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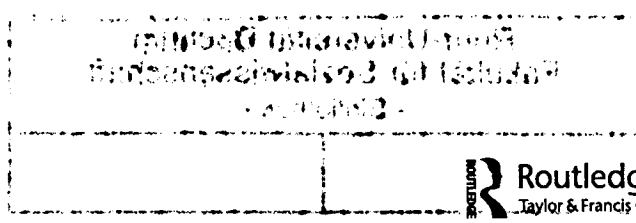
Edited by Didier Bigo, Thomas Diez, Evangelos Fanoulis, Ben Rosamond and Yannis A. Stivachtis



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Why and for whom?

Kees Groenendijk

Freedom of movement: A great asset and subject of constant contention

Moving across state borders is essential for people who want to escape suppression by state or local authorities, discrimination, unemployment or poverty in their own country or for those wanting to improve their personal situation or satisfy their curiosity. International human rights treaties only guarantee the right to leave a country. The corresponding right to enter another country is conspicuously absent. State borders often are unsurmountable barriers to movement. The EU granted the right to cross state borders, enter other European states, travel, stay there or look for work to ever larger numbers of non-citizens since 1957. This was a long-term operation breaking down the legal and other barriers against cross border movement of persons. Those barriers became stricter after the World War I, the economic crisis of 1929 and during the years before and after the World War II. Freedom of movement of persons has been and is today of crucial importance as a source of personal development of individuals, of protection against human rights violations and of wealth in the EU.

From the very beginning, free movement of persons has been subject of continuous disputes and struggles between the diverse actors, together making up the EU. It is subject of contention within Member States (often between the Ministries of Social Affairs and of Interior) and between (sending and receiving) Member States. It is the subject of constant struggle between Member States hesitant to give up part of their sovereignty and EU institutions promoting the adoption and actual implementation of common rules, and of conflicts among EU institutions (Council, Parliament, Commission and Court of Justice) in the never ending balancing of inter-institutional power relations.

Three political programmes and three sets of rules

Since the early 1960s, three sets of rules have been developed within or just outside the EU framework granting to various categories of non-citizens a right to enter or work and live in states of which they are not a citizen. The first set of rules relates to the free *movement of workers of Member States.* Its gradual development since 1961 is discussed in para. 3. The second set relates

to the *abolishment of controls at the internal borders of the Schengen area* on the basis of the 1985 and 1990 Schengen Agreements (para. 4). The third set are the EU measures on the *admission of immigrants from outside the EU, their rights after admission and the expulsion of those without permission to stay*, adopted after 2000 on the basis of new competences granted by the Member States to the EU in the Treaty of Amsterdam (para 5).

Each extension of the freedom to move in Europe met with opposition in the population, among politicians and in government bureaucracies. Especially, Ministries of Interior, responsible for controlling both immigration and citizens, voiced opposition arguing with the need to fight crime and illegal entry. Each time the security concerns did not prevail in the end. Over the last six decades freedom of movement and the number of migrants increased in Europe, as in other regions (Pecoud and De Guchteneire 2007), despite terrorist attacks, organized crime, economic recessions and peaks in refugee migration due to wars in EU's neighbourhood, in the former Yugoslavia and in Syria.

In this chapter, we will discuss why did European states agreed to these rules granting rights to non-citizens and inevitably reducing the state's possibilities to control or restrict their movement and integration? To which persons were those new rights granted? How did Member States implement and apply these EU rules and, finally, what are the visible effects for the migrants and the majority of non-mobile EU nationals? Why is freedom of movement in the EU today both taken for granted and under attack?

Gradual extension of free movement from workers (1961) to most Union citizens (2004)

In the first decades after 1945, European rules on migration almost exclusively concerned workers migrating within Europe. In particular, Italy through bilateral recruitment agreements and multilateral instruments tried to gain access to the labour market of other countries in order to reduce its extremely high unemployment. The Italian pressure stimulated adoption of the 1953 OEEC Council Decision liberalizing labour migration, the 1955 Council of Europe Convention on Establishment and the incorporation of free movement of workers in the 1957 EEC Treaty. The first proposals for the EEC Treaty did not mention free movement of workers. Only Italy and Belgium, because of the high wages in the latter country, argued for its inclusion. Ultimately the two succeeded in overcoming the opposition of the other four original EEC states, mainly because of the fear that the massive unemployment would enhance the possibility of a communist takeover in Italy. US diplomatic pressure on those four countries reinforced that fear. Other reasons for accepting free movement of workers as the fourth central element of the EEC Treaty were the low unemployment, the related recruitment of workers from Mediterranean countries by five of the six countries and the expected advantages of other elements of the Treaty (free movement of goods and capital) (Goedings 2005; Groenendijk 2013a). The opposition was reflected in a transitional period of 12 years in the Treaty, postponing most effects of this new freedom. Three EEC Regulations gradually developing the free movement of workers were adopted in 1961, 1965 and in 1968. The last one shortened the transitional period with one year. During the transitional period, there was only significant movement of Italian workers to Belgium. The large migration of Italian workers to the other EEC countries started before the EEC-Treaty was signed in 1957 and peaked before the full freedom of movement entered into force in 1968. Under conditions of high demand for workers, freedom of movement has an enabling function which assumes significant proportions only if receiving countries have previously significantly controlled immigration and residence of foreign workers and/or if sending

countries have a really large surplus of workers willing and able to fill the positions in question (Böhning 1972). With a few minor amendments, the 1968 Regulation remained into force until 2004.

Enlargement

For two decades after 1970, no agreement was reached between the Member States on new rules on free movement. However, the scope and practical significance of the early rules on free movement increased due to the accession of new Member States and to the case-law of the EU Court of Justice. The interpretation of the rules by the Court extended free movement among others to part-time workers (mostly women), students, those looking for employment and tourist (as service recipients) (Guild, Peers and Tomkin 2014). Because lawyers and judges began to take these rulings of the Court seriously, immigration officials and politicians, too, were obliged to give effect to those judgments and the EU rules concerned in practice. The accession of Greece, Portugal and Spain in the 1980s after the return to democracy in those countries, of the UK, Ireland and Denmark in 1973, of Austria, Finland and Sweden in 1995 and of thirteen states in Central and Eastern Europe after 2004 considerably extended the personal and territorial scope of free movement. The EU enlargements in the 1980s and those after 2004 were primarily motivated by securing political stability in the region: Inclusion of European states in Southern and Central Europe, previously ruled by left or right wing totalitarian regimes. Free movement of persons was as contributing to political stability and democracy, economic aims came second. In 2019 the EU free movement rules applied to the nationals of all 28 EU Member States plus Norway, Iceland, Liechtenstein (all three part of the European Economic Area) and Switzerland.

Union citizenship

In 1992 Member States at the initiative of Spain, aiming to strengthen the position of its nationals living elsewhere in the EU, agreed to establish Union citizenship. All nationals of Member States were granted this new EU status. In the following decade, the Court of Justice put flesh on the bones of this status, reinforcing the rights of mobile EU citizens. In 2004, the day before the accession of the EU-10, the "old" EU-15 codified that case-law of the Court and extended the residence status of Union citizens, by introducing a right of permanent residence for those with 5 years lawful residence in another Member State. The relevant Directive 2004/38 granted the right to live and work or study in another Member State to all EU citizens who could find a genuine job or are self-employed and to their family members irrespective of their nationality. Not all Union citizens, however, are willing and able to use this freedom. Those having insufficient means to pay for a passport or the travel or who are unable to find a job due to their handicap de-facto are excluded. Prolonged reliance on social assistance before having acquired the permanent residence status or a serious criminal record are grounds for exclusion and expulsion of EU citizens. The proposal of the Commission to ban expulsion of EU citizens after 10 years of lawful residence in another Members State was rejected in 2004. Member States preferred to restrict the full right to remain on their territory to their "own" nationals.

Who uses free movement?

