

---

# Climbing the Wall around EU Citizenship: Has the Time Come to Align Third-Country Nationals with Intra-EU Migrants?

Petra Weingerl\* and Matjaž Tratnik\*\*

## Abstract

*This article discusses legal migration in the EU, in particular labour migration. It addresses the following question: once migrant workers from non-EU countries have been admitted into the Union, should they be treated like workers from EU countries for purposes of free movement? The EU migration acquis is one of the most politically charged issues covered by the EU Treaties. As EU citizens, nationals of member states enjoy a set of free movement and political rights that can be exercised in other member states in accordance with the principle of non-discrimination on grounds of nationality affirmed in Article 18 TFEU. This principle is arguably not applicable to third-country nationals. Thus, member states are free to accord unequal treatment to third-country nationals as compared to privileged EU immigrants. The pressing question is whether it is desirable to maintain different levels of rights for third-country nationals who have been legally admitted and whose connection to the host member state does not otherwise differ from that of EU citizens who have exercised their mobility rights. To answer that question, this paper examines arguments for and against treating migrant workers from EU countries and non-EU countries equally for purposes of free movement. It will show how these arguments push in different directions depending on whether they concern the political, human, social, cultural or economic impact of such differential treatment. Our analysis strongly suggests that, on balance, there are convincing reasons for aligning the treatment of long-term resident migrant workers from non-EU countries with that of migrant workers from EU member states.*

\* Assistant Professor, Faculty of Law, University of Maribor, Slovenia. Email: [petra.weingerl@um.si](mailto:petra.weingerl@um.si).

\*\* Full Professor, Faculty of Law, University of Maribor, Slovenia. Email: [matjaz.tratnik@um.si](mailto:matjaz.tratnik@um.si).

We thank participants in the EJIL Symposium on Inequalities in International Law and Marija Jovanović for helpful comments and suggestions.

## 1 Introduction

In recent years, the EU immigration *acquis* has been predominantly focused on asylum and illegal migration. This article, by contrast, addresses legal migration in the EU, specifically for purposes of employment.<sup>1</sup> It ponders the following question: once migrant workers from non-EU countries have been admitted into the Union, should they be treated in the same way as migrant workers from EU member states for purposes of free movement?

In particular, the article examines the disparity between the free movement rights of EU national workers and the limited intra-EU mobility rights of so-called third-country nationals (TCNs) who have been granted long-term resident (LTR) status in accordance with the EU Long-Term Residence Directive (LTRD).<sup>2</sup> Around 39 million non-nationals live in EU member states, approximately 22 million of whom are TCNs. Although the legal situation of TCN workers has, in some areas, become aligned with that of EU nationals enjoying free movement as part of EU integration,<sup>3</sup> the fact remains that '[c]ompared to EU workers, TCNs cannot claim ... equal treatment "within the scope of the Treaty"'.<sup>4</sup> As EU citizens, nationals of a member state enjoy a set of free movement and political rights that can be exercised in other member states in accordance with the principle of non-discrimination on grounds of nationality affirmed in Article 18 of the Treaty on the Functioning of the European Union (TFEU). This principle, which is a general principle of law<sup>5</sup> and has the status of a fundamental right by virtue of Article 21(2) of the EU Charter of Fundamental Rights (Charter),<sup>6</sup> is not applicable to TCNs.<sup>7</sup> Thus, inequality in the treatment of TCNs by member states,

<sup>1</sup> Persons whose right to residence is dependent on a primary beneficiary (e.g. TCN family members of migrating EU citizens) are beyond the scope of this article.

<sup>2</sup> Council Directive 2003/109/EU of 25 November 2003 concerning the status of third-country nationals who are long-term residents, OJ 2004 L16/44, amended by Directive 2011/51, OJ 2011 L 132/1. On the implementation of this Directive in practice, see Commission, 'Report from the Commission to the European Parliament and the Council on the implementation of Directive 2003/109/EC concerning the status of third-country nationals who are long-term residents', COM(2019) 161 final.

<sup>3</sup> See F. Wollenschläger *et al.*, *Analytical Report on the Legal Situation of Third-Country Workers in the EU as Compared to EU Mobile Workers* (2018), available at <https://ec.europa.eu/social/BlobServlet?docId=20576&langId=en>, at 1. The status resulting from this partial approximation is sometimes referred to as 'denizenship'. See T. Hammar, *Democracy and the Nation State* (1990).

