merely instruments of international law.

The results of the intergovernmental cooperation under the Maastricht regime were rather poor, particularly due to the structural deficit of third pillar decision-making.[48] The absence of the European Parliament in the decision-making process, the lack of clearly defined aims for the cooperation, and the absence of judicial supervision, meant that the cooperation which was formed following the Treaty of Maastricht became ineffective, undemocratic and inconsistent.[49] Instead of developing a principled, coherent and integrated policy for managing migration in line with the Union's interests and working towards TCN migrant's integration into the EU's society, this cooperation focused on restricting migration from outside the Union.[50]

The Amsterdam Treaty, which came into force in May 1999, was a turning point in the EU's competence on migration and its relevant matters. It brought this area of EU law within the shared competence of the EU and the Member States, by moving this policy area from the Third Pillar to the First Pillar of the EU.[51] Unlike the Third Pillar, within which cooperation between the Member States was intergovernmental, in the sphere of the First Pillar, the EU could promulgate supranational legislation in the field of migration. The Treaty of Amsterdam set a five-year deadline for the EU to adopt a common policy on the conditions of entry and residence of TCNs in the Member States.[52] Consequently, the status of having a common policy on immigration was changed from a *common interest* to a *mandate* for the EU.

In addition to requiring the EU to adopt measures defining the conditions of entry and residence of TCNs in a Member State, the Amsterdam Treaty instructed the EU to establish an area of freedom, security and justice in the EU, where TCNs could freely move between the Member States. Article 73J of the Amsterdam Treaty obliged the EU to abolish the internal border controls for TCNs. This was in practice inevitable once the border controls for

[48] See Report of Justice and Home Affairs Council to the European Council of 11/12 December 1993, 10655/93 JAI 11; the Communication from the Commission to the Council and the European Parliament of 23 February 1994, COM (94) 23 final.
[49] R Bieber and J Monar, *Justice and Home Affairs in the European Union. The Development of the Third Pillar* (Interuniversity Press 1995); D O'Keeffe, 'The Emergence of a European Immigration Policy' (1995) 20 ELR 20.
[50] The Dublin Convention 1990 which regulates the asylum claims made to EU Member States is an example.
[51] Title IV of TEU was transferred to the Title IV TEC (now TFEU), which received the title of 'Visas, asylum, immigration and other policies related to free movement of persons'.
[52] Treaty of Amsterdam, Article 73O.

EU citizens were abolished as one could not distinguish TCNs from EU citizens and enforce the controls for TCNs only. Paragraph 4 of Article 73K of the Treaty of Amsterdam also required the EU to adopt measures defining the conditions under which TCNs who were legally resident in a Member State, might reside and possibly settle in the other Member States. Until that time, only those who were nationals of an EU Member State, those (either Union citizens or TCNs) who were related to a national of a Member State, TCNs linked to an EU employer, and TCNs who were nationals of a country with an association agreement with the EU, could qualify for intra-EU freedom of movement. The Treaty of Amsterdam, nonetheless, introduced a new criterion for qualifying for autonomous freedom of movement within the EU: residence rather than nationality. The Amsterdam Treaty recognised that this freedom should be extended to TCN residents, whatever their nationality is. The Treaty, thus, signalled a change in the EU's traditional approach, according to which freedom of movement for persons should be limited to EU citizens and those TCNs who are somehow affiliated to an EU citizen. This could lead to the creation of a new privileged group of TCNs under EU law, based on the person's residence. This category of TCNs – TCN residents – would be able to directly derive free movement rights from EU law; they would not be required any more to be either a family member of an EU citizen, an employee of an EU company or a national of a country with an association agreement with the EU, to be able to move and reside freely across the EU. Accordingly, the changes brought by the Treaty of Amsterdam indeed constituted a significant progress towards the extension of the freedom of movement within the EU to TCNs.

The new objectives defined by the Treaty of Amsterdam for the EU were not limited to ensuring the free movement of TCNs in the EU, but also they included *ensuring protection of rights* for TCNs in the second Member State. In other words, the EU was required to adopt measures for safeguarding the rights of TCNs in the host Member State. The structural changes brought to EU immigration policy by the Amsterdam Treaty enabling the EU to adopt supranational legislation, together with the mandate to ensure the free movement of TCNs and the protection of their rights in the host State, provided the basis for the expansion of the competence of the EU to the integration of mobile EU citizens to TCN residents.

Nevertheless, the Amsterdam Treaty was carefully drafted in a way that the provisions requiring the EU to ensure the protection of rights of resident TCNs, did not amount to a declaration of equality between TCN migrants and EU citizens. The Treaty did not introduce

a prohibition of discrimination against resident TCNs on the basis of nationality.[53] The extension of the free movement rights of EU citizens to TCNs without ensuring their equal treatment with other migrants – including migrant EU citizens – would place TCNs in an unequal position to migrant EU nationals in terms of employment, access to education and recognition of qualifications. This would discourage TCNs from moving from the Member State in which they are already resident, to other Member States. Such a limited extension of rights in the second Member State meant that the EU's approach to the integration of TCN migrants remained unchanged: rights, particularly the equal treatment with nationals of the host State, is reserved for EU citizen migrants.

The Amsterdam Treaty maintained the unanimity rule for decision making in the field of JHA for five years after its coming into force. This meant that until 2004, any decision in this field would, still, have to be agreed upon by all of the Member States involved. While this could delay a significant improvement in EU immigration policy, and undermine the process of shifting immigration matters from the Third Pillar to the First Pillar, it, nonetheless, seemed to be sensible. Taking the control from the Member States on such sensitive issues would seem to be impossible without accepting a transitional period, so they could adapt themselves to the new system provided by the JHA policy area. Refusing to make provision for this transitional period could encourage the Member States to completely opt out of the JHA policy area.[54]

Overall, while the Treaty of Amsterdam endorsed the traditional inequality between TCNs and EU citizens, it, at least, brought freedom of movement for TCNs within the EU, within the EU Treaty framework. It provided the EU with the competence to adopt legally-binding measures harmonising – and probably facilitating – the entry, residence and movement of TCNs in the EU. The Amsterdam Treaty did not directly refer to the integration of TCN residents thus it was not clear whether the Treaty provides the EU with the legal basis for adopting legislation with regards to this matter. The Tampere conclusions, however, clarified the situation by providing 'the political foundation for the launch of a common immigration policy and a "vigorous [European] integration policy"'.[55] The Programme bridged the gap

[53] Similar to Article 12 TEC (now Art 18 TFEU) for the protection of EU citizens against discrimination on the grounds of nationality in the host society.
[54] The partial Communautarisation of the Third Pillar of the Treaty on European Union has been criticised. See, inter alia, T Kostakopoulou, 'The "Protective Union"; Change and Continuity in Migration Law and Policy in Post-Amsterdam Europe' (2000) 38 Journal of Common Market Studies 497.
[55] Carrera (n 26) 49.

between a broadly defined aim set by the Amsterdam Treaty and detailed legislation to achieve that aim.

3.1 Overview of the Tampere Programme

The Tampere Programme outlined a number of general principles that would guide JHA policy between 1999 and 2004. For the very first time, a common, multiannual, programme with a series of objectives and deadlines was established on policies as sensitive as the integration of TCN migrants. One might wonder why a policy guidance which was in place over a decade ago might still matter today and would form the core of a PhD thesis in 2018. The answer is that the objectives established in Tampere are still on today's EU agenda:

> Achieving the Europe 2020 objectives of employment, education and social inclusion will depend on the capacity of the EU and its Member States to manage migrants' integration, ensuring fair treatment of third-country nationals and granting rights, opportunities and obligations comparable to those of EU citizens.[56]

Hence, the objectives of the Tampere Programme are not outdated aims belonging to the 20th century. They are, rather, linked to today's strategic plan of the Union.

3.2 Objectives of the agenda

The Tampere Programme had 62 objectives with two of them being directly related to the integration of TCN residents in the Member States. The first relevant objective of the Programme is objective number 4 which, inter alia, made the Member States responsible for developing a common approach for ensuring the integration of TCN lawful residents into the society of the Union:

> A common approach must … be developed to ensure the integration into our societies of those third country nationals who are lawfully resident in the Union.[57]

The second relevant objective is objective 18, which recommended to the Union to 'ensure fair treatment' of TCN residents in the territory of its Member States. The objective calls for a 'more vigorous' integration policy which should, first, aim at granting TCN residents rights and obligations comparable to those of EU citizens; and secondly, enhance non-

[56] Commission Staff Working Paper, 'EU initiatives supporting the integration of third-country nationals', COM (2011) 455 final, Brussels. 20 Jul 2011, SEC(2011) 957 final, < https://ec.europa.eu/home-affairs/sites/homeaffairs/files/doc_centre/immigration/docs/2011_commission_staff_working_paper_on_integration.pdf> last accessed on 6 Dec 2017.
[57] Tampere Programme, paragraph 2.

discrimination in economic, social and cultural life and develop measures against racism and xenophobia:

> The European Union must ensure fair treatment of third country nationals who reside legally on the territory of its Member States. A more vigorous integration policy should aim at granting them rights and obligations comparable to those of EU citizens. It should also enhance non-discrimination in economic, social and cultural life and develop measures against racism and xenophobia.[58]

Two interesting points in relation to these objectives are (i) the emphasis of the European Council on a *common* approach by the Member States and (ii) that the second model of integration, namely, the inclusive, rights-based, model – as identified above in section 2.1.2 – was chosen by the European Council for facilitating the integration of TCN residents in the Union.

The Programme was an indication of a change in the approach of the Member States to the integration of non-EU citizens. The Tampere Programme 'stressed equal opportunities and equality as key aspects of TCNs' integration'.[59] The traditional approach according which a) facilitating the integration through granting rights to enhance the integration of migrants works only for EU citizens, and not TCNs; b) the integration of TCN residents is a matter for the Member States, seemed to be replaced by a new common approach to the integration of TCN residents entailing inclusion of these migrants into the society, providing them with equal opportunities and rights with the nationals of the host State, as well as with mobile EU citizens.

The other important point about the Tampere Programme was the balance of responsibility which was discussed earlier on page 23. In the Programme, the responsibility of integration was not on the shoulders of migrants, but rather on the Member States. The Programme expressed that it is the responsibility of the Member States to ensure the integration of TCNs into the Union society. As discussed on page 23, civic integration model which impose the responsibility on migrants to *acquire* integration, ignores the crucial part of any integration policy identified earlier (i.e. that integration is a two-way process, on the one side is the migrant and the other side the state and a welcoming society).

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[58] Tampere Programme, paragraph 18.

[59] For more on the Race Equality Directive see S Morano-Foadi, 'Third Country Nationals Versus EU Citizens: Discrimination Based on Nationality and the Equality Directives' [2010] Social Science Research Network 1, 45.

The next key point in the Tampere Programme was that no condition other than lawful residence was recommended to be imposed for acquiring rights and obligations comparable to those of EU citizens; in other words, under the Programme, a TCN who resides lawfully in the territory of the Union, should acquire those rights and obligations without needing to satisfy any other conditions. In the context of integration, this would mean that TCN residents could become 'one of us' by virtue of simply having lawfully resided in the Union.

Nevertheless, it should be noted that the Programme did not call for harmonisation of integration measures across the Union, most likely due to the lack of competence in the domain of integration of TCNs. It simply called for the Europeanisation of the integration policy, in terms of approach and direction, rather than harmonisation of legislation covering TCNs' integration into the host society.

Overall, the Tampere Programme seemed to be a clear U-turn in the approach of the Union to the integration of TCN residents. The Programme proposed granting TCN residents rights and imposing on them obligations *comparable* to those, respectively, enjoyed by and imposed on EU citizens. The Programme was an 'ambitious political statement towards the inclusiveness of migrants'.[60] It defined a clear mandate for the Union with regards to the integration of TCN residents. An ambitious policy with clear mandates and a clear deadline seemed to be the right first step of 'good policy-making in JHA'.[61] However, there seems to be a deviation from this policy, at least as regards the adoption of the LTR Directive. In the next two sections, I will analyse the Directive, and examine the extent to which the Directive is different, both in language and approach, from the Tampere Programme, with regards to the integration of TCN residents.

4. Integration condition of the LTR Directive

The LTR Directive is one of the main pieces of EU immigration legislation aimed at facilitating the integration of TCN migrants. The Directive recognises the integration of LTRs as 'a key element in promoting economic and social cohesion, a fundamental objective of the Community stated in the Treaty'.[62] The Directive was a major shift in the Member States' approach to the treatment of TCN residents – a shift from an extreme reluctance to

[60] S Carrera, '"Integration" as a Process of Inclusion for Migrants? The Case of Long-Term Residents in the EU' (2005) 219 CEPS Working Document 5, 2.
[61] J Apap, 'Towards Closer Partnerships - Requirements for More Effective JHA Cooperation in an Enlarged EU' (2004) 211 1.
[62] The LTR Directive, Recital 4.

accept any change in the treatment of TCNs, to making the fair treatment of TCN residents *a priority*.[63] The Directive, therefore, highlighted a change in the priorities of the Union in terms of the treatment of TCNs, as measures adopted by the Council until 2003 generally aimed at 'curbing irregular immigration' from outside the Union.[64] The word 'integration' is explicitly mentioned five times in the Directive: two times in the Preamble and three times in the text. The ECJ has also confirmed that the integration of TCNs settled in the EU is the main objective of the Directive.[65]

In its preamble, the LTR Directive recognises that equality of treatment with EU citizens would enhance the integration of LTRs:

> In order to constitute a genuine instrument for the integration of long-term residents into society in which they live, long-term residents should enjoy equality of treatment with citizens of the Member State in a wide range of economic and social matters, under the relevant conditions defined by this Directive.[66]

In the main body of the Directive, however, enjoying this equality of treatment has been made dependent on the choices of the national legislators,[67] as Member States may require TCNs who intend to apply for the status of long-term residence to comply with integration conditions imposed by national laws (Article 5.2). These integration conditions which can be imposed on applicants as mandatory requirements were initially introduced as 'integration measures', but during the Council negotiation, they were changed to 'integration conditions' in order to please specific Member States – Germany, Austria, and the Netherlands – by allowing them to protect pre-existing norms of national legislation.[68] If it was possible to interpret *measure* as an action by the host State, it is clear that *condition* is a requirement which the TCN must satisfy. The three Member States which inserted a provision on integration *conditions* to the LTR Directive, appear to be concerned that TCN residents are unwilling to accept western values, and participate in the society's life.[69]

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[63] R Bieber and J Monar, *Justice and Home Affairs in the European Union. The Development of the Third Pillar* (Interuniversity Press 1995), 4.
[64] F Trauner and I Kruse, 'EC Visa Facilitation and Readmission Agreements: A New Standard EU Foreign Policy Tool?' (2008) 10 European Journal of Migration and Law 411, 413–414.
[65] For instance, cases C-502/10, *Singh* para 45; C-508/10, *Commission v Netherlands* para 66; C-571/10, *Kamberaj*, para 90.
[66] Recital 12.
[67] Article 5(2).
[68] Jesse (n 7) 183; for a summary of the negotiations see: European Council, Document 12217/02, Brussels, 23 September 2002; for a detailed study of the negotiations within the Council, see S.Carrera (n 14).
[69] Kostakopoulou, (n 14) 936.

4.1 Discrimination and exclusion in the name of integration

The LTR Directive's integration conditions have been generally criticised and described as the 'Achilles heel' of the Directive.[70] A number of studies also demonstrate that in all Member States, the imposition of integration requirements is counterproductive to the process of integration of migrants into their society.[71]

The integration conditions are not defined in the LTR Directive. They are rather governed by national legislation. As also noted by Boelaert-Suominen there are no express limits on the integration conditions of the Directive.[72] Each Member State is free to adopt its own integration conditions laid down in its national immigration legislation.[73] Consequently, integration measures vary in each Member State. For example, in France, applicants sign a long-term contract for integration classes, while in Germany applicants only sit a test. This means, first, that there is no uniformity in the implementation of the same Article of the Directive. Secondly, applicants are treated differently depending on where they apply, while they all rely on the same EU legislation. Thirdly, Member States are free to raise the bar so that certain 'undesired' TCNs are simply unable to acquire the status. This difference in the method of delivering integration measures casts doubt on the intention of Member States to facilitate the integration of LTRs:

> it is difficult to see why some countries should have higher requirements than others for the same need, these differences throw doubt on the argument that immigrants need the knowledge they are required to demonstrate in order to successfully integrate.[74]

Moreover, the LTR Directive allows different treatment of applicants on the basis of their nationality. Member States are free to exempt nationals of certain (non-European) countries from the requirement of integration. For instance, as noted by Carrera, nationals of the US, Canada, Japan and many more countries are 'held to be perfectly integrated into the values and symbols of the receiving country' when applying for a residence permit in Germany and

[70] Boelaert-Suominen (n 3) 1023.
[71] A Bocker and T Strik, 'Language and Knowledge Tests for Permanent Residence Rights: Help or Hinderance for Integration?' (2011) 13 European Journal of Migration and Law 157, 179.
[72] Boelaert-Suominen (n 3) 1023.
[73] As we will see in chapter 5, the only limitation to these conditions is that the conditions do not undermine the effectiveness of the Directive.
[74] Bocker and Strik (n 71).

France.[75] In his opinion, this differential treatment in the personal scope of the integration conditions and the exemption of certain categories of ('Western', highly skilled and rich) foreigners from the obligation to meet the integration conditions 'leads to the incompatibility of civic integration measures with the principle of non-discrimination'.[76] In 2008, Human Rights Watch published a report on the Dutch integration test abroad, criticising the blanket exemption for some nationalities and not others.[77] The report argued that the test was disproportionate in its aims and nature, constituting a violation of Article 14 of the European Convention on Human Rights (ECHR) and Protocol 12 of that Convention.[78]

It may be argued that the purpose of integration conditions is to provide migrants with 'sufficient knowledge' about the life and society of the host State. In France, for example, when applying for the status of long-term residence, TCN migrants are required to sign an integration contract,[79] which includes an 'information session on life in France',[80] and aims to 'provide the signatory with knowledge about practical life in France and access to public services, including training and employment, housing, health, early childhood and child care, school, as well as community life'.[81] In Germany, the integration programmes aim to provide applicants for the status of long-term residence with 'basic knowledge of the legal and social order and the living conditions in the federal territory'.[82] It is, nonetheless, hard to explain how a migrant who has resided in a country for at least five years, still needs to be taught the *basic knowledge* of the living conditions in that country.[83]

Applicants for the status of long-term residence are also required to cover the costs of the integration conditions imposed on them. This means that, first, the responsibility of the integration is on the migrants rather than the Member States; secondly, the migrant's financial status will be linked to their ability to be recognised as one of 'us' and thus deserve the rights 'we' enjoy.

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[75] S Carrera and A Wiesbrock, 'Civic Integration of Third-Country Nationals: Nationalism versus Europeanisation in the Common EU Immigration Policy' (2009).
[76] ibid.
[77] Human Rights Watch (2008), "The Netherlands: Discrimination in the Name of Integration, Migrants Rights under the Integration Abroad Act", Human Rights Watch, New York, 14. May < https://www.hrw.org/sites/default/files/reports/netherlands0508.pdf > last accessed on 25/01/2018.
[78] Together with Article 8 ECHR (right to family life).
[79] Contrat d'accueil et d'intégration.
[80] Decree 2006-1791, Article L. 311-9.
[81] Decree 2006-1791, Article R. 311-25.
[82] Aufenthaltsgesetz, Section 9(2).
[83] Unless they have been excluded from the society, which is again the result of the society not being welcoming. This issue is unlikely to be resolved by teaching basic knowledge about the society to migrants. Recalling the Jesse example, a circle of friends should open up a bit and make room for the newcomer.

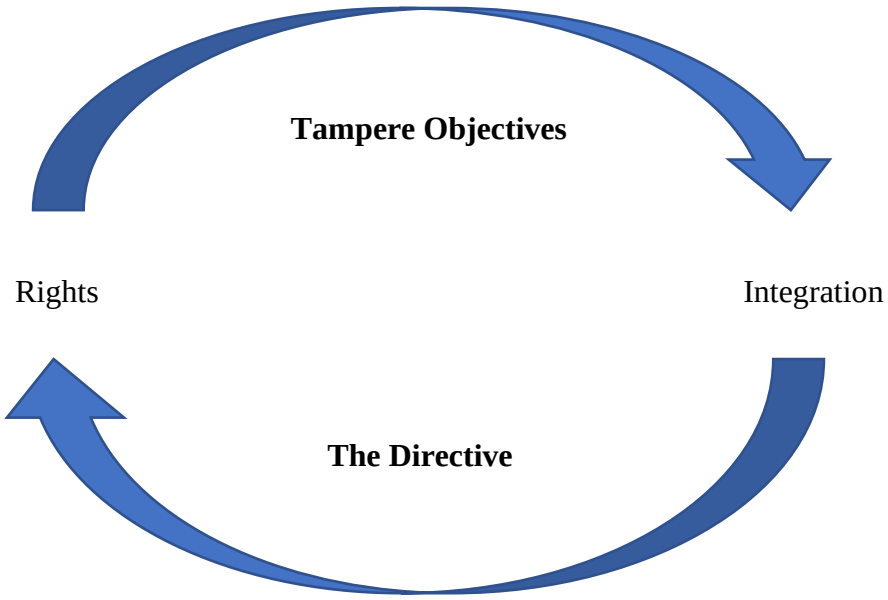
The economic self-sufficiency condition and having health insurance suggest that the LTR Directive's purpose, inter alia, is to keep those who are not considered economically viable, out as unwanted, which is often the purpose of civic integration.[84] Moreover, Member States are free to impose financial sanctions on those who fail to meet the integration conditions. For example, those who fail the integration tests in the Netherlands, may be issued with a 'fine'.[85] In other words, the Directive allows the Member States to adopt a civic-integration approach to the integration of TCN residents, which is based on conditions, and sanctions for failure to satisfying those conditions.

5. Comparing the LTR Directive with the Tampere Programme

In this section I shall examine the extent to which the LTR Directive is in line with the Tampere Programme, which was in place as EU immigration policy when the Directive was adopted.

The first difference between the Tampere Programme and the LTR Directive appears to be the approach of these two documents to the integration of TCN residents. The former stressed equal opportunities and equality of treatment with EU citizens as key aspects of TCNs' integration; the latter sets integration as a condition for access to equal opportunities and equality of treatment. In the Programme, integration is the *result of extending certain rights* of EU citizens granted to TCN residents; in the Directive, integration is *a condition for enjoying those rights*.

[84] M Jesse, 'The Selection of Migrants through Law - a Closer Look at Reguation Governng Family Reunification' in F Anthias and M Pajnik (eds), *Contesting Integration, Engendring Migration* (Palgrave Macmillan 2014); see also Kostakopoulou, 'The Anatomy of Civic Integration' (n 14) 947.
[85] Wet Inburgering Nieuwkomers, Article 18.



In addition, each of these documents employs a different migrant integration model (of the two models seen earlier). The Tampere Programme is based on the second model of integration, namely the inclusionary model of integration, which provides for the grant to TCNs of rights and obligations similar to those enjoyed by EU citizens, while the LTR Directive employs the first model of integration, namely 'civic integration', entailing no admission without integration.

The Tampere Programme signalled a departure from the assumption that granting rights for enhancing the migrants' integration works only for EU citizens. The Programme sees comparable rights and responsibilities as a way to facilitate the integration of non-EU citizens too. In the LTR Directive, however, we do not see such an assumption. Like all the years before the Tampere Programme, the Directive assumes that non-EU citizens are not integrated in the host society until they can prove otherwise. The Directive allows Member States to 'teach and test' TCN residents and, if they successfully pass, only then give them the rights defined in the LTR Directive. In other words, the inclusionary approach recommended by the Programme was not followed in the Directive.

The next difference between the Tampere Programme and the LTR Directive is the balance of responsibility. The Programme places the responsibility of ensuring and facilitating the integration of TCN residents on the Member States, while in the Directive, all the

responsibility is on the TCN resident who wishes to apply for the status of long-term residence.

We can see a further deviation in the LTR Directive from Objective 4 of the Tampere Programme. The objective called for a common approach by the Member States to the integration of TCN residents, while the Directive allows Member States to adopt different positions on this matter in their implementing legislation.

Additionally, Objective 18 of the Tampere Programme called for ensuring that TCN residents are treated fairly. Nevertheless, requiring TCN residents to comply with integration requirements which may vary depending on the Member State in which they apply, is discriminatory. It is not fair treatment either, as there is another category of migrants in the host State – mobile EU citizens – who regardless of the real extent of the link they have established with the host State, are presumed to be integrated, and thus are *automatically* granted the rights for which LTRs have to apply and meet conditions, simply because of their (non-EU) nationality. One might, rightly, argue that EU citizens enjoy the right to be protected from discrimination on the grounds of nationality and this is the reason that EU citizens cannot be required to comply with integration measures. However, first, the argument here is not about protection against discrimination. It is rather about 'fair treatment' of TCN residents, as recommended by the Programme. It is hard to justify this difference in treatment between two categories of migrants, one which has at least resided lawfully in a Member State for five years, while the other one might have just arrived. EU citizens may be required to meet integration conditions (e.g. length of residence) in order to enjoy rights, however, here I am talking about integration conditions, such as classes and exams. EU citizens may never be required to satisfy such conditions. They are assumed to have perfectly integrated into the host State to enjoy basic rights such as a residence right – and later enjoy more rights by virtue of length of residence – while LTRs, in addition to satisfying the residence requirement – which was considered to be enough by EU immigration policy for acquiring those rights – must prove their integration into the host State. Moreover, we should not forget the rationale and purpose behind extending rights and obligations of EU citizens to TCN residents. The purpose of extending the rights of EU citizens to TCN lawful residents was to enhance their integration into the host society. Nevertheless, the approach in the Directive widens the gap between the status and rights of TCN residents and the status and rights of EU citizens, which clearly would not contribute to the integration of LTRs.

The Tampere Programme was a political document which defined the priorities in the area of EU immigration policy. The Programme was the European Council meeting's statement of intention, with vague and general objectives. It is of course not unlikely that in adopting a legal document such as the LTR Directive, the language and terms used in those vague and general objectives are changed, even significantly. It would be unrealistic to expect the Directive to use the exact terms and language of the Programme.

Nevertheless, the Tampere Programme was the overarching EU immigration policy when the LTR Directive was adopted. The Directive could at least be expected to be *in line* with those chief objectives rather than going to a different direction from the initial goal set by the Programme. The initial aim of the Programme, as noted earlier, was to facilitate the integration of TCN residents to the host society, not setting integration as a condition for acquiring those rights. The Directive shifted from facilitation of integration, to requiring proof of integration, and even further, to imposing sanctions for failure to prove integration. Thus, the Directive seems to be contradicting the objectives of EU immigration policy. Furthermore, the Directive does not seem to be capable of achieving coherency in EU immigration policy, as prescribed by the Tampere Programme. By 'coherency' I mean that the various components of the immigration policy should support, and not undermine, the EU's defined goals on enhancing integration.[86]

Another deviation of the LTR Directive from the Tampere objectives is the shift in the responsibility of the Member States as regards the integration of TCN residents. While the Programme considered the integration of TCN residents as a two-way process (where both the host State and migrants have a responsibility) and emphasised the responsibility of the Member States, the Directive makes the integration of TCN residents a one-way process in which only the migrants have the responsibility.

In addition, the inclusionary approach adopted in the Tampere Programme (i.e. that all those who have resided in the Union for a certain time should be granted the rights of EU citizens) is absent from the LTR Directive. This approach has been replaced with an exclusionary approach, according to which no TCN enjoys the rights of EU citizens unless he/she satisfies the integration conditions.

[86] J Niessen and T Huddleston, *The Legal Framework for the Integration of Third-Country Nationals* (Martinus Nijhoff 2009).

Furthermore, the inclusionary method of facilitating integration used in the Tampere Programme was changed to a mandatory, sanction-based, method in the LTR Directive. Using this restrictive conditionality, may undermine social cohesion and inclusion, as well as the migrants' basic rights (e.g. residence).[87] The integration of TCN residents was originally seen in the Programme as a matter of equality.[88] Enhancing their integration was also seen as a goal for EU immigration policy. Now, in the Directive, integration is not treated as a matter of equality. It is not treated even as a remuneration prize, but as a requirement which imposes costs on TCN residents. While the Programme insisted on removing the factors of otherness between EU citizens and TCN residents, the Directive treats TCN residents like 'others' and 'newcomers'. The deviation in the Directive is clear when it allows the Member States to require TCN residents who have resided for at least five years in a Member State (equal to how long EU citizens must reside in the host State to acquire permanent residence) to attend a course entitled 'Law and Citizenship Newcomers' in the Netherlands,[89] or 'welcome and integration contract' in France.[90] The approach to integration has moved away from focusing on security of residence, access to rights, and the inclusion of TCN residents into society, to integration as a condition with which access to rights can be restricted.[91]

It is difficult to see why a method of integration works for one category of migrants (mobile EU citizens and their family members) but not for the other (TCN migrants). EU citizens are assumed to have integrated into the society of the host State after five years residence, while TCNs who have resided in the EU for the same number of years must still prove their integration. It has been suggested that the Member States may use the integration conditions as a tool to exclude certain undesired TCNs by raising the bar of integration requirements.[92] The method of integration adopted in the LTR Directive suggests that Member States still see TCN residents as suspects who are not willing/not capable to be included in the society:

> 'When a comparison is made between the first proposal of the Commission for a directive on long-resident third country national and the final directive as adopted it is difficult to avoid the conclusion that the Member states consider third country

[87] Carrera, (n 26) 1.
[88] S Morano-Foadi and M Malena (eds), *Integration for Third-country Nationals in the European Union: the Equality Challenge* (Edward Elgar 2012) 46.
[89] Wet Inburgering Nieuwkomers.
[90] Contrat d'accueil et d'intégration (CAI).
[91] S Carrera and A Wiesbrock, '*Civic Integration of Third-Country Nationals: Nationalism versus Europeanisation in the Common EU Immigration Policy*' (2009).
[92] Boelaert-Suominen (n 3) 1023.

> nationals even after five years stable and lawful residence in the Union an intrinsically suspect category'.[93]

Although the adoption of the LTR Directive was a beneficial step towards developing a common EU immigration policy, as recommended by the Tampere Programme, the lack of legal certainty in relation to the integration clauses of the Directive appears to cause a deviation from the Programme. The Directive allows the Member States to adopt their own legislation on the integration of TCN residents, which of course may vary from one State to another. TCN residents in different Member States are, therefore, treated differently. Treating applicants for the same EU status (derived from EU legislation) differently, simply because of the Member State of application seems to be contrary to the need to ensure the fair treatment of TCN residents, which was underlined by the Member States in Tampere.

5.2 Why deviation?

The deviation of the LTR Directive from the objectives of the Tampere Programme can be attributed to a number of internal and external factors.

The first cause appear to be the desire of the Member States to control migration of non-EU citizens.[94] The proposal for the LTR Directive was based on for the 'Europeanisation' of the legal regime governing the migration of TCN residents.[95] This transfer of legislative power to the supranational level could mean that the Member States lose one of their sovereign powers: control over the migration of non-EU citizens. By the inclusion of the integration conditions, the Member States managed to retain their control.

The second cause of the deviation could be to do with the terms used in the Tampere Programme. The clauses of the Programme were ambitious, but also ambiguous. They were vaguely formulated, which left room for the Member States to change the proposal for the LTR Directive in a way they desired. These last two causes together are not the recipe for an inclusionary, right-enhancing legislation:

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[93] E Guild, *The Legal Elements of European Identity* (Kluwer Law International 2004) 233.
[94] Jesse, (n 7) 184.
[95] Commission proposal for Directive on the status of long-term resident third-country national (COM (2001) 127, 13 March 2001).

vaguely formulated plan

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the Member States' reluctance to interpret the plan in a liberal way

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rights-enhancing legislation

The last internal cause which can be identified for the deviation is the legislative procedure that was in place when the LTR Directive was negotiated and adopted. At that time, the European Parliament did not have much say in adopting legislation in the area of immigration. In addition, the voting system in the Council was based on unanimity. All Member States had to agree upon the terms of the proposal and, thus, every Member State had a veto, which made reaching an agreement in the sensitive area of immigration of TCN residents even harder.

The major external cause of the deviation was the 9/11 attacks in 2001 which occurred between the adoption of the Programme in 1999 and the adoption of the Directive in 2003. A number of states introduced legislation to respond to the fear caused by the attacks – legislation, which was generally security-conscious and exclusionary.[96] This will be discussed further on page 156 in chapter 5, where I analyse possible cause and cures for the deviation together.

5.3 Despite the deviation, does the Directive facilitate the integration of TCN residents?

The LTR Directive provides LTRs with a secure residence status, which is crucial in the process of the integration of migrants.[97] Those TCN residents in a Member State, who manage to satisfy the conditions for acquiring the status, will enjoy protection against expulsion (Article 12). The host State may withdraw the secure residence status in very limited circumstances, such as where the LTR constitutes an actual and sufficiently serious threat to public policy or public security (Article 12). These grounds are similar to the

[96] Anti-terrorism, Crime and Security Act 2001, in the UK and the Patriot Act, in the United States. In October 2001, five weeks after the attacks, Congress passed the 342-page Patriot Act; removed restrictions on wiretaps, search warrants and subpoenas. PA allows search without warrant, spying on the telephones and emails and keeping the information in a national database.
[97] Jesse, (n 7).

grounds which can be used against EU citizen migrants. However, LTRs who remain outside the Union continuously for twelve months will lose the status (Article 9C).[98] This possibility of withdrawal of status within a relatively short period of absence makes the status and the security of residence attached to it unstable and not so secure.

Having said that, the status of long-term residence is permanent and may be withdrawn only in limited situations.[99] Therefore, it seems that the LTR Directive provides a satisfactory secure residence status in the host State and the major deviation of the Directive from the Tampere Programme is related to the procedure *before* the acquisition of the status, particularly the integration conditions.

Overall, the LTR Directive provides its beneficiaries with the essential element of integration, namely, a secure resident status; nevertheless, due to the lack of other elements of integration, such as equal treatment with other members of EU society (EU citizens) and not being considered different until proven to be one of us, the status is not capable of facilitating integration of TCN residents, at least by the same way as prescribed by the Member States in Tampere.

5.4 Interim conclusion: discrimination and exclusion in the name of integration

In this section, the Tampere Programme and the LTR Directive were compared. The approach of the Programme to the integration of TCN residents in the Union, seems to follow the second model of migrants' integration (inclusion). The Programme considers that the integration of TCN residents will be facilitated by granting them the rights and obligations granted to other members of the society (i.e. EU citizens). On the contrary, the LTR Directive sets the integration as a pre-condition for enjoying the rights of EU citizens (civic integration model). The Directive allows the Member States to require TCN residents to *prove* their integration to the host society, *in order to enjoy those rights*. Moreover, the language of the two documents is different, and shifts from encouragement to sanctions. The balance of responsibility has also shifted from the host State in the Tampere Programme, to migrants in

[98] EU citizens who are permanent residents in a Member State also lose their status after an absence of 2 years from the Member State, however, they do not lose their status of EU citizenship and can return to the Member State.

[99] Directive 2003/109, Article 9: a twelve-month absence from the territory of the Union, a longer absence of six years from the host state due to residence elsewhere in the Union, or if it comes to light that the LTR used deception in acquiring the status, if the LTR constitutes an actual and sufficiently serious threat to public policy or public security.

the LTR Directive. Thus, there is a significant deviation in the Directive from the directions given in the Programme.

Nevertheless, despite these deviations, the Directive provides successful applicants with a secure residence status and a series of rights which were previously reserved for EU citizens.

6. Why not the same method of integration for EU citizens and TCN residents?

EU citizens automatically acquire the right of permanent residence once they have resided legally for a continuous period of five years in the host State.[100] This also applies to their TCN family members.[101] This right is not subject to further integration conditions, such as integration contracts or multiple-choice question tests. Thus, first, EU citizens are assumed not to face any issue of inclusion or integration in the host society which requires further measures; secondly, it is not the nationality of the migrant which causes the assumption of integration, as *TCN* family members of EU citizens are also assumed under EU law to have integrated into the society.

In respect to EU citizens, the approach to the correlation of rights and integration is similar to the one recommended in the Tampere Programme: enjoying rights will facilitate integration. Directive 2004/38 – which governs the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States – utilises the right of permanent residence in the host State in order to enhance the integration of mobile EU citizens into the society of the host Member State:

> In order to be a genuine vehicle for integration into the society of the host Member State in which the Union citizen resides, the right of permanent residence, once obtained, should not be subject to any conditions.[102]

Thus, the rights which are the cornerstone for the integration of EU citizens and their TCN family members, are often subjected to formal integration conditions for TCN residents.[103] The paradox in the approach of the Member States to the integration of migrants (EU citizens and their TCN family members) might have an obvious legal reason which is the protection of EU citizens and their family members from discrimination on the basis of nationality.

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[100] Art 16.1 of Directive 2004/38 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States.
[101] Directive 2004/38, Art 16.2.
[102] The Preamble to Directive 2004/38, Recital 18.
[103] Jesse, (n 7) 172.

Nevertheless, assuming that a method of integration works for one category of migrants and yet not for the others, does not seem to have any logic to it.

It might be argued that this sectorial approach to migration is legal. It might also be argued that this differentiation in treatment is due to the fact that migrants are subject to different laws and, thus, their different treatment is justified. While this difference in treatment is generally justified, as well as legal, one should not forget the logic behind the adoption of the LTR Directive and the introduction of the LTR status. Moreover, Member States justifies their approach to the integration of LTRs by expressing the concern that TCN residents who are LTRs may not be willing/able to integrate into the receiving society. Nevertheless, the logic behind this justification may also be used for TCN residents who are family members of EU citizens, as well as TCNs who are scientist. If the issue is the migrant's nationality, why just some TCNs are subject to civic integration and the rest are presumed to be willing/able/ to smoothly integrate into European society.

The concern of the Member States (e.g. Germany, Austria, and the Netherlands) that TCN residents are unable or unwilling to accept the receiving society's values, adapt to a new way of life also seems irrelevant, as if the second method of integration (facilitating inclusion by providing right of residence and equal treatment with the host State nationals) works for TCN family members of EU citizens, it will work for other TCN residents too. Furthermore, it is not only illogical to resist the same method of integration to be used for TCN residents, but it seems to be in the EU's interest to adopt the inclusion method of integration for LTRs, for the following reasons.

