9

Economic Objectives and Social Demands behind an Incoherent System of Regulation for TCNs

9.1 The Failure of the System of Admission to Promote Economic Objectives

Following the Tampere Council and the unfulfilled promise of regulating migration for TCNs, The Hague Programme set the political guidelines at the beginning of the period under review.[1] Acknowledging the importance of legal migration for the economic development of the EU, the Council invited the Commission to develop a framework on the regulation of legal migration with due regard to demands for migrant labour by 2005, while noting that the determination of volumes of admission was a competence of Member States.[2] In response, the Commission issued a plan on the legislative initiatives that could be adopted to meet the competitiveness goals of the Lisbon strategy.[3] In this policy plan, the Commission pointed to the advantages of a horizontal admission framework for the last time.

Without support by the Member States and after the failed efforts to regulate migration presented in Chapter 6, the Commission suggested the adoption of one horizontal instrument and different sectoral Directives in order to grant labour migrants a minimum set of rights, while at the same time attracting specific categories of migrant workers crucial for the development of the EU economy.[4] The sectoral approach in the regulation of admission was the only viable option to overcome Member States' reservations and align migration law with the economic objectives of the EU.[5] The analysis in this section highlights how economic objectives lie behind the differentiation of rights TCNs enjoy

[1] Council of the European Union, The Hague Programme: strengthening freedom, security and justice in the European Union [2005] OJ C 53/1.
[2] Ibid, Section 1.4.
[3] Communication, Policy Plan on Legal Migration, COM(2005)0669 final, Section 1.2.
[4] Ibid, Section 2.
[5] Communication, Towards a Common Immigration Policy, COM(2007)0780 final 4, 7–8.

under the instruments, before engaging with how economic fears significantly dilute social rights and the effectiveness of these instruments in Section 9.2. Section 9.3 demonstrates the way in which the rights of TCN migrants are reconstructed in the case-law through a strong emphasis of the Court on the Charter. Finally, Section 9.4 points out to the incoherence of the system of fundamental rights protection for EU and TCN migrants.

During this period, the regulation of migration took shape in the following way. Admission takes shape under a sectoral regime which provides entry and residence to specific categories of TCNs: researchers and students, intra-corporate transferees, highly skilled workers, and seasonal workers.[6] These sectoral instruments provide for specific rights attached to each category of migrants. The admission of researchers was first regulated in a Directive adopted in 2005, which was recast.[7] Currently the admission of researchers and students is regulated in a single instrument, the Researchers and Students Directive. This recasting and unification did not alter the economic and social considerations behind their admission. Further, the admission of highly skilled workers is regulated in the Blue Card Directive adopted in 2009, which was amended in 2021. In the analysis that follows, all these instruments – that is, both the 2005 and the 2016 Directives on researchers and the two Blue Card Directives – are taken into account. The changes they introduced and potential shifts in the way economic and social considerations appear therein are commented when necessary.

[6] Directive (EU) 2016/801 on the conditions of entry and residence of third-country nationals for the purposes of research, studies, training, voluntary service, pupil exchange schemes or educational projects, and au pairing (recast) [2016] OJ L 132/21; Directive 2014/66/EU on the conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer [2014] OJ L 157/1; Directive 2009/50/EC on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment [2009] OJ L 155/ 17 (Blue Card Directive 2009) and Directive (EU) 2021/1883 on the conditions of entry and residence of third-country nationals for the purpose of highly qualified employment, and repealing Directive 2009/50/EC [2021] OJ L 382/1 (Blue Card Directive 2021); 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.

[7] Before Directive 2016/801, the admission of researchers was regulated under Directive 2005/71/EC on a specific procedure for admitting third-country nationals for the purposes of scientific research [2005] OJ L 289/15 and of students under Directive 2004/114/EC on the conditions of admission of third-country nationals for the purposes of studies, pupil exchange, unremunerated training or voluntary service [2004] OJ L 375/12.

In parallel, the Single Permit Directive and the Family Reunification Directive regulate horizontally the rights of all migrants legally resident in the EU regardless of whether they enjoy residence rights under national or EU law.[8] It should be noted that the Single Permit Directive underwent a revision in March 2024.[9] The analysis below refers to the currently applicable Single Permit Directive and explicit note is made for changes introduced for the first time in the 2024 recast version.

Finally, the Long-term Residents Directive extends the protection and the rights afforded to migrants due to their long presence and integration in the Member States.[10] Through a horizontal examination of the conditions for entry and the rights the instruments establish, the economic and social objectives behind the current form of regulation of migration from third countries becomes clear.

All the sectoral Directives that regulate admission have been put in place to contribute to the economic objectives of the EU. The harmonization of admission aimed at ensuring that the necessary human capital would be available to drive the desired growth.[11] This becomes clear if we look at the recitals of the different Directives, all of which are aligned with the economic targets set by EU during the years they were adopted.[12] At the same time, national contestation and fear about the effects of the attribution of rights to national economies have limited both the extent of rights TCNs are entitled to under the different

[8] Directive 2011/98/EU on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State [2011] OJ L 343/1 and Directive 2003/86/EC of 22 September 2003 on the right to family reunification [2003] OJ L 251/12.

[9] Final Compromise text, Directive (EU) 2024/ . . . of the European Parliament and of the Council of . . . on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State (recast), A9-0140/117.

[10] 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.

[11] European Council, The Stockholm programme, An Open and Secure Europe Serving and Protecting Citizens [2010] OJ C 115/1. See Researchers and Students Directive, Recital 3; Intra-Corporate Transfers Directive, Recital 4; Blue Card Directive 2021, Recital 1; Seasonal Workers Directive, Recital 6.

[12] Researchers Directive, Recital 2; Blue Card Directive 2009, Recital 3 mentioning the Lisbon European Council objective of making the Community the most competitive and dynamic knowledge-based economy in the world by 2010; Seasonal Workers Directive, Recital 4 and Researchers and Students Directive, Recital 3; Intra-Corporate Transfers Directive, Recital 3; Blue Card Directive 2021, Recital 1 on the Europe 2020 strategy for Smart, sustainable and inclusive growth.

instruments and the instruments' contribution to achieving the economic objectives of the EU.[13]

In any case, considering this shared objective, the instruments present crucial similarities. As a rule, admission is based on the fulfilment of certain conditions and the absence of grounds for limitation of admission (negative conditions).[14] Provided that an applicant meets the conditions of admission, migrants are entitled to a residence permit for a period of time, the minimum and maximum duration of which are defined in the relevant Directives as per Table 9.1.

Looking more closely into the Directives, we find many similarities on the substantive conditions that need to be met for entry to the EU to ensure the admission of individuals who will actively contribute to EU growth, while minimizing the potential economic risks, thus aligning migration to economic sustainability. Such similarities are framed differently in the relevant texts, due to their sectoral nature.[15] Despite the different framing, all the Directives require sufficient resources on the part of the TCN who applies for admission and an appropriate health insurance. At the same time, the legislative texts emphasize the need to ensure that in all cases the migrant does not become a burden on the social security system of Member States.[16] In the case of highly skilled workers, sufficient resources are proven by the contract the applicants need to provide and by the requirement that their employment meets a certain salary threshold.[17] When it comes to researchers, the Directives specify that the applicants need to have sufficient means of subsistence.[18]

[13] Cf Kees Groenendijk, 'Equal Treatment of Workers from Third Countries: The Added Value of the Single Permit Directive' (2015) 16 ERA Forum 547; Jean-Baptiste Farcy, 'Labour Immigration Policy in the European Union: How to Overcome the Tension between Further Europeanisation and the Protection of National Interests?' (2020) 22 European Journal of Migration and Law 198.

[14] Case C-544/15, *Fahimian*, ECLI:EU:C:2017:255.

[15] Commission Staff Working Document, Executive Summary of the Fitness Check on EU Legislation on legal migration SWD(2019)1055 PART 2/2, Annex 5, 52.

[16] Ibid.

[17] Proposal for a Directive on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment, COM(2007)0637 final, Explanatory Memorandum, Article 5; Proposal for a Directive on the conditions of entry and residence of third-country nationals for the purposes of highly skilled employment, COM(2016)0378 final, Explanatory Memorandum, Article 5.

[18] Explicit requirement on sufficient means in Researchers Directive 6(2)(b) and Researchers and Students Directive 7(1)(e) which can be provided either in the form of employment by the research institution or through any other grant, while for students this entails proving sufficiency of resources, Seasonal Workers Directive 5(3) and 6(3).

Table 9.1 *Security of residence*

	Length of permit	Potential renewal
Researchers Directive	Minimum one year unless the research project is planned for less	Renewable under conditions
Researchers and Students Directive	Minimum one year unless the research project is planned for less Minimum two years for researchers covered by EU or multilateral programmes, including mobility measures Maximum one year for au pairs Maximum six months for trainees unless the duration of the agreement is longer	Renewable under conditions for researchers and trainees Renewable for maximum six months at justified request for au pairs
2009 Blue Card Directive	Minimum one and maximum four years. If the contract is for less than one year, then for the duration of the contract plus three months	Renewable under conditions
2021 Blue Card Directive	Minimum two years; if the contract is for less, then for that period plus three months	Renewable under the conditions
Seasonal Workers Directive	Five to nine months in any twelve-month period	Extension for a maximum period of nine months in total Facilitation of re-entry for seasonal workers admitted at least once in the past five years and who have respected the conditions of the Directive

As for seasonal workers, the work agreement required for admission has to specify remuneration. The need to do so in this case also serves social objectives in parallel to the economic ends served by the seasonal workers' admission. The specification of remuneration was deemed vital

to avoid unfair advantages for the employer and, relatedly, exploitation of workers.[19] All the Directives also require a proof of address. However, when admission relates to migrant groups that are considered more vulnerable to exploitation, the requirement of proof of address turns into a requirement of adequate accommodation that meets specific characteristics, as is the case for seasonal workers, au pairs, and trainees.[20] Behind the requirement of adequate accommodation lies the consideration that these migrant groups are more vulnerable to exploitation, and the requirement indirectly enshrines social objectives in the regulation of admission. As can be seen in Table 9.2, admission conditions are essentially framed so as to ensure that migrant admission will not pose the slightest risk to economic growth, and that relatedly migration will be economically sustainable.

The grounds for refusal, withdrawal, and non-renewal of permits are also to a large extent unified as Table 9.3 shows. In all the Directives, the central ground for rejection or non-renewal is repeated as almost self-evident – that is, the failure to fulfil the criteria of admission. In addition, we find grounds that exist as negative conditions for admission: the inexistence of fraud in the application process, and the requirement that the applicant should not be a threat to public policy, public security, and public health. The Directives also contain limitations linked to the fight against irregular migration. Such limitations appear either related to the nature of the employer (to what extent economic activity effectively takes place or whether an employer is set up for the purpose of facilitating entry) or to the risk of overstaying one's initial permit (found in the Seasonal Workers Directive). Essentially, most of the grounds of refusal, withdrawal, or non-renewal are connected to public order considerations.