<sup>4</sup> Wollenschläger *et al.*, *supra* note 3, at 30.

<sup>5</sup> See Case C-115/08, *ČEZ*, [2009] ECR I-10265 (ECLI:EU:C:2009:660), at para. 91.

<sup>6</sup> The Charter is directed only at EU institutions and member states when implementing EU law; it cannot be used to extend the competences of the Union. See Article 6(1) TEU and Article 51(2) Charter.

<sup>7</sup> See Joined Cases C-22/08 and C-23/08, *Vatsouras and Koupatantze*, [2009] ECR I-04585 (ECLI:EU:C:2009:344). See also Brouwer and De Vries, 'Third-Country Nationals and Discrimination on the Ground of Nationality: Article 18 TFEU in the Context of Article 14 ECHR and EU Migration Law: Time for a New Approach', in M. van den Brink, S. Burri and J. Goldschmidt (eds), *Equality and Human Rights: Nothing But Trouble?* (2015) 123, at 140; Iglesias Sánchez, 'Fundamental Rights Protection for Third Country Nationals and Citizens of the Union: Principles for Enhancing Coherence', 15 *European Journal of Migration and Law (EJML)* (2013) 137; McCormack-George, 'Equal Treatment of Third-Country Nationals in the European Union: Why Not?', 21 *EJML* (2019) 53, at 65; Wiesbrock, 'Granting Citizenship-related Rights to Third-Country Nationals: An Alternative to the Full Extension of European Union Citizenship?', 14 *EJML* (2012) 63.

as compared to privileged EU migrants, still remains possible to a considerable extent. There has even been talk of an ‘apartheid européen’,<sup>8</sup> with non-EU nationals being assigned a lesser status.<sup>9</sup>

The EU migration *acquis* is one of the most politically charged areas covered by the EU Treaties. The constant flow of persons across borders between member states is essential to the EU’s very existence and a principle affirmed in Article 3(2) of the Treaty on European Union. However, this principle does not extend to TCNs, whose movement in the internal market is subject to restrictions imposed to accommodate national political considerations. Thus, TCNs legally resident in one member state must submit to standard immigration procedures if they want to move to another member state. Despite living and working in a member state just like the member state’s own citizens and migrating EU citizens, and despite paying the same taxes and the same social security contributions, TCNs are treated worse simply because of their nationality. This could be problematic from a human rights perspective, because such differential treatment can, in certain cases, amount to unjustified discrimination against TCNs.<sup>10</sup> This practice is also at odds with Article 79 TFEU, which requires the Union to develop a common immigration policy aimed at ensuring ‘*fair treatment of third-country nationals residing legally in Member States*’.<sup>11</sup> Thus, the question is whether it is legally tenable to maintain different levels of rights for TCNs who have been legally admitted and whose connection to the host member state does not otherwise differ from that of EU citizens exercising their mobility rights.<sup>12</sup>

To address this question, the present article will start by analysing the legal and policy framework that constitutes the EU legal migration *acquis*. After briefly explaining our use of the concept of equality to assess the tenability of differential treatment of EU and TCN migrant workers, Section 2 will discuss the legislation relating to the status of TCNs in the EU and demonstrate how TCN migrant workers are treated less favourably than EU migrant workers, noting the social and economic implications of such unequal treatment based on nationality. Section 3 will examine the political, human, social, cultural and economic arguments for and against treating EU and TCN migrant workers equally in terms of freedom of movement within the EU and show how these arguments push in different directions. To frame our analysis of those arguments, we will refer to the competing and contrasting interests and narratives – individual rights vs national sovereignty

<sup>8</sup> E. Balibar, *Nous, citoyens d’Europe? Les frontières, l’État, le peuple* (2001).

<sup>9</sup> See Kochenov and Van den Brink, ‘Pretending There Is no Union: Non-derivative Quasi-Citizenship Rights of Third-Country Nationals in the EU’, EUI Working Paper LAW 2015/07 (2015), at 9. See also Kochenov, ‘Citizenship without Respect: The EU’s Troubled Equality Ideal’, Jean Monnet Working Paper 08/10 (2010).

