

## PART C IMMIGRATION

### I.

#### Legal Framework for EU Immigration Policy

**Selected Bibliography:** Acosta Arcarazo/Murphy (eds), *EU Security and Justice Law* (Hart, 2014); Azoulai/de Vries, (eds), *EU Migration Law* (OUP, 2014); Boeles/den Heijer/Lodder/Wouters, *European Migration Law*, 2<sup>nd</sup> edn (Intersentia, 2014); Bonjour/Rea/Jacobs (eds), *The Others in Europe* (Institut d'études européennes, 2011); Coleman, *European Readmission Policy* (Martinus Nijhoff, 2008); Bribosia, 'Les Politiques d'intégration de l'Union européenne et des États Membres à l'épreuve du principe de non discrimination', in: Pascouau/Strik (eds), *Which Integration Policies for Migrants?* (Wolf, 2012), p. 51 81; Carrera, *In Search of the Perfect Citizen?* (Martinus Nijhoff, 2009); Geiger/Kahn/Kotzur (eds), *European Union Treaties* (C.H. Beck/Hart, 2014); Groenendijk, 'Citizens and Third Country Nationals', in: Carlier/Guild (eds), *L'avenir de la libre circulation des personnes dans l'U.E. The Future of Free Movement of Persons in the EU* (Bruylant, 2006), p. 79 102; Hailbronner, *Immigration and Asylum Law and Policy of the European Union* (Kluwer, 2000); Iglesias Sánchez, 'Fundamental Rights Protection for Third Country Nationals and Citizens of the Union', *EJML* 15 (2013), p. 137 153; Kugelmann, 'Einwanderungs und Asylrecht', in: Schulze/Zuleeg/Kadelbach (eds), *Europarecht. Handbuch für die deutsche Rechtspraxis*, 3<sup>rd</sup> edn (Nomos, 2015), § 41; Labayle, 'L'espace de liberté, sécurité et justice dans la Constitution pour l'Europe', *Revue trimestrielle de droit européen* 41 (2005), p. 437 472; Peers, *EU Justice and Home Affairs Law*, 3<sup>rd</sup> edn (OUP, 2011); ter Steeg, *Das Einwanderungskonzept der EU* (Nomos, 2006); Thym, 'EU Migration Policy and its Constitutional Rationale', *CML Rev.* 50 (2013), p. 709 736; Thym, 'Residence as *de facto* Citizenship?', in: Rubio Marin (ed), *Human Rights and Immigration* (OUP, 2014), p. 106 144; Thym, 'Towards International Migration Governance?', in: Van Vooren et al. (ed), *The Legal Dimension of Global Governance: What Role for the EU?* (OUP, 2013), p. 289 305; Weiß, Articles 77 80 TFEU, in: Streinz (ed), *EUV/AEUV. Kommentar*, 2<sup>nd</sup> edn (C.H. Beck, 2011); Wiesbrock, *Legal Migration to the European Union* (Martinus Nijhoff, 2010); Wilsher, 'Economic Migration into the European Union: Standing at the Crossroads', *Yearbook of European Law* 21 (2002), 163.

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## I. General Remarks

### 1. Evolution of EU Immigration Policy

- 1 Under the original Schengen Agreements, which contained only corollary rules on short term stays (see Thym, Legal Framework for Entry and Border Controls, MN 3), immigration policy towards third country nationals remained mainly the domain of Member States' competencies. This changed when the **Treaty of Maastricht** designated immigration policy a matter of common interest, thereby signalling the start for the gradual harmonisation of national policies.<sup>1</sup> On the basis of intergovernmental decision making procedures at the time (see Hailbronner/Thym, Constitutional Framework, MN 2), the Member States agreed upon a number of joint positions and draft conventions which did not become binding law but paved the way, nevertheless, for the later adoption of legislation after the introduction of a **more robust Treaty foundation** by the Treaty of Amsterdam.<sup>2</sup> Decision making procedures were gradually aligned with the orthodoxy of the supranational method in a process which came full circle when the Treaty of Lisbon introduced the present Article 79 TFEU in line with the contents of the erstwhile Constitutional Treaty, which had never entered into force (see Hailbronner/Thym, *ibid.*, MN 3 4). From today's perspective, Article 79 TFEU provides for a comprehensive shared competence of the Union for most questions relating to the entry and stay of foreigners (see below MN 11).
- 2 Political agreement on new instruments for legal migration was difficult to reach in contrast to entry and border controls as well as asylum with regard to which the Schengen Agreements on the Geneva Convention established a solid foundation for substantive policy harmonisation. Even negotiations on family reunion were cumbersome (see Hailbronner/Arévalo, Directive 2003/86/EC Article 1 MN 2 13) despite the human rights framework under Article 8 ECHR (see below MN 52 56). In contrast to the predominantly restrictive national practices in the field of economic migration at the time, the Commission boldly proposed a 'proactive immigration policy' based on the assumption that 'the existing "zero" immigration policies which have dominated thinking over the past 30 years are no longer appropriate.'<sup>3</sup> A corresponding proposal for a directive on economic migration met with stiff resistance in the Council and was abandoned after some initial discussions at working group level.<sup>4</sup> It was not until a couple of years later that the Commission, after an extensive consultation process, readdressed the issue in a policy plan on legal migration,<sup>5</sup> which laid the basis for a **sectoral approach to economic migration** with specific directives on individual aspects<sup>6</sup> that were eventually adopted after prolonged debates. The Blue Card, the Seasonal Workers Directive, the ICT Directive and the Single Permit Directive, which will be commented on in this volume, are the outcome of this process.

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<sup>1</sup> See Article K.1(3) EU Treaty as amended by the Treaty of Maastricht of 7 February 1992 (OJ 1992 C 191/1); and Hailbronner, *Immigration and Asylum*, p. 47 52.

<sup>2</sup> See Hailbronner, *Immigration and Asylum*, p. 260 288.

<sup>3</sup> Commission Communication, COM(2000) 757, p. 13 (first quotation) and p. 6 (second quotation).

<sup>4</sup> See Commission Proposal, COM(2001) 386 and Council doc. 11803/01 of 12 September 2001; on the course and the context of inter institutional debates, see Wilsher, *Economic Migration*, p. 172 183; and Papagianni, *Institutional and Policy Dynamics of EU Migration Law* (Martinus Nijhoff, 2006), ch. 5.

<sup>5</sup> See the Commission Communication, COM(2005) 669 and the consultation with Member States and stakeholders beforehand on the basis of a Commission Green Paper, COM(2004) 811.

<sup>6</sup> The Commission Communication, COM(2005) 669, p. 5 8 announced policy initiatives on a general framework directive as well as for sectoral proposals on highly skilled workers (the later Blue Card), seasonal workers, intra corporate transferees and trainees.

More recently, the Commission reactivated its ambition when it suggested the future adoption of an **immigration code** to streamline existing legislation after the agreement on the Stockholm Programme and was rejected by the Member States in the Council.<sup>7</sup> The current **Ypres Guidelines** by the European Council (see Hailbronner/Thym, Constitutional Framework, MN 8 9) are decidedly vague, stressing, in a similar vein as Commission President Juncker, that the EU should ‘remain an attractive destination for talents and skills’ on an equal footing with Australia or Canada.<sup>8</sup> To agree on such objective still leaves open the search for coherent policy responses, especially in respect of the transnational movement of people less qualified than the highly skilled with regard to which the economic and social benefits of more inward migration for European societies are much less evident.

Political disagreement over the direction of immigration policy should not come as a great surprise. With regard to legal migration, the Treaty framework, with its collection of diverse and occasionally contradictory policy objectives, established no clear political guidance on the course of action to be pursued by the legislature (see Hailbronner/Thym, Constitutional Framework, MN 5 7). There were, and sometimes continue to be, protracted disputes at EU level about the desirability of joint policies and the scope of supranational competences (see below MN 24 27).<sup>9</sup> The underlying reason may be the **absence of a basic agreement about the conceptual underpinning of immigration policy**, since the Commission could not convince Member States to follow its essentially market driven approach to economic migration (see above MN 3).<sup>10</sup> Generally speaking, immigration policy presents itself, also beyond the European Union, as a **conglomerate of competing policy objectives** which cannot easily be reconciled, not least since states do not always control policy outcomes.<sup>11</sup> In the field of legal migration, cultural and identificatory aspects should not be as easily brushed aside as xenophobia, since European societies change in response to migration.<sup>12</sup> It remains the responsibility of politicians, when deciding about the contours of the present and future immigration regime at European level, to evade the pitfalls of scapegoating inherent in many policy responses to migratory phenomena.<sup>13</sup>

## 2. Territorial Scope (Member State Participation)

The EU immigration measures are subject to country specific opt outs for the United Kingdom, Ireland and Denmark. The abstract rules guiding these arrangements are described in the introductory chapter to this commentary (see Hailbronner/Thym, Constitutional Framework, MN 38 45). It was demonstrated that the overall picture is rather complex and can be difficult to discern in specific scenarios, since the **country**

<sup>7</sup> Contrast the Commission Communication, COM(2010) 171, p. 7 with the Council Conclusions, Council doc. 9935/10 of 19 May 2010 (adopted by the JHA Council on 3 June 2010); for the broader political context, see Kostakopoulou et al., ‘EU Migration Law’, in: Arcarazo/Murphy (eds), *EU Security*, p. 129, 132–134.

<sup>8</sup> See European Council, doc. EUCO 79/14 of 27 June 2014, para 7; and the political guidelines for the 2014–19 EU Commission by its President Juncker, *A New Start for Europe*, 14 July 2014, p. 9–10.

<sup>9</sup> See also Ryan, ‘The European Union and Labour Migration’, in: Toner et al. (eds), *Whose Freedom, Security and Justice?* (Hart, 2007), p. 489, 490–496.

<sup>10</sup> On different policy visions, see Thym, *Migrationsverwaltungsrecht* (Mohr Siebeck, 2010), ch. 3; Wilsher, *Economic Migration*, p. 184–187; Guild, ‘Mechanisms of Exclusion’, in: Apap (ed), *Justice and Home Affairs Law in the EU* (Elgar, 2004), p. 211, 217–221; and Peers, ‘Aliens, Workers, Citizens or Humans?’, in: Guild/Harlow (eds), *Implementing Amsterdam* (Hart, 2001), p. 291–308.

<sup>11</sup> See Boswell, ‘Theorizing Migration Policy’, *IM Rev.* 41 (2007), p. 75, 87–95; and Castles/de Haas/Miller, *The Age of Migration*, 5<sup>th</sup> edn (Palgrave, 2013), chs 8–12.

<sup>12</sup> See Thym, *Constitutional Rationale*, p. 220–221; and *ibid.*, ‘Citizens and Foreigners in EU Law’, *ELJ* 22 (2016), sect. 4 (forthcoming).

<sup>13</sup> See, generally, Girard, *La Violence et le sacré* (Grasset, 1972).

specific opt outs for the United Kingdom, Ireland and Denmark do not follow a uniform pattern. There are differences between the rules for Denmark on the one hand and for the United Kingdom and Ireland on the other. Moreover, we are faced with two sets of rules for the above mentioned countries: measures building upon the Schengen acquis and other instruments. In practice, the last recitals of most instruments reveal whether the United Kingdom, Ireland or Denmark are bound. In order to facilitate orientation, the list of the measures below indicates whether the instruments commented on in this volume are binding for the United Kingdom, Ireland and/or Denmark and whether they are considered to be building upon the Schengen acquis.

Instrument	United Kingdom	Ireland	Denmark	Schengen? <sup>14</sup>
Family Reunification Directive 2003/86/EC	no	no	no	no
Long Term Residents Directive 2003/109/EC	no	no	no	no
Human Trafficking Directive 2004/81/EC	no	no	no	no
Return Directive 2008/115/EC	no	no	no	no
Student Directive 2004/114/EC	no	no	no	no
Researcher Directive 2005/71/EC	no	yes	no	no
Blue Card Directive 2009/50/EC	no	no	no	no
Employer Sanctions Directive 2009/52/EC	no	no	no	no
Single Permit Directive 2011/98/EU	no	no	no	no
Seasonal Workers Directive 2014/36/EU	no	no	no	no
Inter Corporate Transfers Directive 2014/66/EU	no	no	no	no

Participation in immigration law instruments commented upon in this volume.

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<sup>14</sup> Does the measure build upon the Schengen acquis? If yes, it is subject to the opt out arrangements in the Schengen Protocol described by Hailbronner/Thym, Constitutional Framework, MN 41, 44.

## II. Treaty Guidance under Article 79 TFEU

### Article 79 TFEU

1. 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, and the prevention of, and enhanced measures to combat, illegal immigration and trafficking in human beings.

2. For the purposes of paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures in the following areas:

- (a) the conditions of entry and residence, and standards on the issue by Member States of long term visas and residence permits, including those for the purpose of family reunification;
- (b) the definition of the rights of third country nationals residing legally in a Member State, including the conditions governing freedom of movement and of residence in other Member States;
- (c) illegal immigration and unauthorised residence, including removal and repatriation of persons residing without authorisation;
- (d) combating trafficking in persons, in particular women and children.

3. The Union may conclude agreements with third countries for the readmission to their countries of origin or provenance of third country nationals who do not or who no longer fulfil the conditions for entry, presence or residence in the territory of one of the Member States.

4. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may establish measures to provide incentives and support for the action of Member States with a view to promoting the integration of third country nationals residing legally in their territories, excluding any harmonisation of the laws and regulations of the Member States.

