

National Contestation over the Aspiration of Long-Term Solutions to Migration

6.1 The Complicated Issue of a Harmonized Admission Policy

To achieve the intended objective of an internal market without frontiers, actions were required by both the Community and the Member States in their respective areas of competence.¹ What this objective would mean for the rights of TCN migrants was not conceived in a uniform way by the Commission and the Council. Specifically, during this period, Member States were coordinating action outside the framework of EU institutions. Intergovernmental meetings of different kinds took place from the late 1980s to the end of the 1990s with the aim of setting an agenda for closer cooperation in what they considered to be sensitive areas.² The discussions that occurred in these groups were shrouded with a veil of secrecy and their outcome contained technical goals related to specific areas.³ To the extent that these technical goals were incorporated

¹ Communication of the Commission on the Abolition of Controls of Persons at Intra-Community Borders, COM(88)640 final, para 9.

² Indicatively see the ad hoc group on immigration set up at the initiative of the UK presidency, Coordinator's group on the free movement of persons set up following the Rhodes European Council, Trevi ministers' group, and Immigration ministers group under the Belgian Presidency.

³ Ford Glyn (1990), Report drawn up on behalf of the Committee of Inquiry into Racism and Xenophobia on the findings of the Committee of Inquiry, Session Documents, A3-195/90, 23 July 1990 criticized these groups for deflecting community competence and democratic control from the Parliament; Communication, Towards an Area of Freedom, Security and Justice, COM(98)459 final in retrospect on the absence of transparency and the inadequacy of the achievements of the period before the Amsterdam Treaty. On the goals on migration, see Statewatch European Monitoring and Documentation Centre on Justice and Home Affairs in the European Union, Compilation no 3, Maastricht Immigration Programme (1991) and Follow up (1993), Supplement to: 'Key texts on justice and home affairs in the European Union, Volume 1 (1976–1993)', 1. Report from the Ministers responsible for immigration to the European Council meeting in Maastricht on immigration and asylum policy, SN 4038/91 (WGI 930) 3 December 1991.

in Council Resolutions regarding migration, they form part of the analysis that follows.

The Commission's agenda on migration, in contrast, was more transparent. For this institution, the abolition of border controls should entail the elimination of legal obstacles to access to employment in other Member States and the harmonization of policies on admission.⁴ Aware of the constantly changing socio-economic circumstances, the Commission emphasized the need to create a system that could accommodate the fluctuation of population movements and, relatedly, labour demand and supply in Member States, while promoting the social advancement for legally resident migrants.⁵ Behind this demand lay the acknowledgement that migration had brought economic and cultural benefits to the European societies, and such benefits needed to be preserved.⁶ The approach of the Commission constantly attempted to align migration with economic and social sustainability. Against this background, the analysis will develop as follows.

In Sections 6.1.1 and 6.1.2, we see how social and economic considerations played out in attempts to harmonize admission, before looking at proposals to grant rights to TCN workers in Section 6.2. Unlike the period examined in Chapter 3, where the Community institutions emphasized the need to align the regulation of migration for TCNs to that of EU migrants, the politicization of migration precluded a uniform approach to the regulation of TCN migrants' rights.

6.1.1 Reactive Approach of the Council Shaped by Economic Fears and Unwillingness to Yield Competence

Already with the adoption of the Single European Act, Member States issued a Declaration, in which they acknowledged their intention to cooperate on matters of entry, movement, and residence of TCNs on the one hand and terrorism, crime, and trafficking on the other hand.⁷ They also added a General Declaration to Article 13 SEA stating that they retained competence on measures related to controlling migration.⁸

⁴ On Immigration, SEC(91)1855 final, para 62.

⁵ Ibid, paras 3, 69.

⁶ On Immigration and Asylum Policies, COM(94)23, Section I.2.

⁷ Political Declaration by the Governments of the Member States on the Free Movement of Persons [1987] OJ L 169/24.

⁸ General Declaration on Articles 13 to 19 of the Single European Act [1987] OJ L 169/24.

In line with this emphasis on national competence, the Council paid little attention to issues of harmonizing admission or granting rights to TCN migrants.

Contrary to the Commission's emphasis on the need to ensure the development of the EU project via a regulated system of admission shaped around long-term considerations, discussed in detail in Section 6.1.2, the Council adopted a series of resolutions stemming from inter-governmental cooperation, which stressed national competence over admission. The 1994 Resolutions touched upon admission of different categories of migrants. One resolution was issued on migrant workers, while two more followed on self-employed migrants and students.⁹ The Resolution on TCN workers was extremely restrictive. At a time when Member States were struggling with high national unemployment and had no immediate need for migrant workers, the Resolution on TCN workers was restrictive and only addressed the issue of admission for temporary employment.¹⁰ Member States reserved the right to allow family reunification for people admitted for temporary employment.¹¹ Finally, failing to take into account long-term considerations, the resolution emphasized that the restrictive measures on admission implemented in Member States should be maintained and, if necessary, reinforced.¹² These principles set out to govern admission were meant to represent the stricter standards and were not intended to be relaxed by Member States.¹³

The overall approach of the Council was that Member States should in principle refuse entry to all TCN workers. Entry should only be considered in case of vacancies that could not be filled by Community workers or TCN workers already permanently residing in a Member State.¹⁴ Such admission was to take place for workers who had specialist

⁹ Council Resolution of 30 November 1994 relating to the limitations on the admission of third-country nationals to the territory of the Member States for the purpose of pursuing activities as self-employed persons [1996] OJ C 274/7; Council Resolution of 20 June 1994 on Limitations on Admission of Third-Country Nationals to the Member States for employment [1996] OJ C 274/3; Council Resolution of 30 November 1994 on the admission of third-country nationals to the territory of the Member States for study purposes [1996] OJ C 274/10.

¹⁰ Council Resolution on admission of TCNs for employment [1996] OJ C 274/3, paras ii and iii.

¹¹ *Ibid.*, para v.

¹² *Ibid.*, para vi.