In 2018, a total of 17.6 million EU citizens were living in another Member State. This number neither takes into account those who returned to their own country nor those who naturalised in their country of residence. Nevertheless, it is clear that only a relatively small minority of

the 500 million EU citizens used their right to live elsewhere in the EU even after most legal barriers to migration had been abolished. The 17.6 million mobile EU citizens represented almost 45% of the total non-citizen population (40 million) of the 28 Member States, the other 22.3 million being nationals of third (i.e. non-EU) countries. This implies that Member States due to the EU rules on free movement, de facto lost most of their traditional means of immigration control with regard to almost half of their non-citizen population. Of course, this effect varies between Member States: In Luxembourg, Cyprus, Ireland, Belgium and the UK nationals of other Member States by far outnumber nationals of non-EU countries, whilst in Poland, Latvia, Estonia, Italy, Greece and France, it is the other way round (Eurostat 2019). The number of EU citizens living in another Member State than their own increased with 50% in the 10 years between 2008 (11.3 million) and 2018 (17.6 million) due to the enlargements of the EU, the economic crisis hitting some Member States more than others, the low costs of transportation and the increased level of education in the EU. The loss of control on a considerable share of immigrants may explain the political and administrative resistance against free movement and the fears among public opinion in Member States.

Effects of free movement

Free movement allows EU citizens to vote with their feet. They can leave their home country since they have a right to live and work elsewhere in the EU. It creates an opportunity to earn more money than at home, improve their economic position and learn to enjoy or dislike other cultures and social settings. It is a way out of unemployment, social exclusion or discrimination (for Roma in Central Europe) or to evade political justice (the Catalan PM). The strong legal status of EU workers reduces the possibilities for their exploitation by employers. The worker is no longer bound to one employer. He or she can leave for a better job of a better employer without first obtaining permission from public authorities. The remaining exploitation of workers from other EU states often is caused by the lack of enforcement of the protective social rules by national authorities or trade unions. Free movement rules have changed the status and perception of workers form other Member States from being a foreign worker, an alien with little rights into a person with rights, to almost a co-citizen. This transformation, the access to employment, equal rights, the secure residence status and the right to family reunification all contributed to the integration of the workers or students, who decided to stay on in another Member State.

Migration is never completely free. It implies costs at both sides. The actual or potential arrival of large numbers of immigrants inevitably implies uncertainty, possible change and often raises fears among the resident population. Opponents of free movement tend to forget that if workers from other EU states would not be free to fill the vacancies, most probably employers would in some way succeed in filling most of those vacancies with workers from outside the EU. Those workers would, generally, be cheaper, resulting in unfair competition and more dependency on their employer.

Fears and opposition

Almost every extension of the free movement raised fears and opposition in the public debate in Member States. Recurrent fears are the different origin or culture of potential migrants (Dutch and German fears for incoming "black" UK nationals in 1973), competition with national workers and downwards pressure on wages, the abuse of social security and the "unreasonable" export of social security benefits, especially child benefits and unemployment benefits. Those fears were

prevalent in debates on the Internal Market (1992) and before the 2004 and 2007 enlargements. The proponents of the idea "those EU citizens are coming after our honeypot" often disregard that mobile EU, generally, are younger, more often of working age and more often employed than the national population.[1] Hence they rely less on social security and social assistance than nationals. Moreover, they pay tax and social contributions. In the often emotional debate, the results of empirical research indicating that nationals of other EU states apply for and receive less social assistance than nationals (Groenendijk 2013b) are often neglected.

A few years after the unanimous adoption of the 2004 Directive on Free movement of Union citizens, for the first time, some Member States started to table proposals to reduce rather than extend free movement. In 2008, the *Metock* judgment of the Court of Justice on reunification of third-country national family members of mobile EU nationals raised concerns in several Member States. The judgment made clear that Germany and the Netherlands could not require family members of EU citizens to pass a pre-entry language or integration test. Several Member States were afraid they could no longer effectively act against marriages of convenience and other forms of irregular migration. Denmark proposed to amend the directive and was supported by Ireland, Germany, Austria and Cyprus. The UK used the debate in the Council to table a proposal to widen the possibilities for expulsion of EU citizens after a criminal conviction. The French Presidency cooled down those moves and the Commission promised to publish a report. The report documented that many Member States did not correctly implement the 2004 Free Movement directive. The Commission decided not to propose amendments but to stimulate proper implementation of the directive.[2]

In 2011, the Dutch minority government depending on Geert Wilders' party (PVV) distributed a position paper in four languages advocating amending the directive in order to reduce the free movement rights of EU citizens (Ministry of Interior 2011). Two years later, the ministers of interior of Austria, Germany, Netherlands and the UK wrote a letter to their colleagues in the EU Council of Ministers proposing to reduce the free movement rights in order to fight fraud and systematic abuse such as marriage of convenience, allow for more expulsion and re-entry bans and reduce "the pressure placed on our social welfare systems".[3] The Commission in reply to this letter asked for concrete information on the abuses and the misuse of social benefits. When the four Member States did not provide proof for their statements, the issue disappeared from the Council's agenda in 2013.

Brexit

Three years later, all issues raised in the letter of 2013 returned in the discussions between the UK Prime Minister Cameron and the other EU political leaders in the European Council on how to deal with the concerns of the UK and increase the chances for a majority voting to remain in the EU in the 2016 Referendum. The Council agreed to an emergency brake for the UK on social security benefits and to reduce child benefits paid for children living in the Member State of origin. The European Council also agreed to reduce the right to family reunification and allow for more expulsion and re-entry bans for EU citizens. For the first time since the beginning of free movement Member States unanimously agreed on major restrictions of three central elements of the right to free movement of Union citizens: Their security of residence, their right to family reunification and the equal treatment of EU workers. This time the Commission promised to cooperate and propose the required amendments in the relevant EU free movement measures, in case the UK would decide to remain in the EU (Groenendijk 2017).[4] The withdrawal of the UK from the EU would be the first major reduction of free movement of EU citizens after almost six decades of extensions (Grütters et al. 2018). The flip-side being

that the 2016 decision on those restrictions does not enter into force if the UK actually leaves the Union. Moreover, the draft Withdrawal Agreement of November 2018 with a few exceptions meticulously copies the current level of free movement rights. Politically, it will be difficult to continue granting those acquired rights to EU citizens in the UK and to UK nationals in the EU-27 but diminish the rights for all other EU citizens.

Schengen: Abolishment of controls at internal borders: 1985–990–1995

The second set of rules on free movement in the EU relates to the *abolishment of controls at the internal borders of the Schengen area.* In 1985, five EU Member States (Belgium, France, Germany, Luxembourg and the Netherlands) signed an agreement in Schengen a town in Luxembourg. After 5 years of negotiations, a second agreement setting out details for the implementation was signed by these five states in 1990. The actual abolition of the controls followed in 1995.

Reduction of controls at the internal borders had been under discussion in the EEC since the early 1980s in relation with the Internal Market, planned as an area of free movement of goods and persons to be established 1992 and as part of a programme to make citizens aware of the advantages of the EU. Since consensus among Member States could not be reached on this issue, the German Chancellor Helmut Kohl decided not to let the "slowest" Member State dictate the speed of EU integration. He embarked on concluding bilateral agreements on the gradual abolishment of controls at the common borders with Germany's neighbours. Within 2 months after Kohl convinced the French President Mitterand to make an agreement on this issue, the bilateral Agreement of Saarbrücken was signed in July 1984. Kohl immediately invited the prime ministers of Austria, Belgium, Luxembourg and the Netherland to follow the German–French example. The three Benelux countries accepted the invitation. Since controls at the internal borders in the Benelux had been abolished already in 1962, their previous experience contributed to a long list of issues which would require common rules: Visa policy, exchange of information on unwanted persons and their refusal at common external border, cross border police cooperation and hot pursuit to fight cross border crime (Oelgemoller et al. 2019).