5. This Article shall not affect the right of Member States to determine volumes of admission of third country nationals coming from third countries to their territory in order to seek work, whether employed or self employed.

#### 1. Migration Governance (Article 79(1) TFEU)

The EU Treaty takes up, in Article 79(1) TFEU, the **objective of ensuring an efficient<sup>15</sup> management of migration flows**, thereby reiterating a demand that was common among politicians across Europe when the European Convention proposed the new text that later found its way into the Treaty of Lisbon (see Hailbronner/Thym, Constitutional Framework, MN 4, 13). It indicates that public authorities should strive for an impact on cross border movements of people that can occur, like often in the US, ‘outside the law.’<sup>16</sup> Of course, this objective remains counterfactual, since state authorities will never be in full control. Nonetheless, EU Treaties express the desire that public authorities should strive for regulatory leverage, reflecting both Europe’s

<sup>15</sup> While the English language version employs the process oriented term ‘efficient’ (not the outcome oriented word ‘effective’), other language versions, which are equally valid, use the term ‘effective’ or wording that can mean both; cf. the German ‘wirksam’, the French ‘efficace’ or the Spanish ‘eficaz.’

<sup>16</sup> See Motomura, *Immigration Outside the Law* (OUP, 2014).

wider 'social model' of active state involvement in social and economic policy and the wish to prevent the unintended side effects that had hitherto defined the immigration policies of many Member States.<sup>17</sup> Article 79(1) TFEU signposts that EU policy is, among other things, meant to reduce the often widespread mismatch between legal rules and social realities concerning migration.

- 7 The objective to ensure an efficient management of migration flows 'at all stages' indicates that the EU Treaties do not conceive of cross border movements as a simple one step settlement that instantly results in full membership. EU primary law specifies, rather, that the legal dimension of migrants' biographies can be described as a **process of legal status change**.<sup>18</sup> Depending on the circumstances of the individual case, EU migration law can provide for 'short stay residence permit[s]' (Article 77(2)(a) TFEU) leading towards 'long term residence permits' (Article 79(2)(a) TFEU) and the eventual acquisition of Union citizenship by means of naturalisation at national level (see MN 14) or it can result in 'removal' in situations of 'unauthorised residence' (Article 79(2)(c) TFEU). This gradual approach contrasts with the classic position of US law which has traditionally distinguished categorically between the distinct category of 'immigrants' with a permanent right to residence from day one and 'non immigrants' with a temporary status.<sup>19</sup> The careful distinction between different scenarios in the Treaty articles, including the demarcation between immigrants and asylum seekers, indicates that the objective of effective migration management is to be achieved by means of distinct conditions and standards for different status groups. The **European concept of an 'immigration policy'** (French: *politique d'immigration*) is not about either entry or rejection, but about a differentiated and selective admission process on the basis of refined statutory rules, whose content is decided on by the EU legislature in the ordinary legislative procedure.<sup>20</sup>
- 8 The EU Treaties emphasise that public migration management must not result in a treatment of human beings akin to that of objects when it calls upon EU institutions to guarantee the **'fair treatment of third country nationals'** (Article 79(1) TFEU; similarly, Article 67(2) TFEU; French: *traitement équitable*), thereby introducing a basic notion of normative considerations of social justice into the Treaty design for immigration policy. I have explained elsewhere that the different Treaty objectives for immigration policy ranging from migration management to fair treatment, read in conjunction, should be conceived of as an aspiration of 'migration governance' accommodating the management perspective of state authorities with the legitimate interests of migrants.<sup>21</sup> Corresponding requirements for efficient migration management and fair treatment are **legally binding at an abstract level** that does not translate in a similar way as other Treaty objectives into judicable standards for the review of EU legislation in regular circumstances (see Hailbronner/Thym, Constitutional Framework, MN 5 7). In so far as the fair treatment of migrants is concerned, limited judicability does not exclude judicial review in so far as migrants may, within the context of EU immigration policy, always rely upon the human rights in the EU Charter (see below MN 51 52).

<sup>17</sup> See Castles, 'The Factors that Make and Unmake Migration Policies', IM Rev. 38 (2004), p. 852 884; Thym, International Migration Governance, p. 291 292; and Hollifield, 'The Emerging Migration State', IM Rev. 38 (2006), p. 885, 894 899.

<sup>18</sup> On the underlying concept, see Thym, *Migrationsverwaltungsrecht* (Mohr Siebeck, 2010), p. 18 24.

<sup>19</sup> In practice, the distinction has increasingly given way to a gradual system in which initial temporary statuses are 'upgraded' to immigrant status after some years of residence.

<sup>20</sup> The ordinary legislative procedure applies to all aspects of Article 77 79 TFEU.

<sup>21</sup> See Thym, Constitutional Rationale, p. 721 723.

## 2. Scope of EU Competences (Article 79(2) TFEU)

As a shared competence, legislation on immigration policy must comply with the **principles of subsidiarity and proportionality** that oblige the EU legislature to limit their action to initiatives that cannot be sufficiently achieved at national level and remain limited, in terms of regulatory intensity, to what is necessary to achieve legitimate policy objectives.<sup>22</sup> However, when assessing specific proposals, it should be acknowledged that the far reaching Treaty objective of a ‘common immigration policy’ capable of managing migration flows efficiently ‘at all stages’ requires a certain generosity in the application of the principles of subsidiarity and proportionality.<sup>23</sup> The term ‘**measure**’ in the introductory part of Article 79(2) TFEU indicates that directives, regulations and decisions can be adopted and that operative and financial support, which legally usually rests upon a decision, are also permissible (see Thym, *Legal Framework for Entry and Border Controls*, MN 7).

The recurrent use of the term ‘third country national’<sup>24</sup> indicates that the migration status of **nationals of third states including stateless persons** can be regulated on the basis of Article 79 TFEU read in conjunction with the second sentence of Article 67(2) TFEU. Union citizens cannot be the object of legislation on the basis of Article 79 TFEU, not even when they have no right to reside under the Citizenship Directive 2004/38/EC. By contrast, the migration status of **third country national family members of Union citizens** can be dealt with on the basis of Article 79 TFEU as a matter of legal competence.<sup>25</sup> If the EU legislature decided to do so, it would have to ascertain in the drafting process whether the derived rights of third country national family members of Union citizens benefit from a privileged treatment that commands priority over immigration legislation in cases of conflict (see below MN 31). It should be noted in this context that family members of static Union citizens who had not exercised their free movement rights and are living in the Member States of which they hold the nationality are not covered by corresponding EU rules: Member States remain free to apply domestic laws (see below MN 31).

**a) Entry and Residence.** The generous formulation in Article 79(2)(a) TFEU concerning ‘conditions of entry and residence’ shows that the Union has acquired an **extensive competence for core aspects of immigration law**, which must be exercised with due respect for the principles of subsidiarity and proportionality (see above MN 9). Family reunion is mentioned in the Treaty text by way of illustration; the EU legislature remains free to establish other status groups or to modify their configuration (see above MN 7). In practice, it has done so extensively in recent years, as the numerous legislative instruments commented on in this volume demonstrate. Corresponding permission for entry and residence can be handed out either by consulates in the countries of origin for the purpose of first admission by means of ‘visas’ or by domestic immigration authorities in the form of classic residence ‘permits’ for those who are already residing in the Member State concerned; both options are mentioned in Article 79(2)(a) TFEU, thereby illustrating the broad reach of the provision. While entry permits for **short stays of no more than a few months are covered by Article 77(2)(a) TFEU**, permission for

<sup>22</sup> Cf. Article 5(3), (4) TEU.

<sup>23</sup> Similarly, see Labayle, *L’espace*, p. 463; ter Steeg, *Einwanderungskonzept*, p. 454; Peers, *EU Justice*, p. 393; and Kugelmann, *Einwanderungs und Asylrecht*, para 113.

<sup>24</sup> Article 79(1), (2)(b), (4) and (5) TFEU.

<sup>25</sup> In practice, the Family Reunion Directive, in particular, does not extend to the entry of family members of Union citizens; see Hailbronner/Arévalo, *Directive 2003/86/EC Article 3 MN 2*.

longer periods comes within the reach of Article 79(2)(a) TFEU. Read in conjunction, the Treaty articles allow for the seamless regulation of immigration statuses, with the precise delimitation of shorter and longer stays being the prerogative of the legislature (see Thym, *Legal Framework for Entry and Border Controls*, MN 12).

- 12 There is little doubt, in contrast to the previous situation, that the Treaty of Lisbon established a competence for the EU to adopt **legal rules on economic migration** such as the Blue Card Directive 2009/50/EC for as long as Member States retain a certain flexibility regarding economic migration in accordance Article 79(5) TFEU (see below MN 26–27). The introduction of this caveat concerning Member State flexibility was based on the assumption that the EU had acquired a competence for economic migration as a matter of principle.<sup>26</sup> The concept of an immigration policy based on a process of legal status change (see above MN 7) does not imply that first admission must necessarily bring about the option of long term residence; the EU can provide for **residence permits without the option of renewal**, as in the example of the Seasonal Workers Directive 2014/36/EU. It follows from the broad designation of ‘conditions’ and ‘standards’ that Article 79(2)(a) TFEU supports rules on the **revocation of residence permits** in immigration legislation, including expulsion. Once a residence permit has been revoked, measures against ‘illegal immigration and unauthorised residence’ under Article 79(2)(c) TFEU can be instigated (see below MN 19).
- 13 Rules concerning refugees are covered by Article 78 TFEU as *lex specialis*, while complementary humanitarian protection statuses for those who do not qualify for asylum or subsidiary protection status under that provision can come within the reach of Article 79 TFEU. There are, at present, multiple and highly diverse national regimes for those who do not receive international protection in line with the Asylum Qualification Directive 2011/95/EU because their asylum application has been rejected.<sup>27</sup> If the EU decided to harmonise the current patchwork, it would have to be assessed in line with established ECJ case law on the demarcation of legal bases whether the object and purpose of corresponding rules argue in favour of Article 78 or Article 79 TFEU as the legal basis.<sup>28</sup> In principle, there is nothing in the broad wording of Article 79(2)(a) TFEU that would prevent the **harmonisation of national rules on complementary humanitarian protection**. Similarly, the EU could adopt legislation on the **regularisation of unauthorised residence** on the basis of Article 79(2)(a) TFEU,<sup>29</sup> although the principle of subsidiarity argues for a careful assessment of the necessity of pan European legalisation schemes (see above MN 9); it is a matter of political judgment anyway whether and, if so, in what form one considers regularisation to be politically and morally appropriate.
- 14 By contrast, there is nothing in the wording of Article 79 TFEU indicating that the acquisition of nationality should be covered by EU immigration policy. Article 20(1) TFEU highlights, in addition, that Union citizenship shall be acquired by means of naturalisation at national level. Accordingly, the ECJ has reaffirmed on a number of

<sup>26</sup> Cf. the proposal for a Article III 163(5) in the draft Constitutional Treaty by the Presidium of the European Convention in doc. CONV 847/03 as well as the summary of the reactions among the members of the Convention in doc. CONV 821/03, p. 83; see also Ladenburger/Verwirlghen, ‘Policies Relating to the Area of Freedom, Security and Justice’, in: Amato/Bribosia/de Witte (eds), *Genèse et destinée de la Constitution européenne* (Bruylant, 2007), p. 743, 764; as well as Peers, *EU Justice*, p. 393–394 et seq.; and Weiß, Article 79 TFEU para 3.

<sup>27</sup> For a rich comparative study, see Schieber, *Komplementärer Schutz* (Nomos, 2013), ch. 3.

<sup>28</sup> See Schieber, *ibid.*, p. 298–314; in practice, the distinction makes little difference, since the ordinary legislative procedure applies to both provisions.

<sup>29</sup> Similarly, Schieber, *ibid.*, p. 311; and Bast, *Aufenthaltsrecht und Migrationssteuerung* (Mohr Siebeck, 2011), p. 146–147.



occasions that **nationality law remains a national prerogative**.<sup>30</sup> It would require a formal Treaty change under Article 48 TEU to establish a supranational competence for the harmonisation of nationality laws in the European Union.

Rules on migration in **association agreement with third states** creating privileged links with a non member country which must, at least to a certain extent, take part in the Community system are covered by Article 217 TFEU as *lex specialis* (see, *mutatis mutandi*, see Thym, *Legal Framework for Entry and Border Controls*, MN 15), while the adoption of negotiating positions in treaty bodies established on the basis of such agreements is covered, both procedurally and in substance, by Article 218(8)(1), (9) TFEU, also in areas which are, like Article 79(2) TFEU, subject to the ordinary legislative procedure.<sup>31</sup> In line with settled case law, the ECJ may interpret such agreements, since they are an integral part of Union law.<sup>32</sup> Corresponding privileges for nationals of specific countries under association agreements or pre existing bilateral treaties of Member States are usually protected in EU legislation by means of explicit provisions on more generous national treatment (see *Hailbronner/Thym*, *Constitutional Framework*, MN 28 33), which are declaratory in nature international obligations contrast with internal EU legislation (see *ibid.*, MN 56 59).