First, TCN residents not only reside in the society of the host State, but they are also part of the society of the Union; the Union should do its part in creating a link between LTRs and the Union. Moreover, any LTR may become an EU citizen by acquiring nationality of their host State. It is in the EU's interest to start the process of inclusion (e.g. the sense of belonging to the Union) of LTRs in the EU's society as soon as possible (e.g. once a TCN becomes a long-term resident in the Union). By the time they become EU citizens, it may be too late for starting that process. by providing LTRs with the right to equal treatment with other members of the society, the Union shows its commitment to the inclusion of its permanent members into the society. Omitting their inclusion into the society could lead to 'social dumping' within the Union.

Even if LTRs do not become EU citizens, they are still residents of the Union and officially permanent members of its society. The Union should do its part in the integration of its permanent members. It is in the EU's interest to protect the effectiveness of its immigration policy by limiting the use of disproportionate and discretionary integration conditions for the applicant of an EU legal status.

Secondly, the enhancement of TCN residents' integration into the Union society has social and economic benefits for the Union. 'A successful and efficient integration strategy of migrants would serve as a fundamental element that not only addresses the challenge of maintaining social cohesion, but also enhances the EU's overall economic welfare and the functioning of the internal market.

Thirdly, in EU immigration policies adopted after Tampere, the Member States keep defining priorities similar to those of the Tampere Programme. The objectives being repeated for almost two decades now, show that the LTR Directive and similar pieces of legislation that have been adopted, concerning, inter alia, the integration of TCN residents, have failed to address the issue and this matter is still on the priority list of EU immigration policy.

7. Concluding Remarks: Integration, aim or condition

In this chapter I have looked at the integration of TCN residents, particularly LTRs. It was discussed that the integration of migrants has neither a formula, nor can it be ordered. It occurs when migrants are engaged in different aspects of life in the receiving society. This is where legal instruments can play a role in facilitating this social phenomenon, by providing the opportunity for migrants to be involved in aspects of the host society's life.

Two different approaches to integration were identified: (1) civic integration, and (2) inclusion of migrants into the receiving society. The Union utilizes the first approach for the integration of TCN residents, and the second one for the integration of EU citizens: satisfying conditions is the foundation of integration for the former category of migrants, and enjoying rights, especially the security of residence and equal treatment with the host State nationals, is the cornerstone of the integration of EU citizens. For decades the EU has followed the inclusion method of integration for EU citizens. It was illustrated that the Tampere Programme recommended the application of this method of integration also to the integration of TCN residents. In other words, the Programme signalled the end to the traditional

approach of the Member States towards facilitating integration of migrants, by granting rights to enhance the integration of TCNs as well.

Nevertheless, a comparison of the LTR Directive with the Tampere Programme, demonstrated that there is a deviation in the Directive from what the Programme recommended with regards to the approach to the integration of TCN residents. We saw that the two documents are different, or even contradictory, in relation to this matter. On the one hand, in the Programme, an inclusionary, encouraging, rights-based approach was suggested, whilst, on the other hand, an exclusionary, mandatory, sanctions-based approach was adopted in the Directive. The inclusionary approach in the Programme was translated to exclusion until discretionary conditions are satisfied. A concept which was understood in the Programme as the participation of TCN residents in the society, access to rights, non-discrimination, and promoting social inclusion, has now become a condition for access to rights.

It was demonstrated that while the LTR Directive provides its beneficiaries with a secure residence status, which is essential in the process of migrants' integration, the integration conditions of the Directive, in relation to which the Member States maintain major discretion, are capable of undermining the effectiveness of the Directive *and* the effectiveness of the Programme.

I have mostly argued that the same method of enhancing integration which is used for EU citizens and their family members can/should be used for LTRs too. In addition, the Union should play a more active role in the integration of LTRs. The Union does not have the competence to adopt legislation in this area, and I am not suggesting that integration measures should be harmonised across the Union: first, because the EU does not have such a competence, and, secondly, because integration measures should be designed according to local needs, considerations, and conditions. However, at least a common direction, approach, and understanding of integration of LTRs should be agreed between all Member States, and the Union becomes the coordinator of the Member States' integration policies.

Chapter 3 - Free Movement of LTRs to a second Member State

1. Introduction

In chapter two, I discussed those two objectives of the Tampere Programme which recommended the adoption of a more vigorous integration policy based on a common approach,[1] aiming to grant TCN residents rights and obligations comparable to those of EU citizens. It was concluded that the 2003 Long-term Residents Directive (the LTR Directive) is neither able to ensure a common approach to integration will be adopted by the Member States,[2] nor its own approach to integration is in line with the approach of the Tampere Programme.

This chapter and the next intend to examine the extent to which the LTR Directive is capable of giving long-term residents (LTRs) rights and obligations *comparable* to the rights enjoyed by Union citizens, and the obligations imposed on them. If the provisions of the LTR Directive extend the rights granted to EU citizens to LTRs, then it can be said that the Directive is in line with this part of the Tampere Programme. To be comparable with the rights of EU citizens, the rights of LTRs should, at least, include the 'core' rights of EU citizens.

This chapter analyses the first set of core rights of EU citizens: the right to freely move within the Union, and the right to reside in any Member State. These rights have been supplemented by the right to equal treatment with the nationals of the host Member State in similar situations. The primary aim of this chapter is to examine the extent to which the LTR Directive is capable of providing LTRs with the right to free movement within the EU, residence in another Member State, and equal treatment with the nationals of that State.

Directive appears to be a revolutionary step towards extending these rights to non-EU citizens, nevertheless, as will be illustrated in this chapter, free movement rights of LTRs and EU citizens are not identical, and indeed are different in nature. It will be argued in section 5.1 that the extension of these rights to LTRs makes sense both from the economic point of view as well as the integration one. It is not economically justifiable because personal market freedoms which have traditionally been available to economically active individuals

[1] Tampere European Council, 15-16 October 1999, Presidency Conclusions, SN 200/99, Brussels
[2] Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents. OJ L 16, 23 January 2004.

(Member State nationals only) for economic purposes of the Treaties,[3] if extended to LTRs, they can also be economic actors in the internal market and contribute to those economic aims. It will be demonstrated that the free movement of LTRs poses no additional security risk as LTRs are already within the EU's borders and are free to move within the Schengen area.

In addition, this chapter considers the LTR Directive's capability to approximate the various national legislation on the conditions of entry and residence of LTRs to a second Member State (i.e. a Member State other than the one in which they have acquired the long-term residence status), as recommended by the Tampere Programme. It will investigate to what extent are the Member States free to apply their national immigration laws on the conditions of entry and residence of a TCN who has already acquired the status of long-term resident in another Member State (first Member State).

This chapter is structured as follows. I will begin by briefly analysing the rights of EU citizens to freely move to another Member State, reside there, and enjoy equal treatment with the nationals of that State (Section 2). The section that follows (Section 3) explores the position of LTRs with regards to these rights: do LTRs enjoy a similar right to move freely and reside in the territory of a second Member State, and enjoy equal treatment with the nationals of that State? In section 4, the results of sections 2 and 3 will be compared, in order to examine the extent to which the rights of movement and residence granted by the LTR Directive to LTRs are 'comparable' to the rights of EU citizens. Section 5 of the chapter explains why the Union should ensure LTRs enjoy the free movement and residence rights which are similar to those of EU citizens. Parts of this chapter (sections 2 and 3) may appear descriptive. Nevertheless, having these descriptive sections is necessary as 1) this thesis for the first time is providing a detailed analysis of the rights of LTRs who have different statuses (employed, self-employed, self-sufficient) and compare them with what EU citizens enjoy. 2) it was not possible to answer the normative questions of section 5 without having these mostly descriptive sections. In other words, it was not possible to have normative arguments in favour of further extension of LTRs' rights without knowing their current position in the second Member State.

[3] Although today, the provisions may not serve purely economic purposes (especially since citizenship provision have been added to the Treaty), personal market freedoms, inter alia, still have economic aims.

2. Freedom of movement of EU citizens

The right of free movement and the right of residence, which enable Member State nationals and their family members to freely move to other Member States and reside there, have been described as the most important rights the Union confers on its citizens.[4] These rights have been supplemented by the right to enjoy equal treatment with the nationals of the host State, in situation that fall within the scope of EU law.

This section does not intend to provide a detailed account of the historical development of the rights of free movement and residence;[5] rather, it seeks to offer a summary of these rights, as well as an analysis of the current legal regime governing these rights, to a level that is necessary for comparing these rights of EU citizens with what the LTR Directive has granted to LTRs.

Member State nationals may derive the rights of free movement and residence from two different sources: a) the 'personal market freedoms' (Articles 45, 49 and 56 TFEU); b) citizenship of the Union and, in particular, Article 21 TFEU. The former grant the 'activity-oriented'[6] rights of free movement and residence to Member State nationals that are economically active in a cross-border context, whereas, the latter grants the status-oriented rights of free movement and residence to economically inactive Member State nationals,[7] merely because they are citizens of the Union.

I will examine these rights separately based on their source, by dividing this section into two parts; the first analyses the rights which economically active Member State nationals derive from the personal market freedoms, and the second will focus on the rights of economically inactive Member State nationals stemming from the citizenship provisions of the Treaty.

2.1 Freedom of movement for economically active Member State nationals

This section is devoted to the analysis of the rights of Member State nationals who move to the territory of another Member State in order to exercise an economic activity there. In other

[4] F Rossi dal Pozzo, *Citizenship Rights and Freedom of Movement in the European Union* (Kluwer Law International 2013) 51.
[5] For such accounts, see E Spaventa, *Free Movement of Persons in the European Union : Barriers to Movement in Their Constitutional Context* (Kluwer 2007); A Tryfonidou, *The Impact of Union Citizenship on the EU's Market Freedoms* (Hart Publishing 2016).
[6] The term is borrowed from Dimitry Kochenov. See D Kochenov, 'Ius Tractum of Many Faces: European Citizenship and the Difficult Relationship between Status and Rights' (2008) 15 Columbia J. Eur. L. 169, 194.
[7] Economically active Member State nationals are still able to rely on the citizenship provisions and derive the free movement rights from them, however, the *lex specialis* principle applies to the situations which have already been covered by the personal market freedoms, and hence, the latter situations are governed by these provisions.

words, it examines the rights of economically active nationals who are involved in a cross-border economic activity.

Member State nationals derive from the personal market freedoms the rights to freely move and reside in the territory of any Member State of the Union, for the purpose of pursuing an economic activity there. Various types of economic activities are covered by the personal market freedoms: employment (Articles 45-48 TFEU), permanent self-employment (Articles 49-55 TFEU), and providing service as well as receiving services (Articles 56-62 TFEU). These provisions regulate (and facilitate) the free movement of economically active Member State nationals within the Union, because, *inter alia*, exercising economic activities in a cross-border context contribute to the economy of the Member States,[8] and, also, they contribute to the establishment and development of the internal market, as an area in which, inter alia, the free movement of persons is ensured.[9]

In addition to the rights of movement and residence in a second Member State, nationals of the Member States enjoy the right to non-discrimination on the grounds of nationality and this derives from all the personal market freedoms and is further elaborated in secondary legislation supplementing them.[10] There is, also, a self-standing prohibition of discrimination on the ground of nationality in all situations falling within the scope of EU law, which is laid down in Article 18 TFEU.[11] Any measure of the host State which, directly or indirectly, discriminates against nationals of other Member States is prohibited.

'Discrimination occurs when comparable situations are treated differently, or non-comparable situations are treated equally'[12] (although the latter, does not always amount to discrimination)[13]. Discrimination may be direct or indirect. The former refers to a different and usually less-favourable treatment which is directly based on nationality, while the latter refers to imposing a condition which is prima facie nationality-neutral (i.e. also applies to

[8] For a detailed analysis of the purposes and functions of the personal market freedoms see: E Szyszczak, 'Building a Socioeconomic Constitution : A Fantastic Object ?' (2012) 35 Fordham Int'l LJ 1364, 1370. See also A Tryfonidou (n 5) for an analysis of the impacts that the introduction of the Union citizenship has had on these personal market freedoms.
[9] Article 26(2) TFEU.
[10] Directive 2004/38 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States [2004] OJ L158/77 (the Citizens' Rights Directive); Regulation 492/2011 on freedom of movement for workers within the Union [2011] OJ L141/1.
[11] The Personal market freedoms include a prohibition of nationality discrimination, and thus, Article 18 TFEU is rarely used in the context of personal market freedoms as lex generalis. An example of such use is Case 186/87 *Cowan* [1989] ECR 195.
[12] Spaventa (n 5) 17.
[13] Case C-13/63 *Italy v Commission* [1963] ECR 337. For examples of non-comparable situations treated equally which do not amount to discrimination, see Spaventa (n 2) 17.

nationals of the host State) but meeting it is harder for nationals of other Member States.[14] It is important to distinguish between the different types of discrimination because the grounds on which different forms of discrimination can be justified are different, depending on the type of discrimination. A directly discriminatory measure may be justified only on the general grounds specified in the Treaty (public policy, public health, public security (the so-called 'Treaty derogations')), whereas, a measure which is found to be indirectly discriminatory, can *also* be saved if such a measure is 'objectively' justified.[15]

Without the right to equal treatment, the mere rights of free movement and residence would have been meaningless.[16] If Member State nationals were not protected against nationality discrimination in the second State, exercising the free movement rights would not be attractive enough for them to abandon their home State, and move to a State where they are treated as second-class residents (nationals of that State are given priority).

It can be understood from the Court's judgments that the Court has been aware of the devastating effect that the feeling of being treated less favourably, could have on Member State nationals' willingness to move or on their genuine enjoyment of free movement rights. The Court has adopted a teleological approach, which aims to achieve the *full effect* of the personal market freedoms, rather than a literal approach to the interpretation of these provisions. In its judgments the Court has (almost always)[17] sought to ensure that Member State nationals do not face any obstacle which may impede their free movement, or hamper their smooth integration into the host State. As a result, as we will see, the personal market freedoms have been extensively developed, both in terms of material scope,[18] and personal scope.[19]

I shall now examine the rights of the first category of economically active Member State nationals who may derive the rights of free movement and residence within the Union from the personal market freedoms: 'workers'.

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[14] C Barnard, *The Substantive Law of the EU* (Oxford University Press 2013), page 278. See also Case C-278/03 *Commission v Italy* [2005] ECR I-3747, 246-7.

[15] Judge-made and non-exhaustive list of non-economic grounds that can justify indirectly discriminatory (on the ground of nationality) and non-discriminatory obstacles to free movement of EU citizens.

[16] F Touboul, 'Le Principe de Non-Discrimination et Les Travailleurs Frontaliers' (2002) 462 Revue du marche commun et de l'Union Européenne 619. See also Article 26(2) TFEU.

[17] For a detailed analysis of the judgments of the Court on the rights of workers and other economic actors, see Tryfonidou (n 5) 73-115; Spaventa (n 5) 32-156.

[18] Case C-15/96 *Kalliope Schöning-Kougebetopoulou v Freie und Hansestadt Hamburg* [1998] ECR I-47.

[19] Case C-292/89 *Antonissen* [1991] ECR I-745. On the development of personal and material scope of the personal market freedoms see: E Spaventa, 'Seeing the Wood despite the Trees ? On the Scope of Union Citizenship and Its Constitutional Effects' (2008) 45 Common Market Law Review 13.

2.1.1 Freedom of movement of workers

Article 45 TFEU concerns the freedom of movement of workers:

> 'Freedom of movement for workers shall be secured within the Union' (Article 45(1).

The term 'worker' is not defined in the Treaties or secondary legislation. It is the Court that decides who is capable of falling within the definition of worker and thus can enjoy the freedom of movement of workers.[20] Therefore, it is the EU – not the host State – that decides who can enjoy this freedom as a worker.

According to the Court in the *Lawrie-Blum* case, a 'worker' is a Member State national who [i] for a certain period of time performs services [ii] for and under the direction of another person [iii] in return for which he receives remuneration.[21] In other cases, such as *Levin*, the Court has held that as long as the work constitutes an 'effective and genuine' activity,[22] the rate of income, duration of employment, type of job,[23] intention of the applicant and whether the person is working part time or full time,[24] are all irrelevant. Trainees,[25] and even those who are employed but still do not earn enough to cover their living expenses and, thus, need to claim social assistance benefit,[26] are all held to fall within the definition of 'worker' for the purpose of Article 45 TFEU and therefore enjoy the rights conferred on workers.

The freedom of movement of workers, as listed in Article 45 TFEU, *entails* the right to accept offers of employment actually made;[27] the right to free movement to the territory of Member States for this purpose; the right to reside in a Member State for the purpose of employment (Article 45(3)). Workers are also protected against any nationality discrimination, both as regards access to employment and during employment (Article 45(2)). As we will see below, and as and the Court has acknowledged, the rights of Member State nationals are not limited to what is listed in Article 45 TFEU; [28] their rights are, actually,

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[20] Case 75/63 *Hokstra v Bestuur der Bedriifsverniging Voor Detailhandel en Ambachten* [1964] ECR 177. It should be emphasised here that the ECJ decides who *is capable of being a worker*, and it is the national courts that apply the criteria established by the ECJ on the facts of the case in order to decide whether the applicant *is* a worker. See, for instance, case C-357/89 *Raulin v Minister van Onderwijs en Wetenschappen* [1992] ECR I-1027.
[21] Case 66/85 *Lawrie-Blum v Land Baden-Wurttemberg* [1986] ECR 2121, para 17.
[22] Case 53/81 *Levin v Staatssecretaris Van Justice* [1982] ECR 1035.
[23] Case C-357/89 *VJM Raulin v Netherlands Ministry for Education and Science* [1992] ECR I-1027.
[24] *Lawrie-Blum v Land Baden-Wurttemberg* (n 21).
[25] ibid.
[26] Case 139/85 *Kempf v Staatssecetaris van Justitie* [1986] ECR 1741.
[27] The word 'entails' has been italicised to show that the list of rights is not exhaustive – but merely an indicative – list.
[28] *Kempf* (n 26) para 13.

more far reaching than the literal interpretation of the provision may suggest. For instance, although, Article 45 TFEU only makes reference to the right to 'accept offers of employment actually made', the Court has made it clear that Member State nationals *also* enjoy the right to seek employment in another Member State.[29] Nevertheless, those who search for employment in another Member State, and are not 'actual' workers yet, hold a semi-worker status and may derive only some of the rights enjoyed by fully-fledged workers under Article 45 TFEU.[30] Providing Member State nationals with an opportunity to search for employment in another Member State is 'necessary' for the full effect of the freedom of movement for workers, [31] as it is not always possible to find employment in another Member State without moving there and actively seeking employment.

The rights which Member State nationals derive from Article 45 TFEU are complemented by a number of pieces of secondary legislation. Regulation 492/11 on the free movement of workers within the Union, and Directive 2004/38 (the Citizens' Rights Directive) are the most important ones,[32] which together with the Treaty provisions, and the Court's judgments comprise the legal framework which governs the rights of workers.

The right to free movement – entry and residence for up to three months

Workers may directly derive the right to freely move to the territory of the host State from Article 45 TFEU. The Court has also confirmed in a number of cases,[33] that the only condition for enjoying such a right is that the person is a 'worker' within the meaning of Article 45 TFEU.

In addition to the right of free movement which workers may derive from Article 45 TFEU, Article 6 of the Citizens' Rights Directive provides *all* Member State nationals with an unconditional right of entry and residence in any Member State for an initial period of up to three months. Obviously, workers also fall within the beneficiaries of Article 6 of the Citizens' Rights Directive, and thus, enjoy the rights it grants to all Member State nationals.

[29] Case 48/75 *Royer* [1976] ECR 497; *Antonissen* (n18).
[30] See Case C-138/02 *Collins* [2004] ECR I-2703; Joined Cases C-22 & 23/08 *Vatsouras and Koupatantze* [2009] ECR I-4585.
[31] *Royer* (n 29).
[32] ibid.
[33] See for example Case C-363/89 *Roux v Belgium* [1991] ECR I-273; Case C-18/95 *Terhoeve* [1999] ECR I-345.

In order to enjoy these rights, Member State nationals may not be required to comply with any formality (e.g. obtaining a visa before travelling, obtaining a residence permit upon entry, or registering with the immigration authorities), other than holding a valid identity card or passport.[34]

The right of residence – beyond three months

After the expiry of the initial period of residence, the host State is allowed to require Member State nationals to register with the competent authorities.[35] At this stage, Member State nationals may be required to demonstrate their status as a worker by producing proof of engagement in an economic activity as an employee (i.e. a contract of employment or a letter from an employer in the host State).

It should be noted here that requiring Member State nationals to register their presence with the authorities of the host State does not mean that Member State nationals need to comply with this requirement *in order to acquire* the right of residence. The right of residence of workers is a fundamental right derived directly from the Treaty provisions and as such it cannot be conditional upon complying with requirements imposed by national or secondary EU legislation.[36] Such a right of residence already *exists*, however, Member State nationals may be required to register with the authorities and produce evidence of employment, in order to *prove* the existence of this right.[37] Therefore, a Member State national who has been offered employment, is able to accept the offer and start working, with no delay or waiting time for approval of their right to work or residence permit.

Moreover, the registration certificate is not *constitutive* of the right of residence of workers, but it is, rather, *declaratory* of such a right.[38] Therefore, a failure to comply with the condition would never lead a Member State national to lose their right of residence in the host

[34] As we will see later in the subsequent sections (Section 2.2 in particular), failure to produce the prescribed documents would not be a ground for refusal of entry, and if entry is refused, it would amount to a breach of Article 6 of the Citizens' Rights Directive.
[35] Citizens' Rights Directive, Article 8(1).
[36] Case 118/75 *Watson and Belmann* [1976] ECR 1185, paras. 15-16. See also G Davies, *Nationality Discrimination in the European Internal Market* (The Hague, Kluwer, 2003) 188.
[37] See *Royer* (n 29).
[38] Case 157/79 *Pieck* [1980] ECR 2171.

State, while proportionate and non-discriminatory sanctions may be imposed on them for such a failure.[39]

The right of residence in the second State for job seekers is notably narrower than what 'actual' workers enjoy. For instance, they have a limited time to find employment and if they fail to change their status to an actual worker, they are no longer considered covered by EU law and they may be asked to leave the host State.[40] The time limit depends on the national rules of the host State, but it cannot be less than three months. At the end of the allowed period, job seekers would not be automatically asked to leave, rather, they will be given the opportunity to show that they still have a genuine chance of being engaged in the market of the host State and that they are actively seeking employment.[41]

Access to the second State labour market

As explained earlier, it would appear meaningless to grant the rights of movement and residence to Member State nationals if they are treated in the host State like 'foreigners', or 'second-class residents' (i.e. a priority is given to the host State nationals). The right to equal treatment with the nationals of the host state sits at the heart of the freedom of movement for workers (and, generally, persons). Any nationality discrimination (discrimination on the grounds of nationality) of Member State nationals in the second Member State is prohibited under Article 45 TFEU. This prohibition is stated in paragraph 2 of the Article, which comes before the paragraph which grants the rights of free movement and residence, which demonstrates the importance of the principle of non-discrimination on the ground of nationality for the effectiveness of the freedom of movement of workers. A number of Directives and Regulations have been adopted to, inter alia, give effect to Article 45(2) TFEU, most of which have been repealed and replaced by Directive 2004/38 and Regulation 492/11.[42]

[39] Citizens' Rights Directive, Articles 5(5), 8(2).
[40] If the job seekers are not dependent on social assistance (i.e. if they have sufficient financial resources), they would be able to continue their residence by relying on other Treaty provisions, for example the citizenship provisions.
[41] Case C-292/89 *Antonissen* [1991] ECR I-745; Case C-344/95 *Commission v Belgium* [1997] ECR I-1035, para 18. This rule has also been included in the secondary EU legislation: Article 14(4)(b) Directive 2004/38.
[42] Directive 2004/38 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States [2004] OJ L158/77; Regulation 492/2011 on freedom of movement for workers within the Union [2011] OJ L141/1.

Nationality discrimination is prohibited both as regards the eligibility of the worker for an employment (access to the labour market), and as regards treatment during employment. Migrant Member State nationals have the right of access to a post with the same priority as the nationals of the host State (Article 1 Regulation 492/11). This principle has been reiterated in Article 24(1) Directive 2004/38. Therefore, applying a special recruitment procedure when it comes to nationals of other Member States, imposing additional requirements on them, or offering them a contract of employment with conditions different from those offered to host State nationals are all not permissible (Article 3(1) Regulation 492/11).

Both directly and indirectly discriminatory measures are prohibited.

a) Directly discriminatory measures

Imposing conditions or criteria which are discriminatory on the grounds of nationality of the applicant for a post are directly discriminatory and are a breach of Article 45 TFEU (and Regulation 492/11 and Directive 2004/38), and therefore prohibited. Such measures may be justified only if they fall within one of the grounds provided for in the exhaustive list of derogations in Article 45(3) – public policy, public health, and public security.

A few examples of directly discriminatory measures are an Italian rule limiting the access to employment in private security firms to Italian nationals;[43] national measures limiting the number of non-national workers coming to the second State, or requiring a ratio of national employees to non-national employees.[44] Additionally, limiting access of nationals of other Member States to the labour market of the second State, by imposing a resident labour-market test on them is also directly discriminatory, and thus, prohibited.

b) Indirectly discriminatory measures

Measures which are applicable irrespective of nationality but their exclusive or principal aim *or* effect is to keep nationals of other Member States away from the employment offered are indirectly discriminatory on the grounds of nationality. Such measures violate the principle of

[43] Case C-283/99 *Commission v Italy* [2001] ECR I-4363.
[44] Case 167/73 *Commission v France* [1974] ECR 359.

non-discrimination under Article 45 TFEU (as well as Regulation 492/11),[45] and therefore are prohibited. Indirectly discriminatory measures, however, may be saved either by one of the Treaty derogation grounds (similar to directly discriminatory measures), or the objective justifications.[46]

Famous examples of the measures held by the Court to be indirectly discriminatory are, the refusal by an Italian employer to take into account a German applicant's previous employment in Germany [47] and making entitlement to a job-seeker's allowance conditional upon a requirement of being habitually resident in the host State (though this condition was found to be justified).[48] The latter example might seem to be not related to the access of Member State nationals to the labour market of a second State, however, measures like this, potentially hinder employment in other Member States by taking the opportunity from Member State nationals to move to a second State and seek job, and undertake employment there.

Imposing a language requirement on an applicant for a post is another example of an indirectly discriminatory measure as, while it does not refer to the nationality of the applicant, it potentially excludes the workers from other Member State whose mother tongue is not the language of the host State. Such a measure may not be imposed on a worker in order to 'save' the labour market of the host State from nationals of other Member States. However, if the nature of the work requires an adequate knowledge of the language of the State concerned, language requirements can be justified. This was at issue in *Groener*, [49] where a Dutch national was refused a permanent post at a design college in Ireland because she did not speak Irish Gaelic. The Court held that requiring lecturers in public vocational education schools to have a certain knowledge of the Irish language was a necessary measure for furtherance of the Government policy to promote the use of the Irish language as a means of expressing national culture and identity. The Court also held that the level of linguistic knowledge required must be proportionate.[50]

[45] Regulation 492/11, Article 3(1)(b).
[46] *Kalliope Schöning-Kougebetopoulou* (n 17).
[47] Case C-419/92 *Scholz* [1994] ECR I-505, para. 11.
[48] Case C-138/02 *Collins* [2004] ECR I-2703.
[49] Case 379/87 [1989] ECR 3967.
[50] This principle is also consolidated in secondary legislation: (Article 3(1) Regulation 492/11).

c) Non-discriminatory measures which hinder market access

In addition to the discriminatory measures (directly or indirectly), there are measures which prima facie seem entirely *neutral* and non-discriminatory, but still affect the access of migrant workers to the host State labour market. These measures may also amount to a violation of Article 45 TFEU,[51] if they constitute an 'obstacle', 'barrier', 'restriction', or 'impediment' to the exercise of the freedom of movement of workers,[52] or if they place migrant workers 'at a disadvantage'.[53]

A non-discriminatory obstacle to the free movement of workers may be saved if it is proportionate, and objectively justified.[54]

d) Permissible limitations

Although discrimination against EU citizens in relation to access to the market of the host State is prohibited, jobs in the public service may in certain circumstances be reserved for the nationals of the host State.[55] Similar restriction may be imposed on the self-employed and on service providers, to be engaged in activities which 'are connected, even occasionally, with the exercise of official authority'.[56] This nevertheless, does not mean that Member State nationals can be excluded from undertaking an employment merely because the employer is the State.[57] It is the nature of the employment which must be taken into account. The derogation is limited to employments which constitute a direct and specific connection with the exercise of public service. [58]

2.1.2 Freedom of establishment

In addition to the freedom of movement for the purpose of undertaking employment, nationals of a Member State may exercise their freedom of movement to other Member States

[51] Case C-415/93 *Bosman* [1995] ECR I-4921.
[52] For an analysis of the Court's approach to neutral measures, see Barnard (n 14) 281–2.
[53] Case C-40/05 *Lyyski* [2007] ECR I-99.
[54] ibid, para. 37; Case C-379/09 *Casteels* [2011] ECR I-1379, para 30.
[55] TFEU, Article 45(4).
[56] TFEU, Article 51.
[57] The Court established a test for employment in the public service in Case 149/79 *Commission v Belgium* [1980] ECR3881. The employment 'must involve direct or indirect participation in the exercise of powers conferred by public law and duties designed to safeguard the general interests of the State or of other public authorities. Such posts in fact presume on the part of those occupying them the existence of a special relationship of allegiance to the State and reciprocity of rights and duties which form the foundation of the bond of nationality'.
[58] Case 2/74 *Reyners* [1974] ECR 631, para. 45; *Commission v Italy* (n 37) para. 20.

for pursuing self-employed economic activities on a permanent basis. This category of Member State nationals is covered by Chapter II of the TFEU, Article 49 TFEU in particular, which provides them with the freedom of establishment, allowing them to establish themselves in another Member State for an indefinite period, and enjoy equal treatment with the nationals of that State.

Like the provisions on the freedom of movement of workers that do not define 'worker', the provisions on freedom of establishment do not offer a definition of the 'self-employed', and thus, it was left to the Court to determine who falls within the personal scope of these provisions. The Court has characterised a self-employed as a Member State national who works [i] outside any relationship of subordination concerning the choice of that activity, working conditions and conditions of remuneration; [ii] under that person's own responsibility; [iii] in return for remuneration paid to that person directly and in full.[59]

Setting such broad criteria for qualifying as a self-employed, ensures a greater number of Member State nationals are able to rely on the provisions on the freedom of establishment. This has also been emphasised by the Court in the *Gebhard* case:

> 'the concept of establishment within the meaning of the Treaty is therefore a very broad one, allowing a Community national to participate, on a stable and continuous basis, in the economic life of a Member State other than his State of origin and to profit therefrom, so contributing to economic and social interpenetration within the Community in the sphere of activities as self-employed persons'.[60]

The main criteria established by the Court for distinguishing between employment and self-employment are [i] the duration of the activity (i.e. being stable and not temporary), and [ii] the level of control that the person has on the activity (i.e. whether the work is subject to the direction and control of another person or not). The self-employment must, like employment in the freedom of movement for workers, constitute an 'effective and genuine' activity.[61]

Article 49 TFEU grants Member State nationals the right to take up and pursue activities as self-employed persons and to set up and manage undertakings; setting-up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State, under the conditions laid down for its own nationals.

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[59] Case C-268/99 *Jany and others v Staatssecretaris van Justitie* [2001] ECR I-8615, paras. 34 and 70-1.
[60] Case C-55/94 *Gebhard* [1995] ECR I-4165, para. 25.
[61] ibid.

The rights under Article 49 TFEU have been supplemented by detailed pieces of secondary legislation, such as Directive 73/148 on the abolition of restrictions on movement and residence within the Union for nationals of Member States with regard to establishment and the provisions of services,[62] which has now been repealed and replaced by the Citizens' Rights Directive. I shall now consider the rights of the self-employed under Article 49 TFEU, as well as the details of these rights provided for by the Directive.

The right to free movement – entry and residence up to three months

Member State nationals who exercise an economic activity which falls within the scope of Article 49 TFEU, have the right to enter the territory of other Member States and establish themselves there.

Moreover, self-employed Member State nationals, like *all* Member State nationals, are provided (by Article 6 Citizens' Rights Directive) with an unconditional right of entry and residence in any Member State for an initial period of up to three months. They may not be required to comply with any formality, other than holding a valid identity card or passport.

The right of residence – beyond three months

Member State nationals have the right to continue their residence after the expiry of the initial unconditional period of residence, as long as they retain the status of the self-employed. They may be required by the host State to register their presence with the competent authorities, prove that they are pursuing an economic activity within the meaning of Article 49 TFEU, and obtain residence documents. However, again, this does not mean that Member State nationals must prove their eligibility for the right of residence in the host State *for* acquiring such a right.[63] The residence documents issued after registration also have merely probative value and are not constitutive of the right of residence.[64] Furthermore, a failure to comply with the registration requirement, per se, may never lead to the loss of the right of residence,

[62] [1973] OJ L172/14.
[63] *Roux* (n 33), para. 11.
[64] *Royer* (n 29), para. 31.

as this is a fundamental right conferred on Member State nationals by a Treaty provision; the host State may only impose proportionate penalties for such a failure.[65]

Access to the host state labour market

Article 49 TFEU requires the host State to treat the self-employed migrants equally with its own nationals. Self-employed Member State nationals are protected against any nationality discrimination.

a) Directly discriminatory measures

Adopting directly discriminatory measures on the grounds of nationality (measures which explicitly (i.e. on their face) treat nationals of other Member States less favourably than the nationals of the host State) is contrary to the principle of equal treatment laid down in Article 49 TFEU, and is therefore, prohibited. Such measures may be justified only by reference to one of the Treaty derogations provided in Article 52 TFEU – public policy, public health, and public security.

An example of a measure held by the Court as directly discriminatory is, a Belgian rule which prevented a Dutch lawyer from practising, because he did not hold the Belgian nationality.[66]

b) Indirectly discriminatory measures

Imposing a condition, which is applicable irrespective of nationality, but in reality, can more easily be satisfied by the nationals of the host State, also, amounts to discrimination (albeit indirect one), and is prohibited unless justified. Indirectly discriminatory measures may be objectively justified, or saved by reference to one of the express Treaty derogations.

[65] *Roux* (n 33), para 12.
[66] *Reyners* (n 88).

c) Non-discriminatory measures which hinder market access

Measures which are entirely neutral among the nationals of the host State and the nationals of other Member States, but constitute an obstacle to the exercise of the freedom of establishment, also breach the principle of equal treatment. Such measures are also prohibited, and may be saved if they are proportionate, and objectively justified.

A famous example of a measure held by the Court to hinder or make less attractive the exercise of the freedom of establishment is imposing a condition to register with the local regulatory/professional/governing bodies.[67]

2.1.3 Freedom to provide and receive services

The next category of Member State nationals who derive rights from the personal market freedoms is service providers. Articles 56 TFEU concerns this category of Member State nationals and bestows on them the freedom to provide services in a cross-border context:

> '… restrictions on freedom to provide services within the Union shall be prohibited in respect of nationals of Member States who are established in a Member State other than that of the person for whom the services are intended'.[68]

Article 57 TFEU then provides the criteria for economic activities to be considered as services:

> '[s]ervices shall be considered to be "services" within the meaning of the Treaties where they are normally provided for remuneration, in so far as they are not governed by the provisions relating to freedom of movement for goods, capital and persons'.

In other words, services are the residual of any economic activities that are not governed by other market freedoms. The economic activities must however, be temporary to fall within the material scope of the provisions on the freedom to provide services.[69]

Furthermore, service recipients also fall within the personal scope of Article 56 TFEU, although the provision does not expressly refer to recipients. This was asserted in secondary legislation (Directive 73/148, now repealed by the Citizens' Rights Directive)[70], and

[67] *Gebhard* (n 60).
[68] TFEU, Article 56.
[69] See for instance, Case C-456/02 *Trojani* [2004] ECR I-7573, para. 28.
[70] [1973] OJ L172/14.

confirmed by the Court in the joint cases of *Luisi and Carbone*,[71] where the Court held that the freedom to receive services from a provider established in another Member State was the necessary corollary of the freedom to provide services, which fulfils the objective of liberalising all gainful activity not covered by the free movement of goods, persons and capital.[72] Thus, both service providers and recipients who, respectively, temporarily provide and receive in a service across borders, may derive rights from the provisions on the freedom to provide and receive services.

The provisions on the freedom to provide services do not explicitly refer to the rights of movement and residence for the service providers/recipients. Nevertheless, it does not mean that the freedom to provide and receive services does not entail the rights of movement and residence for service providers/recipients. As *any* restriction on the freedom to provide/receive services in a second Member State is prohibited by Article 56 TFEU, the restriction on the residence of the service provider/recipient in the second State is also prohibited, *if* this residence is for, or necessary for, the purpose of providing/receiving a service which falls within the scope of these provisions.

Moreover, Member State nationals who need to move to other Member States for the purpose of providing/receiving a service, can derive a right of residence in the host State from the provisions of the Citizens' Rights Directive (i.e. the right to entry and residence up to three months from Article 6, and the right of residence beyond three months from Article 7).[73] The Directive does not expressly refer to service providers, however, the provisions cover *all* Member State nationals, and hence, the service provider/recipients are also able to rely on the Directive's provisions and enjoy the rights of free movement and residence.

<u>Access to the market of the host State (where the service is delivered)</u>

The service providers (and recipients) are protected against any nationality discrimination. Any measure which may impede their freedom to provide/receive services are also prohibited as we will see below.

[71] Cases 286/82 and 26/83 [1984] ECR 377.
[72] ibid. para. 10.
[73] Directive 2004/38, Articles 6 and 7.

a) Directly discriminatory measures

Any direct discrimination based on the nationality of the service provider/recipient is prohibited, as was also the case with the other freedoms that we examined earlier. Therefore, those who exercise their rights stemming from the personal market freedoms, must be treated equally with the nationals of the host State. However, such a basic protection does not address all issues which a service provider/recipient might face in the host State. The service providers/recipients are established in a Member State, and temporarily provide/receive services in another Member State. Hence, they are already subject to the rules of the first State (the State where their business is established), and when they move to the second State, if they are imposed the conditions with which domestic providers (i.e. providers who are established there) are also required to comply (and thus the conditions are not directly discriminatory), the migrant service provider would face a double burden, as they, now, must comply with the conditions imposed by two states. The Court has recognised this issue in the *Säger* case.[74] It held that:

> 'a Member State may not make the provision of services in its territory subject to compliance with all the conditions required for establishment and thereby deprive of all practical effectiveness the provisions of the Treaty whose object is, precisely, to guarantee the freedom to provide services'.