The basic idea was to replace controls at the internal borders by more strict controls at the common external borders of the Schengen area. Moreover, the expected negative effects of the abolishment of controls at internal borders, such as more illegal immigration, "asylum shopping", more cross border criminality, trafficking in drugs and weapons, the drugs policy of other states and threats to national security had to be countered by "compensatory measures". During the negotiations on the 1990 agreement, certain issues (customs, cross border transport and fire arms) disappeared from the Schengen agenda because common rules were agreed within the EEC framework. Other issues, such as the cooperation between the national intelligence, agencies were dropped since not all five Schengen states were ready to make public rules on this sensitive issue.

Why did Schengen take 10 years to become operational?

Controls on persons at internal borders of the first Schengen countries had been gradually reduced already before 1985 with common controls at most border posts and random spot checks instead of systematic checks at the Dutch-German border. At the French-German this process started after the Saarbrücken Agreement. At the internal borders of the Benelux controls had been already abolished decades ago. The gradual reduction continued until the last frontier

controls at the internal border were finally abolished in 1995. People and institutions had got already used to the idea and the practice of minimal controls.

Why did it take so long to prepare for this event? During the first years, there was opposition within the national ministries of several states. They had not been consulted by the political leaders in advance and feared loss of competences and insufficient protection of interests they were professionally committed to fighting cross border crime or illegal migration in the new setting. Secondly, the Schengen Agreements were intergovernmental agreements concluded outside the EEC framework. The 1990 agreement had to be approved by the parliaments of all countries concerned. This process took many years. The institutional framework of Schengen was relatively week: Regular meetings of secretaries of state or national official, supported by officials of the Benelux Secretariat-General. At the first Schengen ministerial meetings the European Commission was not invited. When admitted as an observer later on the Commission's task was restricted to checking that Schengen rules would not infringe on EEC law (Oelgemoller et al. 2019). The European Parliament and the Court of Justice did not have any role in the Schengen cooperation.

Thus, an effective mechanism to solve conflicts was absent in Schengen. This became apparent when the conflict between France and the Netherlands on the liberal Dutch policy on drugs, which festered since the beginning of the Schengen cooperation could not be solved by traditional diplomatic means. As a result, France postponed abolition of controls at the Belgian-French border. After 1990, more EU countries wanted to join the Schengen framework, increasing the pressure on the institutional structure. At one moment none of the Schengen states was willing to take over the 6 months rotating presidency from Germany. This explains why Schengen was incorporated in the EU framework in 1997 as part of the Treaty of Amsterdam. Schengen is a good example of the weaknesses of intergovernmental cooperation often proposed as an attractive alternative by political opponents of the EU.

The third reason for the long delay was a technical one. It took far more time than expected to design and built the Schengen Information System (SIS), the central digital database allowing for exchange of information between the police, criminal justice and immigration authorities of the Schengen states. The functioning of SIS was a crucial condition for the abolition of the border controls (Brouwer 2008). The SIS was the first of series of immigration databases consecutively built and operated by the Schengen countries within the EU framework, Eurodac (data on asylum seekers), Visa Information System (data on visa applicants and their sponsors), EES (with data on entry and exit of non-EU nationals) and ETIAS (entry permit for non-visa travellers)(Michael Merlingen, in this volume). In 2018, the EU decided to connect the data in all systems and grant access to those data by police and immigration authorities in all Schengen states.

Freedom of movement in the Schengen area for whom?

The abolition of border controls allowed for free transportation of goods and free travel of persons across the internal borders between Schengen states. EU citizens had been entitled to enter, stay and work in other EU states since 1968, but until 1995 they could still be obliged to show their passport at the internal borders. Now they did no longer need to slow down or stop at the border. This was a major improvement, especially for EU citizens of immigrant origin. EU citizens visibly not of European origin no longer were confronted with the high risk of being stopped and have their car searched at each border during their travel within Europe. Schengen ended this highly visible form of racial discrimination by public officials at the internal borders and in cross border trains.

Non-EU nationals were granted the right to travel in the Schengen area and stay in each Schengen country for up to 3months ("right to circulation"), if they have a residence permit or a visa in one Schengen country. This allowed those third-country nationals to visit relatives and look for opportunities to work or study in other Schengen states. This form of free movement existed already for decades within the Benelux. Lawfully resident third-country nationals no longer needed to apply for one or more visa for each holiday visit abroad.

Between 1995 and 2001 Portugal, Spain, Italy, Greece and the five Nordic countries joined the Schengen group. In 2007, nine of the 2004 Member States were admitted. After a referendum on the issue Switzerland joined once it had been encircled by Schengen states. Since 2011 the Schengen area consists of 26 countries: 22 EU states and four non-EU states (Norway, Iceland, Switzerland and Liechtenstein). Six EU Member States do not participate. The UK and Ireland, having their common travel area, choose to stay outside. Three Member States (Bulgaria, Rumania and Croatia) are not admitted due to the opposition of some states claiming flows in the rule of law and the level of corruption in those countries. The partial occupation of Cyprus is a barrier for the application of Schengen rules in that country. The extension of the Schengen area from the original five to the current 26 countries also considerably extended the number of persons who could profit from the freedom to travel in the area. The "price" of this increase freedom is paid in more competence for and cooperation between police and criminal justice organisation ("compensatory measures"), the storage of data on millions of persons in the new EU immigration data systems and more strict control at the external borders.

Schengen external borders and Frontex

After the actual incorporation of the Schengen "acquis", its rules and institutions, in the EU framework in 1999, Member States started informal exchange of information between the heads of their national border guards. In 2004, worries about the low level of control at certain points of the external Schengen border in some Member States and opposition to EU control at those borders, resulted in the establishment of a new EU agency, a not unusual compromise solution in the EU. This agency (Frontex) was entrusted with the "management of operational cooperation at the external borders" (EU Regulation 2007/2004). Two years later, the intergovernmental Schengen rules on controls at internal and external borders and on police controls in border zones were codified in the Schengen Border Code of 2006 (EU Regulation 562/2006). This code was repeatedly changed, reflecting the constant political debate on control of the external borders, and finally replaced by a new code in 2016 (EU Regulation 2016/399).

Frontex became active in coordinating the support of border guards in problem areas with personnel and material from other Member State. The agency also coordinated maritime operations by EU naval and coast guard ships in the Mediterranean. In 2016, the competences of Frontex were extended and its name changed into European Border and Coast Guard Agency (EU Regulation 2016/1624; Carrera and Den Hertog 2016). A proposal by the European Commission in 2018 to establish a 10,000 border guard under Frontex aegis met with strong opposition from Member States. The resistance of Member States against EU influence in their guarding of "their" stretch of the common external border is reflected in the fact that the EU's monitoring of the national control at external borders until 2015 was based on the intergovernmental Schengen rules. Basically, it consisted of infrequent peer-review by border guards of other Member States resulting in recommendations in secret reports. After conflicts between France and Italy and other Member States complaining about the low level of controls, stricter rules on monitoring controls at the external borders, organised by the Commission with participation of Frontex were adopted in 2013 (EU Regulation 1053/2013). Each Member State will

be evaluated at least once in 5 years. The Commission is now entitled to schedule unannounced on-site visits in Member States. The Parliament regularly gets information on visits, reports and Member States actions on the recommendations in those reports. There is more EU input and the results are at least partially in the public domain. This new way of monitoring became fully operational for the first time in 2015, a few months before the sharp increase of Syrian refugees arriving at the external and internal borders (Guild et al. 2016).