Article 79(2)(a) TFEU states that the EU legislature may adopt measures with ‘standards on the issue’ of residence permits, thereby indicating that EU legislation can embrace **rules on administrative procedure and judicial protection** which, as *leges speciales*, supplant the principle of national procedural autonomy that applies in the absence of more specific legislative prescriptions (see *Hailbronner/Thym*, *Constitutional Framework*, MN 34 37). Notwithstanding the respect for national specificities and the principle of subsidiarity (see above MN 9),<sup>33</sup> the Single Permit Directive 2011/98/EU and corresponding rules in other directives demonstrate the relevance of procedural requirements for immigration law; their introduction is covered by the competence in Article 79(2)(a) TFEU. When the Treaty explicitly refers to the delivery of residence permits ‘by Member States,’ it reaffirms that supranational rules on immigration should, as a matter of principle, be implemented at domestic level. EU institutions can support effective implementation and transnational cooperation, while the move towards a **federal immigration authority would require a Treaty change** (see Thym, *Legal Framework for Entry and Border Controls*, MN 8).

**b) Rights of Migrants and Free Movement.** In contrast to Article 79(2)(a) TFEU, part B of the provision does not concern conditions of entry but the rights of third country nationals during periods of legal residence.<sup>34</sup> This implies that legislative instruments will usually be based jointly upon part A and B, since the legislature usually wants to regulate residence conditions and rights together.<sup>35</sup> The unspecific wording used in the Treaty indicates that the legislature has broad discretion when deciding

<sup>30</sup> See ECJ, *Rottmann*, C 135/08, EU:C:2010:104, paras 39 41, where the ECJ also required Member States to respect the principle of proportionality in the application of domestic nationality law as a matter of EU law; previously, see ECJ, *Micheletti*, C 369/90, EU:C:1992:295, para 10.

<sup>31</sup> Cf. ECJ, C 81/13, *United Kingdom vs. Council*, EU:C:2014:2449, para 66; this entails, by way of example, that agreement no a negotiating position in a treaty body will not require, unlike the adoption of directives on the same matter, the consent of the European Parliament.

<sup>32</sup> Settled case law in line with ECJ, *Demirel*, 12/86, EU:C:1987:400, para 9.

<sup>33</sup> See also Article 4(2) TEU.

<sup>34</sup> The Treaty of Lisbon clarified, in contrast to earlier formulations, that rights during periods of legal residence can be harmonised; see Toner, ‘The Lisbon Treaty and the Future of European Immigration and Asylum Law’, in: Azoulai/De Vries (eds), *EU Migration Law*, p. 14, 25.

<sup>35</sup> Such dual legal basis is unproblematic if, like in the instant case, the same decision making procedure applies.

which rights should be harmonised. In doing so, it can opt for an approximation with the status of Union citizens, in particular for long term residents, but is not legally obliged to do so (see below MN 33–36). It can also prescribe, under due respect for the principle of subsidiarity (see above MN 9), the **degree of social rights** in relation to social assistance or social security,<sup>36</sup> while rules on migration in regular association agreements with third states are covered by Article 217 TFEU (see above MN 15). Moreover, the ECJ found that reciprocal arrangements with third states integrating the latter into the EU's domestic social security coordination regime fall under Article 48 TFEU<sup>37</sup> migration in association agreements with third states. The competence also covers **access to the labour market** by those who have been admitted for purposes other than economic migration, such as students or family members.<sup>38</sup> The general scheme of the EU Treaties suggests, however, that besides naturalisation (see above MN 12) the **political rights of foreigners, including the right to vote in municipal elections**, cannot be harmonised on the basis of Article 79(2)(b) TFEU in the absence of any indication to the contrary in Article 79(2)(b) TFEU mirroring the express provision in the Treaties on the voting rights of Union citizens.<sup>39</sup>

- 18 Article 79(2)(b) TFEU allows for the adoption of statutory rules on **free movement and residence rights within the European Union** for third country nationals who have already been granted access to the EU territory.<sup>40</sup> The legislature is not obliged to provide this option, as the case of the Seasonal Workers Directive 2014/36/EU demonstrates, but most instruments adopted in recent years do provide for various degrees of free movement. The express reference to 'conditions' in the Treaty text accentuates the **absence of a constitutional guarantee of free movement** for third country nationals (see below MN 35). It remains the decision of the legislature to decide whether and, if so, under which conditions free movement within the EU should be allowed in different scenarios. It should be remembered, moreover, that the asymmetric geographic scope of the EU immigration acquis (see above MN 5) entails that free movement does not extend to all Member States, i. e. the United Kingdom, Ireland and Denmark are usually excluded.

- 19 **c) Illegal Migration.** Notwithstanding repeated academic and political criticism, Article 79(1) TFEU obliges the EU institutions to adopt '*enhanced* measures to combat illegal immigration' (emphasis added). Corresponding actions can include both legislation and operative instruments of an executive or financial nature (see above MN 9).<sup>41</sup> The wording leaves no doubt that these measures can include **both the prevention of illegal entry and the termination of unauthorised residence**, thereby supporting the overall objective of ensuring efficient migration management at all stages (see above MN 6–7). While Article 79(2)(a) TFEU covers the termination of legal residence status

<sup>36</sup> Declaration No. 22 (OJ 2007 C 306/258) promises that in relation to country specific financial and other impacts 'the interests of that Member State will be duly taken into account.'

<sup>37</sup> This applies to scenarios of (almost) complete and reciprocal integration into the single market and its social security coordination regime – not lesser degrees of trade liberalisation; see Renuy/van Elsuwege, 'Integration without membership and the dynamic development of EU law: *United Kingdom v. Council* (EEA)', CML Rev. 51 (2014), p. 935, 944–948 and ECJ, C 431/11, *United Kingdom vs. Council*, EU:C:2013:589, paras 49–64 for the European Economic Area in contrast to ECJ, C 81/13, *United Kingdom vs. Council*, EU:C:2014:2449, paras 48–58 with regard to Turkey.

<sup>38</sup> By contrast, residence for economic purposes is covered by Article 79(2)(a) TFEU; see above MN 12.

<sup>39</sup> Cf. Article 22 TFEU.

<sup>40</sup> While longer stays are covered by Article 79 TFEU, rules on travel within the Schengen area for shorter periods, in particular for touristic reasons, are covered by Article 77(2)(c) TFEU; see Thym, Legal Framework for Entry and Border Controls, MN 18.

<sup>41</sup> Similarly, Kotzur, Article 79 TFEU para 5; and Peers, EU Justice, p. 509–510

(see above MN 12), part C applies to those entering or residing without authorisation, either because their residence permit expired or was revoked or because they never had one.<sup>42</sup> In contrast to Article 77 TFEU (see Thym, Legal Framework for Entry and Border Controls, MN 16), Article 79(2)(c) TFEU embraces domestic measures to counter illegal residence that are not related to border control activities, such as the contents of the Employer Sanctions Directive 2009/52/EC.

The express reference to ‘removal and repatriation’ clarifies, in contrast to earlier formulations,<sup>43</sup> that rules on **deportation**, as well as operative or financial support for national removal operations, are covered by Article 79(2)(c) TFEU, which served as the central legal basis for the Return Directive 2008/115/EC and the provisions concerning removal in the Asylum, Migration and Integration Fund.<sup>44</sup>

**d) Trafficking in Human Beings.** There is little doubt that the competence to combat illegal migration in Article 79(2)(d) TFEU covers measures to combat trafficking in human beings, thereby contributing to the overall objective of adopting enhanced measures on illegal immigration (see above MN 19). Moreover, Article 79(2)(a) TFEU allows for the adoption of legislation concerning residence permits for victims of human trafficking (see above MN 13). It was superfluous therefore, from a strictly legal perspective at least, that the European Convention drafting the erstwhile Constitutional Treaty provided for an **express competence** highlighting the political significance of the issue in the eyes of the drafters of the Treaty.<sup>45</sup> Since the Convention established in parallel an express legal basis for criminal measures in Article 83(1) TFEU, the earlier dispute about the scope of corresponding EU competences (see Kau, Human Trafficking Directive 2004/81/EC Article 1 MN 6 7) has lost its relevance. Migration related measures will continue to be based on Article 79 TFEU, while criminal matters are covered by Article 83 TFEU.<sup>46</sup>

### 3. Readmission Agreements (Article 79(3) TFEU)

Effective migration management depends upon the cooperation of third states, in particular in so far as removals and repatriation are concerned. Notwithstanding the obligation under customary international law to enable the return of nationals,<sup>47</sup> practical cooperation is often flawed and presents one of the main reasons for the mismatch between enforceable return decisions and actual returns<sup>48</sup> a discrepancy that readmission agreements with rules and procedures for effective cooperation are meant to counter. Previous uncertainties concerning the existence and scope of corresponding EU competences are remedied by the introduction of an **express legal base**<sup>49</sup> designating a

<sup>42</sup> See Peers, EU Justice, p. 509 510.

<sup>43</sup> Article 63(3)(3) EC Treaty as amended by the Treaty of Nice of 26 February 2001 (OJ 2006 C 321E/37) had referred to removals only.

<sup>44</sup> Cf. Regulation (EU) No 516/2014 (OJ 2014 L 150/168).

<sup>45</sup> The Convention Presidium did not give reasons for the initial proposal in doc. CONV 836/03, p. 83, available online at <http://european.convention.europa.eu> [last accessed 1 November 2015].

<sup>46</sup> Similarly, Peers, EU Justice, p. 510 511.

<sup>47</sup> See Hailbronner, ‘Readmission Agreements and the Obligation on States under Public International Law to Readmit their own and foreign Nationals’, *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht/Heidelberg Journal of International Law* 57 (1997), 1, 2 5; and Coleman, Readmission Policy, ch. 2.

<sup>48</sup> Cf. the Commission Communication, COM(2014) 199.

<sup>49</sup> Arguably, an express provision was unnecessary, since Article 79(2)(c) TFEU can be read to comprise an implied treaty making power in line with the ECJ case law on external competences; cf. *Muzak*, Article 79 TFEU, in: Mayer/Stöger (eds), *Kommentar zu EUV und AEUV* (Maunz, looseleaf: 141<sup>th</sup> edn, 2012), para 23.

**shared competence.**<sup>50</sup> Article 3(2) TFEU does not change this conclusion, since the Return Directive regulates the conditions for removal, not cooperation with third states and corresponding practical arrangements.<sup>51</sup> The procedure for the negotiation and conclusion of EU readmission agreements follows Article 218 TFEU, which requires the consent of the European Parliament.<sup>52</sup> This implies that Member States retain the power to conclude **national readmission agreements with third states** as long as the EU institutions have not decided to exercise their supranational competence.<sup>53</sup>

- 23 Whenever the EU institutions conclude **combined readmission and visa facilitation agreements**, Article 79(3) and Article 77(2)(a) TFEU can serve as a dual legal basis. If the EU institutions decided to move towards more ambitious **mobility partnerships**, which at present remain soft law instruments (see below MN 60), Article 79(2)(a) TFEU would have to be used as an additional legal basis. When negotiating with third states or adopting internal measures, the EU institutions are bound to coordinate their migration related instruments with other external policies such as development cooperation in order to guarantee policy coherence and realise the broader Treaty objectives for external action (see Hailbronner/Thym, Constitutional Framework, MN 7).<sup>54</sup> Corollary rules on migration in trade or association agreements are covered by the exclusive EU competence for the Common Commercial Policy or relevant other Treaty competences for external action and there is no need to activate Article 79 TFEU in addition (see Thym, Legal Framework for Entry and Border Controls, MN 15).

#### 4. National Integration Policies (Article 79(4) TFEU)

- 24 Article 79(4) TFEU allows for the adoption of measures to provide incentives and support for national integration policies ‘excluding any harmonisation of the laws and regulations of the Member States.’ Corresponding formulations have been used repeatedly over the past decades on the occasion of Treaty amendments in order to designate areas in which the **EU institutions are not allowed to harmonise national rules.**<sup>55</sup> Article 79(4) TFEU should be classified, therefore, as a support and coordination competence in line with Article 2(5) TFEU. The introduction of the new restrictive provision in Article 79(4) TFEU responded to years of sometimes protracted disputes about the permissibility of an autonomous EU integration policy.<sup>56</sup> This resulted, among other things, in the adoption of the **Common Basic Principles (CBP)** for immigrant integration policy as a resolution of the Council together with representatives of the

<sup>50</sup> The shared character flows from the formulation ‘may’ (French: *peut*) and the absence of readmission agreements from the list of exclusive powers in Article 3(1) TEU; see Billet, ‘EC Readmission Agreements’, EJML 12 (2010), p. 45, 60–63; and Coleman, Readmission Policy, p. 75–84; an exclusive character had been discussed, for the previous Treaty regime, by Kuijper, ‘Some Legal Problems Associated with the Communitarization of Policy on Visas, Asylum and Immigration under the Amsterdam Treaty and Incorporation of the Schengen Acquis’, CML Rev. 37 (2000), p. 345, 362.

<sup>51</sup> The different regulatory focus of the rules in the Return Directive 2008/115/EC and readmission agreements implies that no exclusive so called ‘AETR competence’ on the basis of corresponding ECJ case law for implied external treaty making powers has come about when the Directive was adopted; cf. Billet, *ibid.*, p. 60–63.

<sup>52</sup> Given that Article 79(3) TFEU read in conjunction with Article 79(2)(c) TFEU concerns an area where the ordinary legislative procedure applies internally, the European Parliament must give its consent in line with Article 218(6)(a)(v) TFEU; similarly, Billet, *ibid.*, p. 63–65.