The Court in another case,[75] held that Article 56 TFEU does not only prohibit direct discrimination on the grounds of nationality, but also it prohibits any discrimination on the grounds of place of establishment.

An example of a directly discriminatory measure, which was held to violate Article 56 TFEU, can be found in the *FDC* case.[76] At issue was a rule which made the permission to distribute dubbed foreign films in Spain conditional on distributing a Spanish film at the same time. The rule was held to breach (what is now) Article 56 TFEU 'because it gave preferential treatment to the producers of Spanish films over producers established in other Member States, since only Spanish producers had a guarantee that their films would be distributed'.[77]

[74] Case C-76/90 *Säger* [1991] ECR I-4221.
[75] Case C-288/89 *Gouda* [1991] ECR I-4007, para. 10.
[76] Case C-17/92 *FDC* [1993] ECR I-239.
[77] C Barnard, *The Substantive Law of the EU* (Oxford University Press 2013) 383.

Directly discriminatory measures may be justified only by reference to one of the derogation grounds provided in the Treaty in Article 52 TFEU (public policy, public health, and public security).

b) Indirectly discriminatory measures

Measures which are indirectly discriminatory or impose a dual burden on foreign service providers/recipients are also caught by Article 56 TFEU. In the case of *Gouda*,[78] it was held that:

> '[i]n the absence of harmonization of the rules applicable to services, or even of a system of equivalence, restrictions on the freedom guaranteed by the Treaty in this field may arise in the second place as a result of the application of national rules which affect any person established in the national territory to persons providing services established in the territory of another Member State who already have to satisfy the requirements of that State's legislation'.

The Court continued that measures prohibited by (now) Article 56 TFEU may be justified on the grounds of public interest (in addition to public policy, public security, and public health).[79]

An example of prohibited indirectly discriminatory measures is the national rules which require service providers to be authorised by the governing bodies of the host State.[80] Such a measure may make market access harder or even impossible for those who are established in a Member State and want to *occasionally* provide services in other Member States, as it would not be practical for such service providers to register with the relevant governing bodies in each and all Member States where they provide services.

[78] Case C-288/89 [1991] ECR I-4007, para. 12.
[79] ibid. para 13. The Court provided a list of public-interest grounds in its judgment.
[80] See for instance, Case 205/84 *Commission v Germany* [1986] ECR 3755.

c) Non-discriminatory measures which hinder market access

Measures which are neutral but liable to hinder the exercise of the freedom to provide/receive services, also breach Article 56 TFEU. This was asserted by the Court in *Säger*, where it held that:

> 'Article 59 of the Treaty requires not only the elimination of all discrimination against a person providing services on the ground of his nationality but also the abolition of any restriction, even if it applies without distinction to national providers of services and to those of other Member States, when it is liable to prohibit or otherwise impede the activities of a provider of services established in another Member State where he lawfully provides similar services'.[81]

Measures which are not discriminatory but impede freedom to provide/receive services may be justified on the Treaty derogation grounds and the judge-made objective justifications.[82] However, the steps taken to protect the public interest must be appropriate for securing the attainment of the objective which they pursue and must not go beyond what is necessary in order to attain it.[83]

2.2. Freedom of movement for economically inactive nationals (as a citizenship right)

So far in this chapter, I have considered the rights that Member State nationals derive from the personal market freedoms of the Treaty. As mentioned before, the rights which Member State nationals derive from the personal market freedoms are activity-oriented rights and, thus, only those Member State nationals who are engaged or intend to engage in a cross-border economic activity may rely on these provisions and enjoy the rights of free movement, residence and equal treatment with the nationals of the host State in a Member State other than the one of their nationality.[84]

I now turn to consider the status-oriented rights of Member State nationals which they derive from the citizenship provisions of the Treaty.

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[81] *Säger* (n 74), para. 12.
[82] The Court provided a list of public-interest grounds in its judgment in *Säger* (n 74). These grounds are in addition to public policy, public health and public security grounds.
[83] Joint Cases C-369 and 376/96 *Arblade* [1999] ECR I-8453, para. 35.
[84] Case C-281/06 *Jundt v Finanzamt Offenburg* [2007] ECR I-12231, para 17.

The status of citizenship of the Union was introduced to EU law by the Treaty of Maastricht by, what is now, Article 20(1) TFEU which provides that 'Citizenship of the Union is hereby established' and continues by defining the criterion of access to the new status: '[e]very person holding the nationality of a Member State shall be a citizen of the Union'. Then in its second paragraph Article 20 TFEU provides a (non-exhaustive) list of rights that the status of EU citizenship entails. One of these citizenship rights is 'the right to move and reside freely within the territory of the Member States', which has been characterised as a 'primary right' by Advocate General La Pergola in his opinion in *Martínez Sala*.[85]

Article 21(1) TFEU provides more details of the rights of free movement and residence of EU citizens in the second Member State: '[e]very citizen of the Union shall have the right to move and reside freely within the territory of the Member States'. These rights are 'subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect'. The most important piece of legislation which provides extensive details of the free movement and residence rights of EU citizens, [86] as well as details of the limitations and conditions of these rights, is the Citizens' Rights Directive 2004/38.[87]

Before moving to consider the details of the rights of free movement and residence of EU citizens laid down in the Citizens' Rights Directive, there is another important right of EU citizens stemming from the citizenship provisions that needs to be mentioned here: the right to equal treatment. EU citizens enjoy a general protection against nationality discrimination when they exercise their right to free movement, [88] provided for in Article 18 TFEU:

> 'Within the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited'.

The above citizenship provisions are found in Part Two of the TFEU entitled 'Non-discrimination and Citizenship of the Union'. Article 18 TFEU is the first provision of this

[85] Case C-85/96 *Martínez Sala* [1998] ECR I-269, para. 18.
[86] Family members of an EU citizen (as defined in Articles 2(2) and 3(2) Citizens' Rights Directive) may also indirectly derive rights from the Directive, and accompany or join their EU citizen family member in the second State.
[87] Davies has argued that a right granted by the primary law of the Union, should/may not be dependent on the conditions defined in secondary legislation. See Davies (n 36) 188.
[88] It is generally the exercise or the intention of exercising the right to free movement that brings a situation and the EU citizen involved, within the scope of EU law, and triggers Article 18 TFEU. However, a situation may also fall within the scope of Article 18 TFEU even if the EU citizens involved, has not or does not intend to exercise the right to free movement in the foreseeable future. See Case C-403/03 *Schempp* [2005] ECR I-6421.

part. It is placed before the citizenship provisions which illustrates the importance of the right to non-discrimination against on the grounds of nationality.

After briefly reviewing the citizenship provisions which together grant the rights to free movement, residence, and non-discrimination on the grounds of nationality to all EU citizens, we can now proceed to the analysis of the details of these rights.

2.2.1 The right of entry and residence for up to three months

Following the abolition of the border controls between the Member States (with the exceptions of UK, Ireland and recently-joined Member States), everyone (obviously including EU citizens) may freely move between the Member States within the Schengen area without passing a border check.[89] In addition to this *possibility* that is available to everyone present in the EU (but may be limited in certain cases),[90] EU citizens are *guaranteed* a *right* to freely move between the Member States (as will be seen below). EU citizens' right of free movement is also not limited to the Schengen-area States (six states less than the EU), but applies to all States in the Union.

EU citizens may rely on different provisions in order to enjoy the rights of entry and residence within the Union. Above all, they may derive the right from Article 21 TFEU which is a directly effective provision;[91] thus, EU citizens are able to enforce the provision before their national courts and enjoy the right to move to, and enter a Member State other than their home State, and reside there for an indefinite period of time. An EU citizen does not need to satisfy any condition in order to *acquire* the rights of movement and residence provided for in Article 21 TFEU. These rights are free-standing, fundamental rights,[92] and their *existence* cannot be questioned.[93] The *exercise* of the rights however, may be limited if the EU citizen does not satisfy the conditions laid down in the Treaty (the conditions,

[89] Regulation 562/2006/EC of the European Parliament and council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code).
[90] Border controls may exceptionally and temporarily be reintroduced for responding to threats to public policy or internal security: ibid Article 23.
[91] This was established in Case C-413/99 *Baumbast* [2002] ECR I-7091, which has been reflected in Article 25(1) Citizens' Rights Directive. For a detailed analysis of the consequences of direct effect of Article 21 TFEU, see Rossi dal Pozzo (n 4) 54.
[92] For a detailed explanation of the differences between fundamental and other rights see C Hilson 'What's in a Right? The Relationship between Community, Fundamental and Citizenship Rights in EU Law' (2004) 29 *European Law Review* 636, 646 – 49. For a detailed explanation of the consequences of recognising the right to free movement as a fundamental right by the Court, see Tryfonidou (n 5) 38.
[93] *Baumbast* (n 91).

limitations, and derogations to the citizenship right of free movement will be discussed later in this section).[94]

The other provision from which EU citizens may derive the rights of entry and residence in the host State is Article 6(1) of the Citizens Rights' Directive. The provision provides *all* Union citizens with the rights of entry and residence in a Member State other than the one of which they are national, for a period of up to three months. It iterates that no condition or formalities (other than holding a valid identity card or passport) may be imposed on the Union citizens who exercise this initial three month rights of entry and residence. Put differently, an EU citizen may never be required to obtain an entry visa or comply with equivalent formalities. After entry, however, they may be required to register their presence in the host State with the immigration authorities. Failure to comply with this requirement may make the person concerned liable to proportionate and non-discriminatory sanctions',[95] but it never constitutes a reason for deportation.[96]

In addition to the above sources of free movement rights for EU citizens, the right has been recognised in the EU Charter of Fundamental Rights ('the Charter' or 'EUCFR') as a fundamental right.[97] The Charter is legally binding since 2009 and has the same legal value as the Treaties.[98]

As mentioned before, unlike the rights stemming from the personal market freedoms, the right to free movement and residence which EU citizens derive from the citizenship provisions are not dependent on the beneficiary's economic status. The citizenship provisions are detached from any economic considerations. Rather, they are linked to the nationality of the beneficiary. Any national of a Member State may rely on Article 21 TFEU.

2.2.2 The right of residence beyond three months

After the initial period of residence in the host State, during which EU citizens may only be required to produce identity cards and in specific Member States register their presence with

[94] For further analysis of the distinction between the 'existence' and the 'exercise' of the right to free movement and residence see Y Borgmann-Prebil, 'The Rule of Reason in European Citizenship' (2008) 14 ELJ 328, 341-342; J Shaw, 'A View of the Citizenship Classics: *Martínez Sala* and Subsequent Cases on Citizenship of the Union' in M Poiares Maduro and L Azoulai (eds), *The Past and Future of EU Law: The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (Hart 2010) 358 and 361; A Wiesbrock, 'Free Movement of Third-Country Nationals in the European Union: The IlLusion of IncLusion' (2010) 35 European Law Review 455.
[95] Directive 2004/38, Article 5(5).
[96] Case 118/75 *Watson and Belmann* [1976] ECR 1185.
[97] The Charter, Article 45(1).
[98] TEU, Article 6(1).

the host State's authorities, for residence beyond three months EU citizens may be asked to fulfil further conditions.

Economically inactive EU citizens may derive the right of residence beyond three months from Article 7 of the Citizens' Rights Directive if they are economically self-sufficient, i.e. have enough financial resources to support themselves and their family members without becoming a burden on the welfare system of the host State, and are covered by comprehensive health insurance for the period of their residence.[99] Students may also enjoy the right of residence beyond three months, if they can assure the relevant national authority that they have sufficient resources for themselves and their family members without becoming a burden on the social assistance system of the host State during their period of residence.[100] The host State *may* require migrant EU citizens to register their residence with the relevant authorities,[101] and obtain a registration *certificate* (not a permit).[102] At the time of registration, the host State can verify that economically inactive EU citizens who intend to continue residing on its territory meet the conditions specified in Article 7 of the Citizens Rights Directive. However, requiring economically inactive EU citizens to comply with these formalities and prove that they are self-sufficient, does not mean that they are required to do so in order to *acquire* their right of residence. Economic self-sufficiency is not a condition for acquiring the right of residence. EU citizens, regardless of their financial status, have been assumed to have a right of residence in the territory of another Member State,[103] and it is the host State that must rebut this presumption.

In order to rebut the above presumption, the host State must prove that the economically inactive EU citizen has become an unreasonable burden on the social assistance system of the State. Seeking social assistance in the host State, per se, is not enough to make an EU citizen

[99] Citizens' Rights Directive, Article 7(b).
[100] ibid, Article 79(c).
[101] ibid, Article 8(1).
[102] ibid. Article 8(2).
[103] Although the Court has almost in every case (e.g. *Baumbast*) emphasised on this assumption and confirmed that the self-sufficiency is not a condition for acquiring the right of residence by economically inactive EU citizens, in a recent judgment (Case C-333/13 *Dano* ECLI:EU:C:2014:2358), it took a different view. Due to the mixed signals given by the Court in its judgments, it is too early to conclude that the self-sufficiency is, now, a condition to the right of residence of these EU citizens, when the majority of the judgments confirmed otherwise. For further analysis of the judgment see S Peers, 'Benefits for EU Citizens: A U-Turn by the Court of Justice?' (2015) 74 *Cambridge Law Journal* 195.

an unreasonable burden on the social assistance of the host State; the host State must also prove that limiting the right of residence of the EU citizen is proportionate.[104]

Overall, citizens automatically enjoy the right of residence in the host State, and such a right is not conditional. The exercise of the right may be limited, however, if the conditions specified in the Citizens' Rights Directive are not satisfied. Yet, the right of residence of an EU citizen in the host State may not be limited merely because he/she does not meet the conditions specified in the Citizens Rights' Directive. The limitation must also be proportionate.[105]

2.2.3 Protection against discrimination

Economically inactive EU citizens may exercise their rights of movement and residence in the host State without suffering any nationality discrimination or facing any obstacle to the exercise of their rights of movement and residence. Being the subject of nationality-discriminatory measures in the host State obviously makes the exercise of the rights to free movement and residence less attractive for EU citizens, thus, such measures are capable of impeding the exercise of these rights by EU citizens. Unjustified measures which impede the exercise of the rights of movement and residence by EU citizens have been declared by the Court to be caught by Article 21 TFEU.[106]

2.3 Summary of the rights of movement and residence of EU citizens (economically active and inactive)

This section sought to provide an overview of the rights of EU citizens to move from one Member State to another and reside on its territory. The section may seem descriptive, however, having a descriptive section on the rights of EU citizens is necessary, first, in order to compare these rights with the rights of LTRs and establish the extent to which the LTR Directive has effectively granted LTRs rights comparable to those of EU citizens; secondly, to examine which rights of EU citizens can/should be extended to LTRs.

The conclusion that can be drawn from the analysis in this section is that EU citizens derive the rights to free movement and residence within the territory of the Union from two different

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[104] The condition of proportionality for limiting the right of residence of an EU citizen who has recourse to public funds was first established in Case C-184/99 *Grzelczyk* [2001] ECR I-61933, para. 31, and was later confirmed in *Trojani* (n 69), para 45.
[105] See e.g. the facts in B*aumbast* (n 91).
[106] Cases C-224/02 *Pusa* [2004] ECR I-5763; C-224/98 *D'Hoop* [2002] ECR I-6191; Case C-353/06 *Grunkin and Paul* [2008] ECR I-7639; Case C-56/09 *Zanotti* [2010] ECR I-4517; Case C-208/09 *Sayn-Wittgenstein* [2010] ECR I-13693; Case C-391/09 *Runevič-Vardyn* [2011] ECR-3787.

sources. The first source is the personal market freedoms which provide economically active EU citizens with the rights of movement and residence. An EU citizen can only derive rights from these provisions if they are engaged in an economic activity. The rights stemming from these provisions can be called 'activity-oriented', as it is the activity of the EU citizen which enables them to derive rights from these provisions.

The second source of rights of movement and residence for EU citizens is the citizenship provisions of the Treaty. EU citizens enjoy these rights as a result of holding the status of EU citizenship; thus, the rights stemming from these provisions can be called 'status-oriented'.

EU citizens who exercise or intend to exercise their rights of movement and residence, whether such rights are activity-oriented or status-oriented, will be protected against nationality discrimination in the host State.

An important characteristic of the free movement and residence rights of EU citizens clarified in this section is that the *existence* of these rights of EU citizens may never be questioned. EU citizens are presumed to have the rights of movement and residence and the burden to rebut this presumption is on the host State, should it want to restrict the *exercise* of the right by the EU citizen.

It can also be concluded that the provisions do more than just prohibiting discrimination on the basis of nationality. They promote the exercise of the free movement rights. The ECJ has also followed this approach. The Court not only intends to remove the obstacles from the way of mobile EU citizens, but also tries to make free movement more attractive for them.[107]

The next section aims to provide a brief analysis of the intra-EU mobility rights of LTRs.

3. Freedom of movement of third-country national long-term residents

While TCNs can directly enjoy the freedom of movement of goods and capital, they have generally been excluded from the personal scope of the provisions on the freedom of movement of persons.[108] TCNs may neither rely on the personal market freedoms, nor

[107] F Goudappel, *The Effects of EU Citizenship: Economic, Social and Political Rights in a Time of Constitutional Change* (TMC Asser Press 2010) 59.
[108] Case C-230/97 *Awoyemi* [1998] ECR I-6781, para 29.

(obviously) rely on the citizenship provisions, as holding the nationality of a Member State is a condition for falling within the personal scope of these provisions.[109]

Even those Treaty provisions which could potentially be interpreted in a way which extends their personal scope to TCNs, and thus enable TCNs to rely on those provisions, were read by the Court as applicable only to EU citizens. For instance, Article 45 TFEU which reads that '[f]reedom of movement for "workers" shall be secured within the Union', can be interpreted as covering every worker, regardless of nationality. Nevertheless, the Court made it clear that the Article is only applicable to workers who hold the nationality of a Member State,[110] and, thus, TCNs continued to be excluded from the freedom of movement provisions.

LTRs, however, as the Tampere Programme provided, were supposed to be granted a right to free movement and residence 'comparable' to that enjoyed by EU citizens.[111] This milestone, if reached by the LTR Directive, could be a revolution in the concept of Union citizenship, as it would mean that holding the nationality of a Member State was no longer the sole way to the enjoyment of the free movement rights reserved for EU citizens.

The expectation that LTRs will be granted rights of free movement and residence similar to what EU citizens enjoy, was raised with reference to the Charter of Fundamental Rights of the European Union in the preamble to the LTR Directive. Article 45(2) of the Charter confirms the possibility of extension of the freedom of movement and residence within the Union, to TCNs who are legally resident in a Member State:

> Freedom of movement and residence may be granted, in accordance with the Treaties, to nationals of third countries legally resident in the territory of a Member State.[112]

A reference to the Charter in the preamble to the LTR Directive could create an expectation that Article 45(2) of the Charter would be taken into account in adopting the Directive (i.e. the freedom of movement and residence within the Union would be extended to LTRs). Moreover, Recital 18 of the LTR Directive states that the conditions subject to which LTRs acquire the right to free movement should not prevent LTRs from contributing to the effective attainment of an internal market as an area in which the free movement of persons is

[109] The only exception to this general exclusion is TCN family members of migrant EU citizens. This category of TCNs when accompany their EU citizen family member, (indirectly) derive the right of movement and residence from the Treaty provisions.
[110] Case 238/83 *Meade* [1984] ECR 2631.
[111] Tampere Programme, para 18.
[112] The Charter, Article 45(2).

ensured. These two indications in the preamble to the Directive are enough to expect the Directive to grant LTRs a right to free movement similar to what EU citizens enjoy.

In this section, I analyse the rights which the LTR Directive bestows on LTRs to move and reside in a second Member State. In order to make the comparison of the rights of LTRs with the rights of EU citizens, I will analyse the rights of economically active and inactive LTRs separately, starting, again, with the rights of the economically active.

3.1 The rights of economically active LTRs

The right of entry to a second Member State, and residence for up to three months

Entering a second Member State and short stays of up to three months are not covered by the LTR Directive. The movement of LTRs is governed by the 'Schengen acquis' on border controls,[113] which governs the movement of non-EU citizens between the Schengen States.[114] The acquis has, inter alia, abolished the border controls between the Signatory States, and created an area where the freedom to travel is guaranteed for every person, regardless of nationality. Thus, LTRs, like other TCNs can travel within the Schengen Area and stay in any of the Signatory States for up to three months. This means that LTRs do not enjoy any special right of movement between EU Member States.

Residence in a second Member State beyond three months

Chapter 3 of the LTR Directive concerns the right of residence of LTRs in the second Member State for more than three months. Article 14 of the Directive provides that:

> A long-term resident shall acquire the right to reside in the territory of Member States other than the one which granted him/her the long-term residence status, for a period exceeding three months, provided that the conditions set out in this chapter are met.

Paragraph 2 of the Article then provides a list of grounds on which LTRs may reside in the second Member State: [i] for exercising an economic activity in an employed or self-employed capacity; [ii] for pursuing studies or vocational training; [iii] for other purposes.

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[113] The Schengen acquis is mainly based on the Schengen Convention 1990 (OJ 2000 L 239/19), and the supplementary acts adopted by the Schengen Executive Committee after the Amsterdam Treaty.

[114] The Schengen States are: Austria, Belgium, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Netherlands, Norway, Poland, Portugal, Slovakia, Slovenia, Spain, Sweden and Switzerland.

The list of grounds is comprehensive and covers any reason for which an LTR may want to move to a second State. The LTR Directive seems to place LTRs in a position comparable to EU citizens, however, it makes the residence of the LTR in the second State subject to conditions and limitations, which, as I will demonstrate in this chapter, have not only made the free movement rights of LTRs incomparable with the rights of EU citizens, but also have made the comprehensive list of grounds for residence of LTRs in the second State practically useless.

First condition: the residence/work permit requirement

LTRs must submit an application for a residence permit to the competent authorities of the second State 'as soon as possible and no later than three months after entering the territory of the second Member State' (Article 15(1) the LTR Directive). The application must be processed within four months (Article 19(1) LTR Directive).

Requiring LTRs to obtain a work/residence permit means that they may not start working in the second State before their application for a residence/work permit has been approved. This requirement could mean that LTRs who move to a second Member State would be unemployed for months; this could be a clear hindrance to the movement of LTRs, as not every person is willing/able to be unemployed for months between two employments. Article 15(1) of the LTR Directive partly addresses this problem: it provides that LTRs may submit their application for a residence/work permit while they are still resident in the first State. The possibility to submit the application from the first Member State might solve the problem for the employed and self-employed LTRs, who work only for one employer or only in one Member State. However, it does not seem to be a practical solution for service providers who may want to offer their services in more than one Member State, as, first, an LTR can hold a resident permit in one Member State only, thus, they have permission to work and provide service in that Member State only. Thus, an LTR will not be able to offer their service in more than one Member State.. Secondly, the recipient of the service would also have to wait until the LTR service provider successfully obtains a work permit and *then* delivers the service. There is a good chance that the service recipient seeks an alternative service provider, rather than waiting for the LTR's application to be approved.

Moreover, while allowing an LTR to submit an application for a residence/work permit before arrival to the second State may solve the problem to some extent, it is not clear if eventually the application is approved by that State, and thus, the LTR loses the right of residence in the first State, would he/she have to stop working in the first State immediately, as the grant of a residence permit in another State invalidates the residence permit of the first State with immediate effect. If the LTR continues working in the first State (for instance to wrap up his/her pending projects and tasks), would he work illegally (i.e. working while not holding a residence/work permit valid for the first State)?

The total number of residence permits issued for LTRs in the second State may also be limited, if such limitation was in place at the time of adoption of the LTR Directive (Article 14(4) of the Directive). It is not crystal clear whether 'the time of adoption of the Directive' refers to the time at which the Directive was adopted by the Council in 2003, or whether it refers to the time the Directive's period of implementation ended in 2006. This issue might arise later as a question for the Court to decide. Nevertheless, whichever was the intended date, there was a delay in the abolition of national quotas on the number of LTR migrants, which, potentially, created enough time for illiberal Member States between the first proposal (in 2001) and the adoption of the Directive, to place limitations on the number of resident permits issued for LTRs, so at the time of the adoption of the Directive, such a quota was in place, and thus, the Member States remained able to keep the quotas in place even after the adoption of the Directive.

Other issues arise as a result of the residence/work permit requirement as LTRs already hold a residence permit which clearly states: 'EU residence permit' (not a residence permit referring to one Member State and therefore, limited to that Member State).

First, requiring a person who already has a residence permit which (as it reads) should be valid in the territory of the EU to apply for another residence permit, means that an *EU* residence permit is not valid for residence in the territory of the Union. Rather, the status of long-term residence entails a right of residence limited to the territory of the Member State which grants the status, rather than a right of residence valid for the whole territory of the Union, despite the fact that residence permit is entitled '*EU* residence permit'.

Secondly, it is not clear what would be the consequences of LTRs' failure to submit an application for a residence/work permit to the authorities of the second State. Would a holder

of an '*EU* residence permit' become 'illegal' in the second State, while he/she is still within the territory of EU for which he/she has a residence permit?

Second condition: financial resources

At the time of lodging the application for a residence/work permit, the host State may require the applicant to produce evidence of 'stable and regular resources' for themselves and for dependent family members. The second State 'shall evaluate these resources by reference to their nature and regularity' and 'may take into account the level of minimum wages and pensions' (Article 15(2)(a) of the LTR Directive). The applicant may also be required to have a comprehensive sickness insurance (Article 15(2)(b)).

The level of minimum wages and pensions is not harmonised across the Union by EU law; it is the national law of the Member States which sets the minimum wage. Allowing the host State to evaluate the sufficiency of the financial resources in accordance with national law leaves the Member States free to regulate the residence of LTRs in the second State by national law, which is an obstacle to the harmonisation of the conditions of residence of LTRs across the Union.

Moreover, making the *grant* of the right of residence subject to a financial condition, indicates that economic considerations play a major role in the *existence* of the LTRs right of residence in a second State (i.e. the grant of the right of residence may be refused due to an economic reason – not having sufficient resources in accordance with national law).

Satisfying the requirement of holding sufficient resources becomes even harder to justify when it may be imposed on economically active LTRs as well. First, it is an obvious difference in the conditions to which LTRs and EU citizens may be subject. But even more importantly, there is a chance that LTRs who have moved to the second State for undertaking or pursuing economic activities were not satisfied with their income/earning in the first State, and this reason led them to decide to move to another Member State, as EU citizen workers are also tempted to move to another Member State to earn more. In other words, LTRs may not have earned enough in the first State that is deemed sufficient according to the minimum wage threshold of the second State.

Third condition: complying with the integration measures and attending language courses

The migrant LTRs may be asked by the second State to comply with the integration measures (again in accordance with the national law), if the LTRs have not already met the integration conditions in the first State. This condition undermines the role of residence as a factor in the integration of residents in the society, and requires complying with the integration measures while the person has already been resident for at least five years in the EU. Diego Acosta argues that integration measures in the second State question the value of (at least 5 years) residence in the first Member State (given that they acquired the long-term residence status in that State). Requiring LTRs to comply with these measures undermines 'the assumption that LTRs have integrated into the EU as a whole'. Acosta argues that the EU long-term residence permit (issued after at least 5 years of residence in the EU) should suffice as proof of integration in the EU's society.[115]

Residence and its role in the integration of LTRs in the EU was discussed earlier in chapter 2, which dealt with the integration measures imposed in the first State; it is enough to repeat here that civic integration (i.e. requiring LTRs in the second State to comply with the integration measures) does not have a positive effect on the genuine inclusion of LTRs in the EU's society. Such a requirement gives LTRs the message that they are *still* considered 'foreigner' until they can prove otherwise in the second Member State, or have already proven in another Member State.

Moreover, requiring LTRs to comply with the integration measures in the second State – in order to acquire the right of residence – hardly makes sense when migrant EU citizens are not imposed a similar requirement. An EU citizen may never be required to prove his/her integration into the society of the second State. This is the case even if the EU citizen has never lived in the EU. For instance, a person who was born in the US to Spanish parents and, thus, acquired Spanish nationality, and as a result EU citizenship, while he/she has never travelled to any Member State and now is immigrating to Germany directly from the US to establish in Germany, may never be imposed an integration condition, while such a condition may be imposed on an LTR who has lived and worked in Germany for years, and now has moved to Austria. As it has been established by the Court,[116] it is residence that contributes to the genuine integration of migrants into the host State, and holding the nationality of a

[115] D Acosta, *The Long-Term Residence Status as a Subsidiary Form of EU Citizenship* (Martinus Nijhoff Publishers 2011) 146–147.
[116] Case C-209/03 *Bidar* [2005] ECR I-2119; Case C-103/08 *Gottwald* [2009] ECR I-9117.

Member State, per se, is not a proof of integration into the society of the host State. The longer that the migrants reside in the host State, the more integrated they become in its society. Thus, it is hard to explain why an integration condition should be imposed on LTRs, while EU citizens may never be imposed such a condition for acquiring the right to reside in a Member State other than their own.

Attending language courses is the other condition which may be imposed on (mobile) LTRs.[117] Imposing such a requirement on those whose occupation requires adequate linguistic knowledge can be justified, however, it does not seem to be necessary for all LTRs, such as those who intend to provide a service for a short time in the second State.

Fourth condition: resident labour-market test

The second State may examine the situation of its labour market and apply its national procedures regarding the requirements for, respectively, filling a vacancy, or for exercising such activities. For reasons of labour market policy, the second State may give preference to Union citizens, to TCNs who are affiliated to EU citizens, and to TCNs who reside legally and receive unemployment benefits in that State (Article 14(3) the LTR Directive). In other words, LTRs may be required to satisfy a resident labour-market test. They, or their employer, may have to prove that there is no EU citizen in the concerned State who can fill the vacancy, or provide the service which the LTR wishes to offer.

The requirement of resident labour-market test makes the privileged status that the LTR Directive creates for LTRs, fruitless. A resident labour-market test is what *every* TCN who is applying for a job as a 'foreigner' is likely to be required to satisfy. Therefore, in this sense, LTRs have not been given a privilege over other TCNs who may come to the Union for the first time.

In addition, the second State is able to restrict the 'free' access of LTRs to its labour market for the first year of residence, during which restrictions may be placed on the change of occupation or employer.[118] The host State is also permitted to limit the access of LTRs to employment and self-employed activities, if the activity entails *even occasional involvement*

[117] LTR Directive, Article 15(3).
[118] LTR Directive, Article 21(2).

in the exercise of public authority.[119] The conditions under which economically active LTRs gain access to the labour market are also decided in accordance with the national law of the State.[120]

Kocharov has very rightly observed that imposing these conditions is optional.[121] The second State may (or may not) exercise its power to restrict the existence of the right of LTRs to reside in its territory, or limit the LTRs' access to the labour market.[122] However, as she acknowledges, it is more likely that the host State exercises its power – granted by the LTR Directive – to restrict the rights of LTRs, than to grant free access from the first day. Moreover, even if all of the Member States voluntarily do not exercise the power the LTR Directive grants to impose conditions on the rights of LTRs in accordance with the national rules, merely *having* the discretionary option to apply national law to a situation that falls within the scope of the law of the Union is in conflict with the spirit of EU law. Such a power, even if not exercised, means that while there is a piece of EU legislation on the rights and status of LTRs, national law can potentially limit the rights [attached to the status]. Furthermore, the optional limitations are not in line with objective 18 of the Tampere Programme: granting TCN residents rights and obligations comparable to those of EU citizens. They are also not in line with objective 20 of the Programme: approximating national legislation on the conditions for admission and residence of third country nationals. Mobile LTRs are not treated equally in all Member States as each State has the discretion to impose conditions in accordance with its national legislation.

3.2 The rights of economically inactive LTRs

The criteria for acquiring and exercising the right of residence by economically inactive LTRs (e.g. students, self-sufficient) in the second Member State are fairly similar to what economically active LTRs must meet.

In terms of the right of movement between the Member States and the right of entering the second Member State, there is no difference between the rights of these two categories of LTRs. The movement of both of them and their residence in the second State for up to three

[119] ibid. Article 11(1)(a).
[120] ibid. Article 21(2).
[121] A Kocharov, 'What Intra-Community Mobility for Third-Country Workers?' (2008) 33 European Law Review 913, 919.
[122] The option is available to the Member States only for the first 12 months of LTR's residence in their territory. After the initial 12 months the State is not able to limit the access of LTRs to the State's labour market. See on this: Acosta (n 115) 146.

months, is governed by the Schengen acquis, which was considered before, in the economically active LTRs section.

With regard to the right of residence beyond the initial three months, the conditions which economically inactive LTRs must satisfy in order to acquire the right are, also, similar to those applicable to economically active LTRs.

The main difference between the rights of economically active and inactive LTRs is in their access to the labour market of the second State. As we saw earlier, the access of economically active LTRs to the market of the second State may be limited for a period not exceeding twelve months. This limitation may also be imposed on economically inactive LTRs, but without a time limit.[123] For instance, an LTR who enters the second State and obtains a residence permit as a student there, may not have the right to work (even part time) if undertaking economic activities is restricted for migrant students in accordance with the conditions defined in national law, or there is a maximum amount of hours internationals student can work per month. Likewise, a self-sufficient LTR who at the time of applying for a residence permit had no intention to work, and so did not apply for a residence permit bearing a permission to work, if s(he) eventually decides to work, s(he) may have to lodge a new application and obtain a work permit.

3.3 Summary of the rights of movement and residence of LTRs

The LTR Directive provides those TCNs who have acquired the status of long-term residence in an EU Member State with the right to reside in other Member States. This category of TCNs may *directly* derive a right from EU law which until the time that the Directive was adopted, was exclusively reserved for Member State nationals. The list of purposes for which an LTR may reside in the second Member State is comprehensive.

However, the rights bestowed by the LTR Directive on its beneficiaries are subject to discretionary , and discriminatory, conditions, which LTRs must satisfy in order to acquire the right of residence in the host State. LTRs, like all TCNs, have been presumed to not have a right of residence in the host State, unless the LTR successfully rebuts this presumption.

It was illustrated that LTRs have been seen as a threat to the host State's labour market, and the host State may choose those LTRs whose profession is demanded in the country.

[123] LTR Directive, Article 21(2).

In this section it was also illustrated that due to the level of discretion given to the Member State to apply their national legislation, and as the national law of each Member State is likely to be different from the national legislation of the other Member States, the conditions of residence of LTRs cannot be harmonised.

Moreover, until an LTR has successfully satisfied the conditions and obtained the residence permit in the second Member State, they do not enjoy a right to equal treatment with the nationals of the host State.

4. Comparing the free movement rights of EU citizens and LTRs

After analysing the free movement rights of EU citizens and LTRs in the previous sections, this section seeks to compare the position of these two groups of migrants in the second Member State.

Type and Length of residence	Rights of EU citizens	Rights of LTRs	Comments
Entry and residence up to 3 months (tourism and other non-economic purposes)	Right of entry and residence up to 3 months	Right of entry and residence up to 3 months	No significant difference in practice – although the source and nature of rights are different
Residence and employment	Enjoy the rights to reside and undertake any employment other than public services – No application for right to work is required. Registration may be required.	Must apply for a work permit – cannot undertake employment until application is approved (can take up to 4 months). Number of LTRs moving to the host State can be restricted. Quota can be imposed for jobs.	Preference clearly given to EU citizens. The LTR Directive grants LTRs an entitlement – rather than a right – to move to a second Member State for the purpose of employment.

Residence and providing/receiving service	Enjoy the rights to reside and provide/receive services – No application for exercising an economic activity is required.	Must apply for permission to exercise an economic activity (e.g. providing services) which may take up to 4 months.	The LTR Directive grants LTRs an entitlement – rather than a right – to move to a second Member State for the purpose of providing services.
Residence beyond 3 months – self-sufficiency	Enjoy the right to reside in the host State as long as they have a comprehensive health insurance and are self-sufficient. Nevertheless, no proof or application is required. A self-sufficient EU citizen can later start employment, providing services.	Must apply for a residence permit and must prove that they are self-sufficient and have comprehensive health insurance. If application is approved, a residence permit will be issued which may have employment restrictions. The holder of such a residence permit will be required to submit a new application if they intend to start employment or providing services.	The LTR Directive grants LTRs an entitlement – rather than a right – to move to a second Member State.

In respect of the rights of entry and residence of up to three months, practically, there does not seem to be a major gap between what EU citizens enjoy and what LTRs enjoy. The absence of gap between what the LTR Directive provides and what EU citizens enjoy is not because the LTR Directive provides LTRs with the fundamental rights to freely move and reside within the Union, like what EU citizens enjoy, but it is because, practically, there are no border checks between *most* Member States; LTRs, like other TCNs, are able to move within the border-free area (which does not include all EU Member States).

With regards to the residence beyond three months in the second Member State, the LTR Directive has created a privileged status for LTRs which entails the right of residence in the

second Member State. The EU for the first time has distinguished its permanent residents from other TCNs, and extended their right of residence from the territory of the Member State in which they are resident, to the territory of the Union. LTRs as permanent residents of the EU, are not invisible anymore. The EU has recognised that permanent residents must have a special status from which they can derive special rights. This obviously must be welcomed as the first step towards framing a genuine inclusion of LTRs into the Union society. However, the differences between the right of residence of LTRs and EU citizens remain substantial. The differences are not only in the extent of the rights that EU citizens and LTRs enjoy, but also in the nature of the right of residence that these two categories of migrants enjoy in the host State.

On the one hand, EU citizens enjoy a fundamental right of residence in the host State by virtue of their status as citizens of the Union, and the existence of their right of residence in the host State may never be questioned. They are presumed to have and to be able to exercise such a right and the burden to rebut this presumption is on the host State, should it want to restrict the exercise of this right by the EU citizen. On the other hand, LTRs, though hold a status under EU law, are deemed *not* to have a similar right of residence, until they can prove otherwise. For LTRs, residence in the second State is a conditional, rather than a guaranteed, right as they *earn* the right of residence, *after* they comply with the necessary formalities, and satisfy the possibly imposed conditions.