Temporary reintroduction of controls and substitute controls at internal Schengen borders

The 1990 Schengen agreement stated: "Internal borders may be crossed at any point without any checks on persons being carried out." The 2006 Schengen Border Code specified that this basic rule applied "irrespective of the nationality" of the persons crossing the border. Both instruments explicitly allowed for police controls on whole territory of the states and national rules obliging persons to carry and produce IDs or other documents. After 1995, most Member States could not resist the temptation to introduce substitute controls by border guards or police just behind the borders or in border zones or introduced systematic observation by automatic cameras above highways just after the internal border (Groenendijk 2004; Guild et al. 2015; Van der Woude and van der Leun 2017; Barbero 2018; Eyrard et al. 2018). In some Member States "Schengen" was used to legitimize the introduction of the obligation for all persons to carry ID's. In an effort to honour both the wish to grant persons the freedom to move across the borders and the desire to control the movement of those persons, the Schengen Border Code provides that such police controls should not have an effect equivalent to border checks, not have border control as an objective, not be similar to systematic checks at the external borders and only be carried out on the basis of spot-checks. The Court of Justice held that Member States should take those restrictions on substitute "police" checks seriously. After the terrorist attacks in Paris in 2015 and Brussels in 2016, some Members obliged drivers of coaches crossing internal borders to check the ID's of all passengers when entering the coach. The Court ruled that the Schengen Border Code did not permit such systematic checks.[5]

Schengen states may for a limited period reintroduce checks at the internal border if required by public policy or national security. The other states and the European Commission have to be consulted in advance or to be informed afterwards in case immediate re-introduction of controls is required. Until 2015, such temporary reintroduction of controls occurred a few time a year in a few Schengen states, usually at the occasion of meetings of political leaders (European Council, G8 or NATO), at European Football Championships or when the Spanish king was skiing in the Pyrenees, rarely in relation with immigration control or suspected criminal activity. Usually such exceptional controls lasted a few days or weeks (Groenendijk 2004).

A conflict between France and Italy in 2011 over the arrival of Tunisians asylum seekers in Italy who moved on to France on the basis of temporary residence permits granted in Italy, triggered French controls at the border between Menton and Ventimiglia (Carrera et al. 2011; Basilien-Gainche 2011). The same year Denmark developed a plan to intensify customs controls at internal borders which it eventually shelved. Both actions aimed at introducing more "intergovernmentalism" into the Schengen system and reduce its EU law character. The Commission reacted to these attempts by proposing to redefine the conditions under which temporary controls may be introduced at the internal borders and extend the Commission's supervision on the use of this power and on the controls at external borders by Member States. The EU legislator agreed to this move, which clearly increased the involvement of EU institutions in this field by adopting a new Schengen Border Code in 2013.

These new rules were tested when in 2015 in reaction to the arrival of large numbers of refugees from Syria several Schengen states (Austria, Germany, Denmark, Norway and Sweden) introduced temporary controls at crucial border points. France in reaction to the terrorist attacks in Paris re-introduced controls at all internal borders under the state of emergency. The states regularly reported about the introduction, results and extensions of these measures to the Commission, which almost always held this use of exceptional powers to be justified (Guild a.o. 2016). Some of those "temporary" controls at internal borders continued for years even after sharp drop in the number of asylum seekers after the 2016 EU-Turkey Deal. They were still in place at the German-Austrian border in 2019. The Court of Justice held that France could not treat the internal border with Spain, where controls had been "temporarily" reintroduced, as an external Schengen border. Thus, France could not expel an undocumented third-country national arrested in the zone behind that border to Spain but under EU law had to expel the person outside the Schengen area.[6]

Free movement and post Amsterdam directives on legal migration

A decade after the Schengen rules entered into force, the third relevant set of rules on movement and residence of persons from outside the EU were adopted after 2003 on the basis of new competences granted by the Member States to the EU in the Treaty of Amsterdam. These EU directives relating to their admission, their rights after admission and the expulsion of those without permission to stay. In this chapter, we focus on the intra-EU mobility of third-country nationals and the two directives with the largest influence on practice, those on family reunification and on long-term residents.

Intra-EU mobility for third-country nationals

Short history. Since the 1960s, the rules on free movement grant EU nationals the right to work and live in other Member States. These rules also apply to their family members with the nationality of a non-EU state. Those family members could accompany the EU worker or self-employed person. They are entitled to work in the other Member State as well. The rights of those family members are not autonomous rights. They are dependent on the relationship with the EU national and his or her presence in the other Member State. When in 1995, the controls at internal borders were abolished in the Schengen area all third-country nationals (TCN) with a valid visa or residence permit of a Schengen state were granted the right to travel to other Schengen states for up to 3 months, not the right to work. They can only work and live in the state which issued the residence permit. This also applies to Turkish workers and their family members with a privileged residence and employment status under the EEC-Turkey Association Agreement. That privileged status is restricted to one Member State only. Restricting a considerable number of workers to employment in one Member State contradicts the idea of a Single Market for goods, capital and persons, established in the EU in 1992 (Inglesias Sánchez 2009).

In the 1997 Amsterdam Treaty, the Member States created a new competence for the Union to make binding rules on the right of third-country nationals lawfully resident in one Member State to reside in other Member States.[7] An exception was made for admission of workers from outside the EU. At German insistence Member States retained the competence to decide on the number of workers who are admitted.[8] The migration and asylum directives adopted after 2000 grant third-country nationals adopted for other purpose access to employment but only in the Member State of admittance. Directive 2003/109 on the status of long-term resident

third-country nationals, discussed in para. 5.3, contained the first exception to this rule. It allows persons with the EU LTR status a conditional right to live and work with their family members in another Member States. Over the years, the intra EU mobility of third-country nationals was expanded with small steps.

The quest for highly qualified workers from outside the EU. The first directives on admission of students from outside the EU (2004) and on admission of researchers from third countries (2005) provided for limited intra-EU mobility.[9] The Students Directive was part of an EU programme to promote Europe as "a world centre of excellence for studies" and stimulate third-country nationals to come to the EU for study. That directive granted third-country national students also the right to work for at least ten hours a week after their first year. Several Member States allowed the students after graduation time to look for employment in that Member State, thus allowing employers to select the best and the brightest for their labour force. This national practice was codified in EU law in 2016 in the new directive on admission of students from outside the EU which grants a minimum of 9 months period to look for employment after graduation.[10] The mobility clause in the 2005 Researchers Directive was related to the Lisbon Strategy aimed at making the EU by 2010 "the most competitive and dynamic knowledge-based economy in the world capable of sustainable economic growth with more and better jobs and greater social cohesion". Both directives required third-country nationals intending to stay more than 3 months in another Member State to file a new application for a residence permit in that second state. Bringing family members also required permission of the second Member State. These requirements seriously reduced the practical effect of these early EU provisions on intra-EU mobility. In practice, most non-EU student and researchers preferred using their right to travel within the Schengen area and stay up to 3 months in another Schengen state.

The Blue Card: Myth and dilemma. When it became evident that the goals of the Lisbon Strategy would not be achieved in 2010 and the deadline was extended to 2020, the EU decided to make a set of rules on the admission of highly qualified workers. In 2009, the Blue Card Directive 2009/51 established a new EU status and residence card (the Blue Card) for highly qualified workers from third countries. This directive provided elaborated rules intended to make the EU more attractive for highly qualified workers from outside the EU, among others by fast-track admission procedures, easy family reunification and greater mobility within the EU. Highly qualified workers admitted in one Member State may after 18 months move to a second Member State. They are entitled to bring their family members to that state. Periods of residence in both states can be accumulated for the 5 years required for the long-term residence status, but the workers still have to apply for a separate residence permit in the second state. That application may be refused on labour market grounds. The directive explicitly allows Member States to operate their own national schemes for admission of highly qualified workers from outside the EU. In practice, most qualified workers are admitted on the basis of those national rules rather than the rules of Directive 2009/51. The national rules, however, cannot provide a basis for intra-EU mobility of the admitted workers. All 25 Member States bound by this directive duly implemented the EU rules in their legislation, but the majority continued operating their parallel national schemes.[11]

Germany is the only Member State issuing Blue Cards on a large scale. In 2017, it issued 20,500 Blue Cards. The other 24 Member States bound by the directive together issued 3,800 Blue Cards and more than 25,000 national permits for highly qualified workers.[12] Most Member States and highly qualified workers, apparently, prefer the more liberal and flexible national rules. Due to the low numbers of Blue Cards issued and the national immigration rules in potential second Member States, the intra-EU mobility rules of the Blue Card holders exist mainly on paper and in political and academic debates. In 2014, the newly appointed President

of the European Commission Juncker made revision of the Blue Card Directive a spearhead of his policy programme. The 2016 proposal for the recast of the directive which would have abolished the parallel national schemes and widened the definition of highly qualified worker by lowering the income requirement, however, is blocked in the Council since early 2018.[13] Several Member States are not ready to accept the proposed limitation of their competence to make national rules on this issue. They prefer to continue the competition for highly qualified workers between Member States.