<sup>53</sup> In line with ECJ case law, the adoption of a negotiation mandate pre-empted the conclusion of bilateral treaties; see Thym, Legal Framework for Entry and Border Controls, MN 14; and Billet, *ibid.*, p. 60–63.

<sup>54</sup> On the objectives of external action, see Article 21 TEU; on the necessary policy coherence, see Kotzur, Article 77 TFEU para 10.

<sup>55</sup> See, by way of example, Articles 165(4), 166(4), 167(5) and 168(5) TFEU.

<sup>56</sup> See Carrera, In Search, ch. 3.

governments of the Member States in order to emphasise the limited scope of EU competences.<sup>57</sup> Today, such complex constructions are no longer necessary, since Article 79(4) TFEU provides for an unequivocal supranational competence, which, however, excludes harmonisation.<sup>58</sup> Measures that can be adopted on this basis include the Asylum, Migration and Integration Fund.<sup>59</sup> These must always comply with the principle of subsidiarity (see above MN 9).

It should be noted that the exclusion of harmonisation concerns Article 79(4) TFEU only, not other legal bases, such as Article 79(2)(a), (b) TFEU. Whenever their interpretation allows for legally binding measures concerning immigrant integration, **Article 79(4) TFEU does not prevent recourse to other legal bases.**<sup>60</sup> This entails that EU immigration legislation can include rules on immigrant integration, such as the requirement for integration measures in Article 7(2) Family Reunion Directive 2003/86/EC. Moreover, the broad meaning of the term ‘integration’ in EU immigration law (see below MN 43–47) implies that provisions that are not officially designated as integration instruments can also have a profound impact upon immigrant integration, such as labour market access. In light of the principle of subsidiarity (see above MN 9), it is questionable whether the EU has the competence to prescribe in depth the contents of national integration measures, such as the curriculum of integration courses.<sup>61</sup> More generally, Article 79(4) TFEU signals that the EU Treaties attach great importance to national integration policies – an argument that can affect the interpretation of integration related policy provisions (see below MN 44).

### 5. Access to the Labour Market (Article 79(5) TFEU)

Before the entry into force of the Treaty of Lisbon, the scope of supranational powers for economic migration had been a controversial topic.<sup>62</sup> While some commentators rejected the existence of a supranational competence,<sup>63</sup> others claimed that the Treaty provisions on social policy should be activated.<sup>64</sup> This debate has become moot as the result of a clarification in the Lisbon Treaty that the **EU legislature can establish rules on economic migration** subject to the caveat in Article 79(5) TFEU (see above MN 12). It is clear from the wording of the latter provision that the exemption concerns only third country nationals ‘coming from third countries ... in order to seek work’ and therefore does not encompass the labour market access of those who are admitted for other purposes, such as family members or students (see above MN 17). Article 79(5) TFEU concerns **national rules on economic migration sensu stricto**, i. e. admission of

<sup>57</sup> Cf. Council doc. 14615/04 of 19 November 2004.

<sup>58</sup> Nonetheless, the Council and the Representatives of the Governments of the Member States continued to adopt jointly the Conclusions on the Integration of Third Country Nationals Legally Residing in the EU, Council doc. 9905/1/14 of 26 May 2014.

<sup>59</sup> See Regulation (EU) No 516/2014 (OJ 2014 L 150/168).

<sup>60</sup> Cf. ECJ, *Germany vs. Council & Parliament*, C 376/98, EU:C:2000:544, para 77–79.

<sup>61</sup> See Hailbronner, *Immigration and Asylum*, p. 89–90; and ter Steeg, *Einwanderungskonzept*, p. 464–564.

<sup>62</sup> Discussions were further complicated by a opening clause in Article 63 EC Treaty as amended by the Treaty of Amsterdam of 2 October 1997 (OJ 1997 C 340/173), which was discontinued by the Treaty of Lisbon.

<sup>63</sup> Cf. Hailbronner, ‘European Immigration and Asylum Law under the Amsterdam Treaty’, *CML Rev.* 35 (1998), p. 1047, 1049–1050; for a restrictive position, see Knauff, ‘Europäische Einwanderungspolitik: Grundlagen und aktuelle Entscheidungen’, *Zeitschrift für Europarechtliche Studien* 2004, p. 11, 19–23; more generous was ter Steeg, *Einwanderungskonzept*, p. 326–333.

<sup>64</sup> See Brinkmann, ‘The Immigration and Asylum Agenda’, *ELJ* 10 (2004), p. 182, 187–188; and Guild and Peers, ‘Out of the Ghetto?’ in *ibid* and N Rogers (eds), *EU Immigration and Asylum Law. Text and Commentary* (Martinus Nijhoff, Leiden 2006), p. 81, 101–104.

the highly qualified, seasonal workers or other foreigners seeking employment.<sup>65</sup> In this respect, the provision should be read as being comprehensive: it covers those seeking work in the same way as it concerns third country nationals who already have a job offer when applying for entry.<sup>66</sup>

- 27 A comparison of the different language versions of Article 79(5) TFEU shows that the exemption concerns national rules ‘to determine volumes of admission’ (French: *fixer les volumes d’entrée*; German: *wie viele ... einreisen dürfen*) without indicating precisely how this **determination of the volumes of admissions** is to be achieved at national level. Some argue that it should be understood to cover national ‘quota schemes’ for workers only.<sup>67</sup> In the light of the general wording and the interpretative principle of *effet utile* (see Hailbronner/Thym, *Constitutional Framework*, MN 16), such narrow interpretation does not convince, since it would render the provision effectively meaningless for Member States without immigration quotas.<sup>68</sup> It should be read, instead, to require the EU legislature to allow a **certain flexibility for the Member States** in the regulation of economic migration. EU directives can establish individual rights (see Hailbronner/Thym, *ibid.*, MN 15), but the conditions for the existence of these rights prescribed in EU legislation should provide sufficient flexibility for Member States to influence the volumes of admission through national immigration law. Directives can, for instance, allow Member States to apply labour market tests, quota systems or similar requirements.<sup>69</sup> In cases of doubt the ECJ will have to interpret secondary legislation and may, in doing so, have recourse to Article 79(5) TFEU as an argument to the effect that exemptions are legitimate.

### III. Overarching Principles

#### 1. Free Movement of Union Citizens

- 28 The emergence of distinct Treaty regimes for Union citizens and third country nationals was a gradual process. Originally, the **Treaty of Rome** knew neither ‘third country nationals’ nor ‘Union citizens’, but only ‘workers.’<sup>70</sup> It would be wrong, however, to assume that the European founding fathers wanted to establish universal free movement irrespective of nationality. During negotiations, there was agreement that only nationals of Member States should be covered: an explicit nationality clause was discarded in reaction to Franco Italian disputes over the status of workers from Algeria and German concerns about the status of citizens from communist East Germany.<sup>71</sup> As a

<sup>65</sup> Similarly, see Ladenburger/Verwirlghen, ‘Policies Relating to the Area of Freedom, Security and Justice’, in: Amato/Bribosia/de Witte (eds), *Genèse et destinée de la Constitution européenne* (Bruylant, 2007), p. 743, 764; and Peers, *EU Justice*, p. 396.

<sup>66</sup> In contrast to EU citizens, legislation on third country nationals does not usually provide for a statutory right to enter EU territory in order to seek work at present; it usually requires a job offer.

<sup>67</sup> See Peers, *EU Justice*, p. 396; Bast, *Aufenthaltsrecht und Migrationssteuerung* (Mohr Siebeck, 2011), p. 149–153; and Weiß, *Article 79 TFEU* para 48.

<sup>68</sup> Most Member States to which EU legislation on immigration applies in regular circumstances (not: the United Kingdom, see above MN 5) did not have immigration quotas for migrant workers at the time when the provision was drafted, while Germany was considering the introduction of a domestic quota at the time, although the project was abandoned.

<sup>69</sup> See, by way of example, Articles 6, 8(2) Blue Card Directive 2009/50/EC or Articles 5(2), 7 Seasonal Workers Directive 2014/36/EU.

<sup>70</sup> Cf. Groenendijk, ‘Categorizing Human Beings in EU Migration Law’, in: Bonjour et al. (eds), *The Others*, p. 21, 25–31.

<sup>71</sup> See Goedings, *Labor Migration in an Integrating Europe* (SDU Uitgevers, 2005), p. 128–135; the accusation that the limitation of the free movement of workers to Union citizens was the result of ‘revisionist interpretation’ (Guild and Peers, ‘Out of the Ghetto?’ in *ibid* and N Rogers (eds), *EU*

result, immigration law towards third country nationals remained a ‘sovereign’ prerogative of the Member States until the Schengen cooperation and the Treaty of Maastricht brought it within the ambit of the EU institutions (see above MN 1). In the Maastricht Treaty, the introduction of **distinct Treaty regimes for ‘Union citizenship’<sup>72</sup> and ‘nationals of third countries’<sup>73</sup>** was a parallel development that has defined EU rules ever since.

It is important to understand that the distinction between Union citizens and third country nationals in the EU Treaties is more than semantic; it reflects a basic constitutional cleavage at the heart of the European project in so far as it designates a basic distinction between the free movement rights of Union citizens and the absence of corresponding guarantees enshrined at Treaty level (see below MN 33–36) for third country nationals. In a supranational legal order based upon the rule of law, such constitutional distinction matters, since **Treaty guarantees must be respected by the EU legislature**; the ECJ can enforce the free movement rights of Union citizens against the unanimous position of all Member States in the Council.<sup>74</sup> It is well known that judges in Luxembourg have regularly had recourse to the constitutional guarantee of free movement<sup>75</sup> and the subsequent introduction of Union citizenship<sup>76</sup> in order to enhance citizens’ rights by means of **dynamic interpretation**. Corresponding case law on the free movement of citizens concerns the status of workers, the self-employed, service recipients, students and other Union citizens with sufficient resources.<sup>77</sup> Secondary legislation with more detailed rules can be found in the Citizenship Directive 2004/38/EC and Regulation (EU) No. 492/2011 on the freedom of movement for workers.<sup>78</sup>

The ECJ maintains, to this date, that the application of free movement rights requires a cross border element as a matter of principle. Union citizens living in the state of which they have the nationality cannot usually rely upon the fundamental freedoms; to do so requires them to move to another Member State or to have lived there for an extended period.<sup>79</sup> This requirement of a cross border element entails that **purely internal situations** are not covered by the free movement guarantees for Union citizens.<sup>80</sup> This can result in a **phenomenon called reversed discrimination** if the fundamental freedoms accord certain privileges to Union citizens living abroad that the state of residence is not willing to extend to its own nationals who are not covered by the fundamental freedoms as a consequence of the purely internal rule.<sup>81</sup> Free movement experts rightly complain that corresponding case law is highly complex and some have argued that the purely internal rule should be abandoned so as to

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*Immigration and Asylum Law. Text and Commentary* (Martinus Nijhoff, Leiden 2006), p. 81, 114) ignores the historic context.

<sup>72</sup> Union citizenship was first introduced by Article 8 EC Treaty as amended by the Treaty of Maastricht (OJ 1992 C 224/36).

<sup>73</sup> Article K.1 EU Treaty, *ibid.*

<sup>74</sup> On the ambiguous relationship in practice, see Dougan, ‘The Bubble that Burst’, in: Adams et al. (eds), *Judging Europe’s Judges* (Hart, 2013), p. 127, 145–153; and Hailbronner, ‘Union Citizenship and Access to Social Benefits’, *CML Rev.* 42 (2005), 1245–1267.

<sup>75</sup> Cf., by way of example, ECJ, *Bouchereau*, 30/77, EU:C:1977:172, para 33; and ECJ, *Orfanopoulos and Olivieri*, C 482/01 and C 493/01, EU:C:2004:262, para 65.

<sup>76</sup> Cf. ECJ, *Baumbast & R*, C 413/99, EU:C:2002:493, paras 81–82.

<sup>77</sup> For an overview, see Boeles et al., *European Migration Law*, ch. 2; or any textbook on EU law.

<sup>78</sup> See, on the latter, OJ 2011 L 141/1.

<sup>79</sup> In situations, in which the cross border element is not evident, one has to assess, in line with ECJ case law, whether national rules in question amount to a ‘restriction’ of free movement rights; see ECJ, *O. & B.*, C 456/12, EU:C:2014:135, paras 37–54.

<sup>80</sup> See ECJ, *Uecker & Jacquet*, C 64 & 65/96, EU:C:1997:285, paras 23–24.

<sup>81</sup> See O’Leary, ‘The Past, Present and Future of the Purely Internal Rule in EU Law’, in: Dougan et al. (eds), *Empowerment and Disempowerment of the European Citizen* (Hart, 2012), p. 36–71.

abolish the phenomenon of reverse discrimination.<sup>82</sup> The ECJ has, rightly in my view,<sup>83</sup> not followed this argument despite an initial temptation to move in this direction in the *Ruiz Zambrano* judgment, the implications of which were watered down considerably in follow up rulings.<sup>84</sup> Of course, whenever free movement rules cannot be activated in purely internal situations, national constitutions and the European Convention on Human Rights may be applied.