However, social objectives also condition certain of these grounds for rejection or non-renewal, to ensure that migration will be aligned with some minimum social guarantees for the migrants. Specifically, all the relevant Directives contain clauses allowing rejection or non-renewal due to failure of the employer to meet their labour law obligations.[21] Social considerations in relation to the external world also appear in the Blue

[19] Proposal for a Directive on the conditions of entry and residence of third-country nationals for the purposes of seasonal employment, COM(2010)379, Explanatory Memorandum, Article 5.

[20] Fitness Check (n 15), Annex 5, 52; Seasonal Workers Directive, Recital 41.

[21] These clauses were not included in the initial Researchers Directive and Blue Card Directive 2009, but after revision they now appear in all the relevant texts.

Table 9.2 *Admission conditions*

	Employment	Sufficient resources not to have recourse to social assistance	Sickness insurance	Accommodation
Researchers Directive	Hosting agreement by research institution	Condition for signing the hosting agreement	✓	
Researchers and Students Directive	Hosting agreement by research institution, trainee agreement or agreement with the host family for au pairs	Possibility to request that the host entity takes responsibility for subsistence for researchers, students, and trainees, and possibility to set a minimum sum of pocket money to be paid for au pairs	✓	Possibility to request that the host entity take responsibility for accommodation
2009 Blue Card Directive	Contract/offer of at least one year	Specific salary threshold	✓	Possibility to require address
2021 Blue Card Directive	Contract/offer for at least six months	Specific salary threshold	✓	Possibility to require address
Seasonal Workers Directive	Contract/offer	✓	✓	Requirement of adequate accommodation

Table 9.3 *Grounds for refusal, withdrawal, and non-renewal*

	Fraud	Public policy	Employer obligations	Illegal migration	Volumes of admission	Union preference
Researchers Directive	✓	✓				
Researchers and Students Directive	✓	✓	✓	✓	✓	✓
2009 Blue Card Directive	✓	✓		✓	✓	✓
2021 Blue Card Directive	✓	✓	✓	✓	✓	✓
Seasonal Workers Directive	✓	✓	✓	✓	✓	✓

Card Directives, both of which include a clause on ethical recruitment. Under this clause, Member States have the possibility to reject an application for Blue Card where professionals come from developing countries in sectors suffering from a lack of personnel and they stem from the EU commitment to tackle – or at least to not contribute to – the shortage of healthcare workers and the education sector in developing countries.[22] While similar considerations were mentioned in the recitals of the Directives on researchers, they were not incorporated in the legal provisions.[23] Additionally, only the Blue Card Directive includes provisions related to the right of Member States to withdrawal or non-renewal of a permit where the worker has no resources, and needs recourse to the social assistance system for subsistence. This is connected to the fact that Blue Card holders are the only migrants entitled to unemployment benefit during their stay. This more privileged treatment is related to the greater demand for highly skilled workers. As will be discussed later in relation to the differentiated rights enjoyed by TCN migrants, in the current system of regulation, the demand for migrants (rather than their contribution) becomes the reason for attribution of more extensive rights.

The Directives further contain provisions which allow withdrawal or non-renewal of a residence permit where the TCN was admitted for purposes other than those for which their admission was authorized. Looking at the legislative history of the Researchers and Students Directive, we see that the Council insisted on the introduction of this clause. This was, in turn, subject to reservation by both the Commission and the Parliament. In the end, the clause was inserted in the Directive, and was accompanied by a common statement of the Commission and the Parliament, in which these institutions tried to qualify the provision and emphasized that it should not constitute a precedent for the future legal migration instruments.[24] The timing of the revision seems too close to the *Ben Alaya* case to be coincidental.[25] *Ben Alaya* concerned the admission of students under the Students Directive. The German

[22] Blue Card Directive 2009, Recital 22; Blue Card Directive 2021, Recital 41.

[23] Researchers Directive, Recital 6; Researchers and Students Directive, Recital 13.

[24] Communication from the Commission to the Parliament pursuant to Article 294(6) TFEU concerning the Position of the Council on the adoption of a Directive on the conditions of entry and residence of third-country nationals for the purposes of research, studies, training, voluntary service, pupil exchange schemes or educational projects and au pairing, COM(2016)0184 final.

[25] Case C-491/13, *Ben Alaya*, ECLI:EU:C:2014:2187.

government rejected the applicant's application for admission because it entertained doubts as to whether he was truly motivated to study in Germany. Upon referral of the case to the Court, it held that Member States were not allowed to introduce more conditions than those stated in the Directive, as such action would be contrary to its objective to promote mobility of TCNs.[26] Contrary to the suggestion of AG Mengozzi, who made reference to the possibility of rejecting an application for entry if there was precise and specific evidence that pointed to abuse or misuse of the Directive, the Court affirmed the right to entry created in the relevant Directive.[27] In light of this case, which affirmed that the Students Directive created a right of residence for TCNs, it is not hard to imagine the motivation of the Council to incorporate clauses which would allow broader discretion for the Member States.

Economic considerations also appear as a blanket ground to limit entry. In general, the right to entry of TCN migrants is without prejudice to the right of Member States to regulate the volumes of admission of TCNs under Article 79(5) TFEU. This right was given expression via specific clauses in all the relevant Directives. Essentially, Member States can refuse admission, even if a migrant meets all requirements, to protect their labour markets. The legal fitness check on secondary law on migration, conducted by the Commission in 2019, questioned the open framing of the provisions transposing Article 79(5) TFEU in the Directives and enquired whether admission quotas could be fixed at zero level and, thus, undermine the *effet utile* of the *acquis*.[28] What is more, the relevant framework is shaped under the umbrella principle of Union preference. This principle formed part of the previous attempts of the Commission to horizontally regulate entry and residence of TCNs and was articulated in a 1994 Council Resolution.[29] This principle suggests that TCNs may enter the EU labour market provided that a post cannot be filled by a worker who is already part of the labour market. This so-called labour market test, guided by the Union preference principle, means that Member States maintain discretion to reject admission where a vacancy can be filled by an EU national, a TCN legally resident in a Member State and already part of its labour market, or a long-term

[26] Ibid, para 27.
[27] Opinion of AG Mengozzi in C-491/13, *Ben Alaya*, ECLI:EU:C:2014:1933.
[28] Fitness Check (n 15), Annex 5.
[29] Council Resolution of 20 June 1994 on limitation on admission of third-country nationals to the territory of the Member States for employment [1996] OJ C 274/31.

resident in any Member State. In the 2001 Proposal, the Commission suggested a system to operationalize it and prove the fulfilment of the labour market test by Member States.[30] In the current framework, even though the test is included as a reason to reject an application for admission, there is no procedure to be followed for it.

It is important to note here that the labour market test was not included in the first Researchers Directive. This can be explained by the economic need for researchers at the time when the Directive was proposed and adopted. Specifically, in the 2004 proposal, there was particular emphasis on the number of researchers needed by the EU to reach the Barcelona growth target in research activities.[31] Acknowledging that it was impossible to meet this target without external recruitment of TCNs, the Commission emphasized that researcher admission could not be subject to the discretion of Member States to control numbers of admission.[32] However, the possibility of subjecting the recruitment to Union preference came back in the recast Directive, adopted in 2016. The proposal for the recast does not elaborate on why these new grounds were added. Instead, the explanatory memorandum mentions that these were standard conditions under the existing migration Directives.[33] This, connected to the fact that the current Directive includes this test as a ground for non-renewal but excludes researchers from its ambit, must mean that the alignment came on a technical level, but the differentiation as to the treatment of researchers should persist.

Overall, looking at the criteria for admission, the following observations can be made. The Commission's ambition to put in place a harmonized system of admission was clearly tied to the need to promote the economic objectives of the EU and to align the regulation of migration

[30] 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.

[31] Proposal for a Directive and two Proposals for Recommendations on the admission of third-country nationals to carry out scientific research in the European Community, COM(2004)0178, Section 1.3.

[32] Ibid, Explanatory Memorandum, Section 1.5. See also Council Recommendation of 12 October 2005 to facilitate the admission of third-country nationals to carry out scientific research in the European Community [2005] OJ L 289/26, point 1.b. calling on Member States to refrain from using quotas for this type of admission.

[33] Proposal for a Directive on the conditions of entry and residence of third-country nationals for the purposes of research, studies, pupil exchange, remunerated and unremunerated training, voluntary service and au pairing [recast], COM(2013)0151 final, Explanatory Memorandum, Articles 18–20.

with economic sustainability. At the same time, the way national fears on the economic repercussions of migration appear in both primary and secondary law set the system up for failure. Specifically, some of the conditions of admission included in the Directives can significantly limit the right to entry created in secondary law.[34] Such limitations can prove detrimental to the very objective served by the regulation of migration, which is to ensure the economic sustainability of the EU. Among the different conditions that appear in the Directives, the discretion of Member States under their right to regulate the volumes of admission is the most problematic. The inclusion of this requirement in primary law shows the limits of Member States' understanding of the role of migration for the EU collective project. But next to that, the fact that the Directives do not introduce a system of review by the EU institutions means that Member States can apply this right in very diverse ways and limit the effectiveness of EU law. Having explained how economic objectives, economic fears, and certain social demands are reflected in secondary law, Section 9.2 examines the differentiated protection introduced by the Directives for migrant workers depending on how essential they are deemed to be for the EU project of growth.

9.2 Differentiated Rights and Privileged Statuses

Under EU migration law as it stands today, TCNs enjoy different rights depending on how much their contribution is needed to the EU development project. On a basic level, the Single Permit Directive lays down a minimum core of rights for all migrants, resident in EU territory, regardless of from where they draw their right to reside, whether national or EU law.[35] The Single Permit Directive is primarily aligned with the social objectives of the EU, as it aims to guarantee fair treatment to all migrants at EU level. Of course, as has been emphasized throughout this historical investigation, the social objectives of the EU are closely connected with the economic ones, and, relatedly, the economic and social pillars of sustainability expressed in the primary objectives are pursued in parallel in the regulation of migration. In this regard, a closer look at the history and the recitals of the Single Permit Directive reveals that the attribution of rights is also related to economic objectives connected both to the

[34] C-491/13, *Ben Alaya*; Case C-578/08, *Chakroun*, ECLI:EU:C:2010:117. See also Opinion of AG Szpunar in C-544/15, *Fahimian*, ECLI:EU:C:2016:908, para 42.