<sup>10</sup> See Morano-Foadi and De Vries, ‘The Equality Clauses in the EU Directives on Non-discrimination and Migration/Asylum’, in S. Morano-Foadi and M. Malena (eds), *Integration for Third-Country Nationals in the European Union: The Equality Challenge* (2012) 16, at 17; McCormack-George, *supra* note 9, at 74. See also Muir, ‘Enhancing the Protection of Third-Country Nationals against Discrimination: Putting EU Anti-Discrimination Law to the Test’, 18 *Maastricht Journal of European and Comparative Law* (2011) 136.

<sup>11</sup> Emphasis added.

<sup>12</sup> Morano-Foadi and De Vries, *supra* note 14, at 41.

(discretion) narratives – that are reflected in the EU legal migration *acquis* as it currently stands.<sup>13</sup>

Although there is abundant academic literature on the status of TCNs, it is limited in scope because it examines only some of these aspects of the question.<sup>14</sup> Our aim is to provide a comprehensive analysis of the arguments for and against equal treatment of TCN and EU national migrant workers for the purpose of free movement within the EU. We will adopt a broad approach, relying not only on the Treaties but also on international law, most notably the European Convention on Human Rights (ECHR). The conclusion we reach is that, on balance, there are convincing reasons for according equal treatment to LTR migrant workers and EU national workers.

## 2 Setting the Scene: The EU Legal Migration *Acquis* and the Differential Treatment of EU and TCN Migrant Workers

### A Theoretical Framework: The Concept of Equality

The principle of equality is closely linked to the idea of justice.<sup>15</sup> It operates at moral, political and legal levels.<sup>16</sup> In this article, the terms ‘equality’ and ‘inequality’ are used to refer to substantive (in)equality in EU equality law, reflected in the differentiation between EU nationals and TCNs with regard to their status as migrant workers. We adopt an understanding of equality that goes beyond an essentially formal, procedural Aristotelian approach, according to which like matters should be treated alike.<sup>17</sup> Our understanding is supported by the EU equality directives, which combine formal and substantive approaches to equality.<sup>18</sup> While substantive equality can be understood in diverse ways, we perceive it as an attribute of human dignity.<sup>19</sup>

<sup>13</sup> Strumia, ‘European Citizenship and EU Immigration: A Demoi-cratc Bridge between the Third Country Nationals’ Right to Belong and the Member States’ Power to Exclude’, 22 *European Law Journal (ELJ)* (2016) 417; Thym, ‘EU Migration Policy and its Constitutional Rationale: A Cosmopolitan Outlook’, 50 *Common Market Law Review (CMLRev)* (2013) 709.

<sup>14</sup> The academic literature looking at the nature and differences of EU citizenship and the status of TCNs is rich and extensive. Attention has also been paid to the aforementioned competing rules, narratives and rationales in which the EU immigration *acquis* is embedded. This paper does not aim to further the debate on the approximation of the treatment of TCNs to that of nationals of the EU from the lens of EU citizenship and its exclusionary and potential spillover effect on EU immigration rules.

<sup>15</sup> T. Tridimas, *The General Principles of EU Law* (2006), at 59.

<sup>16</sup> *Ibid.*

<sup>17</sup> See, e.g., Fredman, ‘Substantive Equality Revisited’, 14 *International Journal of Constitutional Law* (2016) 712, at 716.

<sup>18</sup> See, e.g., Benedi Lahuerta, ‘Taking EU Equality Law to the Next Level: In Search of Coherence’, 7 *European Labour Law Journal* (2016) 348; De Vos, ‘The European Court of Justice and the March towards Substantive Equality in European Union Antidiscrimination Law’, 20 *International Journal of Discrimination and the Law* (2020) 62.

<sup>19</sup> Small and Grant, ‘Dignity, Discrimination, and Context: New Directions in South African and Canadian Human Rights Law’, 6 *Human Rights Review* (2005) 25, at 25; S. Fredman, *Discrimination Law* (2nd ed. 2012), at 19; Tridimas, *supra* note 18, at 59; Benedi Lahuerta, *supra* note 21; AG Opinion in C-303/06, *Coleman* (ECLI:EU:C:2008:61), at para. 8.