¹³ *Ibid.*

¹⁴ *Ibid.*, I. general criteria.

qualifications or if there was a temporary manpower shortage in national or Community labour markets, which can affect the operation of employers.¹⁵ Authorizations to reside should be restricted to employment in a specific job and with a specific employer.¹⁶ Further, the Resolution provided that admission for temporary employment might be offered to seasonal workers, in strictly controlled numbers, who undertook specific jobs and fulfilled a 'traditional need' in a Member State, trainees; frontier workers; and intra-corporate transferees. Finally, the Resolution included restrictions as to the maximum period of admission for employment, arguably to avoid the settlement of migrant workers.¹⁷ As a result, extension of temporary stays was to be denied to seasonal workers over the six-month employment period, whereas for regular TCN workers, extension of permits could be considered only if the criteria for initial admission continued to be met, that is special skills, vacancies unfilled by Community labour, and jeopardizing the function of an undertaking.

Were economic considerations the reason for such a restrictive policy? While there is not much information in the text of the resolution to draw definite conclusions, if we compare this with the resolutions that followed on self-employed TCNs and students, the economic fears behind labour migration become clear. Specifically, the resolution on self-employed TCNs was not restrictive, and the Council acknowledged therein that the reason for differentiation was that admission of people pursuing independent economic activity added value to the economy of the host state, and thus was, as such, of benefit.¹⁸ To the extent that the economic activity was of no benefit to Member States, then TCNs should not be admitted.¹⁹ Similarly, regarding students, the Council emphasized the importance of ensuring that their migration was time-limited and did not turn into permanent immigration via employment.²⁰

In times of national contestation of immigration, with local unemployment and the possibility of employing workers already residing in EU

¹⁵ Ibid.

¹⁶ Ibid, para iii restrictions as to the scope of employment.

¹⁷ Ibid, para iv restrictions as to the period of admission to employment; for seasonal workers, a maximum six months in a twelve-month period; for trainees, a maximum of one year, which might be extended for the time needed to obtain a professional qualification, and a general ban on admission for more than four years in the first instance.

¹⁸ Council Resolution on admission of self-employed TCNs [1996] OJ C 274/7, para 4.

¹⁹ Ibid, para 5.

²⁰ Council Resolution on the admission of TCN students [1996] OJ C 274/10, para 4.

territory, the slowly resurging economies of Member States had no need for migration from outside the EU to continue to perform. This restrictive approach, although based on economic considerations, did not take into account the constantly changing economic circumstances and their relation to labour migration. What was missing was a long-term understanding of migration for achieving economic sustainability. Towards the end of the 1990s and in the years following, the Council continued to engage very sporadically with economic migration and the need to harmonize conditions of admission and residence. According to the Tampere Council, such harmonization should take place based on a shared assessment of economic and demographic developments within the EU, as well as the situation in the countries of origin.²¹ It is not clear why the Council did not refer to the fact that the Commission had tried to issue an instrument which would embed such assessment within the EU framework, as we will see in Section 6.1.2.

6.1.2 The Persistent Ambition of the Commission to Align Migration with the Project of Growth

With an emphasis on the need to shape a system that has inbuilt guarantees to ensure the development of the Member States in changing economic and demographic circumstances, the Commission submitted a proposal on a Convention to harmonize the rules of admission of TCNs in 1997.²² The proposed Convention was submitted under Article K3(2) of the Maastricht Treaty, and the Commission was prepared to redraft it into a Directive after the entry into force of the Amsterdam Treaty, should there be agreement. Despite its title, the proposal went a lot further than the harmonization of conditions of admission. It suggested a framework for the conclusive regulation migration at EU level by regulating the admission of migrants for employment, independent economic activity, training, study, non-gainful activity, family reunification, and the attribution of progressive rights for long-term residents. This section evaluates how economic and social objectives appeared behind the regulation of admission, while the parts of the proposal that dealt with the attribution of rights to migrant workers form part of the analysis under Section 6.2. The analysis highlights how the Commission

²¹ Tampere European Council, Presidency Conclusions, 15 and 16 October 1999, para 20.

²² Proposal for a Council Act establishing the Convention on rules for the admission of third-country nationals to the Member States, COM(97)387 final.

envisioned a migration system deeply rooted in economic and social sustainability.

Acknowledging that the economic growth of the 1950s and 1960s would not return, and that the current labour market situation would not allow for a liberal migration policy, the Commission remained realistic as to the fact that the zero immigration target envisioned by Member States could not be realized.²³ In the explanatory memorandum, the Commission set the Convention within the context of shaping a system that could ensure the continued benefits of migration for the EU development project. This would materialize as follows: admission would be granted to TCN workers if there existed a vacancy that could not be filled by a Community worker or by a legally resident TCN worker. The idea behind this system was to allow the market to function, while avoiding an increase in labour force via migration at a time when unemployment was already a problem in the Member States.²⁴

TCN workers would need to have an offer of employment for at least one year in order to enter, and they could be admitted with a maximum four-year authorization at the first entry.²⁵ The renewal of their permit would be dependent on the continuation of the conditions behind their initial entry. This meant that, if there was labour demand, migrants would be able to continue to reside, whereas, in the case of recession and unemployment, the conditions of their initial entry would not be fulfilled, and they would not be able to prolong their stay, as their labour would no longer be needed. As for seasonal workers, they would be granted admission for six months, and TCNs who had already been admitted as seasonal workers would have priority in future applications for a seasonal work permit.²⁶ The idea behind the prioritization was to counter the risk of seasonal workers staying illegally, as they would benefit from preferential treatment in future applications.²⁷ The emphasis on the function of labour migration, and more specifically on a harmonized admission system for achieving the economic objectives of

²³ Ibid, Section 2.

²⁴ Ibid, Explanatory memorandum.

²⁵ Ibid, Article 8.

²⁶ Ibid, Article 9.