31 Unfortunately, the overall picture is blurred by a grey area of overlap between rules for Union citizens and third country nationals, since **family members of Union citizens with the nationality of a third state** can in certain circumstances rely indirectly upon the free movement provisions,<sup>85</sup> for instance when a French national is married to a Mexican national with whom she lives in the United Kingdom. Although the EU Treaties do not mention family members from third states explicitly, they benefit from specific rights in secondary legislation and ECJ case law.<sup>86</sup> The Court of Justice has consistently interpreted the free movement guarantees of Union citizens to embrace guarantees for spouses and other family members by means of a legal reflex in the form of ‘derived rights’<sup>87</sup> where the denial of family reunion can be construed as a restriction to the right of free movement of the Union citizen. In a series of judgments in the 2000s, judges in Luxembourg increased the level of protection;<sup>88</sup> this process culminated in the *Ruiz Zambrano* judgment and follow up rulings that at first seemed to considerably enhance the level of protection, although the ECJ later clarified that it concerned mainly third country national family members of minor Union citizens (see above MN 31). In cases of conflict, the rights of third country national family members of Union citizens **prevail over national immigration law or secondary EU legislation**, since they emanate, at least indirectly in the form of derived rights, from constitutional free movement guarantees.<sup>89</sup>

32 In a number of recent judgments, the ECJ confirmed that we have to distinguish carefully, in cases of overlap, between the derived rights of third country national family members of Union citizens (see above MN 31 32) and EU immigration and asylum instruments.<sup>90</sup> The official reasoning given by the Court lists the Citizenship Directive 2004/38/EC and immigration instruments in parallel, thereby indicating that the Family Reunion Directive 2003/86/EC and the Long Term Residents Directive 2003/109/EC in

<sup>82</sup> Cf. Nic Shuibhne, ‘Free movement of persons and the wholly internal rule: time to move on?’, CML Rev. 39 (2002), p. 731, 741–760; and Tryfonidou, *Reverse Discrimination in EC Law* (Kluwer, 2009), ch. 4.

<sup>83</sup> See Thym, ‘Frontiers of Citizenship’, in: Kochenov (ed.), *EU Citizenship and Federalism. The Role of Rights* (CUP, 2016), sect. 2.4 (forthcoming).

<sup>84</sup> Cf. ECJ, *Ruiz Zambrano*, C 34/09, EU:C:2011:124; ECJ, *Dereci et al.*, C 256/11, EU:C:2011:734; and ECJ, *O & S*, C 356/11 & C 357/11, EU:C:2012:776; for further comments, see Reynolds, ‘Exploring the “Intrinsic Connection” between Free Movement and the Genuine Enjoyment Test’, E.L. Rev. 38 (2013), p. 376–392; and Thym, ‘Grenzen der Unionsbürgerschaft’, *Europarecht Beiheft* 1/2015, p. 135, 141–148.

<sup>85</sup> See Barbou des Places, ‘Droit communautaire de la liberté de circulation et droit des migrations’, in: *L’Union européenne: Union de droit, Union des droits. Mélanges en l’honneur de Philippe Manin* (Pedone, 2010), p. 341, 350–356 and Thym, ‘Family as Link’, in: Verschueren (ed.), *Where do I belong?* (Intersentia, 2016), forthcoming.

<sup>86</sup> See, in particular, today’s Articles 5 to 18 Citizenship Directive 2004/38/EC and Article 10 Regulation (EU) No. 492/2011 (OJ 2011 L 141/1).

<sup>87</sup> ECJ, *Dereci et al.*, C 256/11, EU:C:2011:734, para 55; for a taxonomy of different categories see Barrett, ‘Family Matters’, CML Rev. 40 (2003), p. 369–421.

<sup>88</sup> See Spaventa, ‘From *Gebhard* to *Carpenter*: Towards a (non-)Economic European constitution’, CML Rev. 41 (2004), p. 743–773; Epiney, ‘Von *Akrich* bis *Metock*’, *Europarecht* 2008, p. 847–853; and Costello, ‘Case Note: *Metock*’, CML Rev. 46 (2009), p. 587, 611–614.

<sup>89</sup> The precedence of free movement law over the legislative border control regime has been reiterated by the ECJ, see Thym, *Legal Framework for Entry and Border Controls*, MN 16.

<sup>90</sup> In its earlier case law, the ECJ had largely ignored the immigration dimension, see Thym, ‘Towards “Real” Citizenship?’, in: Adams et al. (eds), *Judging Europe’s Judges* (Hart, 2013), p. 155, 168–170.



particular present an alternative frame of reference for the determination of immigration statuses.<sup>91</sup> Judges have emphasised, moreover, that immigration instruments can be scrutinised in the light of human rights, which, in the EU context, are bound to follow the established case law of the ECtHR on the European Convention.<sup>92</sup> This reference to immigration law and human rights requirements as integral parts of the **area of freedom, security and justice** takes centre stage in cases not involving family members of Union citizens from third states. In such **'pure' immigration scenarios**, the intricate demarcation between citizens' rights and the human rights of foreigners, which defines the grey area of third country national family members of Union citizens and of Turkish nationals (see Hailbronner/Thym, Constitutional Framework, MN 19), is irrelevant. The solution to 'pure' immigration cases follows the rules governing the area of freedom, security and justice – not EU citizenship.

## 2. Third-Country Nationals

It has been explained already that the Treaty of Lisbon reaffirmed the constitutional self sufficiency of the area of freedom, security and justice as a policy field in its own right with distinct rules and objectives independent of the single market (see Hailbronner/Thym, Constitutional Framework, MN 5–7). In contrast to Union citizens, third country nationals cannot invoke far reaching mobility guarantees with constitutional status in the EU Treaties (see above MN 29), although this exclusion from the free movement regime does not imply that third country nationals have no constitutional assurances on their side. They certainly have: **third country nationals can invoke human rights**, including the EU Charter (see above MN 32). When it comes to migration, the Charter principally reaffirms existing rules under the European Convention of Human Rights together with some novel guarantees,<sup>93</sup> in the light of which the ECJ interprets statutory rules on immigration (see Hailbronner/Thym, Constitutional Framework, MN 14). This **rejection of the traditional notion of unfettered state discretion** concerning migration in the light of human rights is significant, and I have proposed elsewhere to construe it as the 'cosmopolitan outlook' of EU migration law.<sup>94</sup> It does not diminish the relevance of this finding to recognise that human rights guarantees nonetheless fall short of citizens' rights to free movement.

Closer inspection of the existing human rights guarantees demonstrates that they do not, in contrast to the fundamental freedoms of Union citizens, establish an individual right with constitutional status to enter EU territory in the first place.<sup>95</sup> In the field of legal migration, this has been reaffirmed in the context of the protection of private and family life under Article 8 ECHR and Article 7 EU Charter by both the ECtHR and the ECJ (see below MN 52). With regard to economic migration, **Article 15 EU Charter** reiterates the same conclusion. It starts with a reminder of citizens' rights to free movement under paragraph 2 and continues by reaffirming the **absence of a generic right to enter EU territory for economic purposes** without state authorisation: 'Nationals of third countries *who are authorised to work* in the territories of the Member States are entitled to working conditions equivalent to those of citizens of the

<sup>91</sup> See, in particular, ECJ, *Dereci et al.*, C 256/11, EU:C:2011:734, paras 71–72; and ECJ, *Iida*, C 40/11, EU:C:2012:2405, paras 78–81; see also Thym, Constitutional Rationale, p. 714–716.

<sup>92</sup> Cf. ECJ, *Dereci et al.*, *ibid.*, paras 69–70; and ECJ, *O & S*, C 356/11 & C 357/11, EU:C:2012:776, para 59; see also ECJ, *Carpenter*, C 60/00, EU:C:2002:434, paras 41–45.

<sup>93</sup> For an overview, see Groß, 'Migrationsrelevante Freiheitsrechte der EU Grundrechtecharta', *Zeitschrift für Ausländerrecht* 2013, p. 106–110; and Wiesbrock, *Legal Migration*, p. 208–229.

<sup>94</sup> See Thym, Constitutional Rationale, p. 725–735.

<sup>95</sup> See Iglesias Sánchez, *Rights*, p. 138–148; and Thym, Constitutional Rationale, p. 718–721.

Union.<sup>96</sup> This sounds progressive, but the substance is meagre given that equal working conditions for legally resident third country nationals are uncontroversial in today's Europe (see Iglesias Sánchez, Directive 2011/98/EU Article 12 MN 16 17). Thus Article 15 of the Charter reiterates that third country nationals, in contrast to Union citizens, do not have unrestricted access to the EU labour market; the EU legislature maintains discretion over whether and, if so, under which circumstances to grant individual rights for economic migration.

35 In a similar vein, the Charter differentiates **movements within the European Union** once a third country national has been admitted to the EU territory, for instance when a Moroccan national residing legally in Spain wants to take up employment in Germany. While Union citizens benefit from extensive free movement in such scenarios,<sup>97</sup> **Article 45(2) of the Charter** states that similar rights 'may be granted' to third country nationals in accordance with the Treaties, thereby emphasising that the scope of intra-European mobility is determined in the legislative process (see above MN 17 18).<sup>98</sup> Again, the EU institutions retain a **principled discretion** to decide upon the degree of individual rights to enter EU Member States. The legislator may opt for a generous statutory migration regime for third country nationals, but it is not constitutionally obliged to do so. Within the limits prescribed by human rights, the choice whether entry doors for purposes of legal migration shall be 'open' or 'closed' rests with the political process. The interpretation of corresponding statutory rights of migrants depends on the contents and context of the legislative instrument in question: there is no assumption that they should be interpreted in parallel to the free movement guarantees of Union citizens (see Hailbronner/Thym, Constitutional Framework, MN 15).

36 It is well known among experts of EU migration law that the **European Council in Tampere in 1999**, in addition to their plea to manage migration flows efficiently and to combat illegal immigration, called upon EU institutions to 'ensure fair treatment of third country nationals who reside legally on the territory of its Member States. A more vigorous integration policy was to aim at granting them rights and obligations comparable to those of EU citizens.'<sup>99</sup> More specifically, long term residents 'should be granted ... a set of uniform rights which are as near as possible to those enjoyed by EU citizens.'<sup>100</sup> From a legal perspective, the relevance of these statements **should not be overstated**. Firstly, the political commitment of the heads of state or government is not legally binding (see Hailbronner/Thym, Constitutional Framework, MN 8 9). Secondly, the original enthusiasm of the Tampere guidelines, which expired in 2004, gave way to more restrictive terminology in later strategic guidelines, particularly in the successor programme adopted in The Hague.<sup>101</sup> Thirdly, it was not until the adoption of the Long Term Residents Directive 2003/109/EC that a more specific commitment was realised by establishing an extensive set of rights for long term residents. Fourthly, similar formulations were not elevated to Treaty level when the European Convention

<sup>96</sup> Article 15(3) EU Charter; emphasis added.

<sup>97</sup> This is confirmed by Article 45(1) EU Charter, which has to be interpreted in line with the fundamental freedoms in accordance with Article 52(2), (7) EU Charter and the official explanations (OJ 2007 C 303/17).

<sup>98</sup> As a 'principle', Article 45(2) can be relied upon only indirectly, once legislation has specified the conditions of free movement; see Hailbronner/Thym, Constitutional Framework, MN 49; and Iglesias Sánchez, Free Movement, p. 789 800, also for international human rights law that only guarantees free movement within (not: between) states, *ibid.*, p. 794 796.

<sup>99</sup> European Council, Presidency Conclusions of the Meeting on 15/16 October 1999 in Tampere, para 18.

<sup>100</sup> *Ibid.*, para 21.

<sup>101</sup> See Murphy/Acosta Arcarazo, 'Rethinking Europe's Freedom, Security and Justice', in: *ibid.* (eds), EU Security, p. 1, 4 9.

drafted the new objectives for immigration policy which are enshrined in today's Article 79(1) TFEU and which call, in more abstract terms, for the 'fair treatment' of third country nationals (see Hailbronner/Thym, *ibid.*, MN 7). For legal analyses, the Treaty provisions, together with the Charter, are the central point of reference, not the political commitment of the 1999–2004 period.

### 3. Non-Discrimination

Within the EU legal order, the principle of non discrimination on grounds of nationality constitutes a central axis underlying the dynamic ECJ case law on the single market and Union citizenship. Although the wording of Article 18 TFEU does not specify expressly that it applies only to Union citizens, it has been confirmed by the ECJ that **Article 18 TFEU cannot be relied upon by third country nationals**, since the provision 'is not intended to apply to cases of a possible difference in treatment between nationals of Member States and nationals of non member countries.'<sup>102</sup> This position of the Court has been criticised by academics,<sup>103</sup> but it seems unlikely that judges in Luxembourg will change course. Article 18 TFEU is closely linked to the concept of Union citizenship (see above MN 28–29) and the realisation of a single market in relation to which the abolition of barriers to trade rests, like in the case of many agreements on economic integration, on the principle of national treatment.<sup>104</sup> This rationale cannot be extended straightforwardly to migration law; for rules on migration the established standards of human rights law are the appropriate benchmark.

The EU Charter confirms, in line with earlier ECJ case law, that EU law must respect the principle of equality before the law, which embraces, as *leges speciales*, more specific guarantees against discrimination on grounds of sex, race, colour, ethnic or social origin, genetic features, et cetera.<sup>105</sup> This **general human right to equality before the law** is important for EU immigration law.<sup>106</sup> It can be applied to both EU legislation and national measures implementing Union law (see Hailbronner/Thym, *Constitutional Framework*, MN 47–48). As a freestanding equal treatment provision, Article 20 EU Charter does not depend, in contrast to Article 14 ECHR,<sup>107</sup> upon the parallel applicability of other human rights. It prohibits, in line with settled case law, any unequal treatment that cannot be justified by legitimate considerations in a proportionate manner.<sup>108</sup> Since immigration law often applies to foreigners only, it may well be the case that there is no violation due to non comparability.<sup>109</sup> Similar guarantees under the

<sup>102</sup> ECJ, *Vatsouras & Koupatantze*, C 22/08 & C 23/08, EU:C:2009:344, para 52; see also ECJ, *Khalil*, C 95/99 98/99 & C 180/99, EU:C:2001:532, para 40.