More liberal rules in recent directives. In 2014, a directive on intra corporate transferees was adopted and a new directive on students and researchers from outside the EU in 2016. Both directives provide detailed rules on mobility within the EU, granting students a right to study for a year and to researcher to work for 6 months in another Member State during the validity of their residence permit in the first Member State. Students and researchers only have to inform the immigration authorities in the second state about their movement. For long-term mobility a permit in the second Member State is still required. Family members have the right to accompany the researcher.[14] The practical effect of this liberalisation of mobility is yet unknown.

All three directives with detailed rules on intra-EU mobility primarily concern workers or students with higher education, high qualifications or considerable salaries. No rules on intra-EU mobility are to be found in the Single Permit Directive of 2011/98 covering all lawfully employed third-country nationals (Groenendijk 2015). This also applies to the 2016 directive on admission for seasonal work, generally performed by less qualified workers. From a comparative study in 2013, it appears that the registered mobility of third-country nationals from other EU countries slowly increased, but is very small compared to the intra-EU movement of EU nationals (European Commission 2013).

Naturalisation as a path to intra-EU mobility. Since rules on mobility in EU directives are either made non-operational by national law or blocked by administrative barriers, settled non-EU immigrants use two other avenues to mobility within the EU: Firstly their right to travel in Schengen area as a way to look for employment possibilities and, secondly, acquisition of the nationality of the Member State of residence. With naturalisation, they acquire full free movement rights not restricted by conditions for intra-EU mobility in the EU migration directives. Naturalisation, moreover, is a road to mobility to EU Member States which are not bound by those directives or are outside the Schengen area (Denmark, Ireland and the UK). In 2011, more than 200,000 EU citizens who were naturalised in another Member States were living in the UK. Two-thirds of those mobile EU citizens were born in Africa, the Middle East or Asia, among them 15,000 Somali-Dutch nationals, equivalent to one-third of the Somali population resident in the Netherlands. Similar relocation patterns of migrants from Sri Lanka, Iraq, Afghanistan and Nigeria from Denmark, Sweden and Germany to the UK and to other Member States are well documented (Van Liempt 2011a; Ahrens et al. 2016; De Hoon, Vink, and Schmeets 2019).

The reasons why immigrants are moving to another Member State vary: Better employment opportunities, the anti-immigrant climate or policies in the first Member State, the possibility to live within a larger co-ethnic immigrant community or as correction to the Dublin system which trapped the refugee in another Member State than the one of his preference (Van Liempt 2011a; Ahrens et al. 2016). For immigrants at the lower end of the labour market, which are explicitly or implicitly excluded from the EU employment directives, naturalisation will be the only alternative to irregular migration to the preferred Member State. The relative attractiveness of these avenues depends on national rules and practices on naturalisation. Most Member States apply residence and language or integration requirements. Some have income requirements. Some of these new EU citizens sooner or later return to the country of

their nationality or move on to elsewhere in the EU. The latter ones may perceive themselves primarily as EU citizens. A young Somali-Dutch in the UK in an anthropological study of these mobile Union nationals is quoted as saying: "Nobody can tell me where to go, what to do. I am an EU citizen." (Van Liempt 2011b). For settled immigrants, naturalisation may function as a shield against expulsion, a source of security or as an opportunity for further mobility (Della Puppa and Sredanovic 2017).

In the directives on legal migration, intra-EU mobility often is not a right but depends on the permission of authorities in the second Member State (Pascouau 2014). The 2016 directive on students and researchers is the first one creating a right to stay elsewhere in the EU, 6 months for researchers and up to for 12 months for students. Immigrants from outside the EU are well aware that for EU nationals, irrespective of their place of birth or their ethnic origin, mobility to other Member States is a right. From the available statistical data, it appears that in the first two decades after 2000 acquisition of the nationality of a Member State as a pathway to intra-EU mobility was used far more often than the limited possibilities in the EU migration directives.

Family reunification directive

History. Most immigrants from outside the EU are admitted for employment, family reunification, study or asylum. Between 2008 and 2017, the yearly number of first residence permits issued in the EU-28 for family reunification varied between 670,000 and 830,000, representing roughly between a quarter and one-third of all first permits issued to non-EU citizens migrating to the EU. Of the 18.5 million third-country nationals holding a valid residence permit in the EU-25 bound by the legal migration directives at the end of 2017, almost 40% held a permit for family reasons.[15]

Directive 2003/86 on the right to family reunification[16] was the first directive on legal migration to the EU adopted on the basis of the new competence the Member States granted to the EU in the 1997 Treaty of Amsterdam. It is also the first international instrument granting a right to family reunification. Since the mid 1980's the right to family life in Article 8 of the European Convention on Human Rights had been interpreted by the ECtHR in Strasbourg as providing protection against expulsion of admitted family members in exceptional cases. However, if a family could live together somewhere else in the world or family members caused separation by voluntary migration, the ECtHR hardly ever found that states were obliged to admit family members.

Negotiations. The Commission made its first proposal for the directive in 1999. Early in the negotiations Member States tried to insert their national rules in the proposed text. Later, amendments aimed at avoiding obligations for Member States to change their national rules or creating room in the directive for national policy plans. The Commission twice introduced an amended proposal in order to overcome opposition in the Council.[17] On several issues Germany, Austria and the Netherlands proposed restrictive amendments, whilst France, Spain and Sweden were defending the rights of migrants. Due to pressure by Member States, the level of rights was reduced and many clauses allowing states to make exceptions or apply national law were introduced (Menz 2011). Adoption of the directive at that time required unanimity in the Council. This increased the possibility for Member States to make the others accept their amendments. Most delegations in the end practiced the non-intervention principle, by not opposing proposals from other delegations which reduced the standards and increased national discretion (Bonjour and Block 2013; Groenendijk and Strik 2018; De Somer 2019).

At that time, the Parliament was not yet co-legislator in this field. But, the Commission inserted some amendments proposed by the Parliament in its second proposal. Shortly after the

directive was adopted by the Council, the Parliament started a case before the Court of Justice about the compatibility of the directive with Article 8 ECHR. The Parliament lost, but the Court used the opportunity to explicitly confirm that directive provided a subjective right to family reunification which clearly went beyond Article 8 ECHR.[18]

Aims and conditions. The establishment of a right to family reunification aimed at supporting the integration of immigrants from outside the EU "which serves to promote economic and social cohesion, a fundamental objective" of the EU (recital 4). This strategy of stimulating their integration by allowing migrant workers to bring their spouses and children and allow family members equal access to the labour market and education has been part of the first EEC rules on free movement since 1961. This model now was applied to immigrants from third countries, but in a more restrictive form. Once the migrant has a renewable residence permit valid for at least one year, sufficient income, a health insurance and suitable accommodation, he is entitled to bring the members of his core family (spouse and minor children). An integration condition was added at initiative of Austria, supported by the Netherland and Germany in order to create room for the introduction of a pre-entry integration test or an obligatory integration course for family members after admission (Groenendijk and Strik 2018; De Somer 2019). The rules for family reunification of *mobile* EU citizens are clearly more favourable than those of Directive 2003/86. EU citizens can bring, once they have a job in another Member State, more family members (registered partners, children until the age of 21 years and dependant parents) without further income, housing or integration requirements.

Limits to restrictive implementation and practice. The plan for the directive originated in the late 1990s. At the time of adoption (2003) and even more so by the time Member States had to implement the directive in their national law (2005), the political climate with regard to immigrants had changed. These changes were triggered by the attacks of 11 September 2001, the invasion in Iraq in 2003 and the large scale riots in the French *banlieus* in 2005. This more restrictive attitude towards family reunification continued in the next decade. The impact of this change on the reception and implementation of the directive can be illustrated by the developments in the Netherlands.