²⁷ This was channelled into Directive 2014/36/EU on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers [2014] OJ L 94/375.

the EU, is also apparent if we compare the admission criteria for workers to those of students and trainees.²⁸

Finally, Article 22 of the proposed Convention attested the cost-benefit analysis behind the regulation of admission of TCNs in the EU. Specifically, the Commission suggested that there were certain categories of TCNs who were not covered by the proposal but who should not be denied stay, namely pensioners, people living on capital income, writers receiving royalties, and *au pair* students. Since such people do not seek to join the labour market and create no economic burden, but are rather consumers and investors, their admission should be considered favourably. This proposal was eventually withdrawn in 2001.²⁹

At this point, the Commission issued another proposal under Article 63(3)(a) of the Amsterdam Treaty suggesting that the role of TCNs in the EU labour market had been disregarded in comparison with other areas, related to the single market.³⁰ The 2001 proposal sought to regulate the admission of TCNs for the purpose of paid employment and self-employed activities.³¹ The aim was to provide rights to TCN migrants, while allowing Member States to limit admission for economic migration in case of limited labour demand. Specifically, the framework would permit a quick reaction to changing economic and demographic circumstances, and admission would be allowed only if there was an economic need on behalf of the Member States, or if such TCN migrants had a beneficial effect to the national economies.³²

The proposed Directive provided for equal treatment on a set of basic rights enshrined in Article 11.³³ More specific provisions regulated the admission of seasonal workers, trans-frontier workers, intra-corporate transferees, trainees, and *au pairs*.³⁴ Further, Article 32 of the proposed Directive introduced a general non-discrimination provision regarding its application, with a wording based on Article 13 EC Treaty and Article

²⁸ Articles 17–19 Proposal, COM(97)387.

²⁹ Communication, Withdrawal of Commission Proposals which are no longer topical, COM(2001)0763 final.

³⁰ On a Community Immigration Policy, COM(2000)757 final, 13.

³¹ Proposal for a Directive on the conditions of entry and residence of third-country nationals for the purpose of paid employment and self-employed economic activities, COM(2001)0386 final [2001] OJ C 332E/248.

³² *Ibid*, Explanatory Memorandum, Section 3, points 5, 6, 8.

³³ Housing could be limited to only apply to workers with minimum stay. Article 11 of the Explanatory Memorandum refers to Article 12 of the Long-term Residents Draft Directive which was issued around the same time.

³⁴ Articles 12–16 Proposal, COM(2001)0386 final.

21 CFR.³⁵ Under Article 26 of the proposed Directive, Member States were allowed to maintain horizontal measures in addition to the economic needs test to regulate access to the labour market. Such measures would have to be communicated to the Commission, which would evaluate whether they were justified.³⁶ Finally, Member States could introduce exceptions for employment in public service under Article 28 of the proposed Directive.³⁷ This proposal was eventually withdrawn in 2006, after failing to gather support from the Council, which did not want to address the matter of horizontal admission for all categories of TCN migrants.³⁸

In addition to this failed proposal, the Commission had proposed an instrument on admission of students and an instrument on family reunification, which were supposed to be complementary and to meet the Tampere demand for conclusive regulation of migration. Admission for TCNs for reasons other than these (employment, independent economic activity, family reunification, and studies) was deemed as adequately regulated under domestic law due to the low number of people falling in this category.³⁹

The regulation of student admission was presented as disconnected from the labour market and linked to social enrichment and the exchanges between cultures promoted by student mobility.⁴⁰ The instrument was much more socially oriented, insofar as it aimed at promoting the EU as a global centre of excellence for education which would support the dissemination of human rights values, and sought to contribute to the objective of promoting quality education under Article 149 EC.⁴¹ In the end, the Directive adopted covered the admission of students, and Member States were given discretion on extending its application to school pupils, unremunerated trainees, and volunteers. The Directive included general and

³⁵ Ibid, Explanatory memorandum, Article 26.

³⁶ Ibid, Article 30.

³⁷ Ibid, Explanatory memorandum Article 28 proposed to have the same wording as 39(4) and 46(1) TFEU on employment in public service.

³⁸ Communication, Outcome of the screening of legislative proposals pending before the Legislator, COM(2005)0462 final; Withdrawal of Commission proposals following screening for their general relevance, their impact on competitiveness and other aspects [2006] OJ C 64/3.

³⁹ Proposal for a Directive on the conditions of entry and residence of third country nationals for the purposes of studies, vocational training or voluntary service, COM (2002)0548 final [2003] OJ C 45E/18, Section 1.1.

⁴⁰ Ibid, Section 1.2 and Recital 7.

⁴¹ Ibid, Section 1.3 and Recital 6.

specific conditions of admission for the different categories.⁴² Regardless of the category, though, comprehensive insurance and sufficient resources during the migrants' stay were required.⁴³

Following the national practice of allowing students to remain in Member States in order to address skilled manpower shortages, the Commission also proposed the possibility of change of status from student to worker without having to leave the host state and reapply.⁴⁴ The proposal provided for the right to work to both students and trainees. In the text adopted, this right was only limited to students under Article 17, which also allowed Member States discretion to determine for how many hours students could be employed. Additionally, Member States were allowed to restrict access to employment for the first year of residence under Article 17(3). Finally, Article 12(2)(a) of the Directive provided that a refusal to renew or withdrawal of a permit could be justified based on a failure on the part of the student to respect the limitations regarding access to economic activities.

Essentially, all the proposals by the Commission to horizontally regulate admission for all the categories of TCN migrants failed. It is not easy to determine with certainty why these proposals were rejected by the Council, that is, whether the issue was the need of Member States to maintain competence on regulating migration, the assumed risks for their economies, or the fact that the proposals, especially the 1997 one, would lead to a system of residence and movement equally extensive to that applicable to EU migrants. In any case, in the period under review, the only measure that was eventually adopted regulated the admission of students, which came with no economic cost, and which still incorporated specific limits to avoid the possibility of students entering the EU to find employment.

6.2 Laying the Groundwork for Fragmentation and Differentiation

Unlike the previous period, the claim for migrant rights in the transformed EU legal order drew on a stronger perception of social objectives

⁴² Directive 2004/114/EC of 13 December 2004 on the conditions of admission of third-country nationals for the purposes of studies, pupil exchange, unremunerated training or voluntary service [2004] OJ L 375/12.

⁴³ Sickness in Article 6(1)(c), resources for students in 7(1)(b), for pupils Article 9(1)(d) and (e), for trainees Article 10(b), for volunteers 11(b) and (c), Directive 2004/114.