Due to the difference in the nature of the rights of EU citizens and LTRs, the theme of the Citizens Rights Directive and the Treaty provisions on the right of residence of EU citizens is different from that of the Long-term Residents Directive. The former adopts a right-based approach (the existence of the rights is presumed, unless there is a good reason to restrict them), while the latter adopts a restriction-based approach (LTRs are presumed not to enjoy the right of residence, unless there is a good reason to grant them such a right). The Tampere Programme's objectives suggested that the EU had started to adopt a rights-based approach to the free movement of LTRs, however, that approach does not seem to have been implemented into the LTR Directive.

Moreover, the extent to which the second Member State is free to apply national law when considering the LTRs applications for a residence permit, as well as the level of discretion it has been given to impose discriminatory conditions on the applicants (e.g. on the basis of

their occupation) are significant. National legislation does not play such a major role in the legal framework that governs the right of residence of EU citizens.

With respect to access to employment in the second Member State, preference is explicitly given to EU citizens; LTRs may be denied permission to undertake an employment if there are EU citizens and residents in the host State to fill the vacancy. This has a devastating effect on the movement of LTRs to other Member States for the purpose of employment there, as movement to other States would not be attractive enough for LTRs, if they are treated as second-class applicants for employment.

Moreover, the LTRs' access to the second State's market is subject to complying with the formalities and satisfying discretionary conditions. In granting the right to access to the second State's market, the LTR Directive has not followed the same pattern as the personal market freedoms. The former has seen the movement of LTRs as a threat to the second State market, whereas the latter see the movement of EU citizens as an opportunity for the economy of the Member States.

Furthermore, the geographical scope of the Directive is different from the geographical scope of the provisions on the freedom of movement of EU citizens, as the LTR Directive does not apply to all EU Member States. The States of Denmark, Ireland and the UK have opted-out from participating in the application of the Directive. It is another major factor which prevents the rights of LTRs and EU citizens to be considered as comparable.

In addition, the situations in which the LTR Directive may be enforced are more limited than those in which the provisions on the free movement of EU citizens may be enforced. The Directive does not have horizontal direct effect, and thus, it cannot be enforced against individual or all legal entities, whereas, free movement provisions which grant EU citizens a right of residence (e.g. 45 TFEU) have horizontal direct/semi-horizontal effect in certain circumstances, and, thus, can be enforced against legal and natural persons.

Taking all the fundamental differences listed above into account, the answer to the question 'whether the rights of LTRs with regard to free movement are comparable to the freedom of movement of EU citizens' would be in the negative. Neither the LTR Directive is coextensive with the provisions that grant rights to EU citizens, nor is the nature of the intra-EU mobility rights of EU citizens and LTRs similar.

5. Why should the EU ensure that LTRs enjoy the same free movement rights that EU citizens enjoy?

Following the conclusion reached in the previous section that the mobility rights of LTRs are not comparable with those of EU citizens, I now intend to analyse the reasons for which the Union should extend the freedom of movement within the Union to LTRs. I will examine these reasons from two different angles: (1) economically active LTRs should be granted the freedom of movement of persons in order to effectively further the attainment of the internal market; (2) economically inactive LTRs should enjoy the freedom of movement of persons as civic citizens of the Union.

5.1 Effectively furthering the attainment of the internal market (free movement for economically active LTRs)

One of the Treaty aims stated in Article 26 TFEU is to establish and maintain a properly-functioning internal market.[124] The internal market has been characterised as 'an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured'.[125] The internal market without internal frontiers seems to have been achieved with regards to goods. Third-country origin goods, once admitted to one Member State and complied with the customs of that Member State, enter in free circulation within the Union. Other Member State would not be able to impose any dual burden on the importation of the goods to their territories.[126] Thus, the Union is genuinely border-free with regards to goods, which allows free circulation of third-country-origin goods once admitted to the Union.

Nevertheless, when it comes to movement of persons and service (particularly service providers), there are still internal frontiers within the Union. While Article 26(2) TFEU does not refer to the nationality of the persons whose free movement in the internal market must be ensured, it is only EU citizens who enjoy the free movement of persons within the internal market. There seems to be no mutual trust between the Member States in the admission of TCNs to the Union (similar to mutual trust and recognition with regards to admitted third-country origin goods). TCNs are still subject to new application and conditions in the second Member State, even if they have been admitted to the first Member State and complied with the relevant regulations.

[124] TFEU, Article 26(1).
[125] TFEU, Article 26(2).
[126] Art 28 (2) and 29 TFEU.

The exclusion of non-EU citizens (especially those who are already admitted to the Union on a permanent basis) from free movement of persons is problematic for two reasons: 1) a genuine border-free internal market would be partially achieved; 2) the exclusion of non-EU citizens does not make sense from the economic point of view. Free movement of persons is believed to contribute to the functioning of the internal market. TCNs, including LTRs, have been generally excluded from the scope of the provisions on the free movement of persons within the internal market. Given the economic rationale of the internal market, by excluding LTRs from the scope of the personal market freedoms, the EU has ignored the very rationale of the internal market.[127] It is simply not possible to justify the exclusion of LTRs from the internal market,[128] as there is no reason that it is only the free movement of EU citizens which makes a contribution to the functioning of the market.

There is no doubt that the movement of an LTR from a Member State to another, in order to, for example, provide a service there, is a movement within the internal market and has effects on its functioning (i.e. a service provider has left one part of the market and now provides that service in another part of it. The consumers in that part of the internal market now have found a new source for the service they need). LTRs play a role in the EU market, exactly as much as EU citizens do. LTRs, like EU citizens, undertake employment, provide services, receive services, consume goods, and so on. It should be recognised that if a genuine internal market is to be built it is not possible to ignore a group of economic actors in the market based on their nationality,[129] and, especially, when this group of economic actors are *permanent* part of the market. A crucial prerequisite for maintaining a properly-functioning internal market is to ensure the free movement of all economic participants in the EU market.[130] Therefore, it seems to be logical that the EU extends the personal scope of the personal market freedoms to LTRs, so at least economically active LTRs will be able to move within the internal market.

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[127] A Evans, 'Third Country Nationals and the Treaty on European Union' (1994) 5 Eur. J. Int'l L 199, 207.

[128] D Kochenov and M van den Brink, 'Pretending There Is No Union : Non-Derivative Quasi -Citizenship Rights of Third- Country Nationals in the EU', *Degrees of Free Movement and Citizenship* (Martinus Nijhoff 2015) 12; S 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 *European Law Journal* 791.

[129] For similar view, see inter alia, A Macgregor and G Blanke, 'International Trade Law & Regulation Free Movement of Persons within the EU : Current Entitlements of EU Citizens and Third Country Nationals - a Comparative Overview' (2002) 39 1; R Plender, 'An Incipient Form of European Citizenship' in FG Jacobs (ed), European Law and the Individual (North Holland,1976).

[130] For a similar view see A Wiesbrock, 'Granting Citizenship-related Rights to Third-Country Nationals: An Alternative to the Full Extension of European Union Citizenship?' (2012) 14 *European Journal of Migration and Law* 63, 90.

Kingreen characterises the market freedoms as the 'trampoline that gives all participants in the EU economy the opportunity to leap over the normative turnpikes between the national markets.[131] Denying access to such an opportunity to economically active LTRs, as permanent participants in the EU economy, may have been accepted in the past, but is not the case anymore.[132] They now have been recognised by EU law as participants in the EU economy whose movement contributes to the effective attainment of the internal market,[133] so they should also be given 'the opportunity to leap over the normative turnpikes between the national markets'.[134]

In addition to the extension of the rights of free movement and residence to LTRs which is required for accomplishing the project of creating a genuine internal market as an area where every economic participant can move freely, the lack of equality with respect to access to employment in the second State must also be remedied, as it seems to be capable of discouraging LTRs from exercising their free movement rights for the purpose of undertaking employment in another State, and hence affects the functioning of the internal market.

As we saw in chapter 2 (which examined the situation of LTRs in the first Member State), and this chapter (which examined the possibility for LTRs to move to other Member States), LTRs are in a considerably better legal position, in terms of access to employment, in the first Member State than the second Member State. In the first Member State, the LTR Directive provides LTRs with protection against nationality discrimination with regards to access to employment (Article 11.1 of LTR Directive) while in the second Member States, LTRs cannot have access to employment or self-employment activity until/if their application for a residence permit has been approved in the second Member State. In other words, exercising mobility rights would put them in a, potentially, worse position, and this is likely to impede them of moving.[135] This is, again, against the rationale of the internal market, as an area in which the free movement of persons is *ensured*. Therefore, simply granting LTRs a right to free movement, without a right to non-discrimination on the grounds of nationality in the second State, does not seem to be sufficient to encourage them to move to the second State.

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[131] T Kingreen, 'Fundamental Freedoms' in A von Bogdandy and J Bast (eds), *Principles of European Constitutional Law* (Hart/Beck 2011) 525.
[132] RA Miller and P Zumbansen (eds), 'From Persons to Citizens and Beyond : The Evolution of Personal Free Movement in the European Union', *Annual of German and European Law: Pt. 2* (2007) 269.
[133] The preamble to the LTR Directive, Recital 18.
[134] Kingreen (n 131) 525.
[135] LTRs who move, lose rights, and EU citizens who move acquire new rights, in some respects even more than the host State nationals. On the phenomenon of reverse discrimination see: A Tryfonidou, *Reverse Discrimination in EC Law* (Kluwer Law International 2009).

Such free movement rights must be supported by the protection against nationality discrimination. By extending the personal scope of the personal market freedoms to LTRs the EU can provide them with both of these correlative rights.

Granting *economically* inactive LTRs the rights of free movement and residence, however, cannot be justified by the internal market rationale. The scope of the personal market freedoms can be extended only to economically active LTRs.

5.2 Facilitating the inclusion of [economically inactive] LTRs as de jure permanent members of the society of the Union

Above, it was argued that economically active LTRs should be granted the activity-based rights of free movement and residence within the EU by extending the personal scope of the personal market freedoms. In this section I will argue that the EU should *also* provide economically inactive LTRs with free movement rights, similar to what economically inactive EU citizens enjoy.

Since the establishment of the EU (and the EC before that),[136] Member State nationals have been treated differently from TCNs. This difference was further highlighted by the introduction of the status of EU citizenship,[137] as the status has become a label which distinguishes Member State nationals from 'others'. While such a label may boost the sense of solidarity between Member State nationals, it has a negative impact on the 'sense of belonging' to the host society on 'others' who live in the EU, and consequently on their inclusion into the host society. It is not possible to label someone as 'different', treat them 'different', and expect them to feel 'one of us', and become 'one of us'. This applies to LTRs too. LTRs, who hold the status of *permanent resident of the European Union*, are still treated as individuals who need permission to leave one part of the territory of the Union (first Member State) and move to another part of it (second Member State). Given the impact the right of residence to the receiving society has on the sense of belonging to the society, LTRs are unlikely to have a sense of belonging to the society of the Union while LTRs cannot move and reside in the territory of the Union, like other members of the society – i.e. Union citizens.

The mandate imposed on the Union to facilitate the integration of TCN residents, requires the Union to recognise the impact that treating this category of TCNs as second-class citizens

[136] European Community.
[137] J Shaw, 'The interpretation of European Union citizenship' (1998) 61 *Modern Law Review* 293-317, 305.

(e.g. by excluding them from free movement rights similar to what other members of the society enjoy) has on their sense of belonging to the society. The Union should address the issue by extending the rights of citizens to permanent residents, which is the effective way of inclusion of migrants into society, as discussed in the previous chapter. Nevertheless, I am not suggesting that the free movement rights of EU citizens which are affiliated to the EU citizenship provisions be granted to LTRs (as non-EU citizens). The rights stemming from the citizenship provisions are status-based rights and only those who have the status of EU citizen should enjoy these rights. Thus, such rights should never be extended to non-EU citizens, including LTRs. However, there are reasons which suggest that residence should also become a qualifying criterion for eligibility for EU citizenship, so LTRs could also obtain the status of EU citizenship and thus, could derive rights from the citizenship provisions. These reasons will be briefly explained below but chapter 5 will provide further analysis.

First, the LTR Directive confirmed the membership of LTRs in the Union society. The Directive, as well as the Tampere Programme, changed the status of LTRs from de facto members of the society to de jure members, who participate and contribute to the European society. It is not acceptable that the Union ignores a large part of its population who are active parts of its society. LTRs' rights (and responsibilities) should reflect their established membership, participation and contributions to European society.[138]

Moreover, citizenship rights stemming from the EU citizenship provisions, should be granted to those who have a genuine link with the Union. As Tryfonidou rightly observes, there are people who happen to possess EU citizenship (for instance because their parents hold the nationality a Member State), but they have never set foot on the territory of the Union.[139] Such people, based on the current eligibility criterion for EU citizenship, are considered to be a member of the Union's society, while LTRs who for a long period of time have resided, studied, and worked in the EU, are still considered to be aliens. This is the case because while citizenship, per se, does not result in the integration of migrants to the host society, residence is capable of creating a strong and genuine link between the host society and the person.[140] The Union by excluding LTRs from the status of EU citizenship ignores the important factor of residence in the genuine link between individuals and society.

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[138] M Bell, 'Civic Citizenship and Migrant Integration' (2007) 13 European Public Law 311, 332.
[139] Tryfonidou (n 20) 46.
[140] *Bidar* (n 116); Case C-123/08 *Wolzenburg* [2009] ECR I-9621; *Gottwald* (n 99) in which the Court accepted that residence, per se, can establish the connection of migrant with the host society.

For the above reasons, residence should also become a qualifying criterion for eligibility for the status of EU citizenship, so LTRs after a certain period of time residing in the Union, become the Union's citizens. Consequently, the personal scope of the status-based free movement rights stemming from the citizenship provisions of the Treaty is extended to LTRs, and economically inactive LTRs would be able to enjoy these rights. The extension of the status of EU citizenship to LTRs will be discussed in more detail in chapter 5.

6. Concluding Remarks

The chapter had as its aim to examine the extent to which the rights of LTRs are comparable with the first set of core rights of EU citizens: the right of free movement to another Member State, the right of residence there, and the right to enjoy equal treatment with the nationals of the host State. It sought to identify the important differences between the rights of LTRs and migrant EU citizens in the second Member State, and analyse the reasons for which these differences should decrease and consequently LTRs enjoy genuine intra-EU movement rights.

In Section 2 of the chapter, the free movement rights of EU citizens were analysed. It was explained that EU citizens can derive these rights from two different sources: a) the personal market freedoms, which are source of rights for economically-active Member State nationals; and b) the citizenship provisions of the Treaty which grant the rights of free movement and residence to economically inactive Member State nationals. It was also said that the rights stemming from the personal market freedoms are activity-oriented, and they are, inter alia, granted to Member State nationals in order to contribute to the economic aims of the Treaty, such as the development of the internal market. Nevertheless, the rights stemming from the citizenship provisions are status-oriented rights, and Member State nationals enjoy these rights merely because they are EU citizens.

In Section 3, the rights of LTRs to move to a second Member State and reside there were examined; in Section 4, the results of Sections 2 and 3 were compared. In that section, it was illustrated that the LTR Directive has provided LTRs with the possibility of directly deriving the right of residence within the territory of the Union, from EU law. They now have a privileged legal status which enables them to enjoy the right of residence in a Member State other than the State that granted them the status. In addition, the law governing the rights of

LTRs is now under parliamentary and judicial scrutiny, which is crucial to ensure the fair treatment of LTRs.

However, the LTRs' right of residence in the second Member State is still inherently different *in nature* from the right of residence of EU citizens. The residence right of the latter is an unconditional right, while the rights which the LTR Directive grants to LTRs are conditional and subject to the approval of the host State. The existence of the right of LTRs to reside in the second State can be limited by the host State, while the existence of the right of residence of EU citizens may never be questioned. It was also demonstrated that due to the limited geographical scope of the LTR Directive, LTRs may not move and reside in as many Member States as EU citizens may reside.

Regarding the important supplementary right to non-discrimination on grounds of nationality in the second State, the position of LTRs entirely differs from that of EU citizens. EU citizens *enjoy* the right to equal treatment with the nationals of the host State (subject to limited exceptions, such as the public service/official authority exception), whereas LTRs *acquire* this right after successfully obtaining a residence/work permit in that State.

Based on the results of the analysis in sections 2, 3, and 4, it can be concluded that the rights of EU citizens and LTRs regarding residence and non-discrimination based on nationality in the second State, are neither comparable in nature, nor comparable in geographical scope, nor comparable in their extent. Therefore, the Tampere Programme's objective to grant LTRs rights comparable to those of EU citizens does not seem to have been effectively achieved. The LTR Directive has obviously gone some distance towards accomplishing this intended objective; however, due to differences in the nature and scope of the rights it grants to LTRs, the rights of LTRs cannot be considered comparable. The main problem obviously lies in, first, the lack of mutual recognition of the status and rights of LTRs between the Member States which makes it necessary for LTRs to obtain a new residence permit in the second Member State; secondly, the possibility with which the host State has been provided to impose discretionary, and discriminatory conditions on LTRs when they apply for a residence permit. These two issues in the LTR Directive have also prevented the Directive from approximating the various national legislation on the conditions of admission and residence of LTRs across the Union. Therefore, the answer to the question of 'whether the LTR Directive has managed to approximate the national legislation in this area, as prescribed in the Tampere Programme' is also in the negative. The Directive allows the Member States

to maintain and apply their own immigration rules in considering the LTRs' application for a residence/work permit.

After it was established that LTRs have not been granted the rights of movement and residence in the second State, the reasons for which the Union should ensure LTRs enjoy such rights were considered in Section 5. The reasons were analysed from two different angles. It was demonstrated that providing LTRs (especially those who are economically active) with the rights of movement and residence within the Union is a prerequisite to the completion of the internal market project. As explained, it is against the rationale of the internal market to exclude LTRs from free movement in the EU. To address this issue, it was suggested that the personal scope of the personal market freedoms is extended to economically active LTRs, so they *also* enjoy the activity-based rights granted by these provisions to EU citizens.

Furthermore, it was argued that it is not possible to label LTRs as 'different', 'foreigner', 'alien', 'second-class resident' and expect them to develop a sense of belonging to the host society. Removing these labels and genuinely treating LTRs equally with Member State nationals, constitutes an efficient instrument for the integration of LTRs into the host society. It was thus suggested that the personal scope of the citizenship provisions is extended to LTRs as they have established a genuine link with the Union, and are permanent participants in its society. The extension of the personal scope of the citizenship provisions to LTRs, would enable the economically inactive LTRs to derive the status-oriented rights from these provisions and enjoy freedom of movement within the Union.

Chapter 4 - Political rights of EU citizens for LTRs

1. Introduction

In the previous chapter the first set of core rights of EU citizens, namely, free movement rights, were analysed. The focus of this chapter is on the second and last set of core rights of EU citizens: political rights. According to the Tampere Programme, the legal status of long-term residents (LTRs) should be approximated to that of EU citizens, and the former should enjoy a set of uniform rights *similar* to those enjoyed by the latter. However, the Programme suggested the similarity of rights of LTRs and EU citizens to be only as near as *possible*. Whether it is *possible* to approximate the rights of LTRs to those enjoyed by EU citizens in the area of political rights is one of the questions that this chapter intends to answer. This chapter also has another question to answer: why is in the Union's interest to extend the political rights of EU citizens to LTRs?

The extension of EU citizens' political rights to LTRs, particularly with regards the right to vote, appears not possible as there is no legal basis in the Treaties for such an extension of rights. This will of course be a clear and strong obstacle on the way of extending electoral rights to LTRs. Nevertheless, as will be demonstrated in this chapter, the extension of voting rights to LTRs in in the interest of the Union (even though such an extension of rights may not happen in the near future for various reasons as will be discussed further). The interests of the Union in extending the right to vote to LTRs will be analysed from three different angles.

The first angle is democracy. It will be argued that the Union can enhance its democratic legitimacy by granting LTRs certain political rights, particularly the right to vote in the EP elections. This is because, following the adoption of the Long-term Residents Directive (LTR Directive), LTRs now have the official status of permanent members of the EU society, and thus, form part of the EU's demos. It is the EU's responsibility to ensure that its de jure permanent members enjoy the basic democratic right of voting. Moreover, the exclusion of LTRs from voting right would have a negative impact on the Union's democratic legitimacy as a large part of its demos has no say in its decision-making. As Ziegler has noted, Raz asserts that political communities – e.g. the Union – have a positive duty to 'create the

conditions of autonomy.[1] If, as will be demonstrated, LTRs are part of the Union's demos, the Union owes this duty to LTRs too, and not just to Union citizens.

The second angle is the enhancement of the integration of LTRs into the Union's society. The EU's overarching immigration policies – the Tampere agenda and after – assert that the rights of LTRs should be approximated to those enjoyed by EU citizens in order to facilitate the LTRs' integration into the host society. Putting it differently, the Union's immigration policy is based on the inclusionary model of integration which is built on removing factors of otherness and genuine inclusion of migrants into the society.[2] The right to vote, as will be illustrated in this chapter, is an essential step in removing factors of otherness and a strong sign of inclusion. Therefore, the extension of suffrage to LTRs is in line with the Union's immigration policy documents, and the failure to extend the political rights to LTRs is not consistent with the EU's own immigration policy. The process of LTRs' integration into the society without the extension of suffrage will be partial and deficient.

The third angle is the balance of role imposed on LTRs with the level of representation granted to them. This angle has some similarities with the slogan of 'no taxation without representation'. It will be argued that the Union has imposed certain roles on LTRs, for instance, participating in the development of the internal market.[3] Nevertheless, when it comes to political participation in running and governing this market, LTRs have no role to play. If the Union imposes a role on LTRs in the internal market, equal opportunity to have a representative in the process of decision-making for that market should also be granted to LTRs. Based on the three above angles, this chapter is structured as follows: in section I, the political rights of EU citizens will be identified, followed by an examination of the political rights of LTRs in order to establish the extent to which the situations of these two categories of persons in terms of political rights, is already similar. In the same section, the possibility of extending each of the identified political rights already enjoyed by EU citizens to LTRs will also be considered in order to filter out those rights the extension of which to the latter is practically impossible. The extension of the remaining rights to LTRs will then be considered from three different angles in separate sections: (1) from the angle of democracy (section II); the three well-known principles of democracy (namely, the principles of affectedness, stakeholders, and coercion) will be used to establish whether LTRs form part of the EU's

[1] R Ziegler, *Voting Rights of Refugees* (Cambridge University Press 2017) 68.
[2] Different models of integration were discussed in detail in chapter 2.
[3] The preamble to the LTR Directive, Paragraph 18.

demos; (2) from the angle of the integration of LTRs into EU's society (section III) in that the EU, by granting political rights to LTRs, can enhance the LTRs' integration into its society; (3) the angle of equal rights for equal roles (section IV). The final section (section V) contains concluding remarks and suggestions on the extent to which the political rights of EU citizens should be extended to LTRs.

This chapter may appear biased in favour of extending the right to vote of EU citizens to LTRs. This is because the chapter examines *how* extending the right to vote in the EP elections is in the interest of the Union, rather than discussing *whether* this right should be extended to LTRs or not. Nevertheless, arguments against extending the right to vote in EP elections to LTRs will be presented and discussed as well on pages 117 to 119. For instance, it has been suggested that extending the right of vote may result in ill-informed voters.[4] It has also been argued that granting the right to vote in elections may devalue citizenship of the state. It will be illustrated that while these concerns might be valid and relevant to other non-EU citizen migrants, they are unlikely to be relevant to LTRs.

2. Political rights of EU citizens

The status of EU citizenship entails a number of rights for its holders among which are political rights. These political rights can be found in Article 20 TFEU, [5] and include:

a) the right to petition the European Parliament, to apply to the European Ombudsman, and to address the institutions and advisory bodies of the Union in any of the Treaty languages and to obtain a reply in the same language;[6]

b) the right to enjoy, in the territory of a third country in which the Member State of which they are nationals is not represented, the protection of the diplomatic and consular authorities of any Member State on the same conditions as the nationals of that State;

c) the right to vote and to stand as candidates in elections to the European Parliament and in municipal elections in their Member State of residence, under the same conditions as nationals of that State.[7]

[4] D Munro, 'Integration through Participation: Non-Citizen Resident Voting Rights in an Era of Globalization' (2008) 9 Journal of International Migration and Integration 63, 73.
[5] TFEU, Article 20 (2)(b).
[6] These rights are repeated in Article 24 TFEU.

The rights to vote and stand as candidates in national elections of a Member State, however, are limited to nationals of that State. It has been argued that national-level voting rights are withheld until the person has gained enough knowledge about the State to participate in its election at the highest level.[8]

Moreover, EP electoral rights are concerned with 'the question of developing a distinctive European identity', whereas the possibility to participate in national elections is concerned with 'national identity', which can be reserved for nationals. In any event, the merits of the above arguments (for the enfranchisement of EU citizens in the national election of the host Sate) will not be examined in the thesis, as voting rights in national elections and any political right which is not available to EU citizens fall outside the scope of this chapter: the thesis focuses on examining whether the rights of LTRs can be approximated to those enjoyed by EU citizens and is not concerned with whether the political rights of EU citizenship should be further extended (e.g. whether EU citizens should be provided with the opportunity to vote in national elections).

In addition to the above political rights derived from the TFEU citizenship provisions, there is another important political right available to EU citizens, and that is the right to call on the Commission to introduce a legislative proposal. This so-called 'Citizens' initiative' is laid down in Article 11(4) TEU and enables one million citizens of the EU who are nationals of at least one quarter of the Member States to call on the commission to take action in the above way. It is still in the control of the Commission to officially initiate a proposal; however, EU citizens can invite the Commission to propose law.[9]

3. To what extent do LTRs also enjoy EU citizens' political rights

The main legislation from which LTRs derive rights, the 2003 Long-term Residents Directive (LTR Directive),[10] is silent on political rights. However, there are other sources which grant basic political rights to LTRs, in some cases at the same level as those granted to EU citizens:

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[7] These rights are repeated in Articles 22 and 23 TFEU. The detailed arrangements whereby citizens of the Union residing in a Member State of which they are not nationals may exercise the right to vote and to stand as a candidate there in elections to the EP are laid down in Directives 93/109/EC and 94/80/EC.
[8] Munro (n 4) 69.
[9] For a detailed analysis of the mechanism of citizens' initiative, see: M Dougan, 'What Are We to Make of the Citizens' Initiative?' (2011) 48 Common Market Law Review 1807.
[10] Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents. OJ L 16, 23 January 2004.

a. The right to petition the EP, to apply to the European Ombudsman, and to address the Union in any of the Treaty languages and to obtain a reply in the same language.

Article 228 TFEU provides *every natural person residing in the Union* with the right to apply to the European Ombudsman for matters concerning instances of maladministration in the activities of the Union institutions, bodies, offices or agencies.[11] Article 227 TFEU also provides *every natural person residing in the Union*, with the right to petition the EP on a matter which comes within the Union's fields of activity and which affects him, her or it directly.[12]

Therefore, the right to petition the EP is available both to LTRs and EU citizens; however, it is not unlikely that petitions received from EU citizens are treated differently from the petitions submitted by LTRs, taking into account that it is EU citizens who elect the MEPs.[13]

With regards to the language used by individuals for addressing an EU institution, as long as the language used in a correspondence is one of the EU's official languages, the addressed institution will accept it, and most likely will reply in that language or the language of the host State of the individual. Thus, there does not seem to be any difference between LTRs and EU citizens in respect of the language they can use to address the EU institutions or receive a response.

b. The right to enjoy diplomatic protection in the territory of a third country in which the Member State of which they are nationals is not represented

Neither the LTR Directive nor any other EU legislation requires Member States to provide LTRs or any other TCNs with diplomatic protection, inside or outside the EU. Although providing LTRs with such a protection would probably help to solve a problem they may face in a third country, the exclusion of LTRs from this right is neither inconsistent with the integration aims of the EU's migration policy, nor is it incompatible with the nature of diplomatic protection under international law. It is not inconsistent with the EU's integration policy because the policy's focus is specifically and exclusively on the integration of migrants into the (EU) society while they reside in the EU, not while they are abroad. It is not incompatible with international law as, under the latter, it is the person's state of nationality

[11] With the exception of the Court of Justice of the European Union acting in its judicial role.
[12] The right to petition the Commission with one million signatures, which is known as citizens' initiative, however, is limited to EU citizens.
[13] S Song, 'Democracy and Noncitizen Voting Rights: Should Resident Aliens Vote?' (2009) 13 Citizenship Studies 607, 614.

that is responsible for protecting him/her.[14] In addition, the consular protection of third country nationals is outside the scope of Union law.[15]

Moreover, in case the authorities of the third country are also involved, it may even be practically *impossible* to offer LTRs diplomatic protection in that country. For instance, when an LTR is in police custody, it is only the state of nationality of the LTR will be able to have access to the LTR.

c. Electoral rights in the local and EP elections

When it comes to the rights to vote and stand in elections, the Treaty does not require the Member States to provide LTRs with the right to vote and stand in EP elections and local election. In fact, there is no legal basis in EU law for such rights for non-EU citizens, especially after the Treaty of Lisbon came into force which clearly and specifically limited the MEPs' role to being representative of Union *citizens*. The Lisbon Treaty replaced all references to the 'peoples of the States' with references to 'Union's citizens'.[16] Hence, even if it was possible – prior to this change – to interpret the term 'peoples of the States' to include TCN lawful residents in the Member States, the new version leaves no place for such an interpretation. Moreover, in the current version of the TEU, as amended by the Treaty of Lisbon, 'peoples of Europe' has been used with the term 'EU citizens' interchangeably.[17] These points confirm that electoral rights are exclusively limited to EU citizens.

Results – comparing political rights of EU citizens and LTRs

Comparing the political rights of LTRs with those enjoyed by EU citizens leads to the conclusion that in terms of low level political rights, such as the right to petition the EP, it does not matter whether the person is an EU citizen or LTR. There does not seem to be a considerable difference between these two groups in relation to these particular political rights.

With regards to the right to enjoy diplomatic protection, it is neither necessary nor possible to provide LTRs with the protection which EU citizens receive in a third country.

The most significant difference appears to be in the area of electoral rights – i.e. the right to vote and the right to stand in local and EP elections. Generally, electoral rights are considered

[14] Under certain circumstances, another state which temporarily represents the state of nationality is responsible for providing diplomatic protection to the nationals of that state.
[15] Case C-145/04 *Spain v UK* [2006] All ER (D) 55 (Sep).
[16] Former Article 189 TEC was replaced by Article 14(2) TEU.
[17] TEU, Article 1.

to be the core of citizenship.[18] The exclusion of non-citizen residents from suffrage is not considered to be a breach of relevant European and international conventions.[19]

However, a number of normative claims have been made in favour of the extension of electoral rights to non-nationals or so-called 'alien suffrage'. I now turn to examine these claims in the context of LTR rights, but from the perspective of the Union. In other words, my question here is *how will the EU benefit* from extending the political rights of Union citizens to LTRs? These benefits will be considered from three different angles: a) enhancing democracy in the EU; b) promoting the integration of LTRs into the EU's society; and c) equal participation of LTRs in the political processes of the society of which they are now members.

4. Alien suffrage - Electoral rights for non-citizen residents

'The cornerstone of democracy is the right of voters to elect the decision-making bodies of political assemblies at regular intervals'.[20] In every polity or entity however, this right may be limited to a specific group of people: in a company, to its shareholders; in a club, to those who pay an annual membership fee; and in general elections, to the citizens of the polity. In the EU also the right to cast a vote in the EP and local elections is limited to those who hold the formal status of EU citizenship, which – as we saw – is automatically acquired by those holding the nationality of a Member State. TCNs, who lack that formal status, are thus excluded from electoral participation in these elections.[21] As a result, TCN long-term residents who live in the EU and are subject to the laws of the Union, are excluded from exercising a right which is the cornerstone of democracy.

The exclusion of non-EU citizens from electoral rights is nevertheless lawful. There is no legal basis in the Treaties to extend these rights to non-EU citizens. Indeed, the EU is not the only polity which reserves the privilege of voting for its citizens. This is a universal practice, which is even endorsed by the International Covenant on Civil and Political Rights (Article

[18] R Bauböck, 'Expansive Citizenship—Voting beyond Territory and Membership' (2005) 38 Political Science and Politics 683, 683.
[19] For instance, Article 25 of the International Covenant on Political and Civil Rights; Article 16 of the ECHR.
[20] R Hayduk, 'Democracy for All: Restoring Immigrant Voting Rights in the US' (2004) 26 New Political Science 499, at 499.
[21] Some Member States have chosen to grant TCN residents the right to vote in local elections, nevertheless, this is not the case in all Member States. Moreover, this extension is not required by EU law as is the case for EU citizens.

25) and the European Convention on Human Rights (Article 16).[22] Some states have even attempted to criminalise voting for non-citizens.[23] One reason for the continuing belief that citizenship is a sine qua non for political rights seems to be the idea 'that political power is for members only, and that the most fundamental indication of membership is citizenship'.[24] Putting it differently, political rights are available to *members*, and only citizens are deemed to be members.

Contrary to the legal restrictions on the political participation of non-citizens, normative claims, in the terms of 'alien suffrage', are made for the extension of electoral rights to non-citizen residents. The case for alien suffrage is mainly premised on the residence-based franchise: the distribution of electoral rights based on residence rather than citizenship only.[25] Much of the debate and academic literature around the concept of alien suffrage focuses on the *entitlement* of non-citizens to electoral rights – and not the *responsibility* or interest of the state to provide non-citizen residents with these rights.

It has been suggested that in democratic societies non-citizen residents have moral claims for enjoying electoral rights similar to those of citizens:

> 'noncitizens have the same stake and interest in a community's political decisions and civic responsibility as that of any citizen. Like other citizens, immigrants tend to become involved and invested in their communities'.[26] The denial of 'the right to participate in the democratic process is likely to adversely affect these people in social and economic terms. People with no say in public elections are less equipped to protect their interests. … the disenfranchisement of the resident aliens appears to contradict the principles on which democratic societies are founded'.[27]

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[22] This endorsement was confirmed in: *Mathieu-Mohin and Clerfayt v Belgium* [1987], Appl. No. 9267/81; *Sante Santoro v Italy* [2004], Appl. No. 36681/97. Other international documents also either do not recognise electoral rights for non-nationals, or are not legally binding, such as The Declaration of Human Rights.

[23] Quoted by S Song, 'Citizenship and Voting Rights: Should Resident Aliens Vote?' (2009) 13 Citizenship Studies 607, at 614 from Schuck, P.H., 1998. Citizens, strangers, and in-betweens: essays on immigration and citizenship. Boulder, CO: Westview Press, at 187.

[24] L Beckman, 'Citizenship and Voting Rights: Should Resident Aliens Vote?' (2006) 10 Citizenship Studies 153, 155.

[25] A Schrauwen, 'Granting the Right to Vote for the European Parliament to Resident Third-Country Nationals: Civic Citizenship Revisited' (2013) 19 European Law Journal 201; H Lardy, 'Citizenship and the Right to Vote' (1997) 17 Oxford Journal of Legal Studies 75.

[26] R Hayduk, 'Democracy for All: Restoring Immigrant Voting Rights in the US' (2004) 26 New Political Science 499, 508.

[27] L Beckman, 'Citizenship and Voting Rights: Should Resident Aliens Vote?' (2006) 10 Citizenship Studies 153, 153.

In their arguments, scholars assume that non-citizens should be included in the franchise either because they have interests to protect,[28] or because they are de facto members of society,[29] and thus should be entitled to participate directly in the formulation of its laws.

5. Suffrage for LTRs

The right to vote in the EP elections is significant to LTRs, as their status and rights attached to it are governed entirely by EU law. Despite this, like other TCNs, LTRs are excluded from participating in European elections. Moreover, as is the case for other TCNs, there is no legal basis in EU law for extending the franchise to LTRs. In the absence of legal provisions in favour of enfranchising LTRs, there would be no prima facie ground for challenging their electoral exclusion. However, the longer people reside in a state, the stronger their claim for rights grows.[30] Indeed, LTRs have a strong claim to electoral rights in the Union because, firstly, LTRs' most immediate interest is significantly affected by the EU legislation (e.g. the LTR Directive). Secondly, LTRs are not simply residents who have resided for a long time in the Union – LTRs are also recognised in law as a category of residents who reside permanently in the Union, and thus should enjoy certain rights of EU citizens. The legal status granted to LTRs has now changed the position of LTRs from de facto members of the EU society, to de jure members of the EU society, with a status and rights under EU law. It is the EU's responsibility to ensure that its de jure permanent members enjoy the basic democratic right of voting.

A limited extension of electoral rights to LTRs has already been supported on a number of occasions by the EU institutions. The Commission has attempted to encourage the Member States to extend voting rights in local elections to LTRs. These attempts have led to the adoption of soft law, which may be used to support the claim for enfranchising LTRs. One of these pieces of soft law was adopted by the Council in 2004 which is known as 'common basic principles for immigrant integration policy in the European Union'.[31] Principle number 9 of the document asserts that:

[28] Hayduk (n 26) 508.
[29] CM Rodríguez, 'Noncitizen Voting and the Extraconstitutional Construction of the Polity' (2010) 8 International Journal of Constitutional Law 30, 36.
[30] JH Carens, 'On Belonging: What We Owe People Who Stay' (2005) 30 Boston Review 16.
[31] Council Document 14615/04 of 19 Nov 2004.

> Wherever possible, immigrants should become involved in all facets of the democratic process. … Wherever possible, immigrants could even be involved in elections, the right to vote and joining political parties.

The EP has also engaged with the issue and backed the enfranchisement of TCN residents – though only in municipal elections.[32] These documents encouraging the enfranchisement of non-EU citizen residents were basically articulated around the integration of migrants into society, as the exclusion of non-EU citizens from the political aspect of life in the Union, simply 'reinforces the distance between EU citizens and TCNs'.[33] Thus, the EU institutions are aware of the benefits of the enfranchisement of TCN residents in elections.

Nevertheless, LTRs are still excluded from suffrage in the only election held at the EU level. Franchise in the EP elections is still heavily linked to the status of citizenship as a matter of nationhood,[34] and falls exclusively within Member State competence. The fact that citizenship of the Union is shaped by national laws is of course a powerful exogenous force against the extension of suffrage under EU law.[35] However, the extension of the franchise to LTRs would be inevitable if we accept that they form part of the EU's demos in order to match the EU's demos with the holders of electoral rights in the Union, even though it might take years or decades, and fundamental Treaty amendments are necessary.[36]

Having considered the position of LTRs in the Union with regards to electoral rights, I will now move on to discuss why the EU should extend the suffrage to LTRs. This will first be examined from the angle of democracy.