During the negotiations on the proposal for this directive (2000–2003) the political composition the Dutch coalition government changed twice: From a centre-left to a centre-right and then to a short-lived right government with ministers from an openly anti-immigrant party (LPF). These changes were reflected in a change of positions taken by the Dutch delegation in the EU Council of Ministers: From reinforcing rights of migrants to introducing an integration condition and creating room for more restrictive national rules. A centre-right government used the transposition as an opportunity to introduce new restrictions in Dutch rules on family reunification and immigration law generally, such as the 120% income requirement, increasing the minimum age for reunification of spouses to 21 years and widening the possibilities for expulsion after a criminal conviction.[19] A pre-entry integration exam was introduced primarily with the aim to discourage children of Turkish and Moroccan immigrants to marry partners living in those countries (De Vries 2013).

The dual role of the Commission. During the first 5 years, in all cases where immigrants explicitly argued that the directive entitled them to family reunification the highest administrative court in the Netherlands either held that the directive was not applicable or interpreted the directive to be compatible with current Dutch law or practice. This court visibly took the directive serious for the first time in 2008, when asking the EU Court of Justice whether the 120% income requirement was compatible with the directive. This first reference, apparently, was triggered by the critical remarks by the Commission on this requirement in its first report on the implementation of the directive published 3 months earlier. The EU Court in 2010 decided in

the Chakroun judgment that the requirement violated the directive.[20] The directive left far less room for restrictive national policies than the Dutch delegation had expected at its adoption. In the same year, a new centre-right minority government, depending in parliament on the votes of Geert Wilders Party (PVV), in its coalition agreement announced a range of proposals to further restrict family reunification. Most proposals were incompatible with the directive and hence remained on paper. Only the proposed measures, which did not violate the directive, were implemented. The Dutch national rules on family reunification were levelled down to the standards in the directive. At that time the Dutch government started to lobby other Member States and the Commission for a restrictive revision of the directive (Ministry of Interior 2011; De Somer 2019).

The Commission reacted by publishing a Green Paper on the right to family reunification and organizing a public consultation inviting Member States, NGOs and stakeholders to answer a series of questions on the directive.[21] The Netherlands received little support for their plans from other Member States. They stressed that integration was a national competence, voiced a preference for less restrictive integration measures and preferred no further involvement of the EU on this issue. These reactions made the Commission decide not to propose amendments to the directive but rather ensure implementation of the existing rules by starting infringement procedures and by producing guidelines on issues Member States had identified as problematic. The Commission did start infringement procedures against Germany, the Netherlands and Austria. All three cases concerned the new language or integration test abroad. Only the case against Germany reached the phase of a public notice of non-compliance.[22] All three cases were settled after the Member States made some concessions (Groenendijk and Strik 2018, pp. 376–378). The Guidelines were published in 2014.[23] In its second report on the implementation of the directive in 2019, the Commission again choose to focus on monitoring implementation, infringement procedures and did not propose to amend the directive.[24]

National courts reluctant at first and differences between Member States. After the 2010 Chakroun judgment of the EU Court, it took several more years before Dutch courts started to take the directive and apply the case law of the EU Court seriously in practice. From 2014 on, the highest administrative court several times held Dutch rules on family reunification or the way those rules were applied by the immigration service to be incompatible with the directive. Moreover, this court made six references to the EU Court of Justice asking for interpretation of clauses in the directive. Three District Courts made references to the EU Court on issues where they disagreed with restrictive interpretations of the directive given by the highest court. In two cases the EU Court confirmed the more liberal interpretation proposed by the District Courts.[25] In the third case, the government quickly issued a visa to avoid an unwelcome judgment by EU Court on the integration exam abroad.[26]

It took 10 years after its adoption before the directive was accepted and taken seriously as the prevailing law by national courts. A side-effect of this prolonged "battle" around the directive is that ten references to the Court of Justice asking for interpretation of this directive until 2019 were made by Dutch courts. The other seven references came from five different Member States: Three were made by German courts, all on the language test abroad, and one reference by a court from Austria, Belgium, Hungary and Spain each. The relatively high number of cases from the Netherlands can be explained by the combination of a parliamentary majority for restrictive application of the directive, active lawyers and NGOs, and well-informed judges inclined to take EU law serious. The relatively few references from other Member States may reflect a more limited role of the directive in the family reunification practice in those states. The structure of the immigration service also influences the role of the directive. In the centralised Dutch IND with its systematic internal controls the directive and the CJEU case law are applied either

mechanically according to the written practice instructions or not at all, whilst in the decentralised German *Ausländerbehörde* reference to the CJEU case law occurs more hap-hazard, mainly in cases where the civil servant is not satisfied with the result of the application of the national rules (Dörrenbächer 2018 chapter 5).

The above illustrates the limited role of the Parliament in the field of migration before the Lisbon Treaty entered into force in 2009 and the considerable role of the Commission and the Court in both restricting and legitimizing the national policies and practices in the field of migration (Bonjour and Block 2013; De Somer 2019).

Effects of the directive. The EU provided several fora for exchange between civil servants of their experiences with national family reunification policies: The negotiations on the directive in the Council working groups, the meetings of the Contact Committee convened by the Commission to discuss the national implementation and in cases before the Court on the interpretation of the directive. Rules introduced by one Member State during the negotiations were copied by other Member States at the transposition or later. Examples are the integration test abroad or the rule that refugees have to apply for family reunification within 3 months after receiving the refugee status. Before 2003, the latter rule existed only in one Member State. In 2017, it was in force in 17 Member States.

The EU legislator did not aim at full harmonisation of national law. The directive sets minimum rules and explicitly allows more favourable national rules. In several Member States the directive introduced the right to family reunification, in others the directive provided the occasion to reduce the level of the national rule at the time of transposition or later. The protection of individual rights provided by the directive is nicely illustrated by a comparison with the rules on family reunification in Denmark and the UK. Both countries are not bound by the minimum standards of the directive. The very high fees and income requirement in the UK, which de facto block reunification for a large share of immigrant sponsors, and the Danish minimum age of 24 years for spouses and the discretionary requirement that the aggregate ties of the couple with Denmark have to be stronger than with a third country, all would be unlawful in Member States bound by the directive. In some Member States, the directive functioned as a barrier to extreme anti-immigrant political agenda and it protected the family life for groups formally outside its personal scope, such as static EU nationals and beneficiaries of subsidiary protection.

The EU long-term residents' status: Between alien and citizen

History. The Directive on the status of long-term resident (LTR) nationals of third countries was adopted by the Council a few months after the Family Reunification Directive. Its adoption illustrates how the EU gradually took over tasks from the Council of Europe, which over decades dealt with immigrant integration. Between 1955 and 2000, the Council of Europe produced a series of binding agreements and other legal instruments aiming to support immigration integration. The EU Council in 1996 adopted a non-binding resolution on the status of long-term residents. Shortly after the Amsterdam Treaty entered into force, the European Council in Tampere in 1999 instructed the Commission to prepare a legislative initiative, resulting in a comparative study (Groenendijk et al. 2001) and the 2001 proposal for this directive.[27]

Aims and negotiations. The two main aims of the directive are to assist the integration of non-EU long term immigrants by approximating their legal status ("as near as possible") to the status of EU citizens and contribute to the effective attainment of an internal market as an area in which the free movement of persons is ensured.[28] The Commission when drafting the LTR status used the rules on free movement of EU citizens as a model. During the negotiations in the Council, the Member States at several points reduced the rights attached to the new LTR status.

They disagreed on whether integration should be a right of the LTR or reaching a certain level of integration should be a condition for acquisition of the LTR status. Germany, Netherlands and Austria proposed to introduce integration conditions. France opposed this proposal arguing that 5 years of lawful residence was sufficient indication for the integration of immigrants.[29] The attacks of 11 September 2001 and the US lead invasion in Iraq early 2003, security consideration and increasing anti-Muslim sentiments in Member States made the first perspective prevail in the Council. The Parliament could only give its advice on the proposal. It had no visible influence on the final text. The directive was adopted in November 2003.[30] Denmark, Ireland and the UK are not bound by the directive.