<sup>103</sup> See, by way of example, Hublet, 'The Scope of Article 12 of the Treaty of the European Communities vis à vis Third Country Nationals: Evolution at Last?', *ELJ* 15 (2009), p. 757, 761–774; and de Waele, 'The Ever Evolving Concept of EU Citizenship', in: Talani (ed), *Globalisation, Migration and the Future of Europe. Insiders and Outsiders* (Routledge, 2011), p. 191, 197–202.

<sup>104</sup> See Iglesias Sánchez, *Fundamental Rights*, p. 149–150.

<sup>105</sup> See Articles 20 and 21(1) EU Charter, while the prohibition of discrimination on grounds of nationality in Article 21(2) EU Charter corresponds to Article 18 TFEU in accordance with Article 52(2) and (7) EU Charter and the official explanations (OJ 2007 C 303/17) and does not cover third country nationals as a result.

<sup>106</sup> Similarly, see Hublet, 'Some Foreigners More Equal than Others under EU Law', in: Bonjour et al. (eds), *The Others*, p. 63, 72–74; Bribosia, *Les politiques d'intégration*, p. 54–61; and Wiesbrock, 'Granting Citizenship related Rights to Third Country Nationals', *EJML* 14 (2012), p. 63, 80–82.

<sup>107</sup> See Wiesbrock, *Legal Migration*, p. 226–229.

<sup>108</sup> See Bell, 'Article 20 (Equality before the Law)', in: Peers et al. (eds), *The EU Charter of Fundamental Rights. A Commentary* (C.H. Beck/Hart, 2014), p. 563–578; and Bribosia, *Les politiques d'intégration*, p. 55–61.

<sup>109</sup> This conclusion was reached for integration measures in the form of language tests for long term residents by ECJ, *P & S*, C 579/13, EU:C:2015:369, paras 39–43.

ECHR have been activated by the ECtHR to scrutinise legislation limiting the **access to social benefits for legally resident migrants**,<sup>110</sup> although the ECtHR has more recently reaffirmed that Member States retain a certain margin of appreciation and that Article 14 ECHR does not guarantee unconditional equality in relation to social benefits, in particular for migrants with a temporary or precarious residence status.<sup>111</sup> The ECtHR recognised, in general terms, that ‘immigration status is not an inherent or immutable personal characteristic such as sex or race, but is subject to an element of choice’<sup>112</sup> and weighs less heavily than other, more suspicious forms of unequal treatment.<sup>113</sup> Similar results concern other dimensions of equal treatment during periods of legal residence.<sup>114</sup>

- 39 Judgments reaffirming the relevance of equal treatment for immigration law concern primarily the set of rights during periods of legal residence. Corresponding **statutory guarantees for equal treatment** can be found in most directives on EU immigration law, such as Article 12 Single Permit Directive 2011/98/EU, Article 14 Blue Card Directive 2009/50/EC or Article 11 Long Term Residents Directive 2003/109/EC and the ECJ has reaffirmed that it stands ready to scrutinise potential exceptions laid down in these provisions in the light of human rights law,<sup>115</sup> which does not command equal treatment in all scenarios (see above MN 38). These statutory guarantees in immigration laws are reinforced by the **EU Anti Discrimination Directives** that apply to employment related discrimination and, with regard to considerations of racial or ethnic origin, to the provision of services and to other economic sectors.<sup>116</sup> EU anti discrimination rules have in many Member States been instrumental in enhancing a culture of equal treatment, including through procedural guarantees and the introduction of equality bodies for the supervision of public and private practices.<sup>117</sup>
- 40 The equal treatment guarantees described above apply primarily during periods of legal residence; they can have an impact on the degree of social or economic participation and enhance the rights of migrants in various domains, such as employment law, social housing, education and other public services. By contrast, they **do not apply directly to the determination of immigration statuses**. In the Anti Discrimination Directives (see above MN 39), the non applicability to immigration law *sensu stricto* is laid down in express exemptions according to which the Directives ‘[do] not cover differences of treatment based on nationality and [are] without prejudice to provisions and conditions relating to the entry into and residence of third country nationals ... in the territory of Member States, and to any treatment which arises from the legal status of the third country nationals ... concerned.’<sup>118</sup> In other words, immigration law is not

<sup>110</sup> Cf. ECtHR, judgment of 16 September 1996, No. 17371/90, *Gaygusuz v. Austria*; ECtHR, judgment of 8 April 2013, No. 17120/09, *Dhabi v. Italy*, paras 45–54; and Minderhoud, ‘Social Security Rights of Third Country Nationals’, *Journal of Social Security Law* 17 (2010), p. 227–239.

<sup>111</sup> See ECtHR, judgment of 30 September 2003, No. 40892/98, *Koua Poirrez v. Franc*, paras 46–49; and ECtHR, judgment of 21 June 2011, No. 5335/05, *Ponomaryovi et al. v. Bulgaria*.

<sup>112</sup> ECtHR, judgment of 27 November 2011, No. 56328/07, *Bah v. the United Kingdom*, para 47.

<sup>113</sup> *Ibid.*, para 47; by contrast, earlier judgments had emphasised that unequal treatment based on nationality may be subject to a strict scrutiny; cf. Groenendijk, *Third Country Nationals*, p. 81–82.

<sup>114</sup> For a comparative analysis, see Saroléa, *Droits de l’homme et migrations* (Bruylant, 2006), p. 483–598.

<sup>115</sup> Cf. ECJ, *Kamberaj*, C 571/10, EU:C:2012:233, paras 76–81.

<sup>116</sup> See, for employment, Directive 2000/78/EC (OJ 2000 L 303/16) and, for equal treatment irrespective of racial or ethnic origin, Directive 2000/43/EC (OJ 2000 L 180/22).

<sup>117</sup> See Guild, *The Legal Elements of European Identity* (Kluwer, 2004), ch. 11; and Morano Foadi/de Vries, ‘The Equality Clauses in the EU Directives on Non Discrimination and Migration/Asylum’, in: *ibid./Malena* (eds), *Integration for Third Country Nationals in the European Union* (Elgar, 2012), p. 16–44.

<sup>118</sup> Article 3(2) Directive 2000/78/EC (OJ 2000 L 303/16); and, similarly, Article 3(2) Directive 2000/43/EC (OJ 2000 L 180/22); for further reading, see Bribosia, *Les politiques d’intégration*, p. 53–64; and Muir,

subject to the Anti Discrimination Directives which instead affect the scope of rights during periods of legal residence.

The statutory exemptions in the Anti Discrimination Directives do not extend ipso jure to human rights law, the application of which requires careful analysis nonetheless. The ECtHR in particular has been **reluctant to challenge immigration law sensu stricto in the light of Article 14 ECHR** (in contrast to social benefits cases, see above MN 38). Judges in Strasbourg have recognised, on various occasions in line with the ECJ (see above MN 37), that the legal status of **Union citizens** cannot be compared to immigration rules for third country nationals, since ‘the Union forms a special legal order, which has, moreover, established its own citizenship.’<sup>119</sup> With regard to the differential treatment of different status groups within immigration law, such as asymmetric provisions for temporary and long term residents or the distinct treatment of different countries of origin, the ECtHR requires the states to rely upon a proportionate justification.<sup>120</sup> Such objective and reasonable justification for **distinctions within immigration law** can be available, although it remains difficult to distil clear patterns from the case law.<sup>121</sup> While the ECtHR has at times rejected a justification,<sup>122</sup> it has on other occasions recognised legitimate reasons based on the generic assumption ‘that there are in general persuasive social reasons for giving special treatment to those who have strong ties with a country, whether stemming from birth within it or from being a national or a long term resident.’<sup>123</sup>

It is well established that, in regular circumstances differential, treatment of status groups or countries of origin in immigration law **does not constitute discrimination on grounds of race** or ethnic origin.<sup>124</sup> Experts on migration law have tried repeatedly to push judges in a different direction,<sup>125</sup> albeit without success. The ECtHR and the ECJ seem to instead prefer the more flexible general equal treatment standards.<sup>126</sup>

#### 4. Social Integration

EU immigration legislation can contain rules concerning the integration of migrants into host societies and the EU indeed promotes national integration policies in various respect, among others through the common basic principles for Immigrant Integration Policy (see above MN 24–25). The **meaning and purpose of integration policies** have been discussed controversially at national and European level in recent years. It is possible to distil two potentially opposing approaches to migrant integration policies, the first one concentrating on equal rights as an end in itself irrespective of the actual degree of social integration, while the second approach focuses on social realities on the

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‘Enhancing the Protection of Third Country Nationals against Discrimination’, *Maastricht Journal of European and Comparative Law* 18 (2011), p. 136–156.

<sup>119</sup> ECtHR, judgment of 21 June 2011, No. 5335/05, *Ponomaryovi et al. v. Bulgaria*, para 54; and ECtHR, judgment of 18 February 1991, No. 12313/86, *Moustaquim v. Belgium*, para 49.

<sup>120</sup> See ECtHR, judgment of 27 November 2011, No. 56328/07, *Bah v. the United Kingdom*, paras 38–47; and ECtHR, judgment of 25 March 2013, No. 38590/10, *Biao v. Denmark*, paras 79–91.

<sup>121</sup> For a rich analysis, see Bribosia, *Les politiques d’intégration*, p. 55–61.

<sup>122</sup> See ECtHR, judgment of 6 November 2012, No. 22341/09, *Hode & Abdi v. the United Kingdom*.

<sup>123</sup> ECtHR, judgment of 25 March 2013, No. 38590/10, *Biao v. Denmark*, para 94 reiterating an argument that was originally put forward in ECtHR, judgment of 28 May 1985, Nos. 9214/80 et al., *Abdulaziz, Cabakes & Balkandali v. the United Kingdom*, para 88.

<sup>124</sup> See ECtHR, *Abdulaziz, Cabakes & Balkandali v. the United Kingdom*, *ibid.*, paras 85–86 and the judgments mentioned above MN 41; as well as ECJ, *Kamberaj*, C 571/10, EU:C:2012:233, paras 48–50.

<sup>125</sup> See Groenendijk, *Third Country Nationals*, p. 86–88; Dembour, ‘Still Silencing the Racism Suffered by Migrants...’, *EJML* 11 (2009), p. 221–234; and de Vries, ‘Towards Integration and Equality for Third Country Nationals? Reflections on *Kamberaj*’, *E.L. Rev.* 38 (2013), p. 248, 254–255.

<sup>126</sup> Cf. Bribosia, *Les politiques d’intégration*, p. 61–64.

ground regarding various degrees of social integration, such as knowledge of the local language, civic tests, labour market participation or other criteria. Debates on migrant integration at European level can be described, by and large, as a **struggle between the rights focused standpoint and the broader social or cultural outlook**.<sup>127</sup> While the historic experience of Union citizenship and the political position put forward by the European Council in Tampere (see above MN 36) originally promoted the rights based approach, EU legislation and corresponding soft law instruments on immigration (see above MN 25) later adopted a more nuanced approach.<sup>128</sup>

- 44 EU primary law does not opt for a distinct position with regard to third country nationals. It does in particular not oblige the legislature to follow the model of Union citizenship when adopting rules for third country nationals (see above MN 33–36), and it should be noted, moreover, that the ECJ has started emphasising broader social elements transcending a rights based approach in the field of Union citizenship.<sup>129</sup> Article 79(4) TFEU emphasises the significance of integration policies at national level for immigration law (see above MN 25), although it is submitted that this provision should not be understood as a definite Treaty enshrined statement about the precise course to be followed. The inherent thematic breadth of the concept of migrant integration, which may concern various policy fields such as the labour market, education or culture,<sup>130</sup> requires political choices about the relative weight of different aspects (see above MN 4). Therefore, instead of prescribing a specific integration policy, the EU Treaties **entrust the EU legislature** to decide on the direction to be taken. In light of the principle of subsidiarity, it can be legitimate (see above MN 7) not to lay down detailed benchmarks in EU legislation, thereby allowing the **Member States to decide upon appropriate standards** for migrant integration domestically – as in the case of the Family Reunification Directive (see Klarmann/Hailbronner, Directive 2003/86/EC Article 7 MN 40–46) and the Long Term Residents Directive (see Thym, Directive 2003/109/EC Article 5 MN 13–17).
- 45 In the political and academic debate, integration requirements are often presented as indicators of a restrictive and potentially even xenophobic approach based upon a classic understanding of the nation state as a closed and culturally homogeneous club.<sup>131</sup> While this can be correct in specific scenarios, the **concept of migrant integration is not intrinsically linked to nationalism**, which the European Union was, among other things, created to overcome. European societies change in response to migration, and the Common Basic Principles for Immigrant Integration Policy emphasise, on the basis of a broad conception of migrant integration covering diverse policy fields, that it constitutes a ‘continuous two way process of mutual accommodation, not a static outcome.’<sup>132</sup> It is possible to defend integration policies as post modern instruments for the norma

<sup>127</sup> See Carrera, In Search, ch. 3; and Groenendijk, ‘Legal Concepts of Integration in EU Migration Law’, EJML 6 (2004), p. 111–126.