5.1. First angle: Democracy

In this section, the reasons for which the EU should grant LTRs electoral rights similar to those enjoyed by EU citizens are examined from the angle of democracy. This section has one main question to answer: why should the EU extend the electoral rights of EU citizens to LTRs *for the purpose of enhancing its legitimacy and promoting democracy*? The main

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[32] Bulletin of the European Communities, Supp. 2/88, at 29 (1988). Also see European Parliament on the Joint Declaration Against Racism and Xenophobia and an Action Programme by the Council of Ministers, 1989 O.J. (C 69) 40, at 42 where the EP calls on the Member States to grant the right to vote in local elections to all migrant workers and their families living and working on their territory, regardless of their nationality.
[33] Schrauwen (n 25) 212.
[34] Bauböck (n 18).
[35] J Shaw, *The Transformation of Citizenship in the European Union: Electoral Rights and the Restructuring of Political Space* (Cambridge University Press 2007) 41.
[36] J Shaw, 'Citizenship and Political Participation: The Role of Electoral Rights Under European Union Law' (2010) 2010/22 9.

argument here is that by extending these electoral rights to LTRs, in particular by enfranchising them, the EU will increase its democratic legitimacy. It will be illustrated that LTRs also form part of the Union's demos; thus, enfranchising them in the EP elections is a prerequisite for the Union being a democratically legitimate polity. This is not to say that all of the EU's alleged democratic legitimacy deficit will be remedied by enfranchising LTRs, as there are other democratic legitimacy issues to be resolved as well.[37] Rather, it is simply to say that even if other issues in relation to legitimacy are addressed, still the EU would never become a legitimate democratic polity if a high number of permanent members of its society continued to have no say in its policy-making process.

The EU and its Member States have already acknowledged that exercising democratic rights in the Union should not be limited to Member State nationals only. For instance, non-citizens are provided with the right to apply to the Ombudsman,[38] which is described as 'part of the constitutional arrangements underpinning transparency and democracy at the Union level'.[39] Moreover, the Union has acknowledged that extending formal political rights to non-citizens would enhance the representativeness and democratic legitimation of policies.[40]

Yet, as mentioned before, voting rights in the Union are linked to the citizenship of a Member State. This citizenship-based theory of democracy which leaves non-EU citizen residents of the Union without a voice in political decision-making in the polity where they live and work, gives rise to a problem of democratic legitimacy.[41] Because of the lack of the official badge of a Member State nationality, these permanent residents are excluded from participation in the collective decision-making of the Union, although their basic rights and immediate interest are subject to its law. This is the case despite the fact that, as will be demonstrated below, LTRs form part of the Union's demos. I now proceed to examine *whether LTRs also form part the EU's demos.*

[37] Such as the effectiveness of decision-making procedures suggested in David Beetham and Christopher Lord, *Legitimacy and the European Union* (Longman 1998) 25; unelected Council of Ministers although they may be elected by national electorates to fulfil an explicitly national, not a European, function – see the same book, page 26. See also F Goudappel, *The Effects of EU Citizenship: Economic, Social and Political Rights in a Time of Constitutional Change* (TMC Asser Press 2010) 105; P Craig and G de Búrca, *The Evolution of EU Law* (Oxford University Press 1999) pp 23-27. David Marquand coined the famous expression 'democratic deficit': D Marquand, 1979, Parliament for Europe, Jonathan Cape, London.
[38] TFEU, Article 227.
[39] Shaw (n 36) 8.
[40] Handbook on Integration for policy-makers and practitioners.
[41] Song (n 13) 1.

In order to illustrate that LTRs also form part of the EU's demos, the principle of affectedness, the principle of stakeholders, and the principle of coercion will be employed. The former asserts that '[a]ll those affected by a political decision should have a say in its making'.[42] The principle of stakeholders views government as a public company and argues that just like in a public company, investment provides stakeholders with a right to vote and the power over the company; citizens as stakeholders in the polity, are perceived as voters to the extent that they have paid their taxes'.[43] The last principle says that all individuals subject to state coercion should be given the opportunity to decide how the state's coercive power is exercised.[44]

This is not the first time that these principles have been used to support arguments in favour of enfranchising non-citizen residents. Scholars in a number of books and papers have already suggested the extension of electoral rights to residents who do not officially hold the citizenship of the state.[45] They even often use the same democratic principles that I have used in this chapter. However, this chapter for the first time applies these leading principles to the rights of TCN residents in the EU in the light of the EU's immigration policy (Tampere Programme) as well as the LTR Directive.

I argue that the status of long-term residence that the LTR Directive grants to TCN residents makes the latter permanent members of EU society. As permanent members of the society whose day-to-day lives are heavily affected by EU law, they must have a say in making that law. Because the EU has introduced an EU status which affects the permanent members of the EU society, it should provide the affected individuals with the opportunity to have a say in making EU law. This is my argument based on the principle of affectedness.

My argument based on the principle of stakeholders is that LTRs are given a role in the development of the internal market.[46] This changes their status from passive members of the market (i.e. merely consumers), to active members who have an interest and stake in the EU's

[42] C Hilson, 'EU Citizenship and the Principle of Affectedness' in R Bellamy, D Castiglione and Shaw J (eds), *Making European citizens : civic inclusion in a transnational context* (2006) 56.
[43] Beckman (n 27) 159.
[44] S Benhabib, *The Rights of Others: Aliens, Residents, and Citizens* (V, Cambridge University Press 2004) 217.
[45] Schrauwen (n 25); ME Hawks, 'Granting Permanent Resident Aliens the Right to Vote in Local Government: The New Komeito Continues to Promote Alien Suffrage in Japan' [2008] Pacific Rim Law & Policy Journal 1; Beckman (n 27); L Beckman, 'Who Should Vote? Conceptualizing Universal Suffrage in Studies of Democracy' (2008) 15 Democratization 29.
[46] The preamble to the LTR Directive, Paragraph 18.

internal market. LTRs, as stakeholders of a market which is governed by EU law, should be given a voice in making that law.

The argument based on the coercion principle is that LTRs qualify to be a member of the demos simply by being subject to the power and the laws of the Union and its Member States. Furthermore, the Union and its Member States owe LTRs, as the coercees, the right to have a say in making the laws to which LTRs are subject.[47]

These three principles will be used to illustrate that LTRs now form part of the EU demos. It will then be argued that in order to reduce the Union's democratic legitimacy, it is logical, if not required, for the EU to provide its demos with the opportunity to have its say in making decisions in the Union (e.g. voting rights in the EP elections).

5.1.1. The principle of affectedness – the EU and LTRs

The principle of affectedness or affected interests was established by Robert Dahl in the early 1970s: 'Everyone who is affected by the decisions of a government should have the right to participate in that government'.[48] It is based on the democratic concept of 'rule by the people' which sets the relationship between people and governments in democratic societies as 'ruling and being ruled in turn'. According to the principle of affectedness, 'people should not be subject to a political rule in which they have no say'.[49] Those who are subject to the decisions of a legislature must determine the composition of the legislature through their votes.[50] The exclusion of those people who fall within the scope of the principle of affectedness could challenge the legitimacy of the polity, and its democratic functionality:

> 'If a law is to be regarded as a legitimate product of a properly functioning democratic process, it is essential that the views of those likely to be affected are canvassed as widely as possible'.[51]

Indeed, the exclusion of affected individuals from political participation in the EP elections also calls the validity of the relevant EU norms into question. Jürgen Habermas suggests that 'only those norms can claim to be valid that meet (or could meet) with the approval of all

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[47] J Raz, 'Rights-Based Moralities' in J Waldron (ed), *Theories of Rights* (Oxford University Press 1984) 191.
[48] RA Dahl, *After the Revolution?: Authority in a Good Society* (Yale University Press 1990) 64–65.
[49] J Carens, (1989) Membership and morality: admission to citizenship in liberal democratic states, in W Brubaker (Ed.) *Immigration and the Politics of Citizenship in Europe and North America* (Lanham and New York: University Press of America) 37.
[50] Bauböck (n 18).
[51] Lardy (n 25) 92.

affected in their capacity as participants in a practical discourse'.[52] In other words, as Munro puts it, 'laws and policies can make a claim of democratic legitimacy only when those who are subject to, or whose interests are affected by, laws and policies have had adequate opportunities to participate in the decision-making processes that produce those laws and policies'.[53] Adequate opportunity to participate in the decision-making practically means determining the composition of legislature through elections.[54]

The principle of affectedness does not limit the demos to those who have a certain legal status (e.g. citizenship of the state). Rather, based on the principle, the demos are those who have interests affected by the particular collective decision in question. 'The principle offers an alternative to state-centered conceptions of democracy that define the demos in terms of membership in a nation-state'.[55]

Of course, it is not possible to include *everyone* who is affected by the decisions of a government or civic society in the process of policy making. It is neither practically possible nor logically justified. For instance, when a government is deciding to invade a country, the people of the latter are obviously affected by that decision. Does the principle of affectedness require that government to consult the people of the targeted country? Moreover, there are people who become subject to the laws of a state temporarily, or only marginally. Do these people also fall within the scope of the affected interest principle? Including them in the demos means an over-inclusive demos, many of whom are slightly or occasionally affected by perhaps only relatively few of the government's decisions, but would have a permanent say about the government's decisions.

In an attempt to overcome the issue of over-inclusiveness of the principle of affectedness, Beckman suggests that the scope of the principle of affectedness should be limited to the persons' territorial position.[56] He considers territorial position as a sufficient factor for considering who is affected by the government of a territory. Others have suggested that in defining the scope of the principle of affected interests, the nature of the affected interests, and the extent to which these interests are affected must be taken into account. For instance, Song suggests that 'We might restrict the scope of the principle further, to those who have basic or fundamental interests at stake, such that any person whose basic interests will

[52] J Habermas, Moral consciousness and communicative action. (MIT Press 1990) 166.
[53] Song (n 13) 66.
[54] Bauböck (n 18).
[55] Song (n 13).
[56] Beckman (n 27) 157.

probably be affected by a government's decisions has a presumptive right to participate in that government'.[57] Shapiro suggests that 'those whose basic interests are most vitally affected by a particular decision have the strongest claim to a say in its making'.[58]

In another attempt to address the issue of over-inclusiveness of the principle of affectedness, two decades after introducing the principle, Dahl limited the scope of the principle of affectedness by adding the *criterion of membership*. He suggested that the principle of affectedness should cover 'all adult *members* of the association',[59] because it is the interest of the members of the association or society that are affected by the way that association or society is governed.

So, applying the above views in our context, who is considered to be a member of the EU? What can be the criterion/criteria for membership of the EU? Territorial position? Being subject to the law of the Union more than just occasionally or temporarily? Having a fundamental or basic interest affected significantly by the Union policy? Or, all of these? I shall test these limiting criteria introduced by academics in defining the scope of the principle of affectedness, by applying them to LTRs.

Territorial membership which is not temporary: all individuals who are physically present in the Union are affected by the legal and political decisions of the EU. This includes TCNs; nevertheless, unlike many other TCNs whose presence on the territory of the Union is temporary or for a limited time,[60] LTRs' permanent home is the Union. This means that they are permanently and continuously affected by EU law. In addition, it is not the length of the effect of EU law on LTRs that is significant; the extent of this effect is also significant. The rights of LTRs which are affiliated to their legal status are all governed by EU law (the LTR Directive). For instance, the right to enjoy equal treatment with the host State nationals, which obviously has a considerable impact on various aspects of LTRs' lives (e.g. their working opportunities), stems from the status of LTRs, on which EU law has a significant effect.

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[57] Song (n 13).
[58] Shapiro (n 49) 37.
[59] Dahl (n 48) 129; see also, R Dahl, *Democracy and its Critics* (Yale University Press 1989) 355.
[60] I say many because TCN family members of Union citizens may also enter and remain in the Union on a permanent or at least long-term basis without a deadline to leave.

Having shared values with other members: LTRs acquire their status after having lived, worked or studied, for at least five continuous years in a Member State.[61] During these five years, it is inevitable that TCNs' values are affected by the shared values of the society. Even if this does not always happen organically, LTRs can be required to meet integration conditions, such as language, knowledge of the society's history and values, and so on. Meeting the conditions before becoming LTRs should address any concern regarding the lack of knowledge of LTRs about the values of their receiving society and that they share these values with other society members.[62]

If having a genuine link with the EU is set as the criterion for the EU's membership, again, LTRs meet it. It is accepted that a genuine link between people and polities is established through residence; not merely by holding citizenship.[63] Thus, LTRs, who have resided in the Union, have a genuine link with the Union and its society.

LTRs satisfy any condition that can reasonably be assumed to be considered 'affected' according to the principle of affectedness. As affected individuals, it is hard to exclude LTRs from the EU demos and still consider the EU as a polity with democratic values. The Union would improve its democratic legitimacy by enfranchising LTRs in the EP elections.

5.1.2. The principle of stakeholders

The principle of affectedness is considered vague and over-inclusive by Bauböck. He proposed another normative principle on the basis of interest and stake that non-citizens in a polity have. He argues that non-citizen residents should be recognised as stakeholders in a polity and be granted electoral rights if their 'circumstances of life link their future well-being to the flourishing' of that polity.[64] 'The notion of stakeholding expresses, first, the idea that citizens have not merely fundamental interests in the outcomes of the political process, but a claim to be represented as participants in that process. Second, stakeholding serves as a criterion for assessing claims to membership and voting rights. Individuals whose circumstances of life link their future well-being to the flourishing of a particular polity

[61] Minimum 10 years of residence for students.
[62] The existence of the integration conditions is however, problematic. This matter will be dealt with later in chapter 6.
[63] Case C-209/03 *Bidar v UK* [2005] ECR I-2119.
[64] Bauböck (n 18) 686.

should be recognized as stakeholders in that polity with a claim to participate in collective decision-making processes that shape the shared future of this political community'.[65]

It is necessary here to clarify exactly what counts as a stake. Would financial contribution count as stake for the purpose of the principle of stakeholders? Would a foreigner who has never resided in the EU, but financially contributes to the internal market, and obviously has a stake in the EU and its internal market, also be a stakeholder? For instance, a Chinese citizen residing in China who establishes a business in an EU Member State and enters the market may contribute to the market even more than an EU citizen or an LTR. Does the stakeholder principle mean that this person should also have a right to vote in the EP elections?

The answer is no. According to Dahl, to fall within the scope of the principle of stakeholders, the person must have something more than merely a financial stake in the polity. Their life chances must be at stake. Their fate must be inextricably bound up with the functioning of the polity's institutions.[66] Having life chances and future well-being subject to the way a polity is run, entitles the individuals to participate in running that polity.[67]

Undoubtedly, the life circumstances and future well-being of LTRs are vitally dependent on the decisions made by the EU. The way the EU is run has a significant impact on the LTRs' life circumstances. Their life chances depend on the opportunities which EU law – e.g. the LTR Directive – offers them. Indeed, the whole existence of the status of long-term residence is dependent on the Union and Union law. It is the EU that decides what rights are attached to the status of long-term residence, and whether the status should be approximated to the status of EU citizenship, or the status should be entirely abolished.

5.1.3. The principle of coercion

The third principle of democratic legitimacy used in advocating the extension of electoral rights to non-citizens is the coercion principle. The principle is related to the core value of liberal and democratic theory of autonomy of individuals and that states cannot invade individuals' autonomy against the latter's will. All individuals subject to state coercion

[65] R Bauböck, 'Why European citizenship? Normative approaches to supranational union.' Theoretical inquiries in law 8.2 (2007) 453-488.
[66] B Barry, *Culture and Equality* (Polity Press 2000) 777.
[67] Beckman (n 27) 160.

should be given the opportunity to decide how the state's coercive power is exercised.[68] These individuals are presumed to form part of the demos:

> '[e]very adult subject to a government and its laws must be presumed to be qualified as, and has an unqualified right to be, a member of the demos'.[69]

As can be seen, the criterion for qualifying to be a member of the demos is being subject to the power and laws of the state, not holding its citizenship. Taking into account the fact that non-citizen residents are subject to laws to which citizens are not subject (e.g. immigration laws), the former are likely to be subject to more actual coercion than the latter.[70] This additional level of being subject to the coercion of the state, makes the claim of non-citizen residents to be part of the demos stronger.

It is not only non-citizen residents that have a claim to make. The state owes the coerced a right to participation too. Abizadeh suggests that individuals subject to laws and power of a state are owed a democratic justification,[71] for instance a right to participation in the control over making those laws or the exercise of power. This right of participation is owed 'not simply in virtue of state laws having causal effects on people's basic interests, but rather on the more restricted basis of being subject to state coercion'.[72] Thus, being subject to the laws and coercion of the European Union and its Member States not only creates a claim for LTRs – as the coerced and thus, demos – to a right of democratic participation in the Union's governance, but also creates an obligation for the Union to provide LTRs with such a right.

Nevertheless, the application of the principle of coercion on LTRs does not appear to be straight-forward. It is not as simple as LTRs being subject to coercion of the Union and the latter ownings the former the right to participate in ruling themselves. It is not a situation in which migrants are on the one hand and the Union on the other hand. The LTRs' situation is more complex because there is a third-party involved in the coercion of LTRs: the host State, which is, itself, sovereign in terms of immigration law and control with regards to TCNs.

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[68] S Benhabib, *The Rights of Others: Aliens, Residents, and Citizens* (Cambridge University Press 2004) 217; A Abizadeh, 'Democratic Theory and Border Coercion' (2008) 36 Political Theory 37, 41. Of course individuals must have certain capabilities, e.g. mental capacity, to be autonomous: see J Raz, 'The Myth of Instrumental Rationality' (2005) 1 Journal of Ethics and Social Philosophy 1, 372.
[69] Dahl (n 59) 127.
[70] Song (n 13) 610.
[71] A Abizadeh, 'Democratic Theory and Border Coercion' (2008) 36 Political Theory 37, 45.
[72] Song (n 13) 611.

5.1.4. Interim conclusion: from the perspective of democracy, why the EU should provide LTRs with electoral rights, and to what extent?

In short, LTRs have the same stake and interest in the EU's legal and political decisions as EU citizens. LTRs are also subject to coercion of the Union at least as much as EU citizens are. Falling within the scope of all the democratic principles of affectedness, stakeholders and coercion supports the view that LTRs are now part of the EU demos. All of these principles also support the enfranchisement of LTRs in the EU elections.

The democratic legitimacy of the EU, therefore, depends on the suffrage of the EU's demos. In order to become democratic, the EU must ensure that the demos has its say in collective decision-making processes that shape the shared future of this political community. By enfranchising LTRs as part of the demos, the EU would improve its level of legitimacy (but only to some extent, as the Union suffers from a democratic deficit in other areas such as the fact that the Commission is unelected, and that Union citizens do not have any direct control over the Council of Ministers).

5.2. Second angle: Integration

This section looks at the reasons why the EU should extend EU citizens' electoral rights to LTRs *in order to promote their integration into society*. It has two aims: first, it will explore the nexus between electoral rights and the integration of migrants; second, it intends to illustrate that due to the crucial role which electoral rights play in the integration of migrants into the receiving society, the EU – if it intends to achieve its policy in this area – should extend the electoral rights of EU citizens to LTRs. The main argument in this section is that as the integration of LTRs is a central issue in the EU's immigration policy, and electoral rights play an essential role in enhancing this integration, the EU should provide LTRs with electoral rights for the sake of achieving the aims of its own policy.

Earlier in chapter 2, the concept of the integration of migrants into the receiving society was studied. It was said that genuine integration of migrants occurs by reducing the 'factors of otherness' and treating migrants like 'one of us'. The exclusion of LTRs from EU electoral rights highlights the differences between LTRs and EU citizens, and deepens the gap between 'us' and 'them'. Such an exclusion, as will be illustrated, has a detrimental impact on the integration of migrants, whereas the inclusion of LTRs in the electorate would have a significantly positive impact on the integration of LTRs into the EU's society – beyond

merely the host State. Now I turn to analyse these positive and detrimental impacts on the integration of migrants, and in particular LTRs, into the host society.

First some consideration must be given to the function of electoral rights in the process of integration of LTRs in the host society.

5.2.1. How do electoral rights improve the depth and speed of integration of migrants into society?

The literature on the integration of migrants into the host society has highlighted the importance of political participation in the process of such integration.[73] Academics have generally viewed the right to vote as a key factor in the integration process. This view has also been strongly supported by the EU institutions. The Council recognises the correlation between the participation of migrants in the process of making policies which affect them, and their integration:

> The participation of immigrants in the democratic process and in the formulation of integration policies and measures, especially at the local level, supports their integration.[74]

Based on this principle adopted by the Council, the Commission adopted 'A Common Agenda for Integration Framework for the Integration of Third-Country Nationals in the European Union',[75] which encourages Member States to provide TCNs with the opportunity to participate in making the policy which affects them.

In addition, the Commission Directorate General Justice, Freedom and Security, after consultation with the NGOs active in the area of integration of migrants, produced a Handbook on Integration for policy-makers (2004 version) and practitioners which emphasised the extension of political rights (particularly the right to vote in local elections) to TCNs residing in the Member States.[76]

It can be said that academics, TCN rights activists, and the EU institutions, all agree on the positive impact that the extension of suffrage to non-EU citizens have on their integration. So

[73] For example, Schrauwen (n 25); Ziegler (n 1); Munro (n 4); Shaw (n 35).
[74] Common Basic Principles, Principle 9.
[75] A Common Agenda for Integration Framework for the Integration of Third-Country Nationals in the European Union, Brussels, 1.9.2005 COM (2005) 389 final.
[76] European Commission, Handbook on integration for policy-makers and practitioners, November 2004.

what has stopped this extension? The issue is probably the lack of competence of the EU. I will discuss this issue later in this chapter.

I have divided the function of electoral rights in the process of integration of LTRs into two categories: actual inclusion and emotional inclusion. The actual inclusion, *actually* increases the level of inclusion and involvement of LTRs in the Union political life. In addition to this actual inclusion, electoral rights have an emotional impact on LTRs, which do not actually increase the level of inclusion of LTRs in the society, but create in LTRs a sense of belonging to the EU's society.

5.2.1.1. Actual inclusion

One of the actual and tangible impacts of granting electoral rights to LTRs is engaging them in the democratic processes, such as regular elections. Voting is 'an important means of becoming incorporated and engaged in a polity, not merely the outcome of being assimilated'.[77] Having the opportunity to participate in elections is more likely to make LTRs interested in the pre-election debates, to pay more attention to the events around them, and to learn more about the society in which they live. Hayduk notes that in the US, non-citizens often show more interest and pay more attention to the events around them than many affected citizens. This observation is likely to be applicable to LTRs as well. Unlike EU citizens who might have no interest in the EU – the low turnout in the EP elections confirms this is the case for the majority of EU citizens – LTRs have chosen the EU as their home and, thus, they have an interest in it. Their rights are dependent on the EU and the developments in EU law. Thus, if LTRs are given a right to vote, one could argue that they are more likely to show an interest in learning about the EP elections and more generally about the EU democratic norms and practices.

For a contrary perspective, there are concerns that giving the vote to non-citizens would entail the enfranchisement of ill-informed, unaware, and uneducated voters.[78] It has also been argued that non-citizens may have difficulty in understanding pre-election debates or misunderstand the information given to them by the candidates and their parties before elections. However, the issue of misunderstanding the debates or information given to voters due to lack of language proficiency is unlikely to apply to LTRs. Although it is possible that

[77] R Hayduk, *Democracy for All: Restoring Immigrant Voting Rights in the United States* (Routledge 2006) 79–80.

[78] Munro (n 4) 73.

the mother tongue of LTRs is not the same as the language of the host State, it is unlikely this affects their ability to make an informed decision in elections. First, unlike most national elections, in the EP elections there are no pre-election debates as such. Parties and their candidates campaign along with national elections through local events or leaflets in plain language. Moreover, LTRs have lived in the EU for quite a long time, during which they are likely to have gained sufficient language skills to understand the speeches and simple leaflets. In addition, LTRs may be asked to prove their language proficiency *before* obtaining their long-term residence status. In the unlikely event that a TCN after living, working or studying for five to ten continuous years in a Member State, still has not gained basic language skills, (s)he may not become a LTR at all. Therefore, while these concerns might be valid and relevant to other non-citizen migrants, are unlikely to be relevant to LTRs.

In addition, all the concerns of enfranchising ill-informed, uneducated, and unaware voters apply to EU citizens too. It is not only LTRs who, if enfranchised, may not have acquired the skills and knowledge necessary to participate. Munro points that a person who is unwilling to acquire basic skills and knowledge about elections and the campaigns is also probably unwilling to participate in elections anyway and enfranchising them would, thus, not undermine the quality of public policy:

> enfranchising non-citizens will likely entail the enfranchisement of some ill-formed and uneducated potential voters. But like ill-informed, uneducated, and unaware citizens, these ill-prepared non-citizens will either acquire the skills and knowledge necessary to participate or, if they are unwilling to acquire basic skills and knowledge, they are probably less likely to participate at all and thus unlikely to undermine the quality of public policy.[79]

The other concern regarding the extension of voting rights to non-citizens is that by detaching the right to vote from citizenship, the legal status of citizenship is devalued. In other words, by taking the hallmark of voting rights from citizenship, what would be left of it?[80] However, as suggested by Raskin, the extension of suffrage to non-citizens, which is 'sometimes derided as a threat to the naturalization process', can become a pathway to citizenship.[81] The time that a TCN holds the status of long-term residence would not simply be a waiting time

[79] ibid.
[80] Song (n 13) 615.
[81] JB Raskin, 'Legal Aliens, Local Citizens: The Historical, Constitutional and Theoretical Meanings of Alien Suffrage' (1993) 141 University of Pennsylvania Law Review 1397, 1467.

before becoming an EU citizen and then the person starts to learn about the EU norms and practices. It would rather become a path to citizenship in which the person (probably a future EU citizen) learns about the EU's function, norms and practices.

5.2.1.2. Emotional inclusion

An essential part of the process of integration is creating the feeling of inclusion in the society in migrants. The integration of migrants may not be achieved without creating a sense of membership and belonging to the society. It is unlikely that the feeling of membership is developed in a migrant while his/her voice is not heard by others, his/her preferences are ignored, and he/she is treated like a second-class resident. Migrants are unlikely to feel 'one of us' while we dictate to them their rights and duties, without giving them any say.

The right to vote is a powerful symbol of inclusion and membership. It turns migrants from an 'alien' to 'one of us'; from a foreigner to a permanent member, whose voice is heard and whose vote makes a difference; from a second-class resident to equal member of the society. 'The community confirms an individual person's membership, as a free and equal citizen, by according him or her a role in collective decision-making'.[82] Furthermore, 'mere possession of the right to vote confers social standing and dignity'.[83] 'In a democracy, equal suffrage may be an indication of whether individuals are treated properly by institutions and by their peers'.[84] The right to vote would contribute to the development of the feeling in the migrant of being an equal member rather than a second- class resident.

In contrast, not being on the electoral list is a strong sign of being excluded from the society. Those who do not have a right to vote are identified as individuals who are 'not fully respected or not fully a member'.[85] The integration of such a person into the host society is very unlikely. Full democratic integration requires that 'potential citizens regard themselves not merely as participants in a democratic system but also full-fledged equal members of the political community'.[86]

Overall, holding the right to vote boosts, both actually and emotionally, the LTRs' inclusion in the society. A sufficient level of inclusion of LTRs in the society is necessary for their integration in it. The inclusion of LTRs would be partial and insufficient until they become

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[82] T Christiano, *Philosophy and Democracy: An Anthology* (Oxford University Press 2003) 118.
[83] J N Shklar, *American citizenship: the quest for inclusion* (Harvard University Press 1991).
[84] Ziegler (n 1) 71.
[85] Christiano (n 82) 118.
[86] Munro (n 4) 76.

members of the society through the franchise; as a result, the integration of migrants would also be partial and fragile. In other words, the integration of LTRs would not be achieved without inclusion, and their inclusion would not be completed without the right to vote.

Once it is illustrated how electoral rights could contribute to the integration of LTRs into society, the reasons why the EU should promote this integration must be considered.

5.2.2. Interim conclusion: why should the EU grant LTRs voting rights in order to promote LTRs' integration?

The first and most important reason for the EU to grant voting rights to LTRs in order to promote their integration into EU's society is *the achievement of the aims of its own policy*. Since the Tampere Programme, all immigration policies adopted by the EU focus on enhancing the integration of LTRs into the EU's society. Instead of targeting the smooth integration of LTRs by following the Tampere objectives which prescribe the integration of non-citizens through reducing the differences between citizens and non-citizens, the LTR Directive intends to force LTRs' integration into society through conditions and tests. The current version of the LTRs Directive is dominated by an air of compulsion and forced adaptation. This is capable to have a negative impact on the process of integration of LTRs. As mentioned earlier (in chapter 2), the integration of migrants cannot be *ordered*. It occurs as a result of the inclusion of migrants – both actually and emotionally – in the society. Considering the crucial role that the right to vote plays in the inclusion of LTRs in the society and thus their integration into society, the EU for the purpose of achieving its own policy would need to clear away the strong point of difference between LTRs and EU citizens.

The second reason for the EU to extend the right to vote of EU citizens to LTRs is the mandate that the EU immigration policies, the Tampere Programme in particular, has defined for the EU to approximate the rights of LTRs to those enjoyed by EU citizens, as near as possible. This should have been, and still should be, followed by the EU with regards to electoral rights. It was illustrated in section (I) that the right to vote is one of those political rights of EU citizens whose extension to LTRs faces no practical issue – unlike diplomatic protection, for example. Thus, this right is one of those rights of which its extension to LTRs is possible.

One might correctly argue that approximating the rights of LTRs to those of EU citizens' in the area of electoral rights is not plausible as there is no legal basis in the Treaties for electoral rights for TCNs. This is a clear and serious obstacle on the way of extending

electoral rights to LTRs. Amending the Treaties takes time and more than that, needs political willingness. However, first, it is not impossible, taking into account the convincing normative arguments which support the extension of the right to vote to LTRs, not only for the benefit of LTRs, but also for the benefit of the EU. Secondly, the extension of social and free movement rights for TCN residents also did not have a place in the Treaties. It took decades until, after several attempts, the legal basis for extending these rights was finally included in the Treaties. If that premier fundamental amendment could be made, a second amendment in this area is also possible.

Indeed, as mentioned earlier on page 106, EU soft law already exists for the extension of voting rights to non-citizen residents. In a common framework for the integration of TCN residents, the Commission recommends the participation of TCN residents in the democratic processes.

> The participation of immigrants in the democratic process and in the formulation of integration policies and measures, especially at the local level, supports their integration.[87]

The Commission then elaborates its recommendation:

> Allowing immigrants a voice in the formulation of policies that directly affect them may result in policy that better serves immigrants and enhances their sense of belonging. Wherever possible, immigrants should become involved in all facets of the democratic process. Ways of stimulating this participation and generating mutual understanding could be reached by structured dialogue between immigrant groups and governments. Wherever possible, immigrants could even be involved in elections, the right to vote and joining political parties. When unequal forms of membership and levels of engagement persist for longer than is either reasonable or necessary, divisions or differences can become deeply rooted. This requires urgent attention by all Member States.[88]

The recommendation, known as the Common Basic Principles on Integration, was supported by the Member States and reaffirmed by the Council. The support may be interpreted as the willingness of the Member States to accept that LTRs are members of the society and should

[87] European Commission, Common Agenda on Integration, COM (2005) 389, principle 9.
[88] ibid.

have a say in the formulation of policy which directly and significantly affects them (i.e. EU law). It might appear that there is a good chance that an attempt to extend voting rights of EU citizens to LTRs could eventually succeed, and this chance would even be boosted more by the changes in the EP powers since last time that an amendment was made to the Treaties regarding TCN residents (the Amsterdam Treaty). The EP which has new powers in the area of Justice and Home Affairs, has always supported granting electoral rights to TCN residents. Nevertheless, given the current political reality, and, in particular, in view of the rise of right-wing populist governments in a number of Member States, any development in the rights of LTRs might be postponed.

The third reason for the inclusion of LTRs in the EU electorate is the opportunity that the EU has to develop a connection with people who will probably be future EU citizens. Union citizenship through naturalisation in a Member State is available to LTRs. At some point in the future, many LTRs may become Member State nationals and consequently EU citizens. However, that time might be too late to develop a close connection between the Union and LTRs who would then be EU citizens. Such individuals, if already treated as second class residents under EU law whose will and preferences are ignored by the EU, would be unlikely to have any interest in establishing a connection with the EU after they become official members of the Union. The EU by establishing a connection with LTRs and treating them like its members, would be able to encourage LTRs to maintain their already established connection with the EU even after they become Member State nationals.

The main conclusion that can be drawn from this section is that the process of LTRs' integration without the voting rights would be partial and deficient. The EU has chosen a method of integration of which granting similar rights of citizens to non-citizens is core. In line with the Tampere Programme, the EU should approximate the rights of LTRs to those enjoyed by EU citizens in all areas. To some extent the social and economic rights of LTRs have been approximated to those enjoyed by EU citizens, but in terms of electoral rights no major step has been taken, especially at the European level.

5.3. Third angle: Equal participation

In this section, the reasons for the EU to extend the electoral rights of EU citizens to LTRs are considered from the angle of equal participation for all members. It will be argued that LTRs are now members of the EU society and it is in the interest of the EU to ensure that all

of its members are adequately represented. Therefore, the EU should provide an equal opportunity to participate in elections for LTRs, as members of the EU society.

It will also be argued that the roles assigned to LTRs in the LTR Directive must be in balance with the rights granted to them. LTRs are given a role in the economy of the Union, equal to what EU citizens have, but the political rights of the former are far from equal to those of the latter.

5.3.1. Are LTRs members of the EU society?

The legal status granted to LTRs assign some of the roles of EU citizens onto LTRs. For instance, the LTR Directive assigns LTRs a role which only EU citizens had: participating in and contributing to the internal market. This is a role which no other TCN has,[89] not even family members of EU citizens. In terms of rights attached to the status of LTRs, they enjoy some advantages which only EU citizens had – for instance, the right to equal treatment with nationals of the host State. The LTR Directive for the first time provided its beneficiaries (who are non-EU citizens) with the opportunity to directly derive free movement and equal treatment rights from EU law. Even TCN family members of EU citizens enjoy these rights only as a derivative right, because of their connection to EU citizens.

There is no doubt that EU citizens are members of the EU society. The legal status of LTRs imposes roles that only members have. A legal status which imposes roles on certain migrants that only members would otherwise have, is not a mere immigration status. It is a membership status. It is a clear indication that LTRs are not considered aliens any more. Rather, they are members of the society.

LTRs are not only *de facto* permanent members of the society, but also, after the Union directly granted them a permanent legal status with membership attributes, they have become *de jure* members of the society. Despite their membership status and role in the Union, LTRs are denied practical access to the benefits of membership. The approach of the EU to LTRs is similar to the UK's approach after the Second World War to Italians who were settled in the

[89] Unless their country of nationality has a special agreement with the Union (e.g. EEA nationals). Even posted workers under Directive 96/71/EC have not been imposed a *role* to participate in the internal market. In fact, their employers are provided with a *possibility* to send workers to other Member States. Also, producers/traders of goods are not assigned a role in the internal market. They have this opportunity simply because the Treaty has not excluded them from enjoying freedom of service.

UK and acquired the country's nationality. These Italian-British nationals were relied upon to provide services as soldiers but at the same time they were seen as enemies.[90]

5.3.2. Why the Union should provide LTRs with political participation opportunities

Political participation 'refers to the various ways in which individuals take part in the management of collective affairs of a given political community'.[91] Political participation provides people with a voice in forming the laws which will subsequently govern their lives.[92] It can be in the form of voting or running for elections, or public consultation and other and less conventional types of political activities such as protests, demonstrations, sit-ins, hunger strikes, boycotts, etc.[93]

Most of these means of political participation are available to LTRs. Even the public consultations held by the Commission are open to LTRs (and other TCNs). However, LTRs do not enjoy equal participation opportunities with other members of the society (i.e. EU citizens) with regards to voting rights. As Song acknowledges, without voting rights, individuals are vulnerable, even if political participation through other ways is possible for them.[94] It is because in the Union, which is built on representative democracy, those individuals who do not have representatives in the policy-making institutions such as the European Parliament, are left without a say in the process of Union's policy-making. Those who are in charge of representing members of a society (e.g. MEPs or members of national parliaments) would only feel concerned about representing the people who have elected them and would elect them again in the following elections.

It can be said that having representatives in the EP is more important for LTRs than EU citizens; as the latter, if they were not able to elect MEPs, at least have representatives in other institutions of the Union (e.g. the Council) elected through national elections; LTRs, in contrast, are generally excluded from national elections. Enjoying electoral rights is, therefore, key in effective representation of LTRs in the EU institutions. In addition, the right to vote affects other rights too.[95] The denial of the right to participate in the democratic

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[90] Shaw (n 35) 56.
[91] R Bauböck, *Migration and Citizenship: Legal Status, Rights and Political Participation* (Amsterdam University Press 2006) 84.
[92] J Rawls, *A Theory of Justice* (Harvard University Press 2009) 222–3.
[93] Bauböck (n 91) 84.
[94] Song (n 13) 614.
[95] JP Gardner (ed), 'Hallmark 3: Right to Vote', *Citizenship: The White Paper* (Institute for Citizenshp Studies 1997) 39.

process is likely to adversely affect the migrants' lives in social and economic terms.[96] 'People with no say in public elections are less equipped to protect their interests'. [97]

There are various reasons for the EU to balance the political opportunities between LTRs and EU citizens by granting LTRs the electoral rights enjoyed by EU citizens. First, LTRs as members of the society have a legitimate claim to equal membership and equal political participation opportunities. Once it is accepted that LTRs are members of the EU society, it becomes the EU's duty (or at least interest) as a democratic polity to provide all of its members – including LTRs – with an equal opportunity to participate in the society's political life.

Secondly, the EU has assigned LTRs duties and roles. The imposed roles must be proportionate to the granted rights. As Schrauwen has rightly observed, resident TCNs have a role to play in the Lisbon Strategy, and its successor 'Europe 2020', which set out to enhance the competitiveness of the Union. It is therefore justifiable to ask whether the economic participation role assigned to resident TCNs has consequences for their political participation rights. Putting it differently, LTRs are permitted to participate where there is a benefit for the EU, whereas, where there is a benefit for LTRs, they have been denied the possibility to participate.