Main elements. Directive 2003/109 grants LTRs an enforceable right to the EU status, a secure residence status after 5 years, national treatment in education, employment and many other fields and a conditional right to live and work in other Member States (Boelaert-Suominen 2005; Halleskov 2005; Acosta 2011; Groenendijk 2012; Thym 2016). The directive established the EU residence permit for long-term resident third-country nationals. This is a major difference with the Family Reunification Directive which creates no EU status, but establishes an enforceable right to family reunification and sets common minimum standards for the national rules on family reunification. The LTR directive allows Member States to continue operating parallel national permanent residence status, granting more rights. Those national permanent residence statuses, however, do not allow for mobility to other Member States.

In 2011, the *personal scope* of the directive was extended to refugees.[31] The directive now covers three of the four major immigrant groups: Labour migrants, family members and persons with international protection. Only third-country nationals admitted for temporary purposes and students are excluded. If a student later on is admitted for another purpose, half of his residence as a student counts for the 5 years residence requirement. Member States cannot exclude immigrants from the status by indefinitely extending temporary residence permits.[32]

Acquisition and loss of the EU status in the first Member State. The three mandatory conditions for acquiring the status are 5 years of lawful residence in a Member State, sufficient income and health insurance. Member States may apply an integration condition. Three conditions are mandatory because the EU status also creates rights for LTRs in other Member States. In practice, Member States tend to interpret the conditions restrictively and, disregarding EU law, create additional conditions and barriers in their national law. The EU Court of Justice blocked that tendency with regard to high fees, disproportional requirements on income stability and excessive integration conditions.[33]

The EU status can be lost on five grounds: Fraudulent acquisition, absence from the EU for more than one year, acquisition of the status in another Member State, loss of international protections status or an expulsion decision in accordance with Article 12 of the directive. Expulsion is possibly only in case of serious threat to public policy and public security, not on economic grounds. In this respect, the status approximates the status of EU citizens.

Main differences with EU free movement status. The LTR status is comparable but not equal to the rights of EU citizens under the rules on free movement. Important differences are that the right of LTRs to work in other Member States can be restricted by a labour market test, family reunification is limited to the spouse and minor children and the status is not automatically acquired but only on basis of a decision of the immigration service. Moreover, the equal treatment of LTR in certain fields (scholarship, social security and jobs in the public service) may be restricted. Finally, the residence rights of EU citizens are more secure than for LTR: For EU citizens fewer grounds for loss of right residence apply (Peers 2004; Boelaert-Suominen 2005; Halleskov 2005).

Is the LTR permit a European denizenship? The Swedish political scientist Thomas Hammar revived the word *denizen* to designate long-term resident non-citizens with many but not all of the entitlements of citizenship (Hammar 1989). He used the term for long-term immigrants with a permanent residence permit being unable or unwilling to acquire the nationality of their country of residence. The EU LTR status qualifies as a form of *denizenship*. Its introduction triggered an academic debate whether this new status was an incipient European citizenship, a post-national membership or a European *denizenship*, a temporary status on the way to full Union citizenship (Acosta 2011). Opponents of this new EU status often asked: Why do these long-term immigrants not simply apply for naturalisation? This question disregards the considerable barriers to naturalisation in national law and in the mind of immigrants. The question does raise the issue of the relationship between the LTR status and full citizenship.

Reluctant transposition. Member States were slow in transposing the directive in their national law. The Commission started 30 infringement procedures against Member State for late transposition of the 2003 directive or its 2011 extension to refugees. Most Member States maintained issuing national permanent residence status. In 14 Member States integration conditions were introduced. Before the adoption of the directive a language condition for the permanent residence permit existed only in Germany (Böcker and Strik 2011). Some states introduced additional requirements not permitted under the directive.[34] Only a few Member States introduced favourable rules for admission of LTR from other Member States. The others continued to apply their national rules on admission of workers and students to the LTR from other Member States, reducing the effect of the directive's chapter on intra-EU mobility or in practice block the admission of LTRs who received the EU status in another Member State (Della Torre and De Lange 2018).

Differences in application. Eurostat data reveal considerable differences in application between Member States. Germany, France and Belgium duly transposed the directive in their national law. But in Germany and Belgium less than 1% and in France less than 3% of the LTR acquired the EU status, 97% or more obtained the national status. In Austria, Estonia, Italy, Romania, Latvia, Finland, and Slovenia more than 90% of LTR third-country nationals acquired the EU-status.[35] Do these differences reflect preferences of migrants, a low level of information among immigrants or the attitude of immigration authorities or national policies? Why would almost all Turkish immigrants settled in Austria be interested in acquiring the EU status and Turkish immigrants in Germany not at all? Differences in access to the nationality of the country of residence could explain the differences for some states (Beutke 2015). The status could be less attractive for LTR living in countries which allow dual nationality. Austria, the Czech Republic and Estonia do not allow dual nationality and have an extremely low naturalisation ratio.[36] In those countries, the rate of acquisition of the LTR status is high. The differences in use of the status between Member States appear to primarily reflect political choices, national rules or administrative practices setting the opportunity structure for long-term immigrants.

Unexpected functions of the EU LTR status. In Estonia and Slovenia, the LTR directive played an important role in creating a secure residence status for ethnic minorities which did not acquire the nationality when those countries became independent. In Estonia, a large segment of the Russian speaking population received this EU status. Several years after the independence of Slovenia, the registration of residents born in other ex-Yugoslav republics was "erased" from the civil registration which made their residence illegal. After the European Court of Human Rights held this treatment to be in violation of the European Convention of Human Rights,[37] Slovenia granted the EU LTR status to these long-term residents. In both cases the EU LTR status functioned for members of an ethnic minority as a permanent *denizenship* status where access to nationality of the country of residence was blocked. The status contributed to political

and social stability in the country and secured rights based on long lawful residence for the individuals concerned. In December 2018, the Commission stated that this directive should play a central role in creating a secure status for the one million UK nationals living in the EU in case of a No-Deal Brexit.[38] Few participants in the legislative process will have anticipated this function of the directive.

The role of EU institutions and Member States after implementation. The high number of infringement cases against Member States for late transposition of the directive, the tendency of certain Member States to interpret and apply the directive in a restrictive way and the role of the Court in setting limits to these practices were already mentioned. The Commission started only five infringement procedures for incorrect applications of Directive which reached the public stage of a formal notice of non-compliance: Against the Netherlands (high fees for the EU permit), against Cyprus (exclusion of low paid migrant workers), twice against Italy (equal treatment) and against Bulgaria (high fees). From the 2019 second report on the implementation of the directive it appears that the Commission in recent years started a range of so-called Pilot cases, asking Member States to explain their national law and, where necessary, to stop incorrect application of the directive. Apparently, many of these actions were successful.[39] The Pilots, the informal first phase of the infringement procedures and the negotiations with Member States all take place behind closed doors. So far, only one infringement procedure reached the Court: The case on the high fees in the Netherland. The 2012 judgment of the Court of Justice in this case had beneficial effects for TCN in Belgium, Bulgaria, Greece and Italy as well.[40]

Effects of Directive 2003/109. By 2011, 5 years after the directive should have been implemented by Member States, one million EU LTR status had been issued in the 25 Member States bound by the directive. In 2017, almost one-third of the more than ten million LTR third-country nationals in the EU had obtained the secure EU status. The others held the national permanent status. The EU denizen status precludes that their residence status would remain "temporary" forever. The secure status supports their integration in the Member State of residence.

In several Member States acceding to the EU in 2004 and 2007 the directive introduced a status for LTR, because national law did not provide for a permanent status or the law was not applied in practice. In Austria, Italy and Luxemburg the EU LTR status de facto replaced the national status. In other states, the EU status is competing with the national status or is neglected by national immigration authorities. In Sweden, the relatively easy acquisition of Swedish nationality for immigrants could be an attractive alternative. In some Member States (e.g. Cyprus and Poland) Directive 2003/109 primarily functions for highly educated migrants or those with national residence permits for more than one year (Vankova 2018). For workers with less education it is, generally, far more difficult to acquire the EU status due to the income requirement and their often temporary or unstable jobs. Moreover, in some states cooperation of the employer is essential for the required documentation.