⁴⁴ Proposal, COM(2002)0548 final, Section 1.4. This change of status was to be regulated under the Proposed Directive on self-employed third country nationals, COM(2001) 386 final.

and the importance of TCN rights for social cohesion. Equal treatment continued to be the central principle guiding the Community approach to legally resident TCNs during the 1990s.⁴⁵ Both social and economic considerations lay behind the demand for equal treatment. Economic considerations were included with reference to contradictory practices at national level having the potential of distorting the EU labour market, and of social dumping within the EU.⁴⁶ At the same time, the granting of equal rights was perceived as having the potential to lead to an increase in the workforce, and to affect beneficially the social security systems of Member States, which were experiencing difficulties due to negative population growth.⁴⁷ The emphasis on the value of the migrant worker for the project of growth diminished, and equal treatment became part of broader social objectives of the EU through a link between the treatment of migrants and a social agenda for a functioning EU society.⁴⁸

Against this backdrop, equal treatment was demanded in a series of initiatives to advance the rights of migrant workers. In 1995, the Commission suggested extending the personal scope of Article 22 of Regulation 1408/71 to TCNs in order to ensure their right to immediately necessary healthcare when staying for a short time in another Member State.⁴⁹ This proposal did not go through in the adoption of the Regulation 3095/95.⁵⁰ However, social protection for TCN migrants

⁴⁵ On Immigration, SEC(91)1855 final, para 42.

⁴⁶ Ibid, para 43; Economic and Social Committee, Own-initiative opinion on the Status of migrant workers from third countries (91/C 159/05) [1991] OJ C 159/12, para 3.2.2.

⁴⁷ Ibid, para 3.2.3.

⁴⁸ On Immigration, SEC(91)1855 final, para 59. See also European Economic and Social Committee, Opinion on the status of migrant workers from third countries (91/C 339/15) OJ C 339/82, para 2.4.1 on equal rights as an independent political choice; On Immigration and Asylum Policies, COM(94)23 final, para 130; HAEU, CEUE _SEGE-SEC(1991)0803, Commission, Secretariat General, Communication from the President, Mr Bangemann and Mrs Papandreou in agreement with Mr Andriessen, Mr Marin and Mr Matutes, Communication to the Commission, Immigration, 10.

⁴⁹ Amended proposal for a Regulation amending Regulation 1408/71 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, Regulation 574/72 laying down the procedure for implementing Regulation 1408/71, Regulation 1247/92 amending Regulation 1408/71 and Regulation 1945/93 amending Regulation 1247/92, COM(95)284.

⁵⁰ Regulation 3095/95 of 22 December 1995 amending Regulation 1408/71 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, Regulation 574/72 fixing the procedure for implementing Regulation 1408/71, Regulation 1247/92 amending Regulation 1408/71 and Regulation 1945/93 amending Regulation 1247/92 [1995] OJ L 335/1. See Caroline Laske, 'The Impact of the Single European Market on Social

was eventually achieved with the adoption of Regulation 859/2003.⁵¹ Moreover, TCN workers were included in the scope of the Community Charter on Fundamental Rights of workers, a non-binding instrument, adopted by a declaration in 1989 by all the Member States, with the exception of the UK.⁵² Similarly, the Agreement on Social Policy annexed to the Maastricht Treaty, which sought to set up closer cooperation among all Member States with the exception of the UK, provided that the Council could take action in the area of conditions of employment of legally resident TCNs. Having these in mind, Sections 6.2.1 and 6.2.2 look at the development of family reunification rights and the progressive attribution of rights to long-term residents.

6.2.1 *Towards an Autonomous Protection of Migrant Workers' Families*

The attribution of family reunification rights to legally resident TCN migrants was very controversial. Despite the restrictive admission policies prevalent in the 1980s, Member States had maintained exceptions for humanitarian reasons, among which was also family reunification. This led to substantial migration movements, and, as a result, in the 1990s, Member States started to impose tighter conditions for family reunification.⁵³ According to an ILO working paper, economic considerations influenced both the law and practice of Member States, as foreign family members were viewed as a potential economic liability, searching for work at times of high unemployment.⁵⁴

Protection for Migrant Workers' (1993) 30 CMLRev; Herwig Verschueren, 'EC Social Security Coordination Excluding Third Country Nationals: Still in Line with Fundamental Rights after the *Gaygusuz* Judgment?' (1997) 34 CMLRev.

⁵¹ Regulation 859/2003 of 14 May 2003 extending the provisions of Regulation 1408/71 and Regulation 574/72 to nationals of third countries who are not already covered by those provisions solely on the ground of their nationality [2003] OJ L 124/1.

⁵² Community Charter of Fundamental Social Rights of Workers adopted at the European Council in Strasbourg meeting on 8, 9 December 1989.

⁵³ On Immigration, SEC (91) 1855 final, para 17; Commission, DG Employment, Industrial Relations and Social Affairs, Unit: Freedom of movement, Migration policy, Immigration Policies in the Member States: Between the Need for Control and the Desire for Integration, Working Document, Summary Report of the information network in migration from non-EC Countries (RIMET) year of reference 1991, V/1020/92, 23.

⁵⁴ WR Böhning and J Werquin, *Some Economic, Social and Human Rights Considerations Concerning the Future Status of Third-Country Nationals in the Single European Market* (International Labour Office 1990) 41.