This argument brings to mind the slogan of 'no taxation without representation'.[98] If it is translated into the context of the EU-LTRs relationship, it can be argued that while the EU is not a State, it has assigned LTRs economic roles which directly and indirectly contribute to the economy of the Union and its Member States. As a result of these, LTRs should be given presentation in the EU institutions.

Thirdly, LTRs' physical presence in the EU demands their compliance with the legal and political decisions of the EU. Their exclusion from formal participation in the law and policy-making processes violates a core principle of democratic legitimacy.[99] In other words, LTRs are ruled by EU citizens. This rule of citizens over non-citizens constitutes a form of 'tyranny' of the majority on the minorities,[100] which violates a 'principle of political justice' – namely, 'that the processes of self-determination through which a democratic state shapes

[96] William Cobbett, from *Advice to Young Men and Women, Advice to a Citizen* (1829), cited in Leslie J Macfarlane, *The Theory and Practice of Human Rights* (Maurice Temple Smith, 1985)142.
[97] Beckman (n 27) 153.
[98] James Otis used the slogan for arguing for the representation of the British Colonies in the Parliament.
[99] Munro (n 4) 66.
[100] Ziegler (n 1) 83.

its internal life, must be open, and equally open, to all those men and women who live within its territory, work in the local economy, and are subject to local law'.[101]

6. Concluding Remarks

This chapter started by comparing the political rights of EU citizens with those which LTRs enjoy. The main and important difference between the rights of these groups was found in relation to electoral rights. In the EU, like most polities, these rights are associated with citizenship status. Only those who have the polity's citizenship enjoy electoral rights.

However, it was illustrated that the extension of EU citizens' electoral rights to LTRs is in the interest of the EU. It was argued that the EU would benefit from the enfranchisement of LTRs in the EP elections. These benefits were examined from three angles.

The first angle was democracy. By reference to the leading democratic principles of affectedness, stakeholders, and coercion, it was illustrated that LTRs now form part of the EU demos and thus the EU's democratic legitimacy would increase if a larger portion of its population is enfranchised. It was also said that as long as twenty million of its demos are excluded from the basic democratic rights, the EU will not be a fully democratic polity.

The second angle adopted in this chapter was promoting the integration of LTRs into society. It was shown that electoral rights are essential for the achievement of the integration of LTRs; and the EU, if it intends to accomplish its own-defined mission set out in EU immigration policies since 1999, must enfranchise LTRs.

The third angle used in this chapter was the right to political participation for LTRs as members of the society. It was argued that imposing economic roles (discussed in chapter 3) on LTRs which are identical to the roles defined for members of the EU society (i.e. EU citizens) make LTRs members of the society. Moreover, the political rights available to LTRs must be in balance with the economic roles imposed on them. It was then concluded that the EU, as a democratic institution, must provide all of its members with an equal opportunity to participate in political processes.

It was not for the first time that arguments were made in favour of or against suffrage for TCN residents in the EU; however, this chapter focused exclusively on LTRs, not all TCN residents generally. Moreover, *all* political rights enjoyed by EU citizens (e.g. the right to

[101] M Walzer, *Spheres of Justice. A Defence of Pluralism and Equality* (Basic Books 1983) 60–63.

petition the EP; the right to receive diplomatic protection in a third country) are the subject of this chapter, rather than only electoral rights.[102] In addition, the point of view from which I looked at the LTRs' rights was predominantly that of the EU, and not that of the LTRs.

The arguments made in this chapter or elsewhere in favour of the extension of the franchise to LTRs at the European level – from enhancing the integration of LTRs to boosting the democratic legitimacy of the EU – deserve careful consideration. So, where have the problems arisen? Why have all the attempts by the Commission and the EP to enfranchise LTRs failed?

The main issue, without a doubt, is the lack of legal basis for granting electoral rights to non-citizens, which is unlikely to be solved in the foreseeable future, considering there is no sign of political will to make any change in the Treaties in this regard. Thus, in the next chapter, I will consider other options which are more plausible. For instance, a change in the method of determination of membership for the Union's society and deriving rights from EU law. The Union has adopted a nation-state membership. Like a national government, the EU has linked its membership to (Member State) nationality; those who lack the nationality of a Member State, cannot be a member of the EU society

A nationality-based membership criterion, however, does not seem to be appropriate for the EU as a supranational organisation. A supranational organisation requires a supranational membership model too.[103] Moreover, with the current criterion in place, many of those who are actually members of the EU society and have a genuine link with the EU, are deprived of the advantages of EU membership. LTRs are among these individuals. As held by the ECJ, a genuine link between individuals and the polities is established by, inter alia, long residence, and not citizenship per se.[104] LTRs who have resided in a Member State for at least five years, and thus, have established a genuine link with the EU, are still treated as aliens. Whereas individuals who happen to have the nationality of a Member State, for instance through their parents, but have never set foot on the Union's land, or have lived all or most of their lives out of the EU, are all considered to be members of the Union and close enough to the EU to choose MEPs and the way law affects the EU's actual members – including LTRs.

[102] For example, Schrauwen (n 25) 1.
[103] This will be discussed further in chapter 5.
[104] *Bidar* (n 63).

One might characterise the EU as a club, which has a membership criterion, and that criterion is holding the nationality of a Member State. However, it is not possible for a liberal and democratic organisation to ignore its permanent residents. The exclusion of LTRs from the membership of the EU, as an organisation with liberal and democratic values, counts as a 'political tyranny', using the words of Walzer.[105] The exclusion of LTRs from access to full membership rights, and electoral rights as a result, subjects a part of the population to legislation without representation.

One may wonder whether EU Member States would give up their control over who holds EU citizenship. Member States may have reasonable concerns – in particular, security concerns – over who enters the free circulation of people in the EU. However, these concerns do not apply to LTRs. They are already part of the free circulation. Moreover, Member States are still the gatekeepers of the status of long-term residence, and the hegemonic role of the Member States in controlling who enjoys EU citizenship rights will not change. To obtain long-term residence status, a TCN *has to* be approved by a Member State, and may have to pass economic, security, and social checks.

It may also be argued that granting electoral rights as a privilege of citizens to non-citizens would devalue the status of citizenship.[106] We saw similar claims were made against the extension of the right to equality with the host State national, to resident aliens.[107] The claims that were made on the basis that the right is attached to the status of EU citizenship and the extension of that right would diminish the worth of citizenship, we now know to be wrong and the extension of the right to TCNs has not had any known impact on the value of that right. If the extension of such an important right could occur without devaluing EU citizenship, electoral rights could also be extended without any impact on the value of the status.

Overall, enfranchising LTRs is supported by leading democratic principles, integration policies, and legitimate claims to equality. The enfranchisement of LTRs is not only a claim by LTRs but is also a duty for the EU owed to LTRs. The EU should also extend the franchise to LTRs in the EP elections, in order to take a step towards its democratisation

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[105] M Walzer, *Spheres of Justice. A Defence of Pluralism and Equality* (Basic Books 1983) 60–63, 29.
[106] See for example, US Senator Dianne Feinstein: 'Allowing noncitizens to vote . . . clearly dilutes the promise of citizenship' quoted in Hayduk (n 73) 126.
[107] P H Schuck, Citizens, strangers, and in-betweens: essays on immigration and citizenship (Westview Press 1998). See also, Hayduk (n 73) 126. For counterarguments, see Song (n 13) 615.

(section I), towards the achievement of the aims of its own immigration policy (section II), and towards equal treatment of all members of its society (section III).

Chapter 5 - Long-term residence, a status 'as near as possible' to EU citizenship?

1. Introduction

In chapters 3 and 4 the rights of long-term residents (LTRs) were compared with the rights that EU citizens enjoy under EU law, in order to examine the extent to which the 2003 Long-term Residents Directive (LTR Directive)[1] is capable of achieving two of the objectives of the Tampere conclusions:[2] a) 'A more vigorous integration policy should aim at granting them rights and obligations comparable to those of EU citizens';[3] b) '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 person, as well as the principle of non-discrimination vis à vis the citizens of the State of residence'.[4]

It was illustrated in chapter 2 that third-country nationals (TCNs) may be subject to discretionary integration conditions which may vary from a Member State to Member State. *After* these conditions are met and the status of long-term residence is granted, the LTR Directive has secured the rights of residence and equal treatment with the host State nationals for LTRs in the first Member State.[5] In chapter 3 it was demonstrated that the same rights of residence and equal treatment as those enjoyed by EU citizens were also secured to some extent in the second State for LTRs (although these rights are still *different in nature* to those enjoyed by EU citizens).[6] Again, these rights are subject to conditions which vary from Member State to Member State, and LTRs enjoy these rights only *after* the status of long-term residence is (re)granted by the second State. Therefore, although the Directive to certain extent is capable of providing LTRs with the rights that Union citizens enjoy as regards residence and equal treatment, what the Directive bestows on LTRs is far from 'comparable'

[1] Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents. OJ L 16, 23 January 2004.
[2] Tampere European Council, 15-16 October 1999, Presidency Conclusions, SN 200/99, Brussels.
[3] Tampere Programme, Objective 18.
[4] ibid, Objective 21.
[5] First Member State means the State which grants the status of long-term residence for the first time.
[6] Second Member State refers to the State to which an LTR moves, after acquiring the status in the first Member State.

to what is enjoyed by EU citizens. The position is even worse with regards to political rights which fall entirely outside the scope of the LTR Directive, and thus the latter is not capable of approximating the political rights of LTRs to those of EU citizens.

Using the above conclusions as my point of departure, this chapter aims to examine another objective of the Tampere conclusions: 'the legal status of third country nationals should be approximated to that of Member States' nationals'.[7] The questions which this chapter intends to answer are, first, considering the rights bestowed on LTRs by the LTR Directive, is the Directive capable of 'approximating' the *status* of long-term residence to that of EU citizenship? Secondly, why is it in the EU's interest to approximate these statuses, or at least to extend the rights of EU citizens to LTRs? In previous chapter, the reasons for which the Union should extend the rights of LTRs to what EU citizens enjoy were analysed. This chapter goes beyond just rights. It examines the Union's interest in approximating the *status* of LTRs to that of EU citizens – and not just their rights. At the end of the chapter, possible ways to approximate these statuses will be discussed. It will be argued that the best *possible* way for the Union to treat its permanent residents is what was agreed in the Tampere Programme, namely, a legal status and rights for LTRs 'as near as possible' to those of EU citizens.

It will be argued that because TCN permanent residents have the EU status of long-term resident, treating them differently from EU citizens is no longer justified. It will also be argued that having no competence with regards to the integration of migrants is not an issue for the EU. The Union did not have such a competence with regards to the integration of mobile EU citizens and, yet, the Union has taken action to promote the integration of EU citizens in the host State; in fact, the lack of competence with regards to the integration of mobile EU citizens into the receiving society was never a concern for the Union, due to the reasons which will be discussed later.

2. EU citizenship status

In this section I will briefly explain what actually EU citizenship is, particularly, how it is different from – and more than – just a series of rights. As Article 21 TFEU states, 'Every person holding the nationality of a Member State shall be a citizen of the Union'. Holding the nationality of a Member State is the sole criterion for being a citizen of the EU. As granting

[7] Tampere Programme, Objective 21.

nationality of a Member State is in the sole control of Member States,[8] EU Member States not only have the carte blanche in granting nationality, but also they are the gatekeepers to citizenship of the Union. The ECJ has also recognised that unlike the personal scope of other terms in the Treaties, such as 'worker', which were defined by the Court itself, the personal scope of Union citizenship is entirely determined by the Member States.[9]

Citizenship of the Union has an exceptional character. It is neither the nationality of a state, nor is it the dual nationality of a federal system. EU citizenship is a unique status under international law. It is unique because differential treatment on the grounds of nationality is generally a core feature of international law,[10] while the prohibition of discrimination on the grounds of nationality is one of the crucial components of EU citizenship. It is also interesting that a status which derives from nationality, eliminates distinction based on nationality. Article 18 TFEU protects Union citizens against any discrimination on the grounds of nationality:

> Within the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited.[11]

The core rights associated with the status of EU citizenship (as discussed in chapters 3 and 4) are the rights to free movement and residence in any Member States, the right to vote and to stand as candidates in elections to the European Parliament and in municipal elections in their Member State of residence, under the same conditions as nationals of that State; the right to enjoy diplomatic protection of any Member States in the countries where the citizen is not represented by their country of nationality; the right to petition the EP, to apply to the European Ombudsman, and to address the institutions and advisory bodies of the Union in any of the Treaty languages and to obtain a reply in the same language.[12] These rights are complemented by the right to equal treatment with the host State nationals.

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[8] 'The Edinburgh Decision' OJ 1992 C 348; see D Kochenov, 'Annotation of Rottmann' (2010) 47 Common Market Law Review 1831.

[9] See for example, Case C-145/04 *Spain v UK* [2006] ECR I-7917, where the Court held that the determination of the beneficiaries of the Union citizenship rights to vote and to stand as a candidate for European Parliament elections falls within the competence of the Member State, which must be exercised in compliance with Union law; see also C-369/90, *M.V. Micheletti and others v Delegacion del Gobierno en Cantabria* [1992] ECR I-4239, p10.

[10] P Mindus, *European Citizenship after Brexit* (Palgrave Macmillan 2017) 12.

[11] TFEU, Article 18.

[12] Added to the TFEU by the Amsterdam Treaty, Article 24.

Most of these rights resemble a series of rights which existed even before the introduction of EU citizenship. Member State nationals could enjoy free movement and residence rights in other Member States even before the Maastricht Treaty came to effect by relying on the Residence Directives.[13] They were also, already, enjoying the right to non-discrimination on the grounds of nationality. The EU citizenship status itself, however, has had an impact on the rights that existed in the pre-Maastricht regime. By analysing the cases decided by the Court after the Maastricht Treaty came into force, we can see that the status of EU citizenship is not just a series of consolidated rights which existed even before EU citizenship;[14] the status itself, provides the holder with an additional layer of protection against discrimination, especially against discrimination based on nationality.[15] The Advocate General Opinion in the *Boukhalfa* case supports this:

> The concept [of EU citizenship] embraces aspects which have already largely been established in the development of Community law and in this respect it represents a consolidation of existing Community law. However, it is for the Court to ensure that its full scope is attained. If all the conclusions inherent in that concept are drawn, every citizen of the Union must, whatever his nationality, enjoy exactly the same rights and be subject to the same obligations.[16]

The analysis of cases shows that the Court does generally agree with this opinion. As we will see below, there are a number of cases in which a Member State national was not eligible for a right (e.g. under the free movement provisions), but the Court held the person should be granted that benefit because of their EU citizenship status, which entitles the holder to the same rights as the host State nationals. The Court has shown that 'in the eyes of the Court, Member State nationals would be, above all, Union citizens and any other status they might have (e.g. worker or service-provider) should be coloured by the fact that they are Union citizens'.[17] The Court, as the below examples will demonstrate, has clearly expanded the

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[13] Directive 90/364 on the right of residence [1990] OJ L180/26; Directive 90/365 on the right of residence for employees and self-employed persons who have ceased their occupational activity [1990] OJ L180/28; Directive 93/96 on the right of residence for students [1993] OJ L317/59.

[14] Tryfonidou, *The Impact of Union Citizenship on the EU's Market Freedoms*; for a different view see: D O'Keeffe, 'Union Citizenship' in D O'Keeffe and P Twomey (eds), *Legal Issues of the Maastricht Treaty* (Chancery/Wiley 1994).

[15] For a detailed analysis of the Court's approach to cases where the rights of an EU citizen are at issue, see Tryfonidou (n 14).

[16] Opinion of the Advocate General Léger in Case C-214/94 *Boukhalfa* [1996] ECR I-2253, para 63.

[17] Tryfonidou (14) 30.

personal and material scope of the Treaty provisions just to ensure that the EU citizen would enjoy the right they claimed.

Martínez Sala,[18] is a good example that shows that EU citizenship and the rights attached to it are not simply what Member State nationals were enjoying before the changes made by the Treaty on the European Union. The claimant was a Spanish national who was lawfully resident in Germany (under German law). Her application for a child-raising allowance was refused because she was economically inactive and, thus, could not rely on Regulation 1612/68, which governed the position of migrant workers.[19] The Court held that a Union citizen who is lawfully residing in the host State, may enjoy the prohibition of discrimination on the grounds of nationality in all situations that fall within the material scope of EU law and must be treated exactly the same as German nationals.[20] The case demonstrates that EU citizens enjoy this right even where the discrimination against the claimant would not affect the effectiveness of the Treaty's economic aims. In the case the Court showed that the right to equal treatment with the host State nationals is not merely an instrument for the achievement of the Treaty's aims.[21] The Court elevated the status of EU citizenship to the fundamental status of Member State nationals, meaning that the status holder enjoys the benefits of the status, regardless of their economic status, and regardless of the effect exercising those benefits have on the Treaty economic aims.[22]

In subsequent judgments, the Court made it clear that the prohibition of discrimination against EU citizens is no longer limited to the situations which fall within the material scope of EU law, as it had originally stated in *Martinez Sala*. *Garcia Avello*[23] is an example where the Court ruled that Member State nationals who are lawfully resident in the territory of another Member State must be treated equally with the host State nationals even with regards to matters the regulation of which falls within the Member States competence. The case was about registering the surname of two children born in Belgium to a Spanish couple. The Belgian authorities refused to register their surname in accordance with Spanish practice (two separate words as surname), on the basis that in the registration documents of persons bearing

[18] Case C-85/96 *Martínez Sala* [1998] ECR I-269.
[19] Regulation 1612/68 on freedom of movement for workers within the Community [1968] OJL257/2. It now has been repealed and replaced by Regulation 492/2011 on freedom of movement for workers within the Union [2011] OJL141/1.
[20] Article 6 TEC (now Article 18 TFEU).
[21] Tryfonidou (n 14) 32.
[22] ibid, 31.
[23] Case C-148/02 *Garcia Avello* [2003] ECR I-11613.

Belgian-Spanish nationality, Belgian practice must be followed. The Court held that the children as nationals of a Member State (Spain) lawfully residing in another Member State (Belgium) could invoke Article 12 EC (now 18 TFEU) and thus were protected against discrimination on the grounds of nationality. The Court ruled that although the rules governing a person's surname are within the Member States competence, the host State must still comply with EU law when exercising that competence. In this case, the matter was in the competence of the host State, and not covered by EU law, nevertheless, the Court, once more, extended the scope of EU law in order to guarantee the EU citizen would not be discriminated against. In other words, 'no areas of Member State competence can now remain insulated from the effects of EU law, as any Union citizen who has exercised one of the rights stemming from the personal market freedoms can now rely on EU law in order to challenge the choices of a Member State in any area'.[24]

Rottmann is another example of the Court's intervention with regards to a matter which falls within the exclusive competence of the Member States. The grant or revocation of nationality falls within the complete (almost, after *Rottmann*) control of the Member State.[25] The claimant was an Austrian doctor who moved to Germany and acquired German nationality, for which he had to give up his Austrian nationality as required by German law. He acquired German nationality, for which he had to give up his Austrian nationality as required by German law. He, however, in his application for citizenship, did not reveal the criminal proceedings pending against him in Austria to investigate accusations of fraud in the exercise of his profession. After the German authorities became aware of the criminal proceedings against him in Austria, his German nationality was revoked due to deception in the process of naturalisation. This left Dr Rottmann stateless. The main issue from the point of view of EU law was that in addition to Member State nationality, Dr Rottmann would also lose his EU citizenship, as he would no longer hold any Member State nationality. In its judgment, the Court first referred to the Declaration No 2 on nationality of a Member State, annexed by the Member States to the final act of the Treaty on European Union:

> The Conference declares that, wherever in the Treaty establishing the European Community reference is made to nationals of the Member States, the question

[24] Tryfonidou, (n 14) 34.
[25] D Kochenov, 'Annotation of Rottmann' (2010) 47 Common Market Law Review 1831; Tryfonidou, 'The Impact of EU Law on Nationality Laws and Migration Control in the EU's Member States' (2011) 25 Journal of Immigration, Asylum and Nationality Law 358.

> whether an individual possesses the nationality of a Member State shall be settled solely by reference to the national law of the Member State concerned.…[26]

The Court also observed the conclusions of the European Council at Edinburgh on 11 and 12 December 1992, concerning certain problems on the Treaty of European Union:

> The provisions of Part Two of the Treaty establishing the European Community relating to citizenship of the Union give nationals of the Member States additional rights and protection as specified in that Part. They do not in any way take the place of national citizenship. The question whether an individual possesses the nationality of a Member State will be settled solely by reference to the national law of the Member State concerned.[27]

The Court then mentioned the national law related to the withdrawal of nationality in case of statelessness, which made it possible to do so if the nationality was acquired by fraud. The Court also mentioned international law, such as the Universal Declaration of Human Rights,[28] the Convention on the Reduction of Statelessness,[29] the European Convention on Nationality[30] but what is relevant to our discussion here is 'whether it is contrary to European Union law, in particular to Article 17 EC (now Article 20 TFEU), for a Member State to withdraw from a citizen of the Union the nationality of that State acquired by naturalisation and obtained by deception inasmuch as that withdrawal deprives the person concerned of the status of citizen of the Union and of the benefit of the rights attaching thereto by rendering him stateless, acquisition of that nationality having caused that person to lose the nationality of his Member State of origin'.[31] The Court held that although grant or withdrawal of nationality is a matter that falls to be regulated by Member States, Germany must have due regard to EU law and ensure that a) the withdrawal decision is proportionate, and b) the decisions can be justified to protect the public interest.

The *Rottmann* case illustrates that the Court not only intervenes in matters falling within the competence of the Member States – *Garcia Avello* – but also showed that, in order to protect the rights of an EU citizen, the Court does not hesitate to make a ruling in a case related to a highly sensitive area of Member States' sovereignty (for which the Member States adopted

[26] OJ 1992 C 191, p. 98.
[27] 'The Edinburgh Decision' OJ 1992 C 348, p. 1.
[28] C-135/08 *Janko Rottmann v. Freistaat Bayern* [2010] ECR I-1449, para 53.
[29] *Rottmann*, para 15.
[30] *Rottmann*, para 18.
[31] Paragraph 36.

different decisions and declarations to ensure their sovereignty in this area would not be affected by the status of EU citizenship).[32] The Court has demonstrated its 'ability to guarantee the rights of EU citizens in the supranational capacity by automatically acquiring jurisdiction where such rights are infringed – an innovation introduced in *Ruiz Zambrano* – as well as the necessity for EU law to be taken into account in the determination of the possession of the legal status itself and jurisdiction to have a final say on this matter – acquired in *Rottmann*'.[33]

The Court has also interpreted EU law provisions in a way that EU citizens enjoy the rights granted by those provisions, even if they did not actually fall within the personal scope of those provisions. For this purpose, the Court read the relevant provisions in conjunction with the citizenship provisions of the Treaty. For instance, in *Grzelczyk*,[34] the Court found that Directive 93/96[35] does not establish any right to payment of maintenance grants by the host State for students holding the nationality of other Member States.[36] Mr Grzelczyk was a French national studying at university in Belgium. He successfully completed three years of his studies, nevertheless, in his fourth and final year he applied for the minimex, which was a minimum subsistence allowance. The application was refused, and the Court found that the fact that Mr Grzelczyk was not of Belgian nationality was the only bar to the maintenance being granted to him. The Court then held that because Belgian national could qualify for the minimex, the refusal of minimex to Mr Grzelczyk would amount to nationality discrimination, which is prohibited by Article 18 TFEU (then Article 12 EC).

The Court's decision in favour of Mr Grzelczyk was clearly influenced by the status of EU citizenship. In a similar case, *Brown*,[37] before the introduction of EU citizenship, the Court decided that when a Member State national does not satisfy the conditions of EU law provisions (in that case, Regulation 1612/68), and thus the person does not fall within the scope of the provisions, the former is not eligible for enjoying the rights granted by those provisions, and the host State is able to refuse those rights.[38] In *Grzelczyk* however, that was

[32] For a detailed comment on the *Rottmann* case, see: D Kochenov, 'Annotation of Rottmann' (2010) 47 Common Market Law Review 1831.
[33] S Carrera, 'The Nexus between Immigration, Integration and Citizenship in the EU' (2006) 507.
[34] Case C-184/99 *Grzelczyk* [2001] ECR I-6193.
[35] Directive 93/96/EC on the right of residence for students [1993] OJ L317/59.
[36] *Grzelczyk*, para 39.
[37] Case 197/86 Brown [1988] ECR 3205.
[38] Case 197/86 *Brown* [1988] ECR 3205.

decided after the introduction of EU citizenship, the Court departed from its position in *Brown*, and held that:

> since *Brown*, the Treaty on European Union has introduced citizenship of the European Union into the EC Treaty and added to Title VIII of part Three a new chapter 3 devoted to education and vocational training. There is nothing in the amended text of the Treaty to suggest that students who are citizens of the Union, when they move to another Member State to study there, lose the rights which the Treaty confers on citizens of the Union.

Nevertheless, the Court noted that EU citizens are still required to satisfy the conditions of their right of residence, namely to be financially self-sufficient and to have comprehensive medical insurance, and the host State may withdraw the right of residence of a student who poses an unreasonable burden on the social assistance system of the host State.

The analysis of the above cases shows that in EU citizenship cases, the applicant (EU citizen) is at the centre of the case, and the Court is devoted to ensuring that EU citizens enjoy all the rights and freedoms provided and protected by EU law.[39] The Court has relaxed the connection between the rights of EU citizens with the contribution these rights make to the objectives of the Treaties. It is not (only) the effectiveness of the Treaty, and the contribution granting the right to the subject EU citizen would make to the objectives of the Treaty, or a Regulation or a Directive, that is important, but it is important for the Court that EU citizen is treated equally with the host State nationals, just because the former is a citizen of the Union.

The Court has demonstrated its 'ability to guarantee the rights of EU citizens in the supranational capacity by automatically acquiring jurisdiction where such rights are infringed. The Court has shown that it does not hesitate to intervene in matters falling within the competence of the Member States. Its preference for a rights-based approach to interpreting EU citizenship provisions and especially free movement of persons has often conflicted with 'national governments' preference for the status quo, unilateral citizenship and migration control and a power-driven approach'. The judgments of the Court have often overcome the States' preference and caused significant changes in national legislation – for

[39] S Morano-Foadi and S Andreadakis, 'The Convergence of the European Legal System in the Treatment of Third Country Nationals in Europe: The ECJ and ECtHR Jurisprudence' (2011) 22 European Journal of International Law 1071, 1087.

instance changes made after *Rottmann*, to national legislation on the loss of citizenship because of fraud.[40]

3. EU long-term residence status

The status of EU citizenship brings all its holders under one umbrella and protects them against discrimination on the grounds of nationality. The status is inclusionary for Member State nationals. At the same time, it is exclusionary for the rest of the EU population who are not nationals of a Member State, e.g. TCN permanent residents. The exclusionary nature of EU citizenship has generally been criticised.[41] Similar to all citizenships,[42] EU citizenship defines who is an insider and who is an outsider.[43] 'The very notion of membership in society on grounds of the formal attribute of citizenship means that one includes all individuals, who have citizenship and benefit from rights connected to it, while all those who do not have respective citizenship are excluded and cannot benefit from the special bundle of membership rights'.[44] It is thus a factor of 'otherness'. This seems to have a negative impact on the integration of TCN permanent residents into the EU's society. The Tampere Programme was intended to remedy, or at least minimise, the negative impact that excluding TCN permanent residents from the status of EU citizenship had on the TCNs' integration, by granting them a status 'as near as possible' to those of EU citizens. Whether the LTR Directive is capable of approximating the status of TCN permanent residents to that of EU citizens, is the question this section intends to answer.

TCNs, as discussed above, are excluded from the scope of Article 18 TFEU, and thus are not protected against discrimination on the grounds of nationality. Article 11 of the LTR Directive, however, provides LTRs with the right to equal treatment with the nationals of the host Member State.

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[40] D Kostakopoulou, 'The European Court of Justice, Member State Autonomy and European Union Citizenship' in B de Wittes and HW Micklitz (eds), *The European Court of Justice and the Autonomy of the Member States* (Intersentia 2012) 31.

[41] T Dietrich and R Miles, *Migration and European Integration: The Dynamics of Inclusion and Exclusion* (Fairleigh Dickinson University Press 1995); M Martiniello, 'European Citizenship, European Identity and Migrants:Towards the Postnational State?' in R Miles and D Thranhardt (eds), *Migration and European Integration: The Politics of Inclusion and Exclusion in Europe* (Pinter 1995); T Kostakopoulou, 'European Citizenship and Immigration after Amsterdam: Openings, Silences, Paradoxes' (1998) 24 Journal of Ethnic and Migration Studies 639.

[42] JH. Weiler, 'Thou Shalt Not Oppress a Stranger: On the Judicial Protection of the Human Rights of Non-EC Nationals - A Critique' (1992) 3 European Journal of International Law 65, 68.

[43] M Becker, 'Managing Diversity in the European Union: Inclusive European Citizenship and Third-Country Nationals', (2004) 7 *Yale Human Rights & Development Law Journal*, pp. 132-183, 141; Weiler (n 42) 68.

[44] M Jesse, T*he Civic Citizens of Europe: The Legal Potential for Immigrant Integration in the EU, Belgium, Germany, and the United Kingdom* (Brill 2017) 24, 38.

> Long-term residents shall enjoy equal treatment with nationals as regards:
>
> (a) access to employment and self-employed activity, provided such activities do not entail even occasional involvement in the exercise of public authority, and conditions of employment and working conditions, including conditions regarding dismissal and remuneration;
>
> (b) education and vocational training, including study grants in accordance with national law;
>
> (c) recognition of professional diplomas, certificates and other qualifications, in accordance with the relevant national procedures;
>
> (d) social security, social assistance and social protection as defined by national law;
>
> (e) tax benefits;
>
> (f) access to goods and services and the supply of goods and services made available to the public and to procedures for obtaining housing;
>
> (g) freedom of association and affiliation and membership of an organisation representing workers or employers or of any organisation whose members are engaged in a specific occupation, including the benefits conferred by such organisations, without prejudice to the national provisions on public policy and public security;
>
> (h) free access to the entire territory of the Member State concerned, within the limits provided for by the national legislation for reasons of security.[45]

Three observations can be made about Article 11 of the LTR Directive. First, the right to equal treatment for LTRs is not as general as what Article 18 TFEU provides for EU citizens. The latter provides EU citizens with the protection against discrimination in all matters within the scope of application of the Treaties, while the material scope of Article 11 of the Directive is limited to the specific issues listed in the Article. The second observation to be made is that Article 11 LTR Directive makes multiple references to national laws. A third interesting point is that the right to equal treatment is limited to the Member State which granted the long-term residence status to the TCN. This means that, in case an LTR moves to

[45] LTR Directive, Article 11.

a second Member State, until that State approves the LTR's application for the status of EU LTR – which he/she has already been granted by another EU Member State – the LTR would not be protected against discrimination on the grounds of nationality (even on the limited areas listed above).

The text of provisions governing the rights of EU citizens are also limited but the Court has extensively expanded EU citizens' rights by adopting a right-based approach in interpreting the provisions. Since the adoption of the LTR Directive, the Court has handed down at least three important judgments (*Kamberaj*,[46] *Commission v. Netherlands*,[47] *Mangat Singh*,[48]) in which, in the words of Peers,[49] the Court laid the foundations for the [interpretation of] the Directive. By analysing these cases we can see whether/how the Court approached the position of LTRs differently from that of EU citizens, as seen in the cases discussed in section 2.

In the *Kamberaj* case, Mr Kamberaj, an Albanian citizen residing in Italy since 1994, holding permanent residence permit, had received housing benefit between 1998 and 2008. However, in 2009 his application for the same benefit was refused because the funds available to TCNs had been exhausted. The funds for EU citizens and Italians were still available. He challenged the distinction between TCNs and EU citizens, which, he argued, is prohibited under the LTR Directive, as well as the Race Equality Directive.[50] The national court requested a preliminary reference.

The Court began its judgment by recalling the integration objective of the LTR Directive. The Court ruled that since nationality is excluded from the grounds on which one could claim discrimination under the Race Equality Directive,[51] Mr Kamberaj could not rely on the provisions of this Directive.[52] Thirdly, the Court ruled inadmissible a question relating to the requirement that TCNs must have worked for three years to be eligible for housing benefit.[53]

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[46] Case C-571/10, *Servet Kamberaj v Istituto per l'Edilizia sociale della Provincia autonoma di Bolzano (IPES) and Others*, 2012 E.C.R. I-233.
[47] Case C-508/10, *Commission v Netherlands*, EU:C:2012:243.
[48] Case C-502/10, *Staatssecretaris van Justitie* v *Mangat Singh*, [2012] OJ C 379/4.
[49] S Peers, 'The Court of Justice Lays the Foundations for the Long-Term Residents Directive: Kamberaj, Commission v. Netherlands, Mangat Singh Case C-571/10, Servet Kamberaj v. Istituto per l'Edilizia Sociale Della Provincia Autonoma Di Bol' (2013) 50 Common Market Law Review 529, 1.
[50] Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJL 180.
[51] For more on the Race Equality Directive see S Morano-Foadi, 'Third Country Nationals Versus EU Citizens: Discrimination Based on Nationality and the Equality Directives' [2010] Social Science Research Network 1.
[52] *Kamberaj*, paras. 47–50.
[53] ibid., paras 51–54.

Mr Kamberaj had worked for three years prior to claiming the benefit. Finally, the Court declared inadmissible two questions as to whether requiring EU citizens to live or work in the relevant province for five years, and to declare themselves belonging a linguistic minority. The questions were inadmissible as they were relevant to EU citizens only.

The Court then addressed the question related to Article 11 of the LTR Directive which provides LTRs with the right to equal treatment with nationals of the Member State where they reside as regards certain entitlements.[54] In that regard, the Court repeated its ruling in *Ekro*,[55] and held that when an express reference to national law is made in EU law, such as in Article 11(1)(d) of the LTR Directive, 'it is not for the Court to give the terms concerned an autonomous and uniform definition under European Union law'.[56] The meaning and exact scope of such concepts are defined by national law. The Court however, held that in the absence of such an autonomous and uniform definition under EU law of a concept (e.g. social security, social assistance and social protection) in a provision – in this case, Article 11(1)(d) of the LTR Directive – the concept must not be defined by a national law provision in a way that the effectiveness of the LTR Directive is undermined.[57] The judgment means that where there are references in the Directive to national legislation, it is the relevant national law that governs the situation, and the national legislation can be saved as long as they do not undermine the effectiveness of the aims of the Directive.

The second of the three cases mentioned above, *Commission v Netherlands*, was about the charges for residence permits of LTRs who move to the Netherlands from another Member

[54] (a) access to employment and self-employed activity, provided such activities do not entail even occasional involvement in the exercise of public authority, and conditions of employment and working conditions, including conditions regarding dismissal and remuneration; (b) education and vocational training, including study grants in accordance with national law; (c) recognition of professional diplomas, certificates and other qualifications, in accordance with the relevant national procedures; (d) social security, social assistance and social protection as defined by national law; (f) access to goods and services and the supply of goods and services made available to the public and to procedures for obtaining housing; (g) freedom of association and affiliation and membership of an organisation representing workers or employers or of any organisation whose members are engaged in a specific occupation, including the benefits conferred by such organisations, without prejudice to the national provisions on public policy and public security; (h) free access to the entire territory of the Member State concerned, within the limits provided for by the national legislation for reasons of security.

[55] Case 327/82 *Ekro* [1984] ECR 107, para. 14.

[56] *Kamberaj* para. 77.

[57] For different views on the three judgments of *Kamberaj, Commission v Netherlands*, and *Singh*, see: Peers, The Court of Justice Lays the Foundations for the Long-Term Residents Directive: Kamberaj, Commission v. Netherlands, Mangat Singh Case C-571/10, Servet Kamberaj v. Istituto per l'Edilizia Sociale Della Provincia Autonoma Di Bol' (2013) 50 Common Market Law Review 529, 1; D Acosta, 'Civic Citizenship Reintroduced? The Long-Term Residence Directive as a Post-National Form of Membership' (2015) 21 European Law Journal 200.

State. The Commission considered the charges excessive and disproportionate and took an action on the basis of recital 10 of the preamble to the LTR Directive:

> A set of rules governing the procedures for the examination of application for long-term resident status should be laid down. Those procedures should be effective and manageable, taking account of the normal workload of the Member States' administrations, as well as being transparent and fair, in order to offer appropriate legal certainty to those concerned. They should not constitute a means of hindering the exercise of the right of residence.[58]

The Dutch authorities argued that since the LTR Directive does not set the amount of application fees, competence in that respect lies with the Member States.[59] The Court firstly pointed out that recital 10 in the preamble, which was the basis of the action by the Commission:

> A set of rules governing the procedures for the examination of application for long-term resident status should be laid down. Those procedures should be effective and manageable, taking account of the normal workload of the Member States' administrations, as well as being transparent and fair, in order to offer appropriate legal certainty to those concerned. They should not constitute a means of hindering the exercise of the right of residence.

The Court held that the recital to the Directive had no binding legal force and did not establish independent obligations for the Member States.[60] It then noted the margin of appreciation the Member States have in fixing fees for issuing residence permits pursuant to the LTR Directive.[61] The Court, however, held that this discretion is not unlimited. Imposing fees may not be so high that the achievement of the objectives pursued by the Directive are undermined, and, therefore, deprive the Directive of its effectiveness. The Court noted that the principal purpose of the Directive is the integration of TCN residents in the EU.[62] The other objective of the Directive, the Court noted, is to contribute to the effective attainment of the internal market by enabling LTRs to move to a second Member State.[63] The Court, thus, ruled that, having regard to the objectives pursued by the LTR Directive, LTRs who move to

[58] Recital 10 of the preamble to the LTR Directive.
[59] *Commission v Netherlands*, para 21.
[60] ibid, para 33.
[61] ibid, para 64.
[62] Recitals 4, 6 and 12 to Directive 2003/109.
[63] ibid, recital 18.

the second Member State, and satisfy the conditions and comply with the procedures laid down in the Directive, have the right to obtain the long-term residence status in the second State. The second State has the discretion to fix the charges for a residence permit, nevertheless, charging a fee must not have either the object or the effect of creating an obstacle to obtaining the residence permit. Finally, the Court held that the fees imposed by the Dutch legislation undermine the objective pursued by the Directive and deprive it of its effectiveness.