Conclusion

The three sets of rules on free movement were top-down political decisions. They were primarily based on economic considerations (reduce unemployment and development of internal market) and on security considerations (political stability and integration of immigrants). The Schengen project also intended to "bring Europe closer to the citizens". In all three cases, a long transitional or preparatory period between the crucial political decision and the actual implementation in practice allowed both the individuals and the national institutions concerned to get used the new situation and its effect: 1957–1968 for the free movement of

workers, 1985–1995 for Schengen and from 2003 (adoption of migration directives) till after 2010 when national courts started to take these directives seriously and make references to the Court of Justice.

The free movement of Union citizens, Schengen and the directives on legal migration of third-country national clearly increased the rights and freedoms of individuals. Since 1961 tens of million EU nationals have used their freedom of movement to escape discrimination, poverty or unemployment: Both lower skilled and highly qualified workers, Roma from Central Europe, over three million Erasmus students since 1887 and many unemployed academics from Southern Member States after the 2008 financial crisis. Millions of persons use their freedom to travel in Schengen area without controls between Lisbon and Oslo or Helsinki each year since 1995. After 2005 millions of third-country nationals used their EU right to family reunification and more than three million long-term resident nationals of third countries acquired a secure EU residence status.

These measures clearly reduced the powers, competences and grip of state institutions on migrating citizens and non-citizens. This loss of power over individuals was "compensated" by the development of massive data systems, first the under Schengen rules and later under the EU rules on asylum, visa and borders, creating new powers and access to personal data on very large numbers of third-country nationals and Union citizens, complemented by intensive camera controls behind the borders on the basis of national rules. Surveillance by data systems and camera's and more strict control at the external borders were part of the price for the freedom of movement.

The basic tension between, on the one hand, the need for clause cooperation and common EU rules concerning immigration and, on the other hand, the unwillingness to give up sovereignty and the fears of losing identity within Member States remains unsolved. The dilemma is at the bottom of many political and legal conflicts. The second dilemma: Measures based on the wish to control immigrants ("migration management") often have direct counterproductive effects on the other professed aim of immigrant integration. Both the free movement of EU citizens and the legal migration directives are programmes where immigrant integration prevailed at the expense of controlling migrants. In the Schengen cooperation, the immigrant integration is less visible and dominant. The highly symbolic decision to end systematic controls at the internal borders was linked with a new set of legal and technical control instruments. The visible lack of effective controls at the external borders of the Schengen area undermined the legitimacy of that project. The abolition of controls at internal borders has not fundamentally enhanced intra-EU mobility of TCN. Most of the 20 million TCN lawfully living in the EU are still confined to live and work in one Member State. They may travel to the other Schengen states. Only a few select categories of highly qualified workers are entitled to work in the other states. New draconic immigration sanctions are planned to keep TCN in "their" Member State on penalty of not acquiring a secure residence status. In practice, naturalisation in the Member State of residence is the main road out of this prison with open doors situation.

The partial harmonisation of migration law implied in the adoption of common rules did not result in uniform practice in Member States. Due to differences in geographical location, colonial and migration history, labour market situation, national political situation and administrative structure of the immigration services, the effect of the common EU rules in practice varies considerably between Member States.

Moreover, all Member States have a tendency to defend their national immigration law and practice against the new EU migration rules. This tendency results in further delaying the actual effects of the EU rules after the transitional periods. The Commission, the Court of Justice and

national courts have played an important role in forcing Member States to take the EU rules on free movement and on migration of TCN serious in practice.

Finally, EU rules of free movement had wider effects both inside and outside the EU. The rules on EU workers served as a model for the rights and the integration of Turkish workers, the largest group of third-country nationals living in the EU. The granting of municipal voting rights to resident nationals of other Member States in several states resulted in the granting of voting rights to resident TCN as well. The Family Reunification Directive in some Members improved the right to family reunification for the static nationals of these states. Free movement of persons also served as a model outside the EU. It is used with adaptions among others in South America (Acosta 2018) and in Africa the Protocol on Free Movement of Persons, Right of Residence and Right of Establishment adopted by the African Union in 2018.

Notes

1. The employment rate of EU citizens living in another Member state is higher (76%) than of those residing in the country of their nationality (72%) (Eurostat 2019).
2. Council documents nos. 13802/08, 15903/2008 and 16483/2008, Tweede Kamer 23490, no. 524, p. 4 and the Commission's report COM(2008)840.
3. Council document 10313/13 of 31 May 2013.
4. For the text of the relevant European Council Decision see OJ 2016 C 69I, p. 1-16.
5. CJEU 22 June 2010, Joined Cases C-188/10 and C-189/10 (Melki and Abdeli), CJEU 19 July, C-278/12 PPU (Adil) and CJEU 13 December 2018, C-412/17 (Touring Tours).
6. CJEU 19 March 2019 C444/17 (Arib).
7. Article 63(4) EU Treaty and Article 79(2)(b) TFEU.
8. Article 79(5) TFEU.
9. Article 8 of Directive 2004/114 and Article 13 of Directive 2005/71.
10. Article 25 of Directive 2016/801.
11. COM(2014)287 of 22 May 2014, p. 4.
12. http://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=migr_resbc1&lang=en
13. COM(2016)378 of 7 July 2016 and Council document 5821/18 of 2 February 2018.
14. Articles 27-32 of Directive 2016/801.
15. https://ec.europa.eu/eurostat/statistics-explained/index.php/Residence_permits_statistics and SWD(2019)1055, p. 365.
16. EU Offical Journal 2003 L 251/12.
17. The three proposal are COM(1999)638, COM(2000)624 and COM(2002)225.
18. CJEU 27 June 2006, case C-540/03 (Parliament/Council), ECLI:EU:C:2006:429, par. 60.
19. Royal Decree 29 September 2004, Staatsblad 2004, no. 496.
20. CJEU 4 March 2010, C-578/08 (Chakroun), ECLI:EU:C:2010:117.
21. COM(2011)735 of November 2011
22. Case 20132009; formal notice of non-compliance on 30 May 2013; case closed on 11 November 2015.
23. COM(2014)210.
24. COM(2019)161.
25. CJEU 12 April 2018, C-550/16 (A & S), ECLI:EU:C:2018:248 and CJEU 13 March 2019, C-635/17 (E), ECLI:EU:C:2019:192.
26. CJEU 10 June 2011, C-155/11PPU (Imran), ECLI:EU:C:2011387.
27. COM(2001)127.
28. See recitals nos. 2 and 18 of the directive.
29. The negotiation documents can be found in the Register of the Council under 2003/0074(CNS).
30. For the text of the directive see OJ 2004 L 16/44.
31. See Directive 2011/51, OJ 2011 L 132/1.

32. CJEU 18 October 2012, C-502/10 (Mangat Singh), ECLI:EU:C:2012:636.
33. CJEU 26 April 2012, C-508/10 (Commission/Netherlands), ECLI:EU:C:2012:243, CJEU 9 July 2015, C-558/14 (Khachab) ECLI:EU:C: 2016:285 and CJEU 4 June 2012, C-579/13 (P & S), ECLI:EU:C:2012:243.
34. COM(2011)585, p. 6/7 and COM(2019)161, p. 2.
35. SWD(2019)1055, p. 378 and http://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=migr_reslong&lang=en, accessed on 14 March 2019.
36. https://ec.europa.eu/eurostat/statistics-explained/index.php/Acquisition_of_citizenship_statistics accessed on 15 March 2019.
37. ECtHR (Grand Chamber) 26 June 2012, case no. 26828/06, Kuric and others v. Slovenia.
38. COM(2018)890.
39. COM(2019)161, passim.
40. CJEU 26 April 2012, C-508/10 (Commission v. Netherland) and CJEU 2 September 2015, C-309/14 (CGIL).

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