[35] Article 3(2), Single Permit Directive on those excluded from its scope.

economic contribution of TCNs but also to the avoidance of social dumping.[36]

In general, in the attribution of rights to TCN migrants, we see the reproduction of the considerations of the EU institutions and the Court behind the rights of EU migrants at the initial stages of the Community project. The first such consideration is that TCNs equally contribute through their work to the EU and, therefore, they should enjoy a set of rights. Secondly, granting equal rights throughout EU territory ensures that there is no unfair competition between the Member States, but also between TCN and EU migrants, thus avoiding social dumping and migrant exploitation.[37] In reproducing such considerations, the Single Permit Directive constitutes yet another attempt to align migration with the economic and social objectives of the EU, as well as with economic and social sustainability.[38] In parallel, each sectoral Directive includes more specific provisions and grants rights of different kind and extent to TCN workers.

The analysis in Sections 9.2.1–9.2.3 maps the rights TCN workers enjoy under all these instruments. Section 9.2.1 engages with the extension of rights for categories of migrants deemed crucial for the EU economy. Subsequently, Section 9.2.2 shows the dilution of equal treatment in secondary law through the introduction of fragmented provisions and various limitations. Finally, Section 9.2.3 investigates how equal treatment was erased from the cooperation of the EU with third countries during this period. The examination reveals the problematic way in which economic objectives served by specific types of migrant admission shape the differentiation of migrants' rights.

9.2.1 Attribution of Rights in Order to Maximize Economic Benefits

The rights of TCN migrants are defined horizontally in the Single Permit Directive and are differentiated based on the function of different

[36] Single Permit Directive, Recital 19.

[37] See Proposal for a Directive on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State, COM (2007)638 final 3 and 7; Case C-302/19, *INPS*, ECLI:EU:C:2020:957, para 34.

[38] The recast is further aligned with the social objectives; see European Parliament legislative resolution of 13 March 2024 on the proposal for a Recast Single Permit Directive (COM(2022)0655 – C9-0163/2022 – 2022/0131(COD)), points 2, 6.

categories of migrants for the EU economy. Specifically, all migrants enjoy the right to enter, stay, and move within the territory of the host state, and to exercise the activity for which their stay was authorized under the Single Permit Directive. Researchers are also allowed to teach next to their scientific work, while highly skilled workers are the only category of people who enjoy access to any type of employment after some time of legal residence. On the other side of the rights spectrum, seasonal workers are restricted to the exercise of a specific activity. However, to protect them from exploitation, the Directive recognizes their right to change employer within the specific field of activity in line with social considerations. The recast Single Permit Directive also creates a right to change employer under specific conditions, thereby enhancing the rights of all migrants legally resident in the Member States.[39]

Section 9.1 showed that security of residence is dependent upon the Directive from which TCN migrants draw residence rights. In most cases, security of residence is attached to a job contract and can be provided for a period of minimum and maximum time provided in the Directives. Until the recent revision of the Single Permit Directive, only highly skilled workers had a right to reside to find work. Specifically, student and researchers can enjoy residence as jobseekers for a limited period, and the reason behind this was to allow Member States to tap into the employment potential of the already trained and qualified workforce.[40] A similar right to reside beyond the specific employment exists for highly skilled workers, who have the possibility of being unemployed for a period of time without risking the validity of their residence permit. After the revision of the Single Permit Directive, all legally resident migrants should enjoy such a right for a different time period dependent on the duration of their permit.[41]

All TCNs legally resident in any Member State are also allowed to move within the EU territory for up to 90 days in any 180-day period. This movement refers to short-term mobility; it is based on Schengen, and it does not relate to the exercise of economic activity.[42] Free movement for the purpose of economic activity is provided only to specific categories of migrants. Specifically, the Researchers and Students

[39] Article 11(2), 2024 Single Permit Directive.
[40] Students and Researchers Directive, Recital 53.
[41] Article 11(4), 2024 Single Permit Directive.
[42] Regulation 2016/399 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code) [2016] OJ L 77/1.

Directive provides for temporary mobility to allow migrants to carry out their work in another Member State. Further, the Blue Card Directives and the Student and Researchers Directive allow for long-term mobility – that is, the possibility to move permanently to another Member State and take up work there.[43] It is purely economic objectives that dictate the free movement rights of highly skilled workers and researchers based on the necessity of making the EU internationally competitive for such migrants and improving labour market efficiency.[44] The mobility of researchers and highly skilled workers also creates free movement rights for their family members. Specifically, for migrants falling under the scope of the Researchers and Students Directive, the Blue Card Directive and the Long-term Residents Directive, family members enjoy intra-EU mobility rights in order to be able to follow their sponsor in case of move.

Notably, economic needs served by the admission of researchers and highly skilled workers are the reason behind the introduction of derogations from the Family Reunification Directive. Specifically, the Blue Card Directives and Researchers and Students Directive include more favourable provisions on family reunification for the categories of migrants falling within their scope. These more favourable provisions, which cover not only the conditions of family reunification but also the rights enjoyed by family members, are linked to the need to make the EU more attractive as a destination to these particular migrants.[45] Indicatively, access to employment is easier for family members of highly skilled workers and researchers. The analysis in Section 6.2.1 showed that access of family members to employment can be limited to ensure that their migration does not become an economic liability for Member States in times of recession.[46] This limitation does not apply to Blue Card holders and researchers. The Blue Card Directive includes a derogation from such limitation and demands the direct access of family members to

[43] This is of course aside from long-term residents, whose mobility rights were discussed in Section 6.2.2.

[44] Proposal for Researchers Directive, COM(2004)178 final, Explanatory Memorandum, Article 13. See also Blue Card Directive 2021, Recital 53; Blue Card Directive 2009, Recital 15.

[45] See Researchers Directive, Recital 18; Council Recommendation of 12 October 2005 [2005] OJ L 289/26, Recital 9 and point 3; Researchers and Students Directive, Recital 11; Blue Card Directive 2009, Recital 23; Blue Card Directive 2021, Recital 50; Intra-Corporate Transfers Directive, Recital 40.

[46] See Article 14, Family Reunification Directive.

employment.[47] The Researchers and Students Directive on the other hand provides that access of family members to employment should not be limited, unless exceptional circumstances exist, such as particularly high levels of unemployment.[48] Overall, in derogating from the minimum standards of the Family Reunification Directive and introducing more relaxed conditions for reunification and more extensive rights for the specific groups of migrants, the objective is no longer ensuring migration in dignity for the worker. Rather, family reunification is used instrumentally as a means to attract migration of specific kind.

In addition to this, the Blue Card Directive is the only instrument that derogates from the Long-term Residents Directive by granting preferential conditions for access to the long-term resident status. Specifically, the 2009 Directive provided that the Blue Card holder and their family members could accumulate periods of residence in different Member States in order to fulfil the five-year duration requirement.[49] It also provided that the long-term resident status would not be lost in case of absence of the highly skilled worker from EU territory for a period of twelve to eighteen months, which could be extended to twenty-four months if Member States preferred.[50] Economic considerations behind this differentiated access of Blue Card holders to the long-term resident status appear in the following way. The EU needs highly qualified personnel to maintain growth, so it is shaping a framework where such highly qualified personnel get easier access to a set of rights, in order to make the EU an attractive destination for these workers.[51] This is fully understandable in terms of marketing the EU as an attractive destination for specific migrants; however, it is highly questionable from the perspective of non-discrimination in the adoption and implementation of EU law. Despite the Commission's recent suggestion to allow all migrants to accumulate periods of residence in different Member States in order to acquire the long-term residence status, the Council's position was that such accumulation could only extend to all highly skilled workers in general.[52]

[47] Article 15(6), Blue Card Directive 2009; Article 17(6), Blue Card Directive 2021.
[48] Article 26(6), Researchers and Students Directive.
[49] Article 16(2), Blue Card Directive 2009; Article 18, Blue Card Directive 2021.
[50] Article 16(4), Blue Card Directive 2009.
[51] Proposal for a Blue Card Directive, COM(2007)0637 final; Blue Card Directive 2009, Recital 20; Blue Card Directive, Recitals 51 and 52.
[52] See Proposal for a Directive concerning the status of third-country nationals who are long-term residents (recast), COM(2022)650 final, Explanatory Memorandum, Article 4.

In this sense, it becomes clear that the legal system put in place attributes more rights to those who are seen as crucial for the development of the EU project. In parallel, the economic fears of Member States, their short-term approach to migration, and the possibility to attract such individuals by parallel national schemes has led to the introduction of so many conditions for the exercise of mobility rights that the economic objectives pursued fail to be achieved in practice. The requirements for cross-border movement under both the Blue Card Directive and the Researchers and Students Directive are very close to requirements for entry, thereby hampering the objectives of the instruments, which is to abolish obstacles to mobility as a means to promote growth and relatedly to align the regulation of migration to the economic sustainability of the EU. Similar problems appear in relation to the pursuit of social objectives in the instruments. As Section 9.2.2 will discuss, the instruments regulating the rights of TCN migrants offer a diluted version of equal treatment in EU law.

9.2.2 *The Dilution of Equal Treatment in Secondary Law*

Equal treatment between TCN migrants and nationals of the Member States is guaranteed in all the relevant Directives. However, unlike the broad clauses inserted in Association Agreements concluded in the 1970s and 1980s, the framework in place now provides detailed enumeration of the areas where equal treatment must be granted, as well as the acceptable limitations to these areas.[53] The force of general equal treatment clauses in EU law has shaped very extensive protection for individuals.[54] In view of this, and of the extensive interpretations of the Court on equal treatment of migrants, it should not come as a surprise that Member States tried to restrict the formulation of equal treatment in the relevant Directives. Table 9.4 shows the areas where the Directives provide for equal treatment rights, as well as the potential limitations that can be introduced to equal treatment.

Cf with 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.

[53] Cf Ana Beduschi, 'An Empty Shell? The Protection of Social Rights of Third-Country Workers in the EU after the Single Permit Directive' (2015) 17 European Journal of Migration and Law 210.

[54] Elise Muir, *EU Equality Law: The First Fundamental Rights Policy of the EU* (Oxford University Press 2018).