During this period, the ad hoc Group on Immigration tabled a resolution on harmonization of national policies on family reunification, which was adopted in Copenhagen in June 1993.⁵⁵ The resolution did not provide much harmonization. Rather, it suggested that family reunification should apply to TCNs legally resident in a Member State 'on a basis which affords them an expectation of long-term residence'.⁵⁶ The definition of what constituted an expectation of long-term residence was left to national law. Member States were allowed to make entry and stay conditional on the availability of adequate accommodation, sufficient resources, and the existence of health insurance, to avoid placing a burden on public funds.⁵⁷ What is more, the authorization to family members could be made conditional on a continued fulfilment of the criteria for admission for a period, which the Member States would define.⁵⁸ Within a reasonable time following admission, family members could be authorized to stay on an independent basis in accordance with the provisions of national law.⁵⁹ This restrictive approach is in stark contrast with the Opinion of the Economic and Social Committee, which suggested that family reunification should take place under the same conditions as applicable to Community workers.⁶⁰

The 1997 Commission proposal on a Convention regulating the admission of TCN migration discussed earlier, also included provisions on family reunification. In the proposal, the issue was disconnected from economic considerations, and instead it was linked with obligations to consolidate the rights of migrant workers.⁶¹ Under Article 24 of the proposed Convention, family reunification rights would be granted to TCNs who were resident for one year and had a prospect of valid residence for two more years. Article 28 of the proposed Convention provided that the applicant should have sufficient material conditions to support their family and to ensure that reunification would not place a burden on state expenditure. Article 30 enshrined a limitation for family members' access to employment for a period of six months, as the admission was granted

⁵⁵ Ad hoc Group Immigration, Resolution on the harmonization of national policies on family reunification, 1 June 1993, SN2828/1/93 WGI 1497 REV1.

⁵⁶ *Ibid.*, point 1.

⁵⁷ *Ibid.*, 16.

⁵⁸ *Ibid.*, 11.

⁵⁹ *Ibid.*, 12.

⁶⁰ European Economic and Social Committee, Opinion on the Communication, On Immigration and Asylum Policies (94/C 393/13) [1994] OJ C 393/69, para 3.2.2.

⁶¹ Proposal, COM(97)387 final, Section 2.

for human rights reasons and not for economic ones. Finally, Article 31 provided that family members would be entitled to an autonomous right to reside subject to the fulfilment of the specified conditions.

After the failure to adopt the proposed Convention, the Commission issued a specific proposal on family reunification for both TCNs and EU nationals who did not fall under the free movement rules.⁶² By this proposal, the Commission sought to consolidate the protection of family life in the EU, as means to promote the living conditions of everyone in the territory, rather than specific migration-related rights. Specifically, the harmonization of family reunification was suggested because of the function of family for integration in the host state.⁶³ By analogy to family reunification rights for EU nationals, the Commission suggested that fair treatment of TCNs was 'indispensable' if they were to lead a normal life in the host states.⁶⁴ However, this horizontal regulation of family life for both TCN and EU nationals who had not moved from their state of origin was not accepted by the Council.⁶⁵

Eventually, the Family Reunification Directive was adopted in 2003.⁶⁶ It applies to all legally resident TCNs and excludes all migrants whose status is considered uncertain or temporary.⁶⁷ Under the current framework, the right to family reunification for TCNs is regulated and harmonized to promote economic and social cohesion under Article 3 TEU, as acknowledged in Recital 4 of the Directive. Even though Article 3 TEU is not explicitly referred to, the recital mentions the central role of family reunification in the creation of sociocultural stability and integration for TCNs, and explains that such outcome serves to promote economic and social cohesion as fundamental objectives stated in the Treaty. The Directive creates a right to family reunification for the nuclear family of TCN migrants. The 1999 proposal for this Directive provided for a larger scope of family members entitled to reunification.⁶⁸ This was met

⁶² Proposal for a Directive on the right to family reunification, COM(99)0638 final, Article 1, Article 3(c).

⁶³ Ibid, Section 2.2.

⁶⁴ Ibid, Section 7.2.

⁶⁵ Amended proposal for a Directive on the right to family reunification, COM(2002)0225 final, Section 2.4.

⁶⁶ Directive 2003/86/EC of 22 September 2003 on the right to family reunification [2003] OJ L 251/12.

⁶⁷ Article 3, Directive 2003/86; See also Amended proposal, COM(2002)0225 final.

⁶⁸ Proposal, COM(99)0638 final, Article 5 with obligation for spouse and unmarried partner in line with Case 59/85, *Netherlands v Reed*, 59/85, ECLI:EU:C:1986:157, ascendants and children of full age.

with resistance by the Council, which suggested as a compromise that the Family Reunification Directive should create an obligation on the part of the Member States for family reunification for members of the nuclear family, and allow discretion for the rest.⁶⁹ Thus, Article 4 of the Family Reunification Directive provides family reunification rights for the spouse of the TCN and the minor children (including adopted children) of the TCN or the spouse as long as the TCN has custody and the children are dependent on them. The age of majority for reunification of children is set by national law and the children must not be married. Apart from the spouse and minor children, Member States have discretion to authorize the reunification of other family members under Article 4(2) and (3) of the Directive. Similarly, the provisions as to the age of children were revised as Member States requested room for manoeuvre to examine whether children met the conditions of integration beyond a certain age before authorizing family reunification.⁷⁰

The Directive also provides family members with rights that are dependent on economic considerations. All family members enjoy entry and residence rights in the host Member State.⁷¹ The Directive also provides rights of access to vocational guidance. This should not come as a surprise, since access to vocational guidance means that family members will be ready and trained for work when labour demand might arise. They should indeed eventually enjoy access to employment. However, the Directive allows Member States to limit such right for up to twelve months, during which they may examine the situation of their labour market, and they may also restrict access to the employment market for the dependent relatives and adult children entitled to reunification under Article 4(2). This type of limitation of family members' right to access the labour market should also not come as a surprise. The purpose served by such restrictions is the following: family reunification is introduced as a social measure to ensure better living conditions for the migrant worker. If family members are allowed to access the labour

⁶⁹ See Council of the European Union, Press Release, 2370th Council meeting – Justice, Home Affairs and Civil Protection, Brussels, 27 and 28 September 2001, 12204/01 (Presse 334).

⁷⁰ Amended proposal, COM(2002)0225 final, Section 2.4 and Article 4. See Article 4(6) and (5), Directive 2003/86.

⁷¹ In the Blue Card Directive 2009/50 and Directive 2021/1883, the Intra-Corporate Transfers Directive 2014/66 and Researchers Directive 2005/71 the duration of their residence permits is altered to match the duration of the sponsor permit.

market with no restriction, this has the potential of negatively impacting the economy at times when there is no labour demand.