The third famous case which touched upon the LTR Directive is the *Singh* case.[64] Mr Singh, an Indian national, who was a resident in the Netherlands holding a residence permit for a fixed period relating to his work as a spiritual leader. That permit was renewed on several occasions, each time for a fixed period. After over five years of lawful residence, Mr Singh applied for the status of long-term resident. The application was refused on the basis that he, as a holder of a limited residence permit, did not fall within the scope of the LTR Directive.[65] Mr Singh appealed against the refusal and the court referred the case to the ECJ in order to clarify the personal scope of the LTR Directive.

The Advocate General referred to the purpose of the LTR Directive, as expressed inter alia in recitals 2, 4 and 12 to the Directive, and noted that is to achieve a scheme based on the integration of TCNs who are legally settled on a long-term basis in the Member States in such a way as to contribute to the economic and social cohesion which is a fundamental objective of the European Union. That scheme is based on the grant of long-term residence status, which should have a common definition in all Member States so that legally resident TCNs can acquire that status and enjoy it on much the same terms in all of the Union. To that effect, the establishment of that status must allow the legal certainty of TCNs to be guaranteed by preventing the acquisition of such a status from being left to the discretion of Member States once the conditions are actually met.[66]

The Court in its judgment clarified the personal scope of the LTR Directive and held that those TCNs who have settled in a Member State, but their residence permit has an expiry date – 'formally limited' – are also included in the beneficiaries of the Directive. The Court then addressed the issue of references in the Directive to national legislation. The Court held that

[64] Case 502/10, *Staatssecretaris van Justitie v Mangat Singh* [2012].
[65] According to the Commission, before *Singh*, Austria, Cyprus, Greece, Italy and Poland excluded all those TCNs who held residence permits with an expiry date, from the scope of the scope of the LTR Directive: COM (2011) 585, 28 September 2011, section 3.1.
[66] Opinion of Advocate General in Case C-502/10, paras 29-30.

when the LTR Directive makes a reference to national legislation, e.g. for defining lawful residence, or the integration conditions, the relevant national law may not undermine the objectives of the Directive.

The first observation about the above judgments is that, unlike the EU citizens' cases, EU LTRs, are not at the centre of the case. It is not the EU status of LTRs which is important for the Court. In the EU citizens' cases analysed on section 2, the main intention of the Court was to ensure that the EU citizens enjoy the rights they claim. Neither the lack of jurisdiction, nor the limited material scope, nor personal scope has prevented the Court from expanding and developing the rights of EU citizens. By contrast, in the LTRs' cases,[67]the focus of the Court is on the effectiveness of the LTR Directive. The Member States are free to impose conditions under national law on LTRs (and applicants for the status of long-term residence), as long as the conditions do not affect the effectiveness of the Directive to achieve its aims.

The principle of effectiveness removes the concern that the references in the LTR Directive to national legislation could make the Directive meaningless. Nevertheless, the application of the principle of effectiveness does not stop the Member States from imposing discretionary conditions on LTRs and those who apply for the status. Two LTRs in the same Member State can still be imposed different integration conditions based on their nationality. A LTR can still be treated differently in two different Member States depending on the economic needs of the States.

The application of proportionality adopted by the Court also does not seem enough to achieve the initial aim to approximate the status of LTRs to that of EU citizens. The rights of LTRs can still be limited by national legislation, which must merely not be excessive and disproportionate. This approach in interpreting the Directive (just ensuring the effectiveness of the Directive and that the conditions defined by national legislation are not disproportionate) is a downgrade from the initial aim: approximating the status of TCN residents to that of EU citizens and granting the former the rights of the latter. The judgments demonstrate the Court's inability to effectively provide LTRs with the rights which were intended to be granted to LTRs. The text of the Directive, particularly the discretion reserved for the Member States to apply national laws on LTRs, ties the Court's hands in adopting the same approach adopted in EU citizens' cases.

[67] Such as *Kamberaj*, *Commission v Italy*, and *Mangat Singh*, which were analysed above.

By applying the principle of proportionality, the Court only tried to balance the aims of the LTR Directive with the text of the LTR Directive. Nevertheless, the Court in these judgments ignored the logic of providing LTRs with freedom of movement and equal treatment rights. It is not logical to give LTRs a status which encourages them to move and then imposing a burden on them, which puts LTRs in a disadvantaged situation in the second State.

The approach of the Court in cases where the claimant is an LTR does not come as a surprise as the claimant simply did not have the status of EU citizenship. The Court has made it clear that in cases such as *Martinez Sala*, *Garcia Avello*, *Grzelczyk*, the Court interpreted the relevant provision in the light that the subject was an EU citizen, and should be treated as such. What made it possible for the Court to adopt such an approach in these cases, was, with no doubt, the Treaty provisions on the general protection of EU citizens against discrimination on the grounds of nationality. The Court expanded the personal and/or material scope of the relevant provision in order to ensure that an EU citizen would have the same rights as the host State nationals. In the absence of the general protection against nationality discrimination for LTRs, the LTR Directive does not seem to form a status comparable to EU citizenship.

4. Long-term residence status as a subsidiary form of EU citizenship?

The introduction of a special status for permanent resident TCNs has generally been welcomed by EU law scholars.[68] The status marks a detachment of autonomous free movement rights and equality of treatment with the host State nationals from the status of EU citizenship. This means that holding the nationality of a Member State (and thus EU citizenship) is no longer the sole route to these rights.[69] LTRs acquire certain citizenship rights because of their residence in the Union. In other words, LTRs are 'civic citizens' of the Union. Civic citizenship, is one of the methods used with the intention to facilitate the inclusion of non-citizens into the receiving society.[70] The exclusion of legally resident non-citizens from enjoying the rights available to other members of the society who are citizens is

[68] L Halleskov '*The Long-Term Residents Directive: A Fulfilment of the Tampere Objective of Near-Equality?*' (2005) 7 European Journal of Migration and Law 181; M Bell 'Civic Citizenship and Migrant Integration' (2007) 13 European Public Law 311; T Kostakopoulou, 'Long-Term Resident Third Country Nationals in the European Union: Institutional Legacies and Evolving Norms' in R Craufurd Smith (ed), *Culture and European Union Law* (2004) 318; K Groenendijk, E Guild and R Barzilay, *The Legal Status of Third Country Nationals Who Are Long-Term Residents in a Member State of the European Union* (University of Nijmegen 2001); Carrera, '"Integration" as a Process of Inclusion for Migrants? The Case of Long-Term Residents in the EU' (2005) 219 CEPS Working Document 5.

[69] Bell (n 68) 327.

[70] R Bauböck, 'Civic Citizenship: A New Concpet For the New Europe' in R Süssmuth (ed), *Managing Integration - The European Union's Responsibilities towards Immigrants* (Bertelsmann Stiftung 2005).

recognised as ‘a major barrier to inclusion’.[71] The concept of civic citizenship removes this barrier by extending the ‘membership’ of the society to non-citizen residents without granting them the formal status of citizenship – either because they cannot or are not interested in acquiring the status.

The status of long-term residence has been described as ‘a subsidiary form of EU citizenship’ by Acosta.[72] The purpose of this section is to examine the extent to which the status of long-term residence is actually ‘as near as possible’ to EU citizenship, and whether it can be described as a subsidiary form of EU citizenship.

Acosta in his book ‘assessed the implementation and possible interpretation by the ECJ of the LTR Directive in order to conclude that long-term residence status has the potential to become a subsidiary form of EU citizenship which escapes direct control by the Member States. Hence, this Directive brings the prospect of transforming Member States’ control over the relationship between territory and population’.[73] This conclusion was made in 2011. Since then the Court has handed down the three important judgments of *Kamberaj, Commission v Netherlands,* and *Singh,* seen earlier. Considering these judgments, does the long-term residence status have the potential to become a subsidiary form of EU citizenship which escapes direct control by the Member States? Does the LTR Directive bring the prospect of transforming Member States’ control over the relationship between territory and population?

Acosta also predicted that ‘a purposive interpretation by the ECJ will mean that LTRs will obtain similar treatment to European citizens in a number of areas in line with the Tampere objective, re-affirmed in the Stockholm programme, of equal treatment’.[74] By comparing the above judgments with the Court’s judgments on EU citizenship, we can see to what extent, as predicted by Acosta, the Court’s approach in both situations is similar and that LTRs receive similar treatment to European citizens in line with the Tampere objective of equal treatment.

The LTR Directive determines the terms for conferring and withdrawing long-term residence status, and the rights pertaining thereto.[75] For the acquisition of the status the applicant must lodge an application with the competent authorities of the host State and provide

[71] M Jesse, The Civic Citizens of Europe: The Legal Potential for Immigrant Integration in the EU, Belgium, Germany, and the United Kingdom (Brill 2017) 24, 39.
[72] D Acosta, *The Long-Term Residence Status as a Subsidiary Form of EU Citizenship* (Martinus Nijhoff Publishers 2011).
[73] ibid 227.
[74] ibid.
[75] LTR Directive, Article 1.

documentary evidence that he/she meets the conditions set out in the Directive. The application and its accompanied evidence are determined by the national law of the host State. Thus, with regards to acquisition, the statuses of LTR is similar to EU citizenship. Both are EU-level statuses, the acquisition of which is governed by national laws.

In terms of the withdrawal of the status of long-term residence, the status will be withdrawn in case of:

a) adoption of an expulsion measure when the LTR is an actual and sufficiently serious threat to public policy or public security;

(b) in the event of absence from the territory of the Union for a period of 12 consecutive months;

(c) detection of fraudulent acquisition of long-term resident status.[76]

With regards to the expulsion measure when the LTR constitutes a threat to public security or policy, the Member States must have regard to the duration of residence in their territory; the age of the person concerned; the consequences for the person concerned and family members; links with the country of residence or the absence of links with the country of origin. The LTR must also be provided with an opportunity to challenge the expulsion decision, as well as legal aid if necessary. With regards to the expulsion measure, the position of LTRs is very similar to EU citizens, who can be returned to their own State on similar grounds.[77] Again, the duration of residence in the host State, age and consequences of deportation will be considered, and any decision to remove an EU citizen is subject to judicial scrutiny.[78]

Losing the status after a year of absence from the territory of the Union may be justified,[79] as such a relatively long absence may indicate that the LTR has changed their intention to live permanently in the Union, and thus allowing them to keep the status would not contribute to the objectives of the Tampere Programme or the Directive (e.g. the development of the internal market or the integration of TCN residents into the host society). However, the possibility of withdrawing the status after one year proves that the status of long-term

[76] LTR Directive, Article 9.
[77] Citizens' Rights Directive, Article 28(2).
[78] ibid, Article 31.
[79] EU citizens also lose their permanent residence right in case of absence from the host State, however, EU citizens do not lose their right to return to that State, whereas, LTRs after being away from the host State, will lose the status and the rights attached to the status, including the right to enter and reside in that State.

residence is not as stable and strong as EU citizenship, which can never be withdrawn in case of absence from the Union.

The long-term residence status, once granted, appears to escape the direct control of the host Member State. It can only be withdrawn in certain circumstances, defined by the Directive, and the withdrawal is subject to judicial scrutiny. Thus, with regards to the withdrawal, the statuses of LTR and EU citizenship share a number of similarities. In other words, just as the grant of both is governed by national legislation – LTR due to the conditions defined in the Directive, and EU citizenship as a result of being derivative – the withdrawal of both is also subject to judicial review – LTR because this is required by the Directive, and EU citizenship, because this was established in the *Rottman* case. Moreover, the grounds of expulsion of LTRs are similar to those on which a Member State may rely for the expulsion of EU citizens. LTRs – who have resided in a Member State for at least 5 years – can only be expelled on the grounds which an EU citizen can be expelled after 5 years of residence in the host state, i.e. serious grounds of public policy and public security.

Nevertheless, although long-term residence seems to have similarities with EU citizenship in terms of acquisition and withdrawal, the long-term residence status is fundamentally different from EU citizenship in terms of characteristics.

First, recalling the conclusions of the previous three chapters, unlike EU citizenship, the status of EU long-term residence is limited to one Member State. The holder of the status, when intending to move to another Member State, needs to obtain the approval of the second State. As we saw in chapter 3, the LTR will not be able to work until his/her application for such an approval is accepted. Even after approving the right of residence, the second Member State is free to limit the right to work or self-employment of the LTR, according to the economic needs of that State. For instance, a quota may be placed on the number of LTRs, or the number of LTRs in a specific job.[80] This means that the movement of LTRs between the Member States for periods exceeding 3 months, which is the right that corresponds to the most basic rights attached to EU citizenship (the rights to move and reside freely in the territory of the Member States), is still, *fully*, within the control of the Member States. A status which does not grant the most basic right derived from EU citizenship, cannot be described as equivalent to EU citizenship. Even the most basic type of it (e.g. subsidiary

[80] See section 2.2.1 in chapter 2 of the thesis.

form). A status with such a geographical limitation does not seem to be an *EU* status at all, let alone an EU citizenship status.

Secondly, the status of EU long-term residence granted by one Member State is not mutually recognised by other Member States. EU Member State have the competence to grant the status of EU citizenship (national laws govern the acquisition of nationality and consequently EU citizenship), but once the status is acquired, the status cannot be challenged by another Member State.[81] In case of movement to a second Member State, that State may never question the basis on which the person acquired the status of EU citizenship. Thus, discretionary measures may not be imposed on EU citizens, for instance, what conditions the-now-EU-citizen satisfied to obtain the status of EU citizenship. In the case of LTRs, however, the status may be challenged and if not all the criteria specified in the Directive were satisfied in the first Member State, the second State can require the LTR to meet the conditions which are not satisfied (e.g. the integration conditions). In addition, not all Member States recognise the status (in particular, the UK, Ireland and Denmark). It is hard to describe the status of long-term residence as a form of *EU citizenship*, when it is recognised only in parts of the Union.

The third issue which makes it difficult to consider the status of long-term residence as a subsidiary form of Union citizenship is the inconsistency between the extension of EU citizenship to cover persons holding the long-term residence status and an EU's primary objective, namely the development of the internal market. As only residence in one Member State counts for acquiring the status of long-term residence (for the first time), those TCN who move between the Member States, i.e. the internal market, acquire the status of long-term residence later than those who reside in one Member States for 5 years. Moreover, an LTR who moves to the second Member State must pay an application fee, additional to the one they had already paid in the first Member State. In other words, a person who has 'the subsidiary form of EU citizenship' (as Acosta claims) is charged a fee for exercising the first rights listed in the Treaty as the core, fundamental, rights of EU citizens. In practice, therefore, the LTR Directive punishes actual contributors to the internal market, and treats non-contributor TCNs better. What kind of EU citizenship is it that those who move within the internal market acquire it later than those who do not contribute to the market?

[81] See, inter alia, Case C-369/90 *Micheletti* [1992] ECR I-4239; Case C-200/02 *Zhu and Chen* [2004] ECR I-9925.

Fourthly, LTRs may be treated better or worse in the second Member State depending on their country of nationality. An LTR can have more expansive rights than another LTR in a similar situation, just because of his/her nationality. For instance, nationals of certain countries are not required to satisfy the integration conditions, while others are required to do so (e.g. as mentioned in chapter 2, nationals of Canada, Japan and the US are not required to meet the integration conditions in France and Germany). This is possible as the right to equal treatment with the nationals of the host State is activated *after* the status is granted by the second State to the applicant. LTRs, unlike EU citizens, do not enjoy a general protection against discrimination on the grounds of nationality such as the one provided by Article 18 TFEU.

The wording of Article 18 TFEU does not explicitly exclude TCNs from its personal scope. On the one hand, the heading of 'non-discrimination and citizenship of the Union', under which the Article can be found in the Treaty, suggests that it applies to EU citizens only.[82] On the other hand, Article 19 TFEU which instructs the Council to take action against discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation, is placed under the same heading but applies to non-EU citizens too.[83] Thus, being under the heading of 'non-discrimination and citizenship of the Union' does not necessarily mean that Article 18 covers EU citizens only. The Court nevertheless, has left no doubt that Article 18 TFEU applies to Member State nationals only.[84] Therefore, LTRs may be treated more or less favourably by the second Member State, depending on their nationality.

The two last issues mentioned above highlight the failure of the LTR Directive to bestow the right to equality with EU citizens on TCN permanent residents, as the Tampere Programme recommended. LTRs are neither provided such equality among the Member States, nor within the Member States. LTRs in the same Member State may be treated differently depending on their nationality. For instance, a Japanese LTR is automatically exempt from the integration conditions while a Chinese national is required to satisfy those conditions in order to obtain the status. LTRs in exactly the same position may also be treated differently by two Member States. For example, LTR A moves to Sweden, where he is re-granted the

[82] S Morano-Foadi and K de Vries, 'The Equality Clauses in the EU Directives on Non-Discrimination and Migration/Asylum' in S Morano-Foadi and M Malena (eds), *Integration for Third-country Nationals in the European Union: the Equality Challenge* (Edward Elgar 2012) 23.
[83] C Hublet, 'The Scope of Article 12 of the Treaty of the European Communities vis-a-vis Third-Country Nationals: Evolution at Last?', (2009) *15 European Law Journal*, p. 757.
[84] Joint Cases C-22/08 and C-23/08 *Vatsouras* [2009] ECR 1-4585.

status with the full right to work, but LTR B moves to Spain and receives a residence permit with no right to work.

Additionally, the status of long-term residence is missing the core of any citizenship status in a democratic society: the right to vote.[85] In the absence of voting rights, the status does not seem to be democratic enough to be considered as citizenship of the EU, which is built on representative democracy.[86]

The above reasons make it hard to agree with the conclusion that 1) the status of long-term residence escapes the direct control of the Member States; 2) the status is a form of EU citizenship. The conclusion is apparently based on inaccurate observations of the Directive. For instance, Acosta observes that 'once TCNs attain long-term residence, they have equal access to the labour market (with the minor exception of activities that entail even occasional involvement in the exercise of public authority)' with EU citizens.[87] This observation ignores the fact that this equal access is limited to the first Member State. LTRs have equal access to the labour market (with the minor exception of involvement in the exercise of public authority) *with the host State nationals.* The second Member State is free to impose quotas and limit the right to work of LTRs. Thus, while it is correct to say that LTRs have equal access to the labour market of the first Member State, it is totally wrong to say that LTRs have equal access to the labour market with EU citizens, as the access of the latter is not limited to one Member State.

Moreover, Acosta claims that '[f]ifteen Member States allow some categories of TCNs to vote in municipal elections and six in regional ones or elections for national representative bodies'.[88] He also mentions the *Spain v. United Kingdom (Gibraltar)* case[89] and continues that 'Member States are also free to grant voting rights in European Parliament elections' to TCNs. While such a conclusion can be drawn from that case, the Member States are free to do so only by granting their nationality. Such a right may never be granted to a TCN. A TCN, once granted the nationality of a Member State, is not a TCN anymore.

The other observation made by Acosta leading him to reach the conclusion that the status of long-term residence escapes the direct control of the Member States is that 'TCNs satisfying

[85] R Bauböck, 'Expansive Citizenship—voting beyond Territory and Membership' (2005) 38 Political Science and Politics 683, 683.
[86] TEU, Article 10(1).
[87] Acosta (n 72) 206.
[88] ibid 207.
[89] Case 145/04 *Spain v. United Kingdom (Gibraltar)* [2006] ECR I-7917.

the conditions and procedures laid down in the directive have a right to obtain long-term residence and that Member States have an obligation to grant it if the conditions are met once the TCN applies for it'.[90] This is only partially accurate. TCNs have the right to obtain the status *if* they satisfy the conditions and procedures, but who sets these conditions and procedures? These are defined by the host State's national law, which is in the control of the host State only. The control may not be absolute – due to the prohibition of imposing disproportionate conditions which undermine the effectiveness of the Directive's aims – but is clearly significant as we see that each Member State defines its own requirement (from no integration conditions, to one-year courses).

I also do not agree that the host State's obligation to grant the status to TCNs who satisfy the conditions, reduces Member States' margin for manoeuvre, and that this obligation has created a 'right-based approach' to long-term residence.[91] This is, again, true for the first State only. The second Member State is still free to refuse (re)granting the status due to a national quota on the number of LTRs who can move to that state in a year.[92] One might say that the first State is now obliged to grant the status if the conditions are satisfied, and that is a 'right-based approach' of the Directive to the status of long-term residence. Nevertheless, first, a right which is *subject to conditions* is an entitlement rather than a right. Secondly, if the status has such a geographical limitation, it is not an EU status which is a subsidiary form of EU citizenship; it is simply a national status which can potentially be exchanged with a similar status in another Member State.

Acosta built his conclusion on the hope that 'a purposive interpretation by the ECJ will mean that LTRs will obtain similar treatment to European citizens in a number of areas in line with the Tampere objectives, re-affirmed in the Stockholm programme, of equal treatment'.[93] The analysis of the cases decided so far by the Court on the rights of LTRs does not support this 'prediction' made in 2011.

The starting point in cases in which the subject is an EU citizen, is whether one of the freedoms of the subject would be hindered.[94] As observed by Evans,[95] the starting point in the

[90] D Acosta 'Civic Citizenship Reintroduced? The Long-Term Residence Directive as a Post-National Form of Membership' (2015) 21 European Law Journal 200, 209.
[91] ibid.
[92] See section 2.2.1 in chapter 2 of the thesis.
[93] Acosta (n 90) 227.
[94] For instance, Case155/80, *Sergius Oebel* [1981] ECR 1993; Case C-357/89, *VJM Raulin v Minister van Ondenvijs en Wetenschappen* [1992] ECR 1-1027.

cases where the subject is a TCN is whether the Union is competent to regulate the rights of the subject, or whether the subject is entitled to such a right.[96] Moreover, in the case of LTRs, as we saw earlier in this chapter, the approach of the Court was not a right-based one, similar to EU citizenship cases. In the EU citizenship cases when the subject was not eligible for a claim, the Court still held the person should be granted that benefit because of their EU citizenship status and the right to equal treatment with the host State nationals attached to EU citizenship. Nevertheless, the judgments in the LTR cases were limited to ensuring that the effectiveness of the LTR Directive is not undermined by disproportionate requirements. Such an approach would possibly prevent the effectiveness of the Directive in facilitating the integration of LTRs to be undermined, but it is unlikely to approximate the treatment of LTRs to EU citizens.

It should also be noted that the rights of EU citizens have been expanded by the ECJ, interpreting the text of the Treaties. The Court, however, has made the most of the possibilities the Treaties offer, and has not overstepped the boundaries of the Treaties.[97] The LTR Directive which explicitly limits the equality of LTRs with the host State nationals to certain areas, does not seem to provide the Court with an opportunity to significantly expand the rights of LTRs.

The Tampere summit conclusions were very promising and liberal. The objectives clearly suggested that the EU had started to move towards a new approach to the status and rights of TCN permanent residents. Acosta reached these conclusions, in the light of the Tampere objectives, which were very promising and liberal. Therefore, one cannot blame him for making such predictions. However, I critically analysed his conclusions simply to: a) highlight the limitations of the LTR Directive and to raise the point that what has been done is not enough to achieve the initial aims; b) demonstrate the illusion that the status granted by the Directive is a subsidiary form of EU citizenship, which will be developed further by the Court, should not slow down the efforts to make the long-term residence status a genuinely *EU* status.

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[95] M Jesse, 'The Value of "Integration" in European Law-The Implications of the Förster Case on Legal Assessment of Integration Conditions for Third-Country Nationals' (2011) 17 European Law Journal 172, 209,
[96]Joined Cases 281,283 to 285 and 287/85, *Germany, France, Netherlands, Denmark and the United Kingdom v EC Commission* (1987] ECR 3203, 3229.
[97] F Goudappel *The Effects of EU Citizenship: Economic, Social and Political Rights in a Time of Constitutional Change* (TMC Asser Press 2010), 157.

5. It is in the Union's interest to extend the status of EU citizenship to LTRs

As explained at the beginning of this chapter, the chapter determines the approximation of the status of long-term residence and EU citizenship as an interest for the Union rather than arguing that LTRs deserve to enjoy certain rights. After considering what the status of long-term residence actually is and to what extent it is similar to EU citizenship, I now explain why it is in the interest of the Union to approximate the status of LTRs to EU citizenship. The benefits of it can be seen from three different angles: 1) facilitating the integration of LTRs; 2) consistency in the EU's immigration and integration policy; 3) the view that residence seems a more appropriate criterion for EU citizenship.

5.1. To facilitate the integration of LTRs by the best possible way which has already been successful

As was concluded above and in the previous chapters, the current status of long-term residence and the rights granted by the LTR Directive to the holder of this status are inconsistent with the EU's objective to ensure the integration of lawfully resident TCNs into the Member States' societies.[98] However, I am not simply suggesting that in order to enhance the integration of LTRs, the rights of EU citizens should be extended to LTRs; rather, I am suggesting that the *approach* to LTRs' integration of TCNs should be changed. The current approach, which distinguishes between mobile EU citizens and LTRs, takes for granted that those not holding a Member State nationality are the only ones facing a problem of inclusion.

The concept of EU citizenship has been a significant element of the process of transforming Member State nationals from 'immigrants', who are subject to national conditions of entry and residence, to EU citizens, who are entitled to equal treatment as the host state nationals. EU law has proven itself to constitute an instrument of integration, as it did with regards to EU citizens.[99] It transformed mobile Member State nationals from 'immigrants' and 'others' to EU citizens.[100] There does not seem to be any reason preventing the Union to reconceptualise the integration of TCN permanent residents and utilise the same method for their integration. The position of LTRs can also change from 'others', 'immigrants', and second-class permanent members of the Union's society, to members of this society who are treated equally with other members, regardless of nationality, and as a result, their integration

[98] Tampere Programme, Objective 4.
[99] C Murphy, 'Immigration, Integartiona and Citizenship in European Union: The Position of Third Country Nationals' 8 Hibernian Law Journal 155, 156; T Kostakopoulou, 'Nested "Old" and "New" Citizenships in the European Union: Bringing out the Complexity' (1999) 5 Columbia Journal of European Law 389, 393.
[100] Murphy (n 99) 156.

would be enhanced. This is the approach to integration of TCN residents which the Tampere Programme recommended.

Although the Tampere Programme drew a distinction between EU citizens and TCN residents, the approach in the Tampere Programme was towards accepting that TCN residents are also members of the society and their integration can be enhanced by granting them rights of other members and treat them like 'one of us', which lead them to become 'one of us'. The approach adopted in the Programme was similar to how the EU has treated Member State nationals. In the LTR Directive, however, this approach was replaced by the approach that integration is a *condition* that TCNs need to meet, rather than the *result* of granting them rights (as discussed in chapter 2).

The shift in the EU's approach to the integration of TCN residents occurred probably due to various reasons, both internal and external. First, the security concerns which arose after the 9/11 terrorist attacks in 2001. They produced radical changes in the states' attitudes as well as political agenda. States, including EU Member States, focused on internal security issues, both at the national and European levels. The states – not only European states – adopted more security-conscious measures, in the climate of fear.[101] The balance between justice and security in the field of Justice, Security and Home Affairs also shifted from the inclusion and fair treatment of migrants toward security. Although the fact that LTRs are already admitted in the territory of the EU and giving them further rights would not pose any further threat to the security of the host State or other Member States, the shift in the field of Justice, Security and Home Affairs could have a negative,[102] but powerful, influence on the negotiations on the proposal of the Directive and pursue the Member States to keep the movements of all non-nationals to their territories under control.

The second reason which caused the deviation of the LTR Directive from the Tampere Programme was the integration conditions inserted into the Directive draft at the initiative of three Member States (Austria, Germany, and the Netherlands). At that time, unanimous

[101] Inter alia, Anti-terrorism, Crime and Security Act 2001 in the UK and The Patriot Act in the US. In October 2001, five weeks after the attacks, Congress passed the 342-page Patriot Act; removed restrictions on wiretaps, search warrants and subpoenas.
[102] M Anderson and J Apap (2002), Changing Conceptions of Security and their Implications for EU Justice and Home Affairs Cooperation, CEPS Policy Brief No. 26, CEPS, Brussels, September.

agreement was required at that time in the Council,[103] and the Directive could not be adopted unless these conditions were added to the proposal.[104]

Now that the two major reasons (the conservative actions taken in the climate of fear after the 9/11 attacks, and the unanimous agreement requirement) which caused the draft for a Directive on the status of TCN permanent residents, in line with the Tampere Programme, to be watered down, do not exist anymore, the Union has the opportunity to create the 'more vigorous' integration policy that it intended to adopt (objective 18 of the Tampere Conclusions), which is also consistent with the Union's *current* objectives, such as 'the aim … to ensure economic, social and territorial cohesion, building on the current European year for combating poverty and social exclusion' by, inter alia, developing a new agenda for migrants' integration to enable them to take full advantage of their potential'.[105]

In the absence of those reasons which caused the deviation of the LTR Directive from the Tampere Programme, the Commission should initiate a proposal for amendments to the Directive in an effort to undo the changes made to the Directive in the 2003 negotiations. The approach to the integration of TCN permanent residents could be revered to granting rights for facilitating integration, rather than the current approach of integration as a condition for obtaining rights. The former did work for EU citizens. It worked so well that the integration of EU citizens in the host society was never discussed in the European Council's meetings as an issue.

The other issue which the EU should address is that the focus of the provisions of the LTR Directive is clearly limited to the integration of TCN permanent residents in the host State society; the integration to the larger society of the EU is omitted from the provisions. By widening the focus of the Directive to the Union's society (i.e. not just the society of the host State), the Union could have the opportunity to not only facilitate the integration of LTRs within the host State, but also within the Union society.

As observed by Carrera, the Union institutions are aware of the impact that a 'successful integration' of legally residing TCNs has on the benefit of EU social cohesion and economic

[103] TEC, Article 64(4).
[104] See A Ripoll Servent and F Trauner, *Policy Change in the Area of Freedom, Security and Justice: How EU Institutions Matter* (Routledge 2014) 11–32 for analysis of policy-making and changes in the AFSJ.
[105] Europe 2020.

welfare.[106] It is in the Union's interest to play a more active role in the integration of non-EU citizen migrants, first, in order to achieve its social and economic objectives; secondly, for the sake of ensuring the effectiveness of the Union's immigration policy since disproportionate integration conditions for TCNs may undermine the effet utile of European immigration policy at facilitating the inclusion of LTRs into the host society.[107] The Union and its Member States have a duty to ensure that disproportionate integration conditions do not impose hurdles on migrants' entry, residence, settlement, and naturalisation, and consequently undermine the effectiveness of European immigration policy.[108]

Nevertheless, playing a more active role, and possibly adopting a uniform framework of integration across the Union, does not mean that the national realities, limitations and demands are ignored. The framework can simply define the concepts and goals which are the same/similar in all countries. The policymakers can be left free to adjust their integration programmes according to domestic considerations, as long as these adjustments do not undermine the common concepts and goals. A more inclusive EU citizenship concept is likely to encourage the integration of TCNs into the EU and could represent a means to overcome weaknesses inherent in national strategies for migrant integration.[109]

It might be argued that the Union has no competence in the domain of the integration of TCNs. Thus, the Union cannot adopt measures in this field. Nevertheless, this is not an issue. The Union had no competence in the integration of mobile EU citizens in the host state either. In fact, such an area of EU law never existed. The integration of EU citizens was facilitated by the equal treatment of EU citizens with the host State nationals. The same method can be used for LTRs. The lack of competence in the integration of TCNs, does not prevent the Union from adopting the same method of integration of EU citizens for LTRs Moreover, although the Union does not have competence in TCNs' integration, it has a clear competence in the immigration-related matters which is limited to what was conferred to the Union by Article 63 EC (now Article 79 TFEU),[110] as Kostakopoulou suggested,[111] the

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[106] S Carrera, '"Integration" as a Process of Inclusion for Migrants? The Case of Long-Term Residents in the EU' (2005) 219 CEPS Working Document 5.
[107] Although, as we saw earlier in this chapter, the Court has shown a strong interest to protect the effectiveness of Directive 2003/109, the integration conditions are linked to national law.
[108] D Kostakopoulou, 'The Area of Freedom, Security and Justice and the Political Morality of Migration and Integration' in H Lindahl (ed), *A Right to Inclusion and Exclusion?* (2009) 186.
[109] M Becker, 'Managing Diversity in the European Union: Inclusive European Citizenship and Third-Country Nationals', (2004) 7 *Yale Human Rights & Development Law Journal*, pp. 132-183.
[110] K Hailbronner, 'European Immigration and Asylum Law Under the Amsterdam Treaty' (1998) 35 Common Market Law Review 1047, 1049.

principle of parallelism may be used to expand the Union's competence in matters linked to immigration, e.g. integration of migrants after immigrating.

5.2. To fix the inconsistency in the Union's immigration policy

Treating TCNs and EU citizens differently is a well-established practice of the EU. It may seem entirely acceptable, as these two categories are not equal in terms of legal status in the Union. It might also be argued that excluding non-EU citizens from the rights that EU citizens are entitled under EU law is justified because the EU is the place of its own citizens. Nevertheless, while LTRs do not have citizenship of the Union, they are granted a special status which stems from the European legal order rather than Member States' immigration laws. The status is the legal badge of membership of the Union's society which changed the position of the holders from temporary guests to de jure members of the society of the *Union*.[112] The Union should not ignore that the de jure members of its society are treated as second-class residents.

Moreover, the Directive not only formally declared LTRs as members of the Union society, but also imposed on them the role of contributing to the development and completion of the internal market. Union law cannot impose a role on LTRs and at the same time allow the less favourable treatment of LTRs who play that role and move to a second Member State. LTRs' position is clearly better – with regards to equal treatment with the host State nationals – in the first Member State than the second Member State. This appears to be inconsistent with the EU's commitment to develop the internal market. Objective 2 of the Tampere Conclusions states that the Union must ensure that the freedom to move freely between the Member States can be enjoyed by *all*:

> The European Union has already put in place for its citizens the major ingredients of a shared area of prosperity and peace: a single market, economic and monetary union, and the capacity to take on global political and economic challenges. The challenge of the Amsterdam Treaty is now to ensure that freedom, which includes the right to

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[111] T Kostakopoulou, 'The "Protective Union"; Change and Continuity in Migration Law and Policy in Post-Amsterdam Europe' (2000) 38 Journal of Common Market Studies 497, 501. Kostakopoulou also suggests that in the absence of express provisions in the Treaty, Article 308 EC (now Article 352 TFEU) might be invoked to fill the gaps in an area of competence. This solution while might work for other areas of competence, it is unlikely to be successful for the particular area of integration of TCN migrants as the Article requires unanimous vote of the Council and considering the sensitivity of the Member States to this field, disagreement within the Council is very likely.

[112] On social membership principle based on residence see: R Rubio-Marín, *Immigration as a Democratic Challenge: Citizenship and Inclusion in Germany and the United States* (Cambridge University Press 2000).

> move freely throughout the Union, can be enjoyed in conditions of security and justice accessible to all. It is a project which responds to the frequently expressed concerns of citizens and has a direct bearing on their daily lives.[113]

Under the Directive's legal regime, despite the objectives of the Tampere Programme, mobile LTRs are punished instead of being encouraged. LTRs who move and thus contribute to this objective, firstly, do not enjoy the right to that freedom. Their movement is still not as free as that of EU citizens (illustrated in chapter 3). Secondly, LTRs who move to a second Member State are treated less favourably than LTRs who stay in the first Member State. Mobile LTRs lose their status of equal treatment with the host State nationals – at least until their application for transferring the status of long-term resident is approved. The logic of the internal market, as well as of objective 18 of the Tampere Programme, and the Directive's own purpose (described in its preamble), call into question the legal regime of the Directive.

The status of long-term residence, as it stands now, is not genuinely an EU status, or putting it differently, an EU-wide status. TCNs derive this status from EU law but the status is linked and limited to one Member State, which can be exchanged with the same status in another Member State. This is not compatible with the concept of moving and residing freely in the territory of the Union:

> The concept of 'moving and residing freely in the territory of the Member States' is not based on the hypothesis of a single move from one Member State to another, to be followed by integration into the latter. The intention is rather to allow free, and possibly related or even continuous, movement within a single 'area of freedom, security and justice,' in which both cultural diversity and freedom from discrimination [are] ensured.[114]

Approximating the status of long-term residence to EU citizenship – which provides the holder with a genuine free movement within the EU, ensures protection against discrimination on any ground and in any area of benefits – would be an important step towards ensuring the coherence and consistency in the European immigration policy and achieving the integration aims of the policy.

The Directive seems to be inconsistent with another Tampere Programme's objective too:

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[113] Tampere Programme, Objective 2.
[114] Opinion of Advocate General Jacobs, Case C-148/02, *Garcia Avello*, 2003 E.C.R. 1-11613, 72.

> The European Union must ensure fair treatment of third country nationals who reside legally on the territory of its Member States. A more vigorous integration policy should aim at granting them rights and obligations comparable to those of EU citizens. It should also enhance non-discrimination in economic, social and cultural life and develop measures against racism and xenophobia.[115]

Approximating the status of long-term residence to EU citizenship is not only in line with the above Tampere objective, but is also a step towards achieving the objective of Article 79 TFEU:

> The Union shall develop a common immigration policy aimed at ensuring, at all stages, the efficient management of migration flows, fair treatment of third-country nationals residing legally in Member States …[116]

It is true that the term of 'fair treatment' is vague and can be interpreted widely, however, it seems difficult to consider as 'fair treatment', a situation whereby a holder of an EU status is treated differently from another holder of the same status in the same situation in another part of the Union. Allowing the Member States to treat LTRs differently based on their nationality, or to impose different conditions on their right of residence in the second Member State, seems to be anything (i.e. discrimination based on nationality, religion, ethnic origin and wealth status) but 'fair treatment'.

5.3. Residence seems to be a more appropriate criterion for EU citizenship

A person who has never set foot in the territory of the Union but happens to have the nationality of a Member State, probably just because his/her father/mother is a national of that State, holds EU citizenship.[117] The person is not required to satisfy any further condition. On the other hand, a person who has lived all or a substantial part of their life and holds the status of EU LTR and thus is a de jure member of the Union's society, and has been assigned a role in the internal market, is an 'alien'. The first person is considered to have a link with the Union and thus deserves to enjoy EU citizenship rights. The second person however, cannot even move freely within the territory of the Union.[118]

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[115] Tampere Programme, Objective 18.
[116] TFEU, Article 79.
[117] A Tryfonidou, 'The Impact of EU Law on Nationality Laws and Migration Control in the EU's Member States' (2011) 25 Journal of Immigration, Asylum and Nationality Law 358.
[118] His or her movement rights are nothing more than those enjoyed by other TCNs, e.g. tourist, under the Schengen acquis.