In EU law, the principle of equality is relied on as a legal concept.<sup>20</sup> It is a fundamental value mentioned in Article 2 TEU and, as such, has constitutional value. More than this, it is also a cornerstone of European integration,<sup>21</sup> underpinning the internal market. In the course of the Union's development, it has transformed from a means of economic integration into an instrument of citizen empowerment.<sup>22</sup>

The principle of equality is a valuable analytical tool for our purposes since, as Tridimas explains, equality implies consistency and rationality. A decision-maker must treat similar cases consistently.<sup>23</sup> This is an idea expressed in Article 7 TFEU, which states that '[t]he Union shall ensure consistency between its policies and activities, taking all of its objectives into account and in accordance with the principle of conferral of powers'. The economic freedoms protected by the Treaty thereby acquire not just legal but also normative priority.<sup>24</sup> In this context, the question arises as to whether EU national and TCN migrant workers find themselves in sufficiently similar positions to trigger the application of this principle. The following subsection will seek to answer that question by using the notion of substantive inequality to identify the main differences between the treatment of EU national and TCN migrant workers under existing EU law and policy.

## **B The Existing Legal and Policy Framework: Fair Treatment of TCNs**

The EU's migration policy has progressively developed over time. The Lisbon Treaty conferred on the EU competence to 'develop a common immigration policy', as distinct from the power merely to adopt measures, which the Council already possessed under the Treaty establishing the EEC.<sup>25</sup> The Lisbon Treaty also brought this policy within the scope of the ordinary legislative procedure.<sup>26</sup> The common immigration policy forms part of the area of freedom, security and justice (AFSJ) of Title V of the TFEU (Articles 67–80). Article 79(2)(b) TFEU provides the legal basis for legislative measures defining the rights of TCNs legally resident in a member state, including the conditions governing their freedom of movement to, and residence in, other member states.<sup>27</sup> Further, the Charter provides that TCNs authorized to work in the EU are entitled to working conditions equivalent to those of EU citizens<sup>28</sup> and that TCNs legally resident in the EU may be granted freedom of movement and residence in accordance with the Treaties (i.e. Article 79 TFEU).<sup>29</sup> However, member states retain wide

<sup>20</sup> Tridimas, *supra* note 18, at 60.

<sup>21</sup> *Ibid.*

<sup>22</sup> *Ibid.*

<sup>23</sup> *Ibid.*, at 76.

<sup>24</sup> Nic Shuibhne, 'The Social Market Economy and Restriction of Free Movement Rights: *Plus c'est la même chose?*', 57 *Journal of Common Market Studies* (2019) 111, at 112.

<sup>25</sup> Wilderspin, 'Article 79 TFEU', in M. Kellerbauer, M. Klammert and J. Tomkin (eds), *The EU Treaties and the Charter of Fundamental Rights: A Commentary* (2019) 837, at 841.

<sup>26</sup> Article 79(2) TFEU.

<sup>27</sup> On this provision, see Wilderspin, *supra* note 28, at 843–846; S. Peers, *EU Justice and Home Affairs Law*, vol. I: *EU Immigration and Asylum Law* (2016), at 326.

<sup>28</sup> Article 15(3) Charter; see also Recital 2 LTRD.

<sup>29</sup> Article 45(2) Charter; see Explanations relating to the Charter of Fundamental Rights, OJ 2007 C 303/17; S. Peers *et al.* (eds), *EU Immigration and Asylum Law* (2nd ed., 2012), at 297.

discretion when it comes to access to their labour markets, as Article 79(5) TFEU allows them to ‘determine volumes of’ admission of third-country nationals coming from third countries to their territory in order to seek work’.

Article 67(2) TFEU requires the common immigration policy to be ‘fair’ towards TCNs. The aim of fair treatment of TCNs is reiterated in Article 79 TFEU, which provides the legal basis for developing a common migration policy.<sup>30</sup> Consequently, TCNs legally resident in the EU have a constitutional right to fair treatment. The fair treatment obligation was not contained in the Treaties before Lisbon, although at Tampere in 1999 the European Council called upon EU institutions to accord fair treatment to TCNs legally resident in the EU.<sup>31</sup> The Tampere Council’s exhortation for TCNs, and especially LTRs, to be granted ‘a set of uniform rights which are as near as possible to those enjoyed by EU citizens’ made equal opportunities and equality central to their integration.<sup>32</sup> Thus, the integration of TCNs started to be perceived as a matter of equality.<sup>33</sup> However, the legal contours of ‘fair treatment’ remain undefined. As argued by Carrera and others, EU policy on legal and labour migration is not detached from the international, regional and EU human rights principles and legal commitments and third-country worker labour standards to which most EU member states have willingly adhered. The notion of ‘fairness’ advanced in the 1999 Tampere programme must therefore be read and interpreted in light of the standards set in those instruments.<sup>34</sup> The underlying question is whether the Article 79 TFEU requirement of ‘fair treatment’ requires equal treatment of Union citizens and TCNs in certain contexts – specifically, as regards the intra-EU mobility rights of TCN workers.