Finally, the Directive provides for the possibility that family members establish an autonomous right of residence.⁷² Specifically, such an autonomous right shall be granted after maximum five years of residence in the host state. Member States are allowed to limit the autonomous rights of the spouse or unmarried children in the case of breakdown of the family relationship. They have the discretion of granting such a right to adult children and dependent relatives under Article 4(2) and the possibility to providing it in cases of widowhood, divorce, separation, or death of first-degree relatives in the direct ascending or descending line, as well as in cases of particularly difficult circumstances. Family members of workers also enjoy a set of procedural rights, which have been consolidated in the case-law.⁷³

The Directive includes limitations to the right to entry and grounds for non-renewal of the permit in case the conditions set by the Directive are no longer satisfied, in case of fraud, public policy threat, fake marriage, or marriage of convenience; in case family members no longer have a real relationship with the sponsor; in case the sponsor has no right to reside; and, finally, in case the sponsor does not have sufficient resources.⁷⁴ The requirement of sufficient resources applies as a condition of entry but is explicitly repeated as a reason to withdraw the permit upon application for renewal.⁷⁵ The difference is that, on renewal, Member States can also take into account the potential contribution of the family member.

Thus, in the field of family reunification, while economic considerations appeared behind restrictive national policies, the Commission's approach was socially oriented. Essentially, the demand for securing rights to family reunification was aligned with a need to protect the human rights of people residing in EU territory and fit with the promotion of the social objectives of the EU project.⁷⁶ This is unlike family reunification for EU migrants, where the stated objective of regulation

⁷² The 1999 Proposal granted such rights after four years, but in the 2002 Proposal it was suggested to change this to improve consistency with the long-term resident status.

⁷³ Joined Cases C-133/19, C-136/19, and C-137/19, *Belgian State*, ECLI:EU:C:2020:577.

⁷⁴ See Case C-557/17, *Y.Z. and others*, ECLI:EU:C:2019:203 on fraud as a ground of withdrawal when such fraud has been conducted by the sponsor and the family member has no knowledge.

⁷⁵ This clause was not included in the original proposal of 1999, but upon deadlock, it became part of the revised proposal of 2002.

⁷⁶ On Immigration and Asylum Policies, COM(94)23 final, para 125.

was to support the migrant worker in the performance of their task, as discussed in Chapter 2. At the same time, economic considerations condition the attribution of rights to migrant families to ensure that the family members will not pose risks to Member States' economy. This is achieved through the introduction of requirements related to sufficient resources of the sponsor as a precondition for enjoyment of the family reunification right. The economic conditioning of the relevant rights has been interpreted in a restrictive way by the Court, as we will see in Chapter 9. Overall, in the regulation of family reunification, we see a shift that places migration closer to the social objectives of the EU, which were redefined during this period and were consolidated in the post-Amsterdam framework. At the same time, it is clear that the parallel pursuit of economic and social sustainability also conditions the attribution and limitation of migrants' rights in this field.

6.2.2 *From a By-product of Economic Progress to a Means of Integration: The Case for Progressive Attribution of Rights*

During this period, the rights of legally resident TCNs appear in concrete legislative proposals. As should be expected at this stage of the analysis, the ambition to attribute rights to TCN migrants was subject to conflicting ideas between different actors. Specifically, the Commission suggested the extension of free movement and access to employment across all Member States for resident migrants.⁷⁷ The need to extend freedom of movement to TCN migrants was also supported by the Parliament and the Economic and Social Committee, with reference to the contribution of TCN workers to the development of the EU project, and to the aim of creating an EU labour market.⁷⁸ Regarding the Commission's position, it appears that the internal market logic lay behind such a demand. Absent any differentiation between EU and

⁷⁷ On Immigration, SEC(91)1855 final, para 62. The Commission suggested the application of free movement, first for certain categories of TCNs (permanent residents, refugees, frontier workers, staff of firms providing cross border services).

⁷⁸ Resolution on the Joint Declaration against racism and xenophobia and an action programme by the Council of Ministers (Doc. A 2-261/88) [1989] OJ C 69; Economic and Social Committee own-initiative opinion on the status of migrant workers from third countries [1991] OJ C 159 point 3.4; European Economic and Social Committee, Opinion on the status of migrant workers from third countries (91/C 339/15) OJ C 339/82, paras 2.6.3, 2.6.4; European Economic and Social Committee, Opinion on the communication, on immigration and asylum policies (94/C 393/13) [1994] OJ C 393/69 para 3.1.3.

TCN workers' contribution to growth, there was a demand to grant access to employment in another Member State to the latter.⁷⁹ In this context, the Commission envisioned the priority of legally resident TCNs after EU nationals in accessing employment in other Member States.⁸⁰ That would be the first step, while a 1994 Commission Communication suggested a second step of allowing TCN workers to enter another Member State to respond to offers of employment.⁸¹ Leaving some leeway to the intergovernmental cooperation taking place at the ad hoc group on migration, the Commission suggested that it would pursue the conditions of movement in the EU for legal migrants if the relevant initiatives did not move forward.⁸²

Free movement of TCNs did not materialize at that time, but instead the Commission submitted a proposal that would grant rights to legally resident TCNs to travel within the Community.⁸³ The attribution of a right to travel was based on Article 100 EC, which provided for the coordination of national laws in matters affecting the functioning of the common market. While such a right would advance the position of TCNs, the central aim was to ensure the full economic benefits of a single market. As the Commission suggested in the relevant proposal, such a right to travel between the Member States for short stays was both useful from an economic point of view and legally necessary.⁸⁴ For the Commission, it did not make sense to have labour demand that can be filled internally, that is, by other EU workers and TCN workers resident in other Member States, and to still preclude TCNs from such employment, which would lead to more external recruitment.

At the same time, security of residence became a demand related to the social advancement of the migrant, and hence there was call for a common permanent residence scheme granted after a fixed period across

⁷⁹ On Immigration, SEC(91)1855 final, para 62.

⁸⁰ On Immigration and Asylum Policies, COM(94)23 final, para 129.

⁸¹ *Ibid*, para 129.