Table 9.4 *Equal treatment*

	Single Permit Directive	Researchers Directive	Researchers and Students Directive	2009 Blue Card Directive	2021 Blue Card Directive	Seasonal Workers Directive
Working Conditions	✓	✓	✓	✓	✓	✓
Education and Vocational Training	Limitations possible	Limitations possible	Limitations possible	Limitations possible	Limitations possible	Limitations possible
Recognition of Professional Qualifications	✓	✓	✓	✓	✓	✓
Tax Benefits	Limitations possible	✓	Limitations possible			Limitations possible
Social Security	Limitations possible	✓	Limitations possible	✓	✓	Limitations possible
Access to Goods and Services	Limitations possible	✓	Limitations possible	Limitations possible	Limitations possible	✓
Freedom of Association	✓		✓	✓	✓	✓
Employment Advice Services	✓	✓	✓	✓	✓	✓

First of all, unlimited equal treatment is guaranteed regarding working conditions; however, there is a lack of coherence in the way this is framed in the relevant Directives.[55] Despite the different framing, it is safe to assume that the right applies to all legally resident migrants without differentiation, as it constitutes an expression of Article 13 CFR.[56] Equal treatment as regards recognition of professional qualifications is also provided in all the Directives.[57] In addition, all the Directives provide equal treatment as regards access to advice services afforded by employment offices.[58] This should not come as a surprise in light of the continuous emphasis in different Commission documents on training the existing workforce to correspond to new needs and on ensuring that labour needs are covered by TCNs already resident and active in the internal market.[59] Finally, all the Directives also provide for freedom of association and affiliation. The Seasonal Workers Directive makes explicit reference to the right to strike and take industrial action, including the right to negotiate and conclude collective agreements. In any case, the relevant right is a specific expression of Article 12 CFR, and as a result, it should not be differentiated between different categories of TCNs, as the right is guaranteed to everyone regardless of their nationality.[60]

As to the rest of the areas where equal treatment is required, they appear with different limitations and variations. Some can be explained due to other rights enjoyed by TCNs (whether they enjoy mobility rights or not, and what is the status under which they entered), while others are firmly based on economic considerations of averting risks from migration. Specifically, in the area of education, limitations appear in all the instruments, allowing Member States to exclude study grants from equal access to migrants.[61] What is more, Member States are given the

[55] Some Directives (Researchers and Students Directive, Blue Card Directive, Single Permit Directive) include health and safety in the workplace, whereas both versions of the Blue Card Directive also include the minimum working age, working hours, leave and holidays in the relevant provisions.

[56] Fitness Check (n 15), Annex 5, Section 2.5.

[57] Ibid, Section 1.5 suggesting the extension of the right to applicants who have not yet been authorized to enter the EU.

[58] This was not the case in Researchers Directive and Blue Card Directive 2009, but now they are all recast.

[59] Communication, European Skills Agenda for Sustainable Competitiveness, Social Fairness and Resilience, COM(2020)274 final.

[60] Fitness Check (n 15), Annex 5, Section 2.5.

[61] In the Proposal for a Blue Card Directive, COM(2007)0637 final, Explanatory Memorandum, Article 15, the Commission stated that the reason for limitation of access

possibility to set conditions of access to university and higher education.[62] In the Single Permit Directive, the text mentions appropriate language proficiency, payment of fees, or specific educational prerequisites as possible conditions, and Member States can also limit access to education if it is not linked to the specific employment activity of the TCN.[63] A similar possibility on limiting equal treatment regarding access to education or training directly linked to the employment activity also exists in the Seasonal Workers Directive.[64] Finally, the Single Permit Directive provides for the possibility to limit the application of equal access to education to TCNs who are employed, or are registered as unemployed, and to exclude students.[65] In the area of education, the Fitness Check conducted in 2019 by the Commission suggested:

> While some [restrictions] appear 'logical', such as the restriction in the SPD [Single Permit Directive] that the right can be limited to those who are in employment or are registered as unemployed, the reason why others have been introduced in one or more Directives (but not in others) cannot be easily explained, such as the restrictions related to language proficiency and the fulfilment of specific educational prerequisites.[66]

Arguably, even such limitations are not really justified if we take into account the social aims pursued by the Directives. Apart from aligning migration with the economic objectives of the EU, the relevant instruments seek to secure fair treatment for migrants and to achieve some kind of social progress in the form of rights attributed to migrants. The emphasis put on education as part of the integration policies pursued at EU level to ensure social cohesion necessitates full equal treatment as regards access to education.[67] That is, of course, since the aim of regulating migration is not only meeting the economic sustainability objectives but also the social ones.

Another area of tension is access to social security, social assistance, and social protection, which are differentiated between the categories of

to study grants was that the TCN workers would not normally be entitled to them on the basis of their contribution as workers.

[62] Article 14(2), Blue Card Directive 2009; Article 16(2), Blue Card Directive 2021; Article 12(2), Single Permit Directive; Article 11(3), Long-term Residents Directive.

[63] Article 12(2)(a)(iv), Single Permit Directive.

[64] Article 23(2)(ii), Seasonal Workers Directive.

[65] Article 12(2)(a)(i) and (ii), Single Permit Directive.

[66] Fitness Check (n 15), Annex 5.

[67] Communication, Action plan on Integration and Inclusion 2021–2027, COM(2020)758 final and in the European Skills Agenda, COM(2020)274 final.

TCNs. The Legal Fitness Check suggested that the limitation of access to social security in employment-related Directives is justified, as this is linked to the condition that migrants have sufficient resources to not become a burden.[68] Equal treatment applies to social security as a recognition that workers contribute by their work and tax payments to public finances, and to serve as a safeguard against unfair competition that may result from exploitation.[69] Social assistance, in contrast, was deliberately excluded from the relevant Directives because incoming migrants should have sufficient resources not to require financial support.[70] Social assistance and social protection is secured only for long-term residents, but even in their case, it can be limited to core benefits. This was not what the Commission aimed for in the original proposals. As regards the Directives that also provide rights to free movement in the EU, limitations can be introduced, and equal treatment can be limited to the Member State where the migrants have their registered place of residence.[71]

It should be noted that all these Directives operate within the context of Article 20 CFR, which provides for general non-discrimination rights within the scope of EU law. Unequal treatment is thereby allowed to the extent it can be justified. Relatedly, the Legal Fitness Check suggested that EU migration law, in the way it is formed through the relevant Directives, could be described as a 'fine-tuning of legitimate differentiated treatment'.[72] Looking at the way equal treatment is dissected and diluted in the relevant provisions, it is clear that limitations are inserted in order to avoid repercussions of granting rights to public finances. In cases where equal treatment comes with no cost for national economies, there is no reason to discriminate. However, in light of the parallel pursuit of economic and social sustainability as manifested in primary law objectives, the question that remains open is to what extent social cohesion can be guaranteed and when equal treatment is intentionally limited to

[68] Fitness Check (n 15), Annex 5.
[69] Proposal Seasonal Workers Directive, COM(2010)379, Explanatory Memorandum, Article 15.
[70] Proposal for a Blue Card Directive, COM(2007)0637 final, Explanatory Memorandum, Article 15; Proposal for Researchers Directive, COM(2004)178 final, Article 12.
[71] Such limitations appear in the Blue Card Directive 2009 and the Long-term Residents Directive but not in the Blue Card Directive 2021 and the Researchers and Students Directive.
[72] Fitness Check (n 15), Annex 5, 66.

deprive migrants from EU law protection.[73] This limitation of social rights of TCN migrants does not align well with social sustainability objectives. This is especially because all these TCN migrants come within the scope of EU law because they are admitted as workers and thereby contribute to the project of growth.

9.2.3 *Erasure of Equal Treatment and Informalization of the Relation of EU with Third Countries*

In parallel to the framework of admission and rights shaped for all legally resident migrants discussed in Section 9.2.2, in this period we witness the erasure of equal treatment clauses in the Agreements concluded by the EU with third countries, and the further informalization of cooperation with third countries in the area of migration.

The Stabilisation and Association Agreements (SAAs) concluded with many Western Balkan countries were the only agreements that set up some minimum rules on equal treatment for workers legally employed in the Member States with regard to working conditions, remuneration, or dismissal.[74] These Agreements did not include equal treatment on social security and did not provide for any kind of right to entry or access to the labour market. This is so even though such Agreements were signed as pre-accession instruments. What is more, the wording of the relevant provisions is different from those of the Euro-Mediterranean Agreements, as they stipulate that equal treatment must be granted subject to the conditions and modalities applicable in each Member State. This could be understood as an attempt to limit the direct effect of the relevant provisions. The identical wording was used in Europe Agreements, and was found by the Court to have direct effect.[75] Even though there is no case-law on SAAs, there is no reason to assume that

[73] Cf Martin Ruhs, *The Price of Rights: Regulating International Labor Migration* (Princeton University Press 2013).

[74] Article 44, SAA with the former Yugoslav Republic of Macedonia [2004] OJ L 084/13; Article 46, SAA with Albania [2009] OJ L 107/166; Article 49, SAA with Montenegro [2010] OJ L 108/3; Article 49, SAA with Serbia [2013] OJ L 278/16; Article 47, SAA with Bosnia and Herzegovina [2015] OJ L 164/2. See, however, similar Article 86(2), SAA with Kosovo [2016] OJ L 71/3, which recognizes the rights of Kosovo people under the EU *acquis* with no differentiation from TCNs and no special rights attributed to migrant workers.

[75] Case C-162/00, *Pokrzeptowicz-Meyer*, ECLI:EU:C:2002:57, paras 23–25 on EA with Poland, and Case C-438/00, *Deutscher Handballbund*, ECLI:EU:C:2003:255, paras 27–29 on EA with Slovakia.

the Court would follow a different approach. In addition, the SAAs grant rights of access to the labour market to the worker's spouse and children who are legally residing with them during the worker's authorized stay of employment.

Aside from these Agreements, which were signed as pre-accession instruments, the approach of the EU to labour migration from third countries has undergone a massive shift. With a general system of admission in place for different categories of TCN workers, development cooperation during this period focused on preventing the entry of all those who attempt to join the EU irregularly. The tensions in the Mediterranean region are perceived as a crisis to be addressed by flexible non-binding arrangements.[76] The objective of cooperation has not changed in so far as its declared focus is still on protection of legal migrants, the development potential of migration for the host state, and combatting illegal migration.[77] However, these objectives demand different legal means of cooperation in light of the evolution of EU law. Relatedly, the EU no longer negotiates any binding instrument that can create channels of admission or rights for nationals from specific third countries. Rather, it emphasizes addressing the root causes of migration and creating better living conditions in the region.[78]

During the relevant period, and in parallel to the shaping of an autonomous EU migration framework, the EU was also dealing with the effects of the 2008 economic crisis with diverse repercussions for national economies. In this regard, it would be hardly imaginable for Member States to support binding instruments that created cooperation on admission and rights for workers from third countries. Instead, what they wanted to promote was smart planning that would allow the EU to admit labour migration when needed, while maintaining cooperation with the Mediterranean countries with a view to assisting their development. The means chosen to do this was to informalize cooperation based on a differentiated dialogue with each Mediterranean country.[79] In so doing, Migration Partnerships which are soft-law instruments are now

[76] Communication, A dialogue for migration, mobility and security with the southern Mediterranean countries, COM(2011)292 final 3.