The treatment of TCNs is for the most part left to highly fragmented secondary legislation. The number of TCNs who can avail themselves of EU rights has grown in recent years through the enactment of secondary legislation granting entry and residence rights to certain categories of third-country nationals – namely, long-term residents,<sup>35</sup> students,<sup>36</sup> researchers<sup>37</sup> and highly qualified workers.<sup>38</sup> The various EU migration directives grant residence and labour market access rights; require equal

<sup>30</sup> *Ibid.*, at 801.

<sup>31</sup> European Council, Presidency Conclusions Tampere 15 and 16 October 1999, at paras 18, 20, 21. See also Article 15(3) Charter; Recital 2 LTRD; Thym, ‘Immigration’, in K. Hailbronner and D. Thym (eds), *EU Immigration and Asylum Law: A Commentary* (2nd ed., 2016) 271, at 288.

<sup>32</sup> European Council, *supra* note 33.

<sup>33</sup> Malena and Morano-Foadi, ‘Integration Policy at European Union Level’, in S. Morano-Foadi and M. Malena (eds), *Integration for Third-Country Nationals in the European Union: The Equality Challenge* (2012) 45, at 46.

<sup>34</sup> Carrera *et al.*, *The Cost of Non-Europe in the Area of Legal Migration* (2019), available at [https://www.europarl.europa.eu/RegData/etudes/STUD/2019/631736/EPRS\\_STU\(2019\)631736\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2019/631736/EPRS_STU(2019)631736_EN.pdf) (last visited 22 February 2022), at xvi. See also McCormack-George, *supra* note 9, at 65; Groenendijk, ‘Legal Migration’, in P. de Bruycker *et al.* (eds), *From Tampere 20 to Tampere 2.0: Towards a New European Consensus on Migration* (2019) 64; Thym, ‘EU Migration Policy and its Constitutional Rationale: A Cosmopolitan Outlook’, 50 *CMLRev* (2013) 723.

<sup>35</sup> Directive 2003/109, *supra* note 2.

<sup>36</sup> Directive 2004/114, OJ 2004 L 375/12.

<sup>37</sup> Directive 2005/71, OJ 2005 L 289/15.

<sup>38</sup> Directive 2009/50, OJ 2009 L 155/17.

treatment with nationals of the host member state; provide for family reunification; address the issue of social security coordination; and guarantee mobility within the EU. Thus, the legal situation of TCN workers has, in some areas, become aligned with that of EU nationals enjoying free movement as part of EU integration.<sup>39</sup> However, as the 2018 Commission's analytical report highlights, important differences remain. The report points out that while the free movement of EU workers is guaranteed by directly enforceable provisions of EU primary law, similar rights for TCNs depend on the enactment of EU secondary law. This leaves a wide margin of discretion when it comes to designing the regime.<sup>40</sup>

The most general piece of EU legislation in this field is the Long-Term Residents Directive (LTRD), adopted in 2003,<sup>41</sup> which confers a limited number of specific equal treatment rights<sup>42</sup> after five years of legal residence, as well as a limited right to reside in another member state. The LTRD has been criticized for shortcomings concerning the acquisition of LTR status and the rights that come with long-term residence.<sup>43</sup> First, under Article 5(1), the condition relating to duration of residence will be met only if the five years have been spent in a single member state, which excludes TCNs who have resided in various member states for a total of five years but without staying for five consecutive years in any one of them. Second, under Article 5(2), member states are allowed to impose integration conditions and to be the sole judge of whether they have been fulfilled. The conditions they impose bear a strong resemblance to the language and/or civic integration tests that member states use as part of their naturalization processes.<sup>44</sup> As Guild observed, this 'reinforces the impression that the EU consists of many labour markets, not one'.<sup>45</sup>

While Article 11(1) LTRD grants equal treatment rights to LTRs, member states have the possibility to restrict them under Article 11(2)–(4). The LTRD's principal deficiency, however, is arguably that it denies TCNs access to the opportunities offered by the internal market.<sup>46</sup> Given that LTR status is governed by EU law, it could be considered inconsistent with the internal market logic to make legal residence for five consecutive

<sup>39</sup> Wollenschläger *et al.*, *supra* note 5, at 1.