⁸² HAEU, CEUE _SEGE-SEC(1991)0803, Commission, Secretariat General, Communication from the President, Mr Bangemann and Mrs Papandreou in agreement with Mr Andriessen, Mr Marin and Mr Matutes, Communication to the Commission, Immigration, 6.

⁸³ Proposal for a Directive on the right of third-country nationals to travel in the Community, COM(95)346 final.

⁸⁴ *Ibid*, para 12; The proposal was amended, Amended proposal for a Directive on the right of third-country nationals to travel in the Community, COM(97)0106 final, and then implicitly withdrawn, Withdrawal of Commission Proposals which are no longer topical, COM(2001)0763 final.

the Member States, as well as for the progressive attribution of extra rights to settled migrants.⁸⁵ While the Council seemed to recognize the social significance of integration of legally resident TCNs, its approach to granting rights to long-term resident TCN workers remained restrictive.⁸⁶ In a 1996 Resolution, the Council held that long-term residents should be defined as TCN migrants who have stayed in the territory of a Member State for a period of ten years.⁸⁷ While the resolution provided that Member States should ensure security of residence for at least ten more years to long-term resident workers, it suggested that when an application was made to this end, Member States should be able to assess whether the applicant had a certain and stable level of means of subsistence, in particular health insurance, and whether they fulfilled the conditions for exercising an occupation.⁸⁸ As to the question of rights, the resolution provided that long-term residents and their family members should enjoy 'no less favourable' treatment than nationals of the Member States as regards working conditions, membership in trade unions, public policy in the housing sector, social security, emergency healthcare, and compulsory schooling.⁸⁹ Moreover, the resolution suggested that it should be possible for long-term residents and their family members to be granted non-contributory benefits.⁹⁰

Unlike the restrictive approach of that Resolution, the 1997 proposed Convention discussed earlier placed security of residence in light of integration, as necessary to safeguard an equilibrium in European societies.⁹¹ Under Article 32 of the proposed Convention, long-term resident status would be granted to TCNs who had been resident in a Member State for five years and who held a residence permit that ensured that on expiry they would have lived in that Member State for a total period of ten years. The rights for long-term residents would be guided by non-discrimination compared to EU nationals and a greater protection against expulsion.⁹² In Article 35, the proposed Convention provided

⁸⁵ On Immigration, SEC(91)1855 final, para 59; On Immigration and Asylum Policies, COM(94)23 final, para 124.

⁸⁶ Recital 3, Council Resolution of 4 March 1996 on the status of third-country nationals residing on a long-term basis in the territory of the Member States [1996] OJ C 80/2.

⁸⁷ Ibid, III.1.

⁸⁸ Ibid, III.2 and IV.2

⁸⁹ Ibid, V.2

⁹⁰ Ibid.

⁹¹ Proposal, COM(97)387 final, Section 2.

⁹² Ibid, Article 34.

them the right to apply for vacancies in other Member States, and to study throughout the EU. The reasoning behind the attribution of such rights was both economic and social. According to the Commission, the possibility to take up work in another Member State would not affect the labour market, as it would not increase the number of migrants employed in the EU.⁹³ Moreover, with the aim of moving towards a broader EU social space, the Commission mentioned that long-term residents were seeking integration not in the particular Member State where they resided but rather in the frontier-free area of the EU.⁹⁴ As the new millennium began, the Commission also used the Charter as a point of reference, perhaps in an attempt to consolidate a direct link of rights between TCNs and the EU legal order. Specifically, it mentioned that the Charter could be a reference point for the development of a civic citizenship that would comprise of common rights and obligations.⁹⁵

Relatedly, a proposal was issued by the Commission with the aim of consolidating the rights of long-term residents.⁹⁶ The proposal suggested that full integration for long-term residents should necessarily imply their right to move between Member States. Specifically, the Commission claimed that '[a] genuine area of freedom, security and justice, a fundamental objective of the European Union, is unthinkable without a degree of mobility for third-country nationals residing there legally, and particularly for those residing on a long-term basis'.⁹⁷ Free movement rights for long-term residents were demanded in light of Article 45 CFR, which provides for the possibility of extending free movement rights to TCNs. Apart from suggesting such rights to free movement, the Commission insisted on the economic need behind such attribution which would allow for 'better utilisation of employment reserves available in different Member States'.⁹⁸

The Commission managed to gather support and adopted the Long-term Residents Directive in 2003, as means to promote the social objectives of the EU by ensuring fair treatment to legally resident TCNs and to put in place an integration policy that would grant TCNs rights and

⁹³ Ibid, Explanatory Memorandum, Article 35(1).

⁹⁴ Ibid.

⁹⁵ On a Community Immigration Policy, COM(2000)757 final, 19–20.

⁹⁶ Proposal for a Directive concerning the status of third-country nationals who are long-term residents, COM(2001)127 final.

⁹⁷ Ibid, Section 5.6.

⁹⁸ Ibid, Section 5.8.

obligations comparable to those of EU migrants.⁹⁹ Recital 4 of the Directive mentions that the integration of TCNs who have had a long residence in the EU is key in promoting the economic and social cohesion of the Union. Under Article 4(1), the status is attributed to all migrants who have lawfully resided in a Member State for a period of five years. Under Article 14, long-term residents can move to another Member State for periods longer than three months for any purpose (study, economic activity, other purposes). What is more, they have access to the labour market of the second Member States under equal treatment conditions under Article 21. However, Articles 13 and 21(2) allow Member States to set restrictions and conditions to the exercise of such rights which can significantly limit their effectiveness by making it extremely hard to move to take up employment in another Member State. Thus, even though free movement found its way in the Directive, the practical effect of the relevant right is significantly limited.