[77] See Council of the European Union, First Euro-Med Ministerial Meeting on Migration, Algarve 18, 19 November 2007, Conclusions 15805/07.

[78] A dialogue for migration, mobility and security with the southern Mediterranean countries, COM(2011)292 final 6.

[79] Ibid, 8.

preferred so as to guarantee the EU can maintain regular migration channels so that it can have the manpower it needs, while at the same time maximizing the impact of migration for development.[80] Mobility Partnerships are signed in the form of political declarations that set the goals for migration cooperation between the EU and third countries. The EU has signed Mobility Partnerships with Morocco, Tunisia, and Jordan in the Euro-Mediterranean region.[81] These declarations do not affect the obligations of the parties under the Euro-Mediterranean Agreements.

In conclusion, the evolution of the framework of cooperation with third countries on migration has undergone a major shift which is based on changing geopolitical circumstances and labour needs in the EU. The more intense labour needs were, the more rights were attributed to migrant workers under Association Agreements. At the same time, we need to remember that, even though in first reading it might look like the rights of such migrants are excluded from EU law, this is not the case; rather, the basis of protection has changed. This means that migrant workers legally resident in the EU and coming from countries in the Euro-Mediterranean no longer enjoy rights on the basis of Association Agreements, but rather on the basis of EU secondary law. Hence, despite the reconfiguration of cooperation, there is a constant understanding on the part of the EU that the rights of migrant workers located in EU territory are non-negotiable due to their active contribution to the EU development project. Rather, what remains negotiable is the regulation of entry or, perhaps, the emphasis on avoiding entry to ensure that no more will come than the EU is able to make use of. The functional role of the migrants, which set the basis for their rights, is now showing its ugly face, by ensuring the exclusion not of those who cannot contribute, but of those whose contribution is no longer needed. Following the examination of the legislative evolutions of this period, Section 9.3 will turn to the consolidation of social rights in the case-law of the Court.

[80] Ibid.

[81] Joint Declaration establishing a Mobility Partnership between the Kingdom of Morocco and the European Union and its Member States of 7 June 2013; Joint Declaration establishing a Mobility Partnership between Tunisia and the European Union and its Member States of 3 March 2014; Joint Declaration establishing a Mobility Partnership between the Hashemite Kingdom of Jordan and the European Union and its participating Member States of 9 October 2014. The EU has signed Mobility Partnerships with Moldova in 2008, Georgia in 2009, Armenia 2011, Azerbaijan 2013, and Belarus 2016.

9.3 The Consolidation of Social Rights in the Case-Law

Contrary to the legislative intention to differentiate social rights between different categories of migrants and to dilute equal treatment by allowing for derogations to avoid presumed economic repercussions, the Court has followed a consistent approach and has guaranteed the rights of migrants by reviewing different national limitations in light of the Charter. While economic considerations are not absent from its reasoning, the Court consistently emphasizes the protection afforded by the Charter to consolidate the rights of TCN migrants.

In the following sections, a broad-range of case-law related to rights of TCN migrants in social security, family reunification, and security of residence under both secondary law and the EEC–Turkey Agreement is examined. The analysis in Sections 9.3.1–9.3.4 showcases the Court's perception on the interplay of social and economic objectives behind migrant protection. Subsequently, in Section 9.3.5, I explain how the approach of the Court not only consolidates the social objectives of the EU project, and relatedly the social pillar of sustainability, but also the constitutional architecture of the EU legal system. The interpretations of the Court follow its meta-teleological technique of adjudication, that is, the interpretation of secondary law as means to fill the normative gaps of the EU constitutional order in the making.[82]

9.3.1 The Judicial Reconstruction of Social Rights of Migrant Workers

Against the incoherent economic obsession with conditioning the rights of migrants in secondary law so that they do not pose risks for the economy, the Court has put forward a positive vision related to the rights all migrants should enjoy under EU law. This concerns not only migrants covered under secondary law but also those whose residence status in Member States is irregular. Specifically, in *Tümer*, the Court had to interpret the scope of application of Directive 80/987/EEC on the

[82] Cf Miguel Poiares Maduro, 'Interpreting European Law: Judicial Adjudication in a Context of Constitutional Pluralism' (2008) 1 European Journal of Legal Studies 137 and Elise Muir, 'The Court of Justice: A Fundamental Rights Institution among Others' in Bruno de Witte, Elise Muir, and Mark Dawson (eds), *Judicial Activism at the European Court of Justice* (Edward Elgar 2013).

protection of employees in the event of insolvency of their employer.[83] Tümer, a Turkish national living in the Netherlands, had worked for a company that was declared insolvent. His application for insolvency benefit was rejected on the ground that he was not legally resident in the Netherlands. In that case, the Netherlands argued that since the Directive was based on Article 137 EC, which provided the Union with competence to adopt Directives with a view to achieving social objectives related to the improvement of working conditions, it could not apply to TCNs, even regularly resident ones.[84] If regularly resident aliens were to be protected, the state argued that the concept of employee could be construed under national law to exclude irregularly resident TCNs.

AG Bot suggested that excluding TCN workers from protective measures adopted for employees would not be compatible with the purpose of the EU social policy, as it would encourage the recruitment of foreign labour in order to reduce wage costs.[85] Additionally, with reference to *Germany and others v Commission*, he emphasized that the Court had already acknowledged the relation of the Union's social policy to the policy that applied to workers from third countries.[86] The AG proceeded to suggest that the crucial factor triggering obligations under the relevant Directive was the employment relationship of a person to an insolvent employer.[87] Importing a condition of nationality in the scope of the Directive would go against its objective to guarantee all employees in the EU a minimum level of protection.[88] He then went on to examine whether there was discretion on the part of Member States to exclude irregularly resident migrants. In this examination, he suggested that since the employee status was the crucial status, making it conditional to legal residence would go against non-discrimination.[89] The AG suggested that irregularly resident TCNs who had worked and paid contributions were in a comparable situation to other employees, and there was nothing to justify a differentiated treatment.[90]

[83] Case C-311/13, *Tümer*, ECLI:EU:C:2014:2337. Directive 80/987/EEC of 20 October 1980 on the approximation of the laws of the Member States relating to the protection of employees in the event of the insolvency of their employer [1980] 283/23.
[84] Opinion of AG Bot in C-311/13, *Tümer*, ECLI:EU:C:2014:1997, para 34.
[85] Ibid, para 52.
[86] Ibid.
[87] Ibid, para 54.
[88] Ibid.
[89] Ibid, para 60.
[90] Ibid, para 89.

The Court confirmed the AG's approach and noted that EU social policy was concerned with promoting the living and working conditions of both nationals of the EU Member States and TCNs.[91] It held that Member States could not define the term 'employee' in such a way as to undermine the social objective of the Directive.[92] As a result, the Directive was found to preclude national laws, such as the Dutch one, which strip irregularly resident TCNs of protection. As long as somebody is in employment, the social rights they derive therefrom should not be undermined because their residence is not legal. This case is significant in showing the application of EU social policy for all migrants engaged in the EU development project. What is more, it is crucial for understanding how the economic contribution made by migrants' work is at the heart of the protection afforded by EU law.

Next to this case, the Court has also handed down rulings reconstructing equal treatment and limiting the effects of secondary law for the rights of migrants. The line of reasoning that underlies the relevant case-law was set in *Kamberaj*, which concerned discriminatory conditions for access to a housing benefit by a long-term resident. In that case, the Court held that while the provisions of the Long-term Residence Directive provided for equal treatment in access to social security, social assistance, and social protection as defined in national law, these concepts could not be defined unilaterally by Member States without the risk of undermining the effectiveness of the Directive.[93] The interpretation of what constitutes social security, social assistance, and social protection under national law needs to comply with the Charter. Article 34 CFR guarantees equal treatment regarding access to specific social benefits in order to guarantee decent living to all those who lack sufficient resources.

In light of this, the Court held that national courts should interpret the relevant concept of social assistance in the Long-term Residents Directive in light of the Charter in order to assess whether benefits of different kinds fell under the categories of benefits where equal treatment should be provided.[94] The Court further stated that the derogation allowed under Article 11(4) of the Directive should be interpreted strictly in light of the social purpose of integration.[95] It also clarified that the provision of

[91] C-311/13, *Tümer*, para 32.
[92] Ibid, paras 42, 45.
[93] Case C-571/10, *Kamberaj*, ECLI:EU:C:2012:233, para 78.
[94] Ibid, para 81.
[95] Ibid, para 86.

the Directive which allowed the limitation of equal treatment only to core benefits could not be invoked on a case-by-case basis. Rather, such a derogation needs to be expressed clearly at the time of implementation of the Directive in national law.[96] It further suggested that the meaning and scope of core benefits for the purposes of equal treatment should be construed with reference to the purpose of integration as the objective for long-term residents.[97] It thus held that core benefits are benefits that enable individuals to meet their basic needs such as food, accommodation, and health, and should be aligned with the minimum benefits covered by the Charter.[98]

A similar reasoning was followed by the Court in relation to rights under the Single Permit Directive in *Martinez Silva*.[99] In that case, a migrant worker was excluded from a grant that was provided to households with at least three minor children and income below a minimum amount. The Single Permit Directive provides for equal treatment not in line with national law, but with reference to social security as defined in Regulation 883/2004 and, more specifically, the family benefits covered under Article 3(1)(j) thereof.[100] The Court found that the benefit at issue fell under Article 3(1)(j) of Regulation 883/2004, with reference to previous case-law where it had held that family benefits covered all kinds of benefits which are automatically granted to families on the basis of objective criteria without discretionary assessment of personal needs, and which are intended to meet family expenses, as a public contribution to the family's budget to alleviate the burdens involved in the maintenance of children.[101] Once more, the Court pointed to the possibility to derogate from equal treatment provided in the Directive, but it held that such a possibility existed only if the Member State explicitly chose so at the transposition of the Directive.[102]

The line of case-law developed in *Kamberaj* for long-term residents, and applied in *Martinez Silva* under the Single Permit Directive, has been since confirmed regarding different types of benefits claimed by

[96] Ibid, para 87.
[97] Ibid, para 90.
[98] Ibid, paras 91–92.
[99] Case C-449/16, *Martinez Silva*, ECLI:EU:C:2017:485.
[100] Regulation 883/2004 on the coordination of social security systems in the EU [2004] OJ L 166/1.
[101] Ibid, paras 22–23.
[102] Ibid, para 29.