<sup>128</sup> On the practice of the EU institutions, see Carrera, In Search, ch. 3; and *ibid.*, ‘Integration of Immigrants in EU Law and Policy’, in: Azoulai/de Vries (eds), EU Migration Law, p. 149, 151–169.

<sup>129</sup> See Thym, ‘The Elusive Limits of Solidarity’, CML Rev. 52 (2015), p. 17, 34–39; and Barbou des Places, ‘Integration’, in: Azoulai et al. (eds), *Constructing the Person* (Hart, 2016), sect. 3 (forthcoming).

<sup>130</sup> See the Common Basic Principles for Immigrant Integration Policy above MN 24; and Groß, ‘Integration of Immigrants: The Perspective of European Community Law’, EJML 7 (2005), 145, 151–162;

<sup>131</sup> Cf. Carrera, In Search, p. 440–448; Acosta Arcarazo/Martire, ‘Trapped in the Lobby: Europe’s Revolving Doors and the Other as Xenos’, EL Rev. 39 (2014), p. 362, 363–366, 375–378; and Kostako poulou/Carrera/Jesse, ‘Doing and Deserving’, in: Guild et al. (eds), *Illiberal Liberal States* (Ashgate, 2009), p. 167, 179–186.

<sup>132</sup> See the Common Basic Principle No. 1 for Immigrant Integration Policy, Council doc. 14615/04 of 19 November 2004.

tive reconfiguration of European societies<sup>133</sup> on the basis of the recognition that social cohesion can also be promoted by means of the instruments of immigration law.<sup>134</sup> Whether or not specific policies are acceptable from a legal perspective depends on the position taken by the legislature and the **interpretation of human rights** by national and European courts that must be respected by the EU institutions and the Member States when implementing Union law (see Hailbronner/Thym, *Constitutional Framework*, MN 47 48).

In its case law on Article 8 ECHR (see below MN 52 56), the ECtHR has in recent 46 years accentuated the significance of social integration, emphasising that the ‘solidity of social, cultural and family ties with the host country and with the country of [origin]’<sup>135</sup> are important factors in the proportionality assessment. It has put this position into effect on numerous occasions and in parallel to the emerging debate about migrant integration policies at national and European level,<sup>136</sup> thereby highlighting that **human rights law can be compatible with a more expansive notion of migrant integration** provided that states do not lay down disproportionate standards.

In its first judgment on the Family Reunion Directive, the **European Court of Justice** 47 in Luxembourg noted that ‘the concept of integration is not defined’ in the Directive and must be applied, nonetheless, by Member States in conformity with human rights.<sup>137</sup> The ECJ later **embraced a broader conceptualisation of migrant integration** by stating, in the context of both the Long Term Residents Directive 2003/109/EC and the Family Reunion Directive 2003/86/EC, that the acquisition of language skills (if necessary by means of a mandatory test) ‘greatly facilitates communication ... and, moreover, encourages interaction and the development of social relations between them. Nor can it be contested that [it] makes it less difficult for third country nationals to access the labour market and vocational training.’<sup>138</sup> It reiterated this approach by stating, in the context of the association council decisions for Turkish workers, that ‘the acquisition of the nationality of the host Member State represents, in principle, the most accomplished level of integration.’<sup>139</sup> This confirms that the ECJ does not extend the essentially rights based approach towards Union citizenship to third country nationals (see above MN 43); with regard to immigration policy, a broader understanding of migrant perspective prevails.<sup>140</sup>

## 5. Abuse

The term ‘abuse’ is used frequently in political debates about migration, usually by 48 those arguing for more restrictive legislation or more rigorous enforcement practices.

<sup>133</sup> Cf. Joppke, *Citizenship and Immigration* (Polity Press, 2010), ch. 4; Orgad, ‘“Cultural Defense” of Nations’, *ELJ* 15 (2009), 719 737; and Thym, ‘Citizens and Foreigners in EU Law’, *ELJ* 22 (2016), sect. V.2 (forthcoming).

<sup>134</sup> Cf. ECJ, *Parliament vs. Council*, C 540/03, EU:C:2006:429, paras 67 70; ECJ, *Dogan*, C 138/13, EU:C:2014:2066, para 58; and ECJ, *Noorzia*, C 338/13, EU:C:2014:2092, paras 14 16.

<sup>135</sup> ECtHR, judgment of 18 October 2006 (GC), No. 46410/99, *Üner v. the Netherlands*, para 58; see also ECtHR, judgment of 23 June 2008 (GC), No. 1638/03, *Maslov v. Austria*, para 71.

<sup>136</sup> See Thym, *Residence as de facto Citizenship?*, p. 138 143; and Murphy, ‘The Concept of Integration in the Jurisprudence of the European Court of Human Rights’, *EJML* 12 (2010), p. 23, 27 31.

<sup>137</sup> See ECJ, *Parliament vs. Council*, C 540/03, EU:C:2006:429, para 70.

<sup>138</sup> ECJ, *P & S*, C 579/13, EU:C:2015:369, para 47 for Directive 2003/109/EC in striking contrast to the position of AG Szpunar, *P & S*, C 579/13, EU:C:2015:39, paras 89 95 (the ECJ does not discuss the divergence explicitly); similarly for Directive 2003/86/EC, see ECJ, *K & A*, C 153/14, EU:C:2015:453, para 53 in line with AG Kokott, *K & A*, C 153/14, EU:C:2015:186, paras 33 47.

<sup>139</sup> ECJ, *Demirci u. a.*, C 171/13, EU:C:2015:8, para 54.

<sup>140</sup> For further comments, see Thym, ‘Towards a Contextual Conception of Social Integration’, *EJML* 18 (2016), forthcoming.

Migrants are said, for instance, to ‘abuse’ immigration law when they apply for social benefits; similarly, asylum claims by those without much likelihood of being awarded international protection are described as ‘abusive.’ It should be noted that, from a legal perspective, the concept of abuse has a more specific meaning in the EU context. It does not apply to those applying for benefits or an immigration status without success if their application can be rejected by immigration authorities on the basis of statutory rules.<sup>141</sup> **In contrast to frequent political usage, the legal concept of abuse does not concern unsuccessful claims.** It rather has a more defined and narrower field of application in EU law, also beyond the sphere of immigration and asylum.

- 49 In contrast to the political usage of the term, the ECJ employs the concept of abuse in scenarios in which state authorities would be required, on the basis of a literal understanding of statutory rules, to comply with a request by individuals. As a legal argument, abuse becomes relevant when **authorities want to reject an application they would otherwise have to consent to.** In such scenarios, the ECJ nevertheless allows for a rejection if state authorities can show that the application was abusive. This conclusion ‘requires, first, a combination of objective circumstances in which, despite formal observance of the conditions laid down by the European Union rules, the purpose of those rules has not been achieved, and, secondly, a subjective element consisting in the intention to obtain an advantage from the European Union rules by artificially creating the conditions laid down for obtaining it.’<sup>142</sup> Abuse in this sense cannot be relied upon in an abstract manner with regard to a large number of cases, but must be based on an **individual examination of the particular case.**<sup>143</sup>

#### IV. Human Rights and International Law

- 50 EU immigration and asylum law is firmly embedded in the constitutional framework of the EU Treaties, including human rights. From a doctrinal perspective, the rights and principles enshrined in the **Charter of Fundamental Rights** serve as the primary yardstick for the judicial review of EU legislation, both in situations where its validity is at stake or where it is interpreted in conformity with human rights. While the EU institutions must respect the Charter in all their activities, the Member States are bound only when implementing Union law (see Hailbronner/Thym, Constitutional Framework, MN 47–48). In specific scenarios, the interpretation of the EU Charter by the ECJ typically follows the **case law of the ECtHR on the ECHR**, although the ECJ is not formally obliged to follow the Strasbourg court (see *ibid.*, MN 51). In contrast to international human rights law and the Geneva Convention, **international agreements of the Member States** to which the EU has not formally acceded do not form part of the EU legal order as a matter of principle (see *ibid.*, MN 58–59). On the basis of these general principles, this section concentrates on the human rights dimension of EU instruments on immigration discussed in this chapter.
- 51 In comparison to asylum policy, there are few human rights constraints for statutory rules on legal migration: **first entry for purposes of legal migration is an area of largely unfettered state discretion** (see Thym, Legal Framework for Entry and Border Controls,

<sup>141</sup> It is not problematic per se if the political and the legal usage of a term does not coincide.

<sup>142</sup> ECJ, *O. & B.*, C 456/12, EU:C:2014:135, para 58 in a case concerning Union citizenship under recourse to earlier judgment without a migratory component; for further comments, see Costello, ‘Citizenship of the Union: Above Abuse?’, in: de la Feria/Vogenauer (eds), *Prohibition of Abuse of Law* (Hart, 2011), p. 321–354.

<sup>143</sup> See ECJ, *McCarthy u. a.*, C 202/13, EU:C:2014:2450, paras 52–57 in a case concerning Article 35 Citizenship Directive 2004/38/EC.



MN 32–34). While Article 8 ECHR exercises some constraints (see below MN 52–56), Article 15(3) of the Charter indirectly reaffirms that access to the labour market is not significantly affected by the human rights in the EU Charter as long as equal working conditions are guaranteed only to those ‘who are authorised to work’ (see above MN 34). This underscores that in the field of legal migration **those residing in Europe can invoke more rights**: Article 8 ECHR lays down hurdles for the justification of expulsion measures (see below MN 53–55), and equal treatment guarantees can be relied on during periods of legal residence in particular (see above MN 37–42); civil rights, such as freedom of expression, are typically available to everybody anyway. Moreover, the social rights and principles in Title IV of the Charter can influence the status of migrants during a stay in the European Union, even if the precise implications of the social rights and principles remain uncertain at this juncture for doctrinal reasons (see Hailbronner/Thym, Constitutional Framework, MN 50).

### 1. Protection of Private and Family Life

Article 8 ECHR, which corresponds to Article 7 of the Charter,<sup>144</sup> is the core human rights guarantee affecting EU immigration policy. In line with established ECtHR case law, we should distinguish between the denial of admission for purposes of family reunion and the expulsion of those claiming legitimate links with family members or to the societies they are living in. In so far as **admission for purposes of family reunion** is concerned, the ECtHR relies upon the doctrine of positive obligations to request state action in support of the individual.<sup>145</sup> More specifically, Article 8 ECHR may oblige states **in exceptional circumstances** to grant permission for cross border family reunion on their territory, thereby effectively extending to the family member residing abroad a human right to be granted access (in contrast to situations of expulsion regarding those living in Europe already, see below MN 53–55). It is cogent that the Court has been reluctant to deduce admission rights from Article 8 ECHR. Most claims in this category have been dismissed in Strasbourg, since the Convention ‘cannot be considered as extending to a general obligation ... to respect the choice by married couples of the country of their matrimonial residence.’<sup>146</sup> To this date, only three applications claiming admission for purposes of family reunion, which had not been resolved domestically on the basis of national rules or the Family Reunification Directive 2003/86/EC,<sup>147</sup> have been successful.<sup>148</sup>

In the context of first admission, judges in Strasbourg have confirmed, among other things, that children cannot necessarily claim family unity with parents under recourse to Article 8 ECHR despite their best interests being paramount in the assessment of immigration cases involving children.<sup>149</sup> The same applies to situations of expulsion,

<sup>144</sup> On parallel interpretation, see ECJ, *McB.*, C 400/10 PPU, EU:C:2010:582, para 53.

<sup>145</sup> Cf. Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (Hart, 2004), p. 171–176, although the ECtHR is not always consistent in distinguishing between negative interferences and positive obligations.

<sup>146</sup> ECtHR, judgment of 28 May 1985, Nos. 9214/80, 9473/81 & 9474/81, *Abdulaziz, Cabakes & Balkandali v. the United Kingdom*, para 68 and, more recently, ECtHR, judgment of 31 January 2006, No. 50435/99, *Rodrigues da Silva & Hoogkamer v. the Netherlands*, para 39.

<sup>147</sup> Most claims for family reunion with reasonable grounds for success will never reach the ECtHR, since national immigration laws provide statutory family reunification rights in accordance with Article 3 Family Reunification Directive 2003/86/EC or more generous national laws.

<sup>148</sup> See ECtHR, judgment of 21 December 2000, No 31465/96, *Sen v. the Netherlands*; ECtHR, judgment of 1 December 2005, No. 60665/00, *Tuquabo Tekle et al v. Netherlands*; and, in a specific scenarios involving earlier stays in the host country, ECtHR, judgment of 14 June 2011, No. 38058/09, *Osman v. Denmark*; for an overview of the case law, see Boeles et al., *European Migration Law*, p. 223–229.