The Long-term Residents Directive is a clear example of the ways in which economic considerations can frame legislation at EU level: the aspiration of extending rights to migrants in order to boost the economy is limited and made ineffective due to economic fears of what might happen to the economy if migrants actually enjoy rights. The long-term approach of the Commission and its emphasis on the positive function of long-term residents for the EU economy was the reason for attribution of free movement rights to this category of TCNs. In parallel, the economic fears connected to potential negative effects of such movement for national labour markets were expressed by the Council as a reason to set substantive limitations to such movement making it practically ineffective.¹⁰⁰

This ineffectiveness led to a demand for the revision of this instrument. In December 2022, the Commission issued a proposal for revision with the aim of strengthening the rights of long-term residents and their families and drawing them closer to the rights of EU nationals.¹⁰¹ The

⁹⁹ Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents [2003] OJ L 16/ 44; Tampere European Council, Presidency Conclusions, 15 and 16 October 1999; Proposal, COM(2001)127 final, Explanatory memorandum 1.1.

¹⁰⁰ See Sara Iglesias Sánchez, 'Free Movement as a Precondition for Integration of Third-Country Nationals in the EU' in Elspeth Guild, Kees Groenendijk, and Sergio Carrera (eds), *Illiberal Liberal States: Immigration, Citizenship, and Integration in the EU* (Ashgate 2009).

¹⁰¹ Proposal for a Directive concerning the status of third-country nationals who are long-term residents (recast), COM(2022)650 final. See also the similar demands in

Commission demanded consolidation of free movement rights for long-term residents once again, based on the idea that such movement can improve labour market effectiveness.¹⁰² The negotiations of the relevant proposal have shown that Member States are unwilling to take away economic limitations from the exercise of mobility rights.¹⁰³ When it comes to the protection of social rights of long-term residents, which were also limited in the original formulation of the Directive, these have been extensively interpreted by the Court, which has limited state discretion behind their limitation, as we will see in Section 9.3. Once again economic and social considerations appear in the approach of different actors and affect the shaping of the EU migration policy. The lack of long-term considerations on the part of the Council limiting the attribution of both mobility and social rights to long-term residents lies behind the unsustainability of this instrument and its failure to achieve the economic and social objectives of primary law in the regulation of migration.

6.3 National Contestation Limiting the Rights of TCN Workers and Social Considerations behind New Demands

Unlike the period reviewed in Part I, the way economic and social objectives appear behind the regulation of labour migration becomes differentiated in the 1990s, leading to paradoxical results. Long-term economic planning dictated the Commission's effort to pursue harmonization of admission for TCN migrants. It put forward various proposals to align migration with the economic and social objectives of the Community under a long-term strategy. Behind these proposals, there was a need to shape a migration policy that could match national labour demand with the TCN workforce resident in the EU, and that would allow admission of TCNs to cover potential labour needs with a long-

Parliament, Committee on Civil Liberties, Justice and Home Affairs, Report on new avenues for legal labour migration (2020/2010(INI)) (rapporteur: Sylvie Guillaume) and of public stakeholders in Commission, DG for Migration and Home Affairs, Synthesis Report, Analysis of the responses to the public consultation on the future of legal migration, January 2021.

¹⁰² Proposal for revision of Long-term Residents Directive, COM(2022)650 final, Explanatory memorandum, Articles 16–18.

¹⁰³ Article 6, Council Document, Proposal for a Directive concerning the status of third-country nationals who are long-term residents (recast) – Mandate for negotiations with the Parliament ST 16000 2023 INIT, 28 November 2023.

term perspective. In parallel, the various Commission proposals sought to align migration to the social objectives of the EU, referencing the need to guarantee a minimum core of rights to migrant workers and a progressive attribution of extra rights to long-term residents, who would eventually be protected similarly to Community workers. At a point of closer political integration, the rights of migrants became tied to a positive vision of what EU societies should look like.

The Council's stance was determined by economic considerations, but unlike the Commission, its approach to EU law-making was reactive.¹⁰⁴ During the period examined, Member States were facing high national unemployment, and in this context labour migration was viewed as an aggravating factor. This created a political sensitivity around migration that precluded any consideration regarding the contribution of migrants as a reason for harmonizing admission. Instead, the Council focused on measures that would reinforce a feeling of control for Member States over their territories and shared borders.¹⁰⁵

Regarding measures that guarantee rights for migrants, such as family reunification and security of residence, equal treatment for TCNs was dictated under both a socially oriented and an economic logic. On the social side, the EU was promoting an identity that was socially and culturally pluralistic, based on respect of human rights and human dignity.¹⁰⁶ At the same time, equality for TCN workers was linked to observance of labour law, as a precondition for attracting migrants for highly skilled jobs, a demand the EU population could not meet.¹⁰⁷ As the Commission stated, granting such equality in terms of wages and working conditions was in the interest of society, which could benefit fully from the contribution of migrants to the economic and social life, while at the same time this would ensure that economic exploitation would not fuel unfair competition.¹⁰⁸

The difference between the Council and the Commission as regards economic and social considerations behind migration appears on two

¹⁰⁴ Neil Walker, 'In Search of the Area of Freedom, Security and Justice: A Constitutional Odyssey' in Neil Walker (ed), *Europe's Area of Freedom, Security, and Justice* (Oxford University Press 2004) suggests that the AFSJ developed as a reactive policy domain.

¹⁰⁵ Giuseppe Callovi, 'Regulation of Immigration in 1993: Pieces of the European Community Jig-Saw Puzzle' (1992) 26 *The International Migration Review* 353 mentions that the obstacles are not technical but purely political.

¹⁰⁶ On a Community Immigration Policy, COM(2000)757 final, 19.

¹⁰⁷ Ibid.

¹⁰⁸ Ibid, 13.

levels. First, the Council focused these considerations on a domestic level and the relation of migration to the circumstances and labour needs of each Member State, while the Commission was looking at the EU as a whole. Second, the Council, perhaps due to its touch with national politics, took a short-term approach to economic and social objectives, while the Commission took a long-term one. It is in this long-term approach to the pursuit of economic development and social progress that the demand of economic and social sustainability finds implicit expression in the regulation of migration.

In any case, these different approaches on the function of migrants for EU economies blocked every attempt to harmonize admission, but they did allow the adoption of instruments guaranteeing a set of rights to some migrants. The rights were not as ambitious as the Commission had planned, as we saw in both the case of the Family Reunification Directive and in the case of the Long-term Residents Directive. However, they did put in place minimum guarantees which, as we shall see in Chapter 9, were significantly extended by the Court.