The Union is a supranational institution with a nationality-based membership criterion. With the current criterion in place, many of those who are actually members of the EU society and have a genuine link with the EU, are deprived of the advantages of EU citizenship. LTRs are among these individuals. As it was held by the ECJ, a genuine link between individuals and the host society is established by, inter alia, long residence, rather than citizenship per se.[119] LTRs who have resided in a Member State for at least five years, and thus, have established a genuine link with the EU, are still considered aliens.[120]

It is difficult to justify the treatment of LTRs by the Union in a way other than how it treats EU citizens. LTRs are 'an integral part of the European community, de facto members of and contributors to the flourishing European societies', Kostakopoulou argues.[121] And taking this argument further, LTRs are not only de facto members of the society and the contributors to the flourishing European societies, but, as a result of the 2003 Directive, LTRs are also de jure members of the Union's society.

The Union is not a nation. The Union is a supranational polity bringing together a diversity of people in Europe. In nations only those sharing common history, ethnicity or cultural ties with that nation can be its citizens. LTRs might not have a shared history with Member State nationals, but they, of course, have a shared future together. This should call for a more appropriate entitlement for citizenship.

Furthermore, if eventually the eligibility criterion for EU citizenship is changed, and permanent residents also become the citizens of the Union, a direct relationship between the EU and its permanent residents would be established. Such a direct relationship would not need to be 'mediated' by the Member States. This would be a step forward towards one of the Union's objectives, to create an ever closer Union among the peoples of Europe.[122]

Moreover, the Union as a supranational polity has no control over its citizenship/membership criteria. The Union should defend its identity and its right to autonomy. 'It is for each State to

[119] Case C-209/03 *Bidar* [2005] ECR I-2119; Case C-103/08 *Gottwald* [2009] ECR I-9117.
[120] Carlier argues that slowly but surely, European citizenship seems to evolve from a nationality citizenship to a residence citizenship. JY Carlier, 'Annotation of *Zhu and Chen*' (2005) 42 Common Market Law Review 1121, 1131.
[121] T Kostakopoulou, 'Long-Term Resident Third Country Nationals in the European Union: Institutional Legacies and Evolving Norms' in R Craufurd Smith (ed), *Culture and European Union Law* (2004) 318.
[122] The preamble to the TFEU, para. 1. In the earlier versions of the Treaty, the objective was stated as: 'creating an ever-closer union among the peoples of Europe, in which decisions are taken as openly as possible and as closely as possible to the citizen'.

determine under its own law who are its nationals'.[123] Although, the European Union is not a state, it has citizens. It should be the Union, itself, that decides who its 'people' are, and thus, who can enjoy the rights it has conferred on its citizens.[124]

One might argue that the change of the criterion of eligibility for EU citizenship is not appropriate because the Union is like a club, and the members of the club are the Member States and, subsequently, their nationals. However, as discussed in chapter 4, it is not possible for a liberal and democratic organisation to ignore its permanent residents. The exclusion of LTRs from the citizenship of the EU, as an organisation with liberal and democratic values, counts as a 'political tyranny', using the words of Walzer,[125] because the exclusion of LTRs from access to full citizenship rights, subjects a part of the population to legislation without representation.

LTRs can potentially become EU citizens in the near future. In other words, LTRs are EU citizens-in-the-making. It is not unlikely that the way LTRs are treated by the Union until they eventually become EU citizens (if they ever do become), will have an impact on the way LTRs see the Union, which can, in turn, negatively affect the relationship of the Union with a large number of potential EU citizens. The Union should seize the opportunity to avoid any unnecessary negative impact on this relationship.[126]

One might argue that if LTRs are Union-citizens-in-the-making, probably other TCN residents are also permanent-residents-in-the-making, and the differentiation between LTRs and other TCN residents may not be justified. Nevertheless, the situation of LTRs is different from other TCNs. LTRs hold an EU status. Other TCNs are still migrants subject to national laws.

5.4. What can be done?

Having argued that it is in the Union's interest to approximate the status and rights of LTRs to those of EU citizens, I now examine the options that are available to the Union. Nationality of a Member State being decisive in access to the status of EU citizenship, means that citizenship of the Union is left in the control of the Member States. The derivative character

[123] Convention on Certain Questions Relating to the Conflict of Nationality Law.
[124] For a different view see B Kunoy 'A Union of national citizens: the origins of the Court's lack of avant-gardism in the *Chen* case' (2006) 43 *Common Market Law Review* 179-190, 187.
[125] M Walzer, *Spheres of Justice. A Defence of Pluralism and Equality* (Basic Books 1983) 60–63.
[126] D Owen, 'Citizenship and the Marginalities of Migrants' (2013) 16 Critical Review of International Social and Political Philosophy 326, 328–329.

of EU citizenship has been criticised by a number of academics.[127] These criticisms generally consider the sovereignty of the Member States to grant EU citizenship unjustifiable from two points of view. First, the EU is not a state for which a traditional state-level form of citizenship links its membership to the polity to which they belong and provides them with a chance to participate in the political activities of that polity.[128] Secondly, the benefits of EU citizenship should be extended to permanent resident TCNs because permanent residents deserve to enjoy these benefits.[129] I build up my argument on these two criticisms and propose that while derivative EU citizenship is not consistent with the characteristics of the Union, and permanent resident TCNs deserve to enjoy certain rights similar to EU citizens, it is in the EU's interest to extend these rights to its permanent residents regardless of nationality (for the reasons which I explain below). To reach such a conclusion I refer to the Tampere Programme objectives, particularly Objective 21 of the Tampere conclusions recommending the status of TCN residents to be approximated to EU citizenship.

The first way to approximate the status of TCN permanent residents and EU citizens (objective 21 of the Tampere conclusions) is to detach citizenship of the Union from nationality of a Member State. By doing so, the Union will have a form of unmediated citizenship. Decoupling the status of EU citizenship from nationality of a Member State has been recommended elsewhere;[130] nevertheless, the solution does not seem to be very plausible.[131] The difficulty is the obsession of the Member States to control who holds the status of EU citizenship. As a result, a change in the Treaties for implying the option does not seem likely to happen in the foreseeable future. Thus, this thesis is not suggesting the transfer of the gatekeeper role to the Union citizenship as a *practical* option for extending the rights of EU citizens to LTRs. This thesis is suggesting that LTRs may enjoy the benefits of the status of EU citizenship, without acquiring EU citizenship, *and* the MSs, can remain the gatekeepers to these benefits for LTRs.

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[127] D Kochenov and M van den Brink, 'Pretending There is No Union: Non-Derivative Quasi-Citizenship Rights of Third-Country Nationals in the EU' in D Thym and M Zoetewij Turhan (eds), *Degrees of Free Movement and Citizenship* (The Hague, Martinus Nijhoff, 2015).

[128] J Shaw, *The Transformation of Citizenship in the European Union: Electoral Rights and the Restructuring of Political Space* (Cambridge University Press 2007).

[129] ibid.

[130] See, for example, A Becker, M, 'Inclusive European Citizenship and Third- Country Nationals' (2004) 7 Yale Hum. Rts. & Dev. L.J 132; A Wiener, 'Rethinking Citizenship: The Quest for Place-Oriented Participation in the EU' (1996) 7 Oxford International Review 44–51; F Fabbrini, 'The Right to Vote for Non-Citizens in the European Multilevel System of Fundamental Rights Protection. A Case Study in Inconsistency?' (2010) 4/2010 <http://www.ericsteinpapers.eu>; Z Yanasmayan, 'European Citizenship: A Tool for Integration', *Illiberal Liberal States: Immigration, Citizenship, and Integration in the EU* (Ashgate 2009) 79.

[131] W Maas, 'Migrants, States, and EU Citizenship's Unfulfilled Promise' (2008) 12 Citizenship Studies 583, 593.

The rigid resistance of the Member States to detaching Union citizenship from nationality has led to the emergence of the concept of civic citizenship. The inability of the Union to define its citizenship criteria, led the Commission to consider the concept.[132] The notion is based on the enjoyment of rights based on residence rather than nationality:

> 'The legal status granted to third country nationals would be based on the principle of providing sets of rights and responsibilities on a basis of equality with those of nationals but differentiated according to the length of stay while providing for progression to permanent status. In the longer term this could extend to offering a form of civic citizenship, based on the EC Treaty and inspired by the Charter of Fundamental Rights, consisting of a set of rights and duties offered to third country nationals'.[133]

Civic citizenship decouples the rights and obligations of citizens from the formal badge of citizenship and extends membership of the society to non-citizens who are permanently resident. Civic citizenship seems to be the most pragmatic way to approximate the status of long-term residence to EU citizenship. Civic citizenship of the Union, on the one hand, gives the permanent residents of the Union a status 'as near as possible' to EU citizenship, and on the other hand, the Member States remain the gatekeepers to EU citizenship (by approving the status of long-term residence) and, thus, may agree with the change. They not only remain the gatekeepers of EU citizenship, but they also decide who will be LTRs, as the status of long-term resident is still granted by the host State following an application. Considering the obstacles in the way of the other option stated above, this option seems to be the most plausible option available to the Union.

Nevertheless, this option would be effective only if:

1) the right to equal treatment with the host State nationals is replaced by the right to equal treatment with EU citizens. In other words, the status of long-term residence, once granted, is automatically recognised by other Member States, and LTRs enjoy the right to equal treatment with nationals in the second Member State.

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[132] Commission, 'Communication on a Community immigration policy' COM (2000) 757, 19.
[133] ibid 757, 22. On the concept of civic citizenship, see Bauböck, Civic Citizenship: A New Concept for the New Europe, Communication from the Commission to the Council and the European Parliament on a Community Immigration Policy COM (2000) 757 final.

2) the possibility to impose discretionary conditions on LTRs under national laws is limited. The status of long-term residence would not be 'as near as possible' to *EU* citizenship (or *EU* civic citizenship), if it is unreasonably linked to national laws, which of course can vary from a Member States to another.

Perhaps the point is best explained by way of example: LTR 1 moves from the Netherlands to Germany, and LTR 2 moves from the Netherlands to Spain, and these two LTRs face different conditions according to the national laws at the destinations; they are treated differently, rather than enjoying 'the benefits attached to EU citizenship'.

The status of civic citizenship is a possible option for the Union, which can be granted to LTRs by making minor changes to the LTR Directive. First, the protection of LTRs against discrimination on the grounds of nationality can be extended to all benefits and not just the certain areas listed in the Directive. The value of such a protection provided by a provision in the Directive will not be less than the protection provided by Article 18 TFEU for EU citizens. Of course, the legal value of the former is not comparable with the latter; nevertheless, practically, the Directive will provide LTRs with such a protection to an acceptable extent, as it is also the case for TCN family members of EU citizens. They are also not covered by Article 18 or any other Treaty provision prohibiting discrimination on the grounds of nationality; however, Directive 2004/38 protects these TCNs from nationality discrimination.[134] The inclusion of a provision similar to Article 18 TFEU in the LTR Directive paves the way for the ECJ to expand the rights of LTRs, as it also expanded the rights of EU citizens by reading EU law provisions together with the Article.

The second change which should be made to the LTR Directive in order to grant a genuine EU civic citizenship to LTRs is the inclusion of the right to vote in the Directive. The Member States are likely to resist the extension of this right to non-EU citizens due to the symbolic meaning of this extension. The extension might be seen by the Member States as devaluing the status of EU citizenship. Nevertheless, as demonstrated in chapter 4, it is in the Union's interest to extend this right to LTRs (in order, inter alia, to enhance the Union's legitimacy and promote democracy).

[134] In matters which fall within the scope of the Directive. Directive 2004/38 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States [2004] OJ L158/77 (the Citizens' Rights Directive)

One may wonder whether EU Member States would give up their control over who holds EU citizenship, even the civic type of it. Member States may have reasonable concerns – in particular, security concerns – over who enters the free circulation of people in the EU. However, these concerns do not apply to LTRs. They are already part of the free circulation. Moreover, being the gatekeeper of EU citizenship is a sensitive issue for Member States. When the status of EU civic citizenship in the form of long-term residence is also granted by the Member States (after satisfying all the conditions laid out in the amended Directive), the hegemonic role of the Member States in controlling who enjoys EU citizenship rights will not change. To obtain long-term residence status, a TCN *has to* be approved by a Member State, and may have to pass economic, security, and social checks. Thus, the Member States remain the gatekeepers to EU citizenship, as well as EU civic citizenship, and the strong desire of the Member States to have control on who can hold EU citizenship, and the benefits attached to it, would be accommodated.

One might also wonder why the extension of the rights and status of EU citizens to LTRs did not occur when the LTR Directive was adopted. What has now changed to make one of the options mentioned above possible? At that time, a number of Member States were clearly against certain rights being granted to LTRs – or in fact the Member States were reluctant to lose control on the rights, especially the intra-EU movement of LTRs. Nevertheless, the extension of EU citizenship rights to LTRs does not appear to be as difficult as it probably was in 2003. This is due to the external and internal reasons discussed earlier in this chapter, such as the state of fear after 9/11 attacks, and the method of the Council's decision-making when the Directive was adopted. Despite all these factors which increase the possibility of adopting a more liberal Directive, any change to the rights of TCN permanent residents will not be easy. Changes to their rights and status may be politicised, as the position of this category of migrants can be linked or confused with asylum, especially in the media. The demand and will of the citizens and constituents will of course have an impact on the actions of the governments, and MEPs.

6. Concluding Remarks

This chapter started by analysing the status of EU citizenship. The analysis shows that the status of EU citizenship is different from just a series of rights. It is a unique status which protects its holders from discrimination on the grounds of nationality. The analysis of the Court's judgments (such as *Grzelczyk* and *Martínez Sala* – as analysed in section 2 of this

chapter) also shows that the Court has extensively expanded EU citizens' rights by adopting a right-based approach in interpreting EU law provisions, when the applicant is an EU citizen. The Court has shown that it is devoted to ensuring that an EU citizen enjoys all the rights and freedoms provided and protected by EU law provisions, even if the EU citizen does not fall within the scope of the provisions or granting those rights to the EU citizen does not contribute to the aims of the Treaties.

On the other hand, LTRs are protected against nationality discrimination in the limited areas listed in the LTR Directive. Thus, the status seems to be far from EU citizenship. Moreover, the focus of the Court in the LTRs' cases is the effectiveness of the LTR Directive, rather than ensuring the LTR enjoys the rights provided by the Directive. In other words, in the LTR's cases, we do not see the right-based approach which the Court adopts in cases involving an EU citizen. Therefore, the status and the rights attached to it do not seem to be developed by the Court.

Despite the fundamental differences between the status of long-term residence and EU citizenship, it has been claimed that i) long-term residence status is a subsidiary form of EU citizenship and ii) as a result of a purposive interpretation of the LTR Directive, LTRs will obtain similar treatment to EU citizens in a number of areas in line with the Tampere objective of equal treatment. The analysis of the statuses of EU citizenship and long-term residence in this chapter does not support the first claim. The analysis of the ECJ's judgments on the Directive also does not support the second claim. The rights and status of LTRs are heavily coloured by the Member States' discretion, which makes it difficult to compare long-term residence with EU citizenship. Moreover, the Court has demonstrated that its focus is on ensuring the effectiveness of the LTR Directive rather than expanding rights of LTRs and ensuring that LTRs obtain similar treatment to EU citizens.

In the last section of the chapter, I argued that it is in the interest of the Union to extend the status of EU citizenship to LTRs. The benefits of such an extension for the Union were considered from three angles: i) the extension will enhance the integration of LTRs into the EU's society; ii) the extension will improve the consistency in the EU's immigration and integration policy; iii) residence seems to be a more appropriate criterion for EU citizenship than nationality of a Member State. At the end of the chapter, possible ways for approximating the status of long-term residence to EU citizenship were discussed.

Chapter 6 – Conclusions

This chapter offers the general conclusions of the thesis, and it has been structured as follows: section one provides a brief background of the issues discussed in this thesis; section two offers a summary of the core findings of each chapter, issues that have been discussed, and how the research questions have been answered; and section three provides some policy recommendations regarding rights and status of long-term residents (LTRs).

1. Background

The European Council imposed a mandate on the Council to adopt a more vigorous integration policy with the aim to enhance the integration of TCN residents in the Union by giving TCNs rights, obligations and status similar to those of Union citizens. The Programme was the EU's overarching immigration policy when the Long-term Residents Directive (LTR Directive)[1] was adopted. Thus, the Directive's provisions would be expected to be in line with the objectives of the Tampere Programme. The preamble to the LTR Directive also confirms that one of the purposes of the Directive is to achieve the objective of the Programme to approximate the rights of LTRs to the rights that EU citizens enjoy. This thesis has examined the extent to which the provisions of the LTR Directive are capable to achieve those objectives of the Tampere Programme which are related to TCN residents. The ultimate aim of this thesis is to examine the capability of the LTR Directive to facilitate the integration of LTR into the EU society.

The research has focused on those objectives of the Tampere Programme which were related to the TCN residents in the Union. I identified four steps in three objectives of the Programme relevant to TCN residents. First, the Union must ensure fair treatment of TCNs who reside legally on the territory of the Union. Secondly, the Union must adopt a more vigorous integration policy which aims at giving TCN residents, rights and obligations comparable to those of EU citizens. Thirdly, the legal status of TCNs should be approximated to that of Member States' nationals. Fourthly, 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

[1] Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents. OJ L 16, 23 January 2004.

employee or self-employed person, as well as the principle of non-discrimination vis à vis the citizens of the State of residence).

2. Summary of findings

Rights – prize or tool for integration?

Chapter 2 focused on the aim of the Tampere Programme to enhance the integration of TCN lawful residents in the receiving society through rights and obligations comparable to those of EU citizens. Two different approaches to integration were discussed in that chapter: i) civic integration, and ii) inclusion of migrants into the receiving society (pages 21 to 24). The first approach is built on conditions, tests, and formal integration trajectories. In this model of integration, rights are the prize for integration, rather than a tool for integration. It was argued that this approach to integration, which is based on testing, imposing conditions, and penalising the failure to comply with the conditions is, unlikely to contribute to the inclusion of migrants, and it will eventually lead to disintegration by fostering intolerance, divisions, and fragmentation within society (page 22). On the other hand, the focus of the second identified approach to integration is on providing migrants with equal opportunities with citizens to participate in the host society. The wider the range of areas available to them to participate, the higher the level of inclusion. This approach to integration is built on the notion of being accepted in the society and on accepting the rules and values of that society (page23).

It was illustrated that the approach of the LTR Directive to the integration of TCN residents is entirely different from what the Programme recommended (page 38 to 42). The Programme's approach to integration was a rights-based approach and the Directive's approach is a condition-based approach. The Programme recommended the first approach to integration (inclusionary approach) whilst the Directive follows a different direction to the integration of LTRs into the society. Those TCNs who apply to enjoy the rights listed in the Directive must meet integration conditions. The balance of responsibility, which in the Programme was on the host State, in the Directive shifted towards the TCN applicant. It was demonstrated that while the LTR Directive provides its beneficiaries with a secure residence status, which is essential in the process of migrants' integration, the integration conditions of the Directive, in relation to which the Member States maintain major discretion, are capable of undermining the effectiveness of the Directive *and* the achievement of the Programme's integration objective.

Considering that the Tampere Programme was a political document with vague and general objectives, it is not surprising that in implementing the objectives of such a document, the language and terms used are changed. Nevertheless, the LTR Directive could at least be expected to be *in line* with those chief objectives rather than contradictory to the initial goal set by the Programme, which was to facilitate the integration of TCN residents to the host society. The Directive shifted from facilitation of integration, to requiring proof of integration, and even further, to imposing sanctions for failure to prove integration.

It was then argued that the Union has traditionally used the inclusive approach (second model of integration) to the integration of mobile EU citizens and their TCN family members; why the same approach could not be adopted for enhancing the integration of LTRs. EU citizens and their TCN family members automatically acquire permanent residence right after residing for 5 years in the host Member State. LTRs, although have resided for the same length of time, can be required to comply with integration conditions when they apply for the status of long-term residence or when they move to a second Member State and did not satisfy integration conditions in the first Member State. The reason for this different approach suggests that the main purpose of integration conditions is not to ensure that non-European nationals are familiar with the culture and life in the host State. As a TCN family member of an EU citizen may come from the same country as an LTR, requiring LTRs to prove their integration into the society – and not TCN family members of EU citizens – calls into question the real intention of the Member States. The intention cannot be enhancing the integration of TCNs into the receiving society, as if this was the reason, the Member State would impose similar conditions on TCN family members too.[2] Thus, the different approach of Member States to integration of LTRs and TCN family members of EU citizens does not seem have a reason other than the willingness of the Member States to be in control of migration of TCNs.

Although the deviation of the Directive from the Tampere Programme is evident, this is still and will probably remain the case in the foreseeable future, that the Member States insist on being in the control of settlement and movement of LTRs to their territories, despite the fact that these Member States in the Tampere Summit vowed to adopt its approach to settlement of EU citizens for LTRs as well.

[2] It should be acknowledged that TCN family members of EU citizens are protected against discrimination, nevertheless, this protection has been granted to them by the Member States and if the Member States were concerned that 5 years of residence would not be enough for the migrant to integrate in the host society, they could impose integration conditions on them.

It is not only the Tampere Programme with which the LTR Directive is not in line. The Directive is not in line, and indeed in conflict, with its own preamble. In the preamble to the Directive, equality of treatment with EU citizens has been recognised as a method of enhancing the integration of TCN residents into society, whereas, the main body of the Directive allows different treatment of LTRs and EU citizens in the name of integration.

Vaguely formulated plan (the Tampere Programme), and the reluctance of the Member States to abandon their control on the migration of TCNs to their territories were identified as the main reasons for the deviation of the Directive from the initial plan (the Programme). Nevertheless, despite this deviation, the Directive provides LTRs with secure residence in the host State (first Member State) as well as certain rights which had been available to EU citizens only (not even TCN family members – as their rights are derivative and not self-standing).

Rights of LTRs as near as possible to those of EU citizens?

Chapter 3 has focused on another objective of the Tampere Programme which recommended those who hold a long-term residence permit should enjoy rights 'as near as possible' to those enjoyed by EU citizens. In this chapter, first, the rights of EU citizens were analysed, and then the rights which LTRs derive from the LTR Directive were compared with what EU citizens enjoy. The analysis of rights in this chapter was limited to the core rights (and obligations) of EU citizens. These core rights are listed in the Citizenship Part of the TFEU: free movement to other Member States, equal treatment with nationals of the host State, and political rights. Free movement rights and equal treatment in the host State were analysed in chapter 3, and political rights in chapter 4.

Chapter 3 has sought to identify the material differences between the rights of LTRs and mobile EU citizens in the second Member State and to analyse the reasons for which these differences should decrease. It was explained that EU citizens can derive free movement rights from two different sources: i) the personal market freedoms, which are source of rights for economically-active Member State nationals; and ii) the citizenship provisions of the Treaty which grant the rights of free movement and residence to *all* EU citizens, including economically inactive Member State nationals. It was also said that the rights stemming from the personal market freedoms are activity-oriented, and they are, inter alia, granted to Member State nationals in order to contribute to the economic aims of the Treaty, such as the development of the internal market. Nevertheless, the rights stemming from the citizenship

provisions are status-oriented rights, and Member State nationals enjoy these rights merely because they are EU citizens.

Then I reviewed the provisions of the LTR Directive regarding residence in a second Member State. It was illustrated that the provisions have provided LTRs with the possibility of directly deriving from EU law the right of residence within the territory of the Union. In addition, the law governing the rights of LTRs is now under parliamentary and judicial scrutiny, which is crucial to ensure the fair treatment of LTRs. However, the LTRs' right of residence in the second Member State is still inherently different *in nature* from the right of residence of EU citizens. The residence right of the latter is an unconditional right, while the rights which the LTR Directive grants to LTRs are conditional and subject to the approval of the host State. It was also demonstrated that the second State is free to impose discretionary conditions on LTRs. Moreover, due to the limited geographical scope of the LTR Directive, LTRs may not move and reside in as many Member States as EU citizens may reside.

Regarding the important supplementary right to non-discrimination on grounds of nationality in the second State, the position of LTRs entirely differs from that of EU citizens. EU citizens *have* the right to equal treatment with the nationals of the host State (subject to limited exceptions, such as the public service/official authority exception), whereas LTRs *acquire* this right after successfully obtaining a residence/work permit in that State.

Due to these material differences, it was concluded that the rights of EU citizens and LTRs regarding residence and non-discrimination based on nationality in the second State, are neither comparable in nature, nor comparable in geographical scope, nor comparable in their extent. Therefore, the Tampere Programme's objective to grant LTRs rights comparable to those of EU citizens does not seem to have been effectively achieved. The LTR Directive has obviously gone some distance towards accomplishing this intended objective; however, due to differences in the nature and scope of the rights it grants to LTRs, the rights of LTRs cannot be considered comparable. The main problem obviously lies in, first, the lack of mutual recognition of the status of long-term residence granted to TCNs in the first Member State, which makes it necessary for LTRs to obtain a new residence permit in the second Member State; secondly, the possibility with which the second Member State has been provided to impose discretionary, and discriminatory, conditions on LTRs when they apply for a residence permit. In other words, the second Member State is free to maintain and apply their own immigration rules in considering the LTRs' application for a residence/work permit

and, thus, the LTR Directive has failed to achieve the other objective of the Tampere Programme to approximate the various national laws on the conditions of admission and residence of LTRs across the Union.

After it was established that LTRs have not been granted rights of movement and residence in the second State, the reasons for which the Union should ensure LTRs enjoy such rights were analysed. It was argued that it is against the rationale of the internal market to exclude LTRs from free movement in the EU and that providing LTRs (especially those who are economically active) with the rights of movement and residence within the Union is a prerequisite to the completion of the internal market project. Thus, it was suggested that the personal scope of the personal market freedoms is extended to economically active LTRs.

It was also suggested that economically inactive LTRs should also be granted rights of movement and residence within the Union, similar to what EU citizens enjoy under the EU citizenship provisions. In other words, the personal scope of the citizenship provisions should be extended to LTRs. This suggestion was made in order to enhance the integration of LTRs into the EU's society. It was argued that it is not possible to label LTRs as 'different', 'foreigner', 'alien', 'second-class resident' and expect them to develop a sense of belonging to the EU's society. Removing these labels and genuinely treating LTRs equally with Member State nationals, constitutes an efficient instrument for the integration of LTRs into the society.

The second set of core rights of EU citizens, namely political rights, has been examined in chapter 4. The main and important difference between the rights of these groups was found in relation to electoral rights. In the EU, like most polities, these rights are associated with citizenship status. Only those who have the polity's citizenship enjoy electoral rights. However, it was illustrated that the extension of EU citizens' electoral rights to LTRs is in the interest of the Union. It was argued that the EU would benefit from the enfranchisement of LTRs in the European Parliament elections. These benefits were examined from three angles.

The first angle was democracy. By reference to the leading democratic principles of affectedness, stakeholders, and coercion, it was illustrated that LTRs now form part of the EU demos and thus the EU's democratic legitimacy would increase if a larger portion of its population is enfranchised. It was also said that as long as twenty million of its demos are excluded from the basic democratic rights, the EU will not be a fully democratic polity.

The second angle adopted in chapter 4 was promoting the integration of LTRs into society. It was shown that electoral rights are essential for the achievement of the integration of LTRs; and the EU, if it intends to accomplish its own-defined mission set out in EU immigration policies since 1999, must enfranchise LTRs in the EP elections.

The third angle used in chapter 4 was the right to political participation for LTRs as members of the society. It was argued that imposing economic roles on LTRs which are identical to the roles defined for members of the EU society (i.e. EU citizens) makes LTRs members of the society. Moreover, the political rights available to LTRs must be in balance with the economic roles imposed on them. It was then concluded that it is a mandate for the EU, as a democratic institution, to provide all of its members with an equal opportunity to participate in political processes.

Long-term resident – an EU status for permanent residents of the Union?

Finally, in chapter 5 I considered the capability of the LTR Directive to 'approximating' the status of long-term residence to that of EU citizenship, and i) whether the status of long-term residence can potentially become 'a subsidiary form of EU citizenship'; ii) whether 'a purposive interpretation by the Court will mean that LTRs will obtain similar treatment to European citizens in a number of areas in line with the Tampere objective, re-affirmed in the Stockholm programme, of equal treatment'. It was demonstrated that although long-term residence has some similarities to EU citizenship in terms of acquisition and withdrawal, long-term residence status is fundamentally different from EU citizenship in terms of characteristics. Moreover, a purposive interpretation by the Court does not seem to guarantee that LTRs obtain a similar treatment to EU citizen. EU citizens are provided with a protection against nationality discrimination in any matter which falls within the scope of EU law (Article 18 TFEU). This has enabled the Court to expand the rights of EU citizens by reading EU law provisions together with Article 18 TFEU. The LTR Directive, however, does not provide LTRs with such a protection. As a result, the Court will not be able to expand the rights of LTRs, and thus, it is unlikely that LTRs will obtain similar treatment to EU citizens. Moreover, the analysis of the Court's judgments on the LTR Directive shows that the Court *does not intend* to expand the rights of LTRs in the same way that the rights of EU citizens have been expanded. It was demonstrated that when the applicant in a case is an EU citizen, the Court is prepared to ensure that the EU citizen is guaranteed the claimed right, even if the applicant does not fall within the personal or material scope of an EU law provision. On the

contrary, in the case of LTRs, the focus of the Court is to ensure the effectiveness of the LTR Directive. Thus, the Court's interpretation of the provisions of the Directive is, at best, likely to expand the rights of LTRs in the limited areas listed in the Directive.

In chapter 5, I also argued that LTRs who have resided in a Member State for at least five years, and thus, have established a genuine link with the EU, are still treated as aliens. They are deprived of the advantages of EU citizenship. On the other hand, individuals who happen to have the nationality of a Member State, for instance through their parents, but do not have a genuine link with the Union's society, are considered to be members of the Union. Thus, a nationality-based membership criterion does not seem to be appropriate for the EU. First, because, a supranational organisation requires a supranational membership model too. Secondly, residents of the Union who have established a genuine link with the Union's society through residence, are possibly treated worse than those who have no genuine link with the Union's society.

It should be recalled that the one of the two main questions which this thesis intends to answer has been whether the LTR Directive is capable to achieve the Tampere Programme's objectives. Based on the findings in this thesis, it can be concluded that integration of TCN residents in the EU was the engine of the Tampere Programme, but the Directive does not seem to be a suitable, powerful enough fuel for that engine.

3. Policy Recommendations

With regards to the integration of LTRs into the Union's society, it is recommended that:

1. The Union should not neglect the European dimension of the integration of LTRs. It was discussed in section 6 of chapter 2 that LTRs are not just members of the host State's society. They are also members of the Union's society and therefore, the Union should play a more active role in enhancing the integration of its society members.
2. Any LTR may eventually become a Union citizen through naturalisation in the host State. The Union should start creating a genuine link with LTRs as soon as possible, e.g. once they become LTRs.

3. As it was illustrated in chapter 2 the approach adopted in the LTR Directive is not in line with the approach recommended in the Tampere Programme and thus, is not capable of achieving the integration objectives of the Programme. If the Union, and the Member States

intend to achieve the objectives set out in the Tampere Programme, they should change their approach to the integration of LTRs, and adopt an inclusionary model to the integration of LTRs into the Union's society. This is necessary for effectively achieving their own-defined objectives in the Tampere Programme, which were also reiterated in the Union's immigration policy documents after the Tampere Programme.

4. As discussed in this thesis, particularly chapter 2, the civic integration approach to the integration of migrants is not appropriate for the society of the Union; this model of integration assumes that the Union's society is a homogenous one, and diversity is a bad thing. Such an approach, thus, ignores the realities of the Union's society as a diverse society.

Unlike the civic integration approach, the inclusionary approach of the Union to the integration of mobile-EU citizens and their TCN family members has proved to be effective and appropriate. Thus, it is the Union's interest to implement the same approach to the integration of LTRs, which has already been approved to be effective.

The lack of competence with regards to the integration of TCNs into the society will, of course, be an obstacle, therefore, I am not suggesting that integration measures should be harmonised across the Union, but, at least, a common direction, approach, and understanding of integration of LTRs should be agreed between all Member States.

It is also submitted that:

5. The integration conditions imposed by the second Member State undermine the value of residence in the first Member State. Such conditions ignore the role which residence plays in the integration of LTRs into the receiving society, and thus, should be removed from the future versions of the LTR Directive.

With regards to giving LTRs rights and obligations comparable to those of EU citizens, it is submitted that:

1. Before the LTR Directive, there was no expectation for the Union to recognise the rights of TCN residents. They were simply residents in one Member State, and their rights and status were governed by national laws. Now, LTRs are permanent residents of the Union, whose rights, status and immediate interests are governed by the Union law.

2. Leading democratic principles of affectedness, stakeholders, and coercion were used in section 5.1 of chapter 4 to examine the position of the Union and LTRs in terms of

the political right of vote in the European Parliament elections. The exclusion of LTRs from access to electoral rights inevitably subjects a part of the EU's population to EU legislation without representation. Since the adoption of the LTR Directive, LTRs are de jure permanent members of the Union's society. It is not possible for the Union as a liberal and democratic organisation to ignore its permanent residents.

3. As illustrated in sections 5.1, 5.2, and 5.3 of chapter 4, enfranchising LTRs is supported by leading democratic principles, integration policies, and legitimate claims to equality. The enfranchisement of LTRs is not only a claim by LTRs but is also a duty for the EU owed to LTRs. Thus, the EU should extend the franchise to LTRs in the EP elections, i) in order to take a step towards its democratisation, ii) towards the achievement of the aims of its own immigration policy, and iii) towards equal treatment of all members of its society.

4. Extending free movement rights of EU citizens to LTRs is a strong sign that LTRs are treated similarly to other members of the society. The Union should seize the opportunity provided by the LTR Directive to show its commitment to the inclusion of LTRs to the society by genuinely extending rights to move and reside within the territory of the Union.

With regards to ensuring fair treatment of TCN residents in the Union, it is submitted that:

1. Given that LTRs are members of the Union's society, the Union should take fair treatment of its society's members seriously. Moreover, the objective defined for the Union by the Amsterdam Treaty and the Tampere Programme to ensure the fair treatment of TCN residents, the Union has a responsibility to *ensure* LTRs' fair treatment. Allowing the Member States to impose discretionary conditions on applicants for the status of long-term residence, or LTRs who move to a second Member State is obviously contrary to fair treatment of LTRs.

With regards to approximating the status of TCN residents to that of EU citizens:

1. The legal status granted to TCNs who are permanent residents in a Member State, changed the position of these TCNs from de facto members of the Union's society to de jure members of this society. This status, however, as illustrated in section 4 of chapter 5, is far from equivalent to EU citizenship. The main difference between the status of long-term residence and EU citizenship is the general protection against nationality discrimination. Article 18 TFEU prohibits discrimination on the ground of nationality in any matter which falls within the material scope of EU law, while the LTR Directive's protection against

nationality discrimination is limited to the areas listed in the Directive. A Member State is also free to impose discretionary and discriminatory conditions on LTRs who move to the territory of the Member State from another Member State.

2. Before the LTR Directive, TCN residents were residents of a country which happened to be an EU Member State. The LTR Directive was a game-changing legislation, which brought the status of rights of LTRs within the scope of EU law. The Union should not ignore that millions of migrants who hold a status under EU law are permanent members of the EU's society.

3. By providing LTRs with the right to equal treatment with other members of the society (i.e. EU citizens), the Union shows its commitment to the inclusion of LTRs into the society. It is also a clear signal from the members of the society that they accept LTRs as new members of the society.

4. Residence seems to be a more appropriate criterion for acquiring the status of EU citizenship. Thus, residence, also, should be the criterion to become EU citizen. Considering the political reality of the Union, especially the obsession of the Member States to control who holds the status of EU citizenship, I suggest that the status of long-term residence should be approximated to that of EU citizenship, without becoming EU citizenship (similar to the status of EEA nationals, who are not EU citizens but enjoy rights and protection under EU law).

The second practical way is granting LTRs a supranational EU citizenship which is not dependant on the nationality of a Member State. In this way, Member States can maintain their control over who holds EU citizenship – i.e. Member States can still decide who can acquire their nationality and, through it, EU citizenship – but at the same time there can be a completely supranational EU citizenship status which does not require that Union citizens first acquire Member State nationality. The Member States can also be in charge of approving that supranational EU citizenship status, by, for instance, considering application for the status of long-term residence, and when all the conditions defined in the Directive (e.g. 5 years residence, health insurance) are satisfied, then the status of long-term residence is granted by the Member State, but this status includes all the rights and benefits of EU citizenship (e.g. a general protection against nationality discrimination under Article 18 TFEU, or the right to vote in the EP elections).

It should be acknowledged that in the current political environment in which rights and treatment of TCNs are highly politicized issues, any liberal change to the rights of LTRs might not be plausible. Thus, this thesis does not recommend the abolition of all differences between EU citizens and TCN long-term residents, e.g. by adding a legal basis for extending the right to vote in the EP elections to LTRs. Nevertheless, the illusion that the status granted by the LTR Directive is a subsidiary form of EU citizenship, which will be developed further by the Court, should not slow down the efforts to make LTR status a genuinely EU status.

Moreover, at least those differences in treatment between EU citizens and LTRs which satisfy any of the following conditions, should be prohibited: (i) measures which cannot be logically justified; (ii) measures which do not contribute to the security of Europe; (iii) measures which collectively exclude LTRs from enjoying the rights of EU citizens and, thus, have a negative impact on the integration of LTRs into the society. One of the differences in treatment of LTRs which neither seems to be necessary, nor is logically justified and also collectively excludes LTRs from enjoying rights of EU citizens is the possibility for the host State to impose integration/language conditions on LTRs. As discussed in chapter 2 this margin of appreciation reserved for the Member States was added by three Member States during negotiations. As the Council had to vote unanimously at that time, other Member States had no choice but to accept the inclusion of this margin of appreciation in the Directive. Now that the model of decision making in the field of JHA has changed to qualified majority, if the Directive is amended this margin of appreciation which affects the effectiveness of the Directive can be removed, even if those three Member States vote against this amendment. This appears to be a practical solution for improving the effectiveness of the LTR Directive with regards to genuine integration of (inclusion) of LTRs into the EU society. Nevertheless, it is not clear that when/if the rights of LTRs will return to the agenda of the Council.

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