TCNs.[103] The Court has followed a clear line of reasoning in promoting fair treatment for this group. When it comes to core benefits, to determine if they need to be granted under equal treatment conditions, Member States need to comply with the Charter. If a benefit serves the purpose set out in Article 34 CFR, then TCNs can in no case be excluded therefrom. The central evaluation then seems to concern the purpose of the benefit: does it aim at making life liveable and ensuring a decent existence for all? If so, it needs to be granted to long-term residents in light of the objective of integration, and to all migrants covered under the Single Permit Directive in light of the objective of ensuring fair treatment. Then as regards non-core benefits, Member States must explicitly exclude migrants therefrom by derogating from equal treatment when they transpose the relevant Directives. It is only in such cases that the Court considers that the relevant discriminatory attribution falls within national law and the measures cannot be reviewed for compliance with the Charter.

In this case-law, we see that the Court puts forward the social objectives served by secondary law (integration of long-term residents and fair treatment) not as a by-product of the economic contribution of the migrants, but rather under a positive vision of social justice in line with the social sustainability objectives of primary law. In doing so, the Court connects the protection of migrants under EU law with the evolution of the legal order and the incorporation of human rights guarantees under the Charter. By correlating the derogations allowed under secondary law to the provisions of the Charter, it dictates minimum safeguards of fundamental rights protection, thereby limiting the space for derogation by Member States and the EU legislator.[104]

9.3.2 *Social Rights Compensating for the Lack of a Right to Remain for Turkish Workers*

A similar extension of social rights has taken place in relation to social security rights of Turkish workers. In the relevant case-law, it is not the

[103] See Case C-302/19, *INPS*, ECLI:EU:C:2020:957. For holders of long-term residence permit in Case C-303/19, *INPS*, ECLI:EU:C:2020:958; Case C-350/20, *INPS*, ECLI:EU:C:2021:659; Case C-462/20, *ASGI and others*, ECLI:EU:C:2021:894; Case C-94/20, *Land Oberösterreich*, ECLI:EU:C:2021:477.

[104] Cf Proposal for a Directive, On a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State (recast), COM(2022)655 final, Explanatory Memorandum, Article 12, on raising the standards of protection in line with the case-law.

Charter that directed the extensive interpretation of the Court, but rather an understanding of rights as compensatory for the work somebody has carried in the EU, in cases where EU law does not grant a right to remain and enjoy such rights in EU territory.

This was the case in *Akdas*, where the Court found that non-discrimination should lead to exportability of benefits for Turkish workers, where the same does not apply to EU workers.[105] Akdas, a Turkish worker in the Netherlands, became incapacitated to work and obtained a supplementary benefit to ensure a minimum income level. He returned to Turkey, where he retained the benefit under Article 39(4) of the Additional Protocol to the Agreement. Dutch law was eventually amended, leading to a progressive withdrawal and termination of the benefit for all workers who had no residence in the Netherlands. The question addressed to the Court was whether such withdrawal for recipients who resided outside the Member State went against Article 6(1) of Decision 3/80.

The Court acknowledged that the wording of the Decision did not tie residence in the host state to continuation of benefits of such kind.[106] At the same time, EU secondary law on social security for EU migrants had been amended and had introduced an exception to the exportability of benefits like the one in question.[107] This meant that EU migrants who found themselves in circumstances like those of Akdas would have the benefit withdrawn if they moved outside the Netherlands. The Court held that such a difference in treatment would not be incompatible with Article 59 of the Additional Protocol to the Agreement, which required that Turkish workers were not treated more favourably than EU ones.[108] In order to justify this, the Court invoked the limited residence rights of Turkish nationals. It pointed out that Turkish migrants, unlike EU ones, had no right to remain in the host state if they could no longer contribute

[105] Case C-485/07, *Akdas and others*, ECLI:EU:C:2011:346.

[106] Ibid, paras 80–82.

[107] Ibid, paras 85–87. Regulation 1247/92 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 [1992] OJ L 136/1 inserted into Regulation 1408/71 on the application of social security schemes to employed persons and their families moving within the Community [1971] OJ L 149/2 a new Article 10a, which introduced an exception to the requirement of exportability laid down in Article 10(1).

[108] C-485/07, *Akdas and others*, para 88.

to the labour force.[109] For them, there is no option to maintain residence and, thereby, the benefit. According to the Court, the fact that they have no right to stay because they can no longer contribute with their labour power should not be construed as a voluntary conduct that leads to loss of their rights.[110]

What happens where the Turkish worker is not forced to leave the territory of the host state? This situation was addressed by the Court in *Demirci*, where a Turkish worker requesting the continuation of exportability of the benefit had acquired Dutch citizenship next to the Turkish one.[111] In this case, as AG Wahl explained, the objective of Article 6 of Decision 1/80 is to compensate workers for the 'the misfortunes they have suffered in the host Member State', an objective which is reasonable precisely due to the contribution the migrant workers have made in the host state.[112] Following the AG, the Court held that such compensation is no longer needed where the worker manages to acquire the nationality of the host state.[113] An opposite conclusion would mean that Turkish workers who acquire the nationality of the Member State would be treated more favourably both compared to Turkish workers who no longer belong to the labour force and have no right to reside, and to nationals of Member States, who would have to maintain their residence in the Netherlands to receive the benefit.[114]The Court has also ruled on cases where the acquisition of nationality of the host state by a worker did not imply the loss of rights derived from the Turkish worker status. This was the case in *Khaveci and Inan*, which concerned family reunification rights for Turkish workers naturalized in the host state.[115] The Court based the differentiation between *Demirci* and *Khaveci and Inan* on the fact that the workers in question had the possibility to enjoy the benefit, if they maintained residence in the Netherlands, and on the social purpose

[109] Ibid, paras 93–95.
[110] C-485/07, *Akdas and others*, para 94. See also Katharina Eisele and Anne Pieter van der Mei, 'Portability of Social Benefits and Reverse Discrimination of EU Citizens vis-à-vis Turkish Nationals: Comment on Akdas' (2012) 37 ELR 204.
[111] Case C-171/13, *Demirci and others*, ECLI:EU:C:2015:8.
[112] Opinion of AG Wahl in C-171/13, *Demirci and others*, ECLI:EU:C:2014:2073, paras 54–55.
[113] C-171/13, *Demirci and others*, para 54.
[114] Ibid, para 59. See also Case C-258/18, *Solak*, ECLI:EU:C:2020:98. See, however, Case C-677/17, *Çoban*, ECLI:EU:C:2019:408, para 32.
[115] Joined Cases C-7/10 and C-9/10, *Kahveci and Inan*, ECLI:EU:C:2012:180.

of Decision 1/80, which created rights for family members and not for the workers themselves.[116]

The significance of this case-law and, relatedly, its financial repercussions for Member States led to a revision of Decision 3/80 in order to limit this extensive protection.[117] Despite the revision, some observations are to be drawn from the consistently extensive application of social security rights in the case-law. There is an implicit understanding by the Court that Turkish workers who can no longer contribute their work and are thus forced to leave the host state, not being able to claim any residence right from EU law, need to be compensated and extensively protected. The basis of such protection is none other than non-discrimination. The extension of social security rights to compensate for a lack of a right to remain should be seen in light of the parallel pursuit of economic and social objectives by EU law. Migrants contribute to economic development by their labour and are granted rights as a compensation for such labour in a legal order constantly guided by the pursuit of economic and social sustainability.

9.3.3 *Social Objectives and Economic Risks behind Family Reunification*

Another instrument which highlights the intimate connection of the economic and social pillars of sustainability pursued in the regulation of migration is the Family Reunification Directive. Section 6.2.1 outlined the social objectives served by its adoption. However, the Directive does not only regulate the conditions under which family reunification should take place; more importantly, it creates a right to family reunification for

[116] C-171/13, *Demirci and others*, paras 67–71.

[117] Council Decision of 6 December 2012 on the position to be taken on behalf of the European Union within the Association Council set up by the Agreement establishing an association between the European Economic Community and Turkey, with regard to the adoption of provisions on the coordination of social security systems 2012/776/ [2012] OJ L 340/19. For an analysis of the relevant case-law and its implication and amendments, see Paul Minderhoud, 'Decision No 3/80 of the EEC–Turkey Association Council: Significance and Developments' in Daniel Thym and Margarite Zoeteweij-Turhan (eds), *Rights of Third-Country Nationals under EU Association Agreements: Degrees of Free Movement and Citizenship* (Brill Nijhoff 2015); Paul Minderhoud, 'Social Security Rights under Decision No 3/80 of the EEC–Turkey Association Council: Developments in the EU and in the Netherlands' (2016) 18 European Journal of Social Security 268. See also Judgment of 18 December 2014, *United Kingdom/Council*, C-81/13, ECLI:EU:C:2014:2449.

all TCNs who fall within its scope.[118] This was acknowledged by the Court in its case-law during the period under review.

In *Parliament v Council*, the Court held that the Family Reunification Directive goes further than international human rights instruments on the protection of family life for migrants.[119] Specifically, looking at international human rights law, the Court confirmed that, as a rule, there is no right for aliens to be allowed to enter the territory of a Member State for the purpose of family reunification and the corresponding protection of family life. Contrary to international human rights law and going beyond it, the Directive creates positive obligations for Member States to authorize family reunification if the conditions stated therein are fulfilled.[120] Relatedly, the Court has held that any limitations to the rights conferred by the Directive should be interpreted strictly and has used the Charter as a basis of review of restrictive national practices. In the respective case-law the balancing of economic and social objectives conditioning the rights attributed under the Directive is clear.