<sup>40</sup> *Ibid.*, at iii.

<sup>41</sup> See Thym, *supra* note 33, at 427–519; D. Acosta Arcarazo, *The Long-Term Residence Status as a Subsidiary Form of EU Citizenship: An Analysis of Directive 2003/109* (2011). For further references, see Thym, *supra* note 33, at 427.

<sup>42</sup> See Article 11 LTRD.

<sup>43</sup> See, e.g., Peers, 'Implementing Equality? The Directive on Long-Term Resident Third-Country Nationals', 29 *European Law Review (ELRev)* (2004) 437; Carrera and Wiesbrock, 'Whose European Citizenship in the Stockholm Programme? The Enactment of Citizenship by Third Country Nationals in the EU', 12 *EJML* (2010) 337; Della Torre and De Langeb, 'The "Importance of Staying Put": Third Country Nationals' Limited Intra-EU Mobility Rights', 44 *Journal of Ethnic and Migration Studies* (2018) 1409.

<sup>44</sup> Kochenov and Van den Brink, *supra* note 11, at 6.

<sup>45</sup> Guild, 'The EU's Internal Market and the Fragmentary Nature of EU Labour Migration', in C. Costello and M. Freedland (eds), *Migrants at Work* (2014) 98, at 107.

<sup>46</sup> Wiesbrock, 'Free Movement of Third-Country Nationals in the European Union: The Illusion of Inclusion' 35 *ELRev* (2010) 455; Kochenov and Van den Brink, *supra* note 11; Iglesias Sánchez, 'Free Movement of Third Country Nationals in the European Union? Main Features, Deficiencies and Challenges of the New Mobility Rights in the Area of Freedom, Security and Justice', 15 *ELJ* (2009) 791.

years in a single member state the principal requirement for acquiring such status. Moreover, LTR TCNs have only a limited right to reside in a second member state. As the 2019 Fitness Check revealed, ‘the majority of Member States continue to require the same procedures, conditions (including market tests), or proof of residence as for first-time applicants, both under EU and national schemes’.<sup>47</sup> Arguably, this does not contribute to the effective attainment of an EU-wide labour market,<sup>48</sup> which is more attractive for TCNs than the labour markets of individual member states.<sup>49</sup> Against this background, a question that deserves attention is, what role does the principle of mutual trust play in this set-up, given that the concept of an internal market – and the ASFJ – is based upon this principle.

In its 2019 report on the implementation of the LTRD,<sup>50</sup> the Commission concluded that the Directive had not yet achieved its objectives, since most member states had not actively promoted recourse to EU LTR status but were continuing almost exclusively to issue national long-term residence permits. In 2017, around 3.1 million TCNs held an EU LTR permit, compared to around 7.1 million holding a national long-term residence permit. As regards intra-EU mobility, the Commission found that most member states’ implementation of the Directive had not really contributed to the realization of the EU internal market, since few LTRs had exercised the right to move to another member state – a situation also explained by the fact that exercising this right is subject to too many conditions and national administrations were not sufficiently conversant with the procedures or found it difficult to cooperate with their counterparts in other member states.

As the Treaty of Lisbon and the Charter have widened the legal basis for measures relating to TCNs legally resident in the EU, the way is now open for the EU legislator to make substantial amendments to the LTRD. In its communication of 23 September 2020, the Commission has already announced a revision of the LTRD, ‘which is currently under-used and does not provide an effective right to intra-EU mobility. The objective would be to create a true EU long-term residence status, in particular by strengthening the right of long-term residents to move and work in other Member States.’<sup>51</sup>

This new impetus given by the Commission needs to be seen in the light of the widely recognized fact that the EU is undergoing a demographic change, which is likely to result in a decline in the working-age population and an increase in the proportion of elderly people.<sup>52</sup> These trends will have a considerable impact on member

<sup>47</sup> Commission, ‘Fitness Check on EU Legislation on legal migration’ SWD (2019) 1055 final, Part I, at 93.