<sup>149</sup> Reaffirmed by ECtHR, judgment of 30 July 2013, Nr. 948/12, *Berisha v. Switzerland*, para 51.

when a mother or father is ordered to leave a country, while their children stay behind; the ECtHR emphasised in several recent decisions that expulsion can be proportionate even if it entails the permanent separation of parents and minor children.<sup>150</sup> Article 24 of the EU Charter and the Convention on the Rights of the Child, which the ECJ considers a source of inspiration for EU human rights (see Hailbronner/Thym, Constitutional Framework, MN 54), do not seem to change the situation significantly, since their contents has effectively been integrated into the interpretation of Article 8 ECHR by the judges in Strasbourg.<sup>151</sup>

- 54 Protection against expulsion of foreigners residing in the European Union continues to be the backbone of the ECtHR's immigration case law, although the ECtHR had maintained that the Convention did not regulate the entry and stay of foreigners for the first three decades of its existence. It took until 1988 for the first expulsion of an alien to be declared incompatible with Article 8 ECHR.<sup>152</sup> Since then the ECtHR has played a crucial role in providing a **human rights safety net against the expulsion of migrants** who have, in many cases, spent their entire lives in Europe as the children of former 'guest workers.' Although residence security has been a driving force behind the case law from the beginning, it was constructed as a means for the protection of family life, i.e. ties to parents, siblings and other members of the nuclear family.<sup>153</sup> The ECtHR developed a **set of criteria guiding the proportionality assessment** and requires states to strike a fair balance on the basis of the following considerations: length of the stay; solidity of social, cultural and family ties with the country of residence and origin; age, best interests and well being of children; nature and seriousness of potential criminal offences; time elapsed since an offence and the conduct during that period; the applicant's family situation and the nationalities of the persons concerned; whether spouses knew about the offence or an unstable immigration status when they entered into the relationship; and any difficulties which the spouse is likely to encounter in the country of origin.<sup>154</sup> If a foreigner was born in the host country or moved there in his young childhood, the Court limits its assessment to three criteria, thereby effectively extending the degree of protection.<sup>155</sup> In assessing specific scenarios, the Member States benefit from a certain margin of appreciation.

<sup>150</sup> Cf., by way of example, ECtHR, *ibid.*; ECtHR, judgment of 14 Feb 2012, No. 26940/10, *Antwi et al. v. Norway*, paras 94 et seq.; ECtHR, judgment of 15 November 2012, No. 38005/07, *Kissiwa Koffi v. Switzerland*; ECtHR, judgment of 15 May 2012, No. 16567/10, *Nacic et al. v. Sweden*; by contrast, a violation of Article 8 ECHR was found, inter alia, by ECtHR, judgment of 16 April 2013, No. 12020/09, *Udeh v. Switzerland*.

<sup>151</sup> Cf. ECtHR, judgment of 28 June 2011, No. 55597/09, *Nunez v. Norway*, para 84; and Gundel, 'Der wachsende Einfluss des EU Rechts auf die Auslegung der EMRK', in: Müller Graff et al. (eds), *Europäisches Recht zwischen Bewahrung und Bewahrung* (Nomos, 2011), p. 58, 74 77.

<sup>152</sup> See ECtHR, judgment of 21 June 1988, No. 10730/84, *Berrehab v. the Netherlands*.

<sup>153</sup> For an overview incl. of the narrow reading of the concept of family involving only members of the 'nuclear family' in regular circumstances, see Thym, Residence as *de facto* Citizenship?, p. 107 130; and Boeles et al., European Migration Law, p. 202 222; for the broader conceptualisation of family life outside Europe, see Lambert, 'Family Unity in Migration Law', in: Chetail/Baulez (eds), *Research Handbook on International Law and Migration* (Elgar, 2014), p. 194, 200 204.

<sup>154</sup> Settled case law since ECtHR, judgment of 2 August 2001, No. 54273/00, *Boultif v. Switzerland*, para 48 with ECtHR, judgment of 18 October 2006 (GC), No. 46410/99, *Üner v. the Netherlands*, paras 57 58 and ECtHR, *Nunez*, *ibid.*, para 84 specifying the best interests of children and the solidity of family ties as sub criteria; ECtHR, judgment of 23 June 2008 (GC), No. 1638/03, *Maslov v. Austria*, para 71 added the solidity of social, cultural and family ties with the host country and the country of origin.

<sup>155</sup> ECtHR, judgment of 10 July 2003, No. 53441/99, *Benhebbba v. France*, para 33 and ECtHR, *Maslov*, *ibid.*, para 71 highlight the following criteria in these scenarios: nature and seriousness of potential criminal offences; length of the stay; and nationalities of persons involved.

In recent years, the ECtHR has further extended the protective reach of Article 8 ECHR by embracing the **protection of long term residence status under the heading of ‘private life’** irrespective of relations with family members.<sup>156</sup> It assumed that ‘the network of personal, social and economic relations that make up the private life of every human being’<sup>157</sup> can be protected under Article 8 ECHR as a matter of principle and that, as a result, interferences by means of expulsion require a justification alongside a proportionality assessment, which is to be guided by similar principles as in cases involving family unity (see above MN 54).<sup>158</sup> Protection of private life can bring about a **human right to regularise illegal stay**, although the ECtHR has emphasised repeatedly in recent years that the removal of illegally staying foreigners will violate the European Convention ‘only in exceptional circumstances.’<sup>159</sup> It has also reaffirmed that even foreigners who have been living in the country of residence since early childhood are not immune from deportation;<sup>160</sup> only **naturalisation brings about an absolute protection against expulsion** for settled migrants.<sup>161</sup>

Article 8 ECHR can be relied upon to challenge the validity of EU legislation or national implementing measures (see Hailbronner/Thym, Constitutional Framework, MN 47–48). For a simple reason such challenges have so far rarely been successful in practice: **rules in secondary EU legislation often lay down more extensive guarantees** than the minimum threshold for the protection of family and private life under Article 8 ECHR as the ECJ recognised explicitly on the occasion of its first judgment on the Family Reunification Directive 2003/86/EC (see Hailbronner/Thym, *ibid.*, MN 15). Settled ECtHR case law can provide useful guidance, nonetheless, on the interpretation of more specific guarantees, such as the limits to linguistic integration requirements for spouses under the Family Reunification Directive (see Klarmann/Hailbronner, Directive 2003/86/EC Article 7 MN 40–46) or the conditions for the expulsion in the Long Term Residents Directive (see Thym, Directive 2003/109/EC Article 12 MN 9–10).

## 2. International Agreements

In contrast to Article 78(1) TFEU on asylum, the Treaty base for immigration law does not specify that policy instruments must be compatible with international treaties (cf. Hailbronner/Thym, Legal Framework for Asylum Policy, MN 8–11), thereby reflecting the absence of any far reaching obligations apart from the ECHR which the EU is bound to respect via parallel interpretation of the EU Charter (see above MN 51). The abstinence from an explicit deference to international law does not prevent judges, however, from reviewing EU legislation in the light of international law whenever general constitutional considerations render international legal standards directly applicable within the EU legal order. It has been explained elsewhere that, on this basis, **most international human rights instruments such as the ICCPR or the European Social Charter can be invoked**, while the **UN Convention on Migrant Workers** and

<sup>156</sup> On the original twist in the case law, see Thym, ‘Respect for Private and Family Life under Article 8 ECHR in Immigration Cases’, ICLQ 57 (2008), 87, 95–102.

<sup>157</sup> ECtHR, judgment of 9 October 2003 (GC), No. 48321/99, *Slivenko et al. v. Latvia*, para 97.

<sup>158</sup> When migrants do not have a nuclear family, the criteria concerning family unity are irrelevant, while the other criteria listed above, such as the solidity of social and cultural ties, have a comparatively higher weight; cf. Thym, Residence as *de facto* Citizenship?, p. 113–117, 125–126.

<sup>159</sup> ECtHR, judgment of 28 June 2011, No. 55597/09, *Nunez v. Norway*, para 83; for further comments, see Thym, Residence as *de facto* Citizenship?, p. 117–120.

<sup>160</sup> See, by way of example, ECtHR, judgment of 20 December 2011, 6222/10, *A.H. Khan v. the United Kingdom*; and ECtHR, judgment of 10 April 2012, No. 60286/09, *Balogun v. the United Kingdom*.

<sup>161</sup> See ECtHR, judgment of 23 June 2008 (GC), No. 1638/03, *Maslov v. Austria*, para 74; and Thym, Residence as *de facto* Citizenship?, p. 138–143.

some ILO conventions concerning migrant workers cannot be relied upon due to an insufficient number of ratifications by the Member States (see Hailbronner/Thym, Constitutional Framework, MN 55). In addition, several conventions concluded within the framework of the **Council of Europe** retain a certain relevance in relation to the nationals of selected third states to which the agreements continue to apply (see Hailbronner/Thym, Constitutional Framework, MN 59).

58 Before the adoption of secondary legislation on immigration, the EU (or its predecessor, the EEC) had concluded a number of **association agreements** with third states, among which the **Ankara Agreement of 1963 with Turkey** and related documents have gained considerable prominence as a result of dynamic ECJ case law approximating the status of Turkish nationals to that of Union citizens.<sup>162</sup> Like other international treaties concluded by the EU, association agreements can be directly applicable in the EU legal order under the conditions stipulated by the ECJ (see Hailbronner/Thym, Constitutional Framework, MN 56–57). This outcome was no foregone conclusion, however, and followed the express desire of the negotiating partners to orientate themselves towards the rules on union citizens; there is no general interpretative standard prescribing parallel interpretation (see Hailbronner/Thym, *ibid.*, MN 19). From the perspective of the EU Treaties, the legislature benefits from a principled discretion in deciding the contents of secondary legislation within the limits prescribed by human rights (see above MN 33). It can exercise this discretion autonomously or bilaterally through the conclusion of international agreements, the **content of which is defined by the negotiating partners**. In the cases of Turkey, Norway, Iceland, Lichtenstein, Switzerland and some corollary aspects of the agreements with Mediterranean countries,<sup>163</sup> association agreements have had a tangible impact; in other scenarios, their significance remains limited to this date.

59 Inspection of the rules on migration in recent association agreements exposes a change of direction in the EU's negotiating strategy. As a result, in part at least, of progressive ECJ case law, Member States insist on careful drafting of new agreements in order to minimise the potential for judicial innovation. Even agreements with future accession candidates nowadays contain only narrow and cautiously drafted rules on migrant workers.<sup>164</sup> This **new approach to association agreements** reflects a change of perspective. Rules on workers no longer primarily follow the single market paradigm, but mirror migration related objectives of the area of freedom, security and justice, reflecting the emergence of migration law as a policy field in its own right.<sup>165</sup> For countries without an accession perspective, rules on cross border movements of workers have always been limited and have been absorbed, in recent years, by provisions focusing on migration control and social policy at home, for instance in negotiations with African states.<sup>166</sup> As a result, the practical impact of more recent association agreements on EU immigration law and the corresponding room for manoeuvre of the Court of Justice have been considerably limited.

<sup>162</sup> For an overview, see Boeles et al., *European Migration Law*, p. 97–116; and Tezcan Idriz, 'Free Movement of Persons between Turkey and the EU', *CML Rev.* 46 (2009), p. 1621, 1625–1664.

<sup>163</sup> For an overview of different agreements and their impact upon EU migration law, see the contributions to Thym/Zoetewij Turhan (eds), *Rights of Third Country Nationals under EU Association Agreements* (Martinus Nijhoff, 2015).

<sup>164</sup> See the Stabilisation and Association Agreements (SAAs) with the countries of the Western Balkans, e.g. Articles 49–58 of the SAA with Serbia of 29 April 2008 (OJ 2013 L 278/16).

<sup>165</sup> See Thym, 'Constitutional Foundations of the Judgments on the EEC Turkey Association Agreement', in: Thym/Zoetewij Turhan (eds), *ibid.*, p. 13, 33–34.

<sup>166</sup> See Devisscher, 'Legal Migration in the Relationship between the European Union and ACP Countries', *EJML* 13 (2011), p. 53, 81–93.

Rules on migration in association agreements concluded by the EU are complemented by so called ‘**mobility partnerships**’ that have been agreed with several third countries, such as Georgia and Morocco, as laboratories for future cooperation, including potential routes for legal migration (although few opportunities have surfaced so far).<sup>167</sup> From a legal perspective, the mobility partnerships are, as soft law instruments, deliberately loosely knit and shy away from firm legal commitments.<sup>168</sup> That said, the EU institutions seem determined to follow down this road and to promote further cooperation on the basis of mobility partnerships. They are often combined with the conclusion of legally binding **readmission agreements** facilitating the return of illegal migrants (see above MN 22–23), which third states have often only been willing to sign up to in conjunction with parallel negotiations on **visas facilitation agreements** (see Thym, Legal Framework for Entry and Border Controls, MN 14) providing for visa free access in return for enhanced migration control measures.<sup>169</sup> The dependence of successful negotiations on mutually beneficial outcomes illustrates the general point: the content and reach of association agreements and related bilateral treaties depend on the outcome of diplomatic negotiations.

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<sup>167</sup> See Thym, *International Migration Governance*, p. 293–301, including on the underlying concerns, on the side of the Member States, that routes for legal migration should be determined through national concessions within the overall framework of mobility partnerships.

<sup>168</sup> See Thym, *ibid.*, p. 300–301; and Lavenex/Nellen Stucky, ‘“Partnering” for Migration in EU External Relations’, in: Kunz/Lavenex/Panizzon (eds), *Multilayered Migration Governance* (Routledge, 2011), p. 116–142.

<sup>169</sup> See Thym, *ibid.*, p. 293–298, 303–304; Gromovs, ‘EU Visa Facilitation Agreements and Readmission Agreement’, in: Maes et al. (eds), *External Dimensions of EU Migration and Asylum Law and Policy* (Bruylant, 2011), p. 221–249; and Coleman, *Readmission Policy*.