Specifically, the Family Reunification Directive provides that Member States may require evidence that the sponsor has accommodation regarded as normal for a comparable family, health insurance, and stable and regular resources to maintain themselves and their family, so they do not become a burden to the social assistance system of the Member States.[121] In *Chakroun*, the Court elaborated on how stable and sufficient resources should be perceived and if this requirement should exclude migrants who may be eligible for certain types of social assistance.[122] Taking the right to entry created for family members under the Directive as a starting point, the Court held that family reunification was the general rule. As a result, the conditions provided for it should be interpreted strictly.[123] The Court further pointed out that the margin of appreciation of Member States should not be exercised in such a way as to undermine the objective of the Directive, namely to promote family reunification, and its effectiveness.[124] This strict interpretation in line with the objective of the Directive also needs to be aligned with the protection of fundamental rights, and specifically respect for family life,

[118] See, however, Case C-706/18, *Belgische Staat*, ECLI:EU:C:2019:993.
[119] Case C-540/03, *Parliament/Council*, ECLI:EU:C:2006:429.
[120] Ibid, para 60.
[121] Article 7, Family Reunification Directive.
[122] Case C-578/08, *Chakroun*.
[123] Ibid, paras 41–43 with reference to *Parliament/Council*, C-540/03, para 60.
[124] Ibid, para 47.

as protected by the Charter and the ECHR.[125] In this context, the Court interpreted the requirements of Article 7(1)(c) of the Family Reunification Directive as meaning that the concept of social assistance referred to assistance which compensated for lack of stable, regular, and sufficient resources and could not cover assistance that enabled exceptional or unforeseen needs to be addressed.[126] This was confirmed by the Court in *O and S*, this time mentioning the need to align the interpretation of the Directive not only with Article 7 CFR but also with Article 24 on the rights of the child.[127]

Subsequently, in *Khachab*, the Court had the opportunity to clarify the meaning of regular and stable resources.[128] Following the line of reasoning established in *Chakroun*, the Court emphasized that this requirement should be interpreted in light of Article 7 CFR and with a view to promoting family life.[129] The presence of stable and regular resources implies the existence of a degree of permanence and continuity, allowing the Member State to assess whether the sponsor has the prospect of maintaining the resources for a period after the submission of the application. This prospective assessment was thought to be in line with the system of the Directive, which allows for refusal of renewal where the sufficient resources criterion is no longer satisfied.[130] What is more, this interpretation was aligned by the Court with the objective of Article 7(1) of the Family Reunification Directive – that the sponsor or his family should not become a burden on the social assistance system of the Member States during their stay.[131] The assessment, however, should take place in line with the principle of proportionality, and on a case-by-case basis in accordance with the requirement of Article 17 of the Directive.[132]

As with the case law on EU migrants, the Court acknowledged the limits set by the legislator on the rights of TCN migrants in light of the economic objectives of the EU project. Nevertheless, it firmly grounded the review of such limitations in the changed architecture of the EU legal order, and it emphasized the need to guarantee the rights of individuals

[125] Ibid, para 44.
[126] Ibid, para 49.
[127] Joined Cases C-356/11 and C-357/11, *O. and S.*, ECLI:EU:C:2012:776, paras 76–77.
[128] Case C-558/14, *Khachab*, ECLI:EU:C:2016:285.
[129] Ibid, para 28.
[130] Ibid, para 37.
[131] Ibid, para 39.
[132] Ibid, paras 42–43.

under EU law in light of the Charter. The use of the Charter in these cases has a double function. First, it consolidates the constitutional architecture of EU law. Second, it appears as a particular manifestation of the social objectives of EU law, and relatedly of how the social pillar of sustainability is pursued by a strong grounding on human rights considerations.

9.3.4 *Security of Residence Promoting the Social Objectives of the EU*

The Court has followed a similar approach also in relation to interpretation of the provisions of the Long-term Residents Directive. The long-term resident status is attributed to all migrants residing in a Member State for a period of five years under Article 4(1) of the Directive. However, not all types of legal residence count towards the fulfilment of the five-year duration criterion. Specifically, the Directive excludes certain categories of legal residence based on the presumption that the migrant in question has no intention to stay in the Member State for an extended period of time.[133]

The Court has had the opportunity to define what is meant by stay on temporary grounds and, thus, what types of permits are excluded from the calculation of the residence duration.[134] In light of the purpose of integration served by the Directive, the Court held that the permits excluded are based on the consideration that their holders do not seem to have prima facie any intention to settle in the EU for the long term.[135] In other words, their legal status objectively represents an intention to exist in the host Member State for a limited period of time. When it comes to national residence permits that are limited (for example, in terms of access to a specific occupation), but do not prevent the long-term residence of the migrant, these cannot be excluded from the calculation of the period necessary for the long-term resident status.[136] If they were excluded, this would allow much leeway to Member States, in consequence depriving the Directive of its effectiveness.

While the duration of residence is the main criterion for access to the status, the Directive also provides for the following

[133] Article 3(2), 4(2) Long-term Residents Directive.
[134] Cases C-502/10, *Singh*, ECLI:EU:C:2012:636 and C-624/20, *Staatssecretaris van Justitie en Veiligheid*, ECLI:EU:C:2022:639.
[135] C-502/10, *Singh*, para 47.
[136] Ibid, para 51.

conditions.[137] Applicants for long-term residence permit need to prove that they have stable and regular resources, and health insurance, and may also be required to comply with integration conditions. In these requirements, we see that the social aim of furnishing security of residence to migrants who have stayed for long in the EU is tied to guarantees that they will not become a burden on the host state. The Court has also engaged with the criterion of stable and regular resources. In the relevant case-law, it emphasized duration of residence as the central criterion of the Directive, which shows that the TCN has managed to put down roots in the host state.[138] Consequently, it held that while the concept of resources may be interpreted by analogy to the relevant concept in Directive 2004/38, it should have a different scope.[139] This is because first, the acquisition of the long-term resident status is definitive, so the interpretation of the resources condition should be in line with the purpose of preserving the social assistance system of the Member States.[140] Second, the text of the relevant provision mentions that resources should be stable and regular, compared to Directive 2004/38 which only mentions stable. In addition to these reasons of differentiation, AG Saugmandsgaard Øe added another one, on which the Court stayed silent.[141] That is the paradoxical formulation of the relevant instruments in a way that allows Member States to withdraw the residence permit of a EU migrant who no longer has sufficient resources if they do not have permanent residence status, while such withdrawal is not foreseen for long-term residents.[142] In view of this, the more exacting economic conditions for access to protection are based on the fact that the social protection enjoyed by long-term residents cannot be taken away when they become economically redundant. In this regard, the Court suggested that the relevant requirement meant that Member States could evaluate the resources on the basis of their nature and regularity, and this would imply an assessment of sufficiency and sustainability of resources, rather than an assessment of their origin.[143]

[137] Article 5, Long-term Residents Directive.
[138] Case C-302/18, *X v Belgische Staat*, ECLI:EU:C:2019:830, para 30.
[139] Ibid, para 34.
[140] Ibid, para 35.
[141] Opinion of AG Saugmandsgaard Øe delivered in C-302/18, *X v Belgische Staat*, ECLI:EU:C:2019:469, para 64.
[142] Ibid, paras 64–66. See also C-308/14 *Commission/United Kingdom*, and Article 28(2), Directive 2004/38.
[143] C-302/18, *X v Belgische Staat*, paras 40–41.

The Court has also ruled on the conditions of loss of the relevant status. Article 9 of the Long-term Residents Directive provides that the status may be lost due to absence from the EU territory for a period of longer than twelve consecutive months. The Court has held that since the Directive creates a right to a status whose nature is permanent, the rules leading to the loss of such status should be interpreted strictly and that the physical presence of a migrant in EU territory is sufficient to interrupt their absence from the territory.[144] This interpretation was also supported both by the purpose of the Directive to bring the rights of long-term residents as close as possible to those of EU nationals and by the need to achieve legal certainty for the migrants concerned.[145]

The social purpose of this Directive as a reason for more extensive protection has also been identified by the Court. In *Commission v Netherlands*, the Commission took action against the Dutch legislature, which imposed excessively high charges for the acquisition of long-term resident status.[146] AG Bot suggested that the margin of manoeuvre of Member States should be limited by the purpose and effectiveness of the Directive, and by respect for fundamental rights.[147] Relatedly, he pointed out the double purpose served by migrant integration under EU law: to promote social and economic cohesion by granting them rights, and to contribute to the attainment of the internal market by granting them mobility rights.[148] To the AG, the charges imposed by the Dutch legislation constituted an indirect means of limiting the exercise of the rights conferred by the Directive, and could lead to discrimination against migrants who did not have sufficient financial resources.[149] He also emphasized the comparability of long-term residents to EU migrants, and failed to see how such a difference in treatment would be justified on the basis of objective reasons.[150]

[144] Case, C-432/20, *Landeshauptmann von Wien*, ECLI:EU:C:2022:39, paras 33–36.
[145] Ibid, para 38. See Proposal for a Directive concerning the status of third-country nationals who are long-term residents (recast), COM(2022)650 final which suggested the extension of permissible absence to twenty-four months and 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 which proposes eighteen months instead.
[146] Case C-508/10, *Commission/Netherlands*, ECLI:EU:C:2012:243/.
[147] Opinion of AG Bot in C-508/10, *Commission/Netherlands*, paras 54, 67.
[148] Ibid, paras 55–57.
[149] Ibid, paras 63, 69.
[150] Ibid, para 66.

In light of the arguments put forward by the Netherlands, the AG also had the possibility to elaborate on the rights created by primary and secondary law for EU and TCN migrants. Specifically, the Dutch government argued that a residence permit granted under secondary law created rights for the migrants, whereas a residence permit granted to EU migrants was merely declaratory.[151] The AG suggested that such a differentiation could no longer hold in line with the development of EU law.[152] While it is true that for EU migrants a residence permit has declaratory effect, the same is true for TCN migrants, in the sense that secondary law directly confers rights on them.[153] The Court emphasized the purpose of the Directive appearing in Recitals 4, 6, and 12, which is to contribute to the integration of migrants and to the effective attainment of the internal market as an area of free movement of people.[154] In line with the AG, it confirmed that the fulfilment of the conditions of the Directive created a right for migrants to obtain the long-term resident status. Member States cannot impose charges which are so high as to have the object or the effect of creating an obstacle for TCNs who are entitled to obtain that status, otherwise the objective and spirit of the Directive would be undermined.[155]

Overall, the extensive interpretations of the Court on this instrument had two consequences: it ensured the social protection of long-term residents in the Member States, and it shaped the Commission proposal for revision of secondary law with closer attention to fundamental rights considerations.[156]

9.3.5 *Social Rights for Migrant as an Indirect Way of Promoting the Constitutional Elements of EU Law*

Primary law on the regulation of migration does not create obligations on the substantive conditions that should inform migrants' rights. The

[151] Ibid, para 71.
[152] Ibid, para 73.
[153] Ibid, para 74 with reference to case-law on Decision 1/80 of the EEC–Turkey Association Agreement and on the Family Reunification Directive.
[154] Ibid, para 66.
[155] Ibid, para 73. See also Case C-309/14, *CGIL and INCA*, ECLI:EU:C:2015:523.
[156] Proposal for a Directive concerning the status of third-country nationals who are long-term residents (recast), COM(2022)650 final, Explanatory Memorandum, Article 5 on resources and integration conditions and Article 12 on removing the permissible limitation of equal treatment to core benefits.

shared competence of the EU on migration is defined in the Treaties by reference to the areas where the EU can adopt legislation. At the same time, the Lisbon Treaty refers to fair treatment and solidarity as principles that should guide the adoption of such legislation. The Court has not referred to the relevant Treaty provisions when reviewing secondary legislation. Rather in the case-law analysed in the previous sections, the Court consolidated the rights of TCN migrants by reference to the Charter. Specifically, the Court consistently held that secondary law creates EU law rights for migrants, the limitations of which should be interpreted strictly and reviewed for compliance with the Charter.

At this stage, it should be noted that the Court has dealt with very few cases regarding the right of first admission of a migrant. In such cases it has been reserved. Despite recognizing the creation of a right to entry in accordance with the conditions of the relevant Directive, the Court does not normally push for review of state discretion. However, when it comes to migrants who are already in EU territory, the Court acknowledges the importance of fundamental rights protection for all individuals who fall within the scope of EU law. Such rights are extended in light of the Charter, which completed the constitutional architecture of the EU. In the relevant case-law, it can be argued that it is not only the social objectives of EU law that are promoted by the Court's interpretation and emphasis on the Charter, but also the integration of the EU legal order.

By this, I mean that in the first years of the Community project, the Court used primary law with an emphasis on economic freedom as a means to promote the integration of Member States and to fortify the Community legal order in light of a constitutional end that was absent from the Treaty text.[157] With the political ambition of the EU project under stress, the failed Constitutional Treaty, and the reformed architecture of the EU legal system with the adoption of the Charter, the Court turned to another instrument that could advance integration, namely the Charter. It has consistently made use of the provisions of the Charter to review secondary law on migration and limit state discretion in an area of shared competence. The Court's interpretation on the relevant secondary law is framing the space of fundamental rights policy exercised by the EU legislature. Both the revision of the Single Permit Directive and the proposed revision of the Long-term Residents Directive were presented

[157] See Chapter 2. Cf G Federico Mancini, 'The Making of a Constitution for Europe' (1989) 26 CMLRev 595.

by the Commission with stronger emphasis on fundamental rights protection for migrants in line with the case-law.[158]

This approach of the Court stands in stark contrast to the interpretations followed on EU migrants' rights, where it has accepted a consolidation of balancing of economic and social objectives by the EU legislature as expressed in Directive 2004/38. The differentiation could also be connected to the maturity of the legal framework on EU migrants, which has been constantly transforming since the 1960s. Secondary law on migration, on the other hand, is very recent. As shown throughout this historical investigation, it has developed in an 'environment in which national jealousies and priorities are never far from the surface'.[159] In cases related to TCN migrants, the Court consistently reviews national law in light of a more positive vision of what individual rights should look like in a legal system whose constitutional architecture is completed by the adoption of the Charter.

This differentiated approach, however, has led to paradoxical interpretations in cases where the Court had to relate the rights of EU and TCN migrants. Maintaining the focus on case-law, Section 9.4 showcases the paradoxes that derive from the emphasis on the different status of EU and TCN migrants and the parallel acknowledgement that safeguarding the economy demands the limitation of rights for both categories.

9.4 Migrants, Citizens, Differentiation, and Incoherence

The analysis in this part revealed the different approach of the Court in its case-law on EU and TCN migrants during this period. Specifically, while the Court has accepted the balancing of economic and social objectives decided by the EU legislature regarding EU migrants, it has extensively interpreted the rights of TCN migrants in view of the constitutional architecture of the EU. In parallel, the analysis carried out

[158] See Proposal for a Directive, on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State (recast), COM(2022)655 final, Explanatory Memorandum, Article 12 with reference to C-302/19, *INPS*; Proposal for a Directive concerning the status of third-country nationals who are long-term residents (recast), COM(2022)650 final, Explanatory Memorandum, Articles 5, 12.

[159] 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).

throughout the book has shown that economic and social objectives condition the rights of both categories of migrants. While EU citizenship provisions have shown their teeth when it comes to rights claimed by migrants against their host state, the movement of EU migrants is very much conditioned by economic considerations, and so are the social rights they can claim. Similarly, the rights TCN migrants draw from secondary law are granted precisely in order to achieve the economic objectives of EU law.

The case-law of the Court has developed through the emphasis on the Union citizenship status as the normative foundation of the rights of EU migrants. Even in cases where such status cannot guarantee rights to economically inactive migrants, the Court still emphasizes its primary nature. At the same time, the Court implicitly, and its AGs explicitly, emphasizes that the rights of EU and TCN migrants are different in their nature.[160] While it is true that the rights of EU and TCN migrants are created under different legal bases and have a different normative outlook, this does not preclude cases where the rights attributed to both groups are of a similar extent and serve the same objectives. This is the case for family reunification rights of EU and TCN migrants, for example. In such cases, the emphasis on the fundamental status of EU citizenship and the different treatment for TCN migrants creates paradoxical outcomes which complicate our understanding of the EU fundamental rights protection system.[161]

Exemplary in this regard is the decision of the Court in *X v État belge*, which demonstrates that the insistence on a differentiation of rights between EU and TCN migrants that is not reflected in secondary law, can adversely affects the potentials of EU citizenship, while at the same time it implicitly encourages Member States to undermine the rights of TCNs.[162] The case concerned the right to an autonomous residence

[160] Opinion of AG Szpunar in C-544/15, *Fahimian*, and in C-579/13, *P and S*, ECLI:EU:C:2015:39; Opinion of AG Mengozzi in C-257/17, *C and A*, ECLI:EU:C:2018:503 and in C-138/13, *Dogan*, ECLI:EU:C:2014:287. In the context of cases exclusively dealing with EU migrants, Advocates General have made very grand statements; indicative is the Opinion of AG Jacobs in C-168/91, *Konstantinidis*, ECLI:EU:C:1992:504 and the famous dictum 'civis europeus sum'.

[161] Cf Sara Iglesias Sánchez, 'The Constitutional Status of Foreigners and European Union Citizens: Loopholes and Interactions in the Scope of Application of Fundamental Rights' in Daniel Thym (ed), *Questioning EU Citizenship: Judges and the Limits of Free Movement and Solidarity in the EU* (Hart 2017).

[162] Case C-930/19, *Belgian State*, ECLI:EU:C:2021:657.

permit for family members of EU citizens, when such family members are victims of domestic violence. Article 13 of Directive 2004/38 requires that the family members are either economically active or have sufficient resources and health insurance, while Article 15 of the Family Reunification Directive provides that the conditions for granting such an autonomous residence permit are provided by national law. The referring court suggested that the only thing that differentiates the conditions under which an autonomous residence right should be granted to a TCN victim of domestic violence is whether their spouse is an EU migrant or not. Due to this, it asked whether the relevant article of Directive 2004/38 should be invalidated as constituting a case of unequal treatment. The Court acknowledged that the two provisions established different conditions even though they shared the same objective – protecting family members who are victims of violence.[163] It then went on to examine all the elements of the relevant framework and to evaluate whether the autonomous rights of family members of EU and TCN migrants could be comparable. The Court found that, even though the specific provisions have the same objective, they exist in Directives that relate to different fields, principles, subject matters, and objectives. It emphasized the difference between the two categories of migrants, suggesting that beneficiaries of rights under Directive 2004/38 'enjoy a different status and rights of a different kind'.[164] However, it did not review secondary law on EU migrants for compliance with the Charter. Instead, it suggested that the paradoxical outcome which leads to the stronger protection for family members of TCN migrants is the result of Belgian law, which did not impose equally strict conditions for family members of TCN migrants, even though it had the discretion to.[165]

This case is exemplary of the analysis of the Court in that it highlights the tensions inherent in EU law and case-law and the way it qualifies the rights of migrants. Instead of reviewing Directive 2004/38 for compliance with the Charter, the Court accepts the economic balancing that results in limitation of the rights of EU migrants and their family members. At the same time, it defers to national law to lower the standard of protection for TCN migrants and to ensure the more favourable treatment of EU migrants. And in general, it puts forward the Charter as a basis of review of national law on TCN migrants, when it consistently

[163] Ibid, para 70.
[164] Ibid, para 89.
[165] Ibid, para 88.

fails to invoke the Charter in relation to EU migrants.[166] Indeed, as Nic Shuibhne suggested in a different context, the Court's case-law is characterized by a 'hegemonic attribution of supremacy to secondary law, which fails to engage the constitutional protocols epitomising the Union legal order more generally'.[167] In the specific case analysed, the Court accepted as legitimate the standards of Directive 2004/38 without further examination of the relevance of the economic conditioning for victims of domestic violence. The minimum standards of protection are ultimately the ones dictated by the economic and social balance as it has taken place for EU migrants.[168]

Essentially, in this period the dust settled. The EU project had been continuously on the road to transformation, as ingrained in the language of the Treaties, but it had also come a long way. Different actors came to different realizations, which affected legislation and case-law on migrants' rights in the following way. The Council realized that it could no longer block admission and rights of TCN migrants because EU growth would be impossible to maintain without their labour. The Commission realized that the Council could not go as far as accepting the shaping of a supranational community whereby EU and TCN migrants alike would enjoy rights directly from the EU legal order. The Court also realized that integration could not only be promoted via law but also needed to find support in democratic processes, and for this reason deferred to the political balancing behind different instruments as legitimate balancing for the purposes of EU law. This does not mean that any effort for integration through law was blocked. During this period the Court proceeded in review of national legislation in light of the Charter in the same way that it employed economic freedoms provisions during the first period reviewed in Part I. With the coming of age of the EU legal order, fundamental rights provisions become a powerful integration technique.[169] This chapter thus concludes the historical overview of EU migration law from the establishment of the European Coal and

[166] See Section 8.2; Cf Niamh Nic Shuibhne, 'Integrating Union Citizenship and the Charter of Fundamental Rights' in Daniel Thym (ed), *Questioning EU Citizenship: Judges and the Limits of Free Movement and Solidarity in the EU* (Hart 2017).

[167] Niamh Nic Shuibhne, 'Limits Rising, Duties Ascending: The Changing Legal Shape of Union Citizenship' (2015) 52 CMLRev 889, 891.

[168] See also Vladislava Stoyanova, 'On the Bride's Side? Victims of Domestic Violence and Their Residence Rights under EU and Council of Europe Law' (2019) 37 Netherlands Quarterly of Human Rights 311.

[169] Cf Muir (n 82) 92.

Steel Community to the present. The persistence of the economic and social pillar of sustainability in the regulation of migration, as they were manifested in the language of economic and social objectives of EU primary law has been revealed throughout the historical investigation. The task of the remaining chapter, therefore, is to draw on the findings of this historical investigation so as to link the balancing of economic and social objectives behind the regulation of EU migration to the contemporary demand of sustainable migration and to conclude by discussing the potentials and limitations of an EU sustainable migration.