<sup>48</sup> Cf. Recital 18 LTRD. For further confirmation, see Case C-508/10, *Commission v. Netherlands* (ECLI:EU:C:2012:243), at para. 66; Commission, ‘Report from the Commission to the European Parliament and the Council on the Implementation of Directive 2003/109/EC Concerning the Status of Third-country Nationals Who Are Long-term Residents’, COM (2019) 161 final, at 9.

<sup>49</sup> Commission, *supra* note 49, at 97.

<sup>50</sup> Commission, *supra* note 50.

<sup>51</sup> Commission, ‘Communication from the Commission on a New Pact on Migration and Asylum’, COM (2020) 609 final at 26.

<sup>52</sup> K. Eisele, *The External Dimension of the EU’s Migration Policy* (2014), at 93.



state labour markets and on future economic growth, making EU action in the field of legal migration all the more important and necessary.<sup>53</sup> Thus, it will be interesting to see how member states respond to the Commission's calls to grant more rights to LTR TCNs more than 20 years after the ambitious Tampere programme and the adoption of the LTRD.

### ***C Differences between EU National Workers and TCNs Covered by the LTRD***

TCNs who are covered by the LTRD are treated less favourably than migrating EU citizens in several respects. As mentioned above in the Introduction, the protection from discrimination on grounds of nationality which EU citizens enjoy under Article 18 TFEU and Article 20(1) Charter does not apply to TCNs.<sup>54</sup> Further, Article 20(2)(a) TFEU and Article 45(1) Charter guarantee economically active and self-supporting EU citizens the right to move and reside freely within the territory of the member states; it is they who decide autonomously whether to avail themselves of that right. The most notable difference between the right of permanent residence enjoyed by EU citizens and LTR status accorded to TCNs is that member states may make the latter conditional upon compliance with integration measures. No such conditions exist for EU citizens, whose integration or non-integration in the new member state is left to their discretion.<sup>55</sup> EU citizens have unlimited access to employment<sup>56</sup> and self-employment activities, whereas member states may restrict the openness of their labour markets to TCNs and may give preference to EU citizens over TCNs. As regards family reunification, EU citizens can benefit from the Family Reunification Directive 2003/86,<sup>57</sup> while the less favourable rules of Article 16 LTRD apply to TCNs. Moreover, Article 11 LTRD allows member states to limit social assistance for TCNs to core benefits and to restrict their access to employment or self-employed activities in situations where, under existing national or EU legislation, these activities are reserved for nationals, or EU or EEA citizens. While migrating EU workers are free to move their residence from one host member state to another, TCNs have only a limited right to do so, as provided in Articles 14–23 LTRD. Another safeguard at the disposal of member states is the possibility they have to withhold LTR status on grounds of public policy and public security. With regard to public security, the CJEU has held that member states enjoy wide discretion in determining whether or not there is a threat to such security.<sup>58</sup>

<sup>53</sup> See Commission, 'The Demographic Future of Europe – From Challenge to Opportunity', COM (2006) 571 final, at 4–5. See also S. Carrera and C. Formisano, *An EU Approach to Labour Migration: What Is the Added Value and the Way Ahead?*, CEPS Working Document 232 (2005).

<sup>54</sup> See Case C-22/08, *Vatsouras* (ECLI:EU:C:2009:344).

<sup>55</sup> Thym, *supra* note 17, at 711.

<sup>56</sup> The exception concerning public employment is broader for TCNs than it is for EU citizens. See Halleskov Storgaard, 'The Long-Term Residents Directive: A Fulfilment of the Tampere Objective of Near-Equality?', 7 *EJML* (2005) 299, at 311–312.

<sup>57</sup> Directive 2003/86, OJ 2003 L 251/12.

<sup>58</sup> Bornemann, 'Threats to Public Security in EU Immigration Law: Finding the Right Discretion' (2020), available at <https://europeanlawblog.eu/2020/01/06/threats-to-public-security-in-eu-immigration-law-finding-the-right-discretion/>.

The CJEU has in the past placed limitations on the discretion exercised by member states in relation to integration tests<sup>59</sup> and core benefits.<sup>60</sup> In *Parliament v. Council* it stated: ‘The fact that the concept of integration is not defined cannot be interpreted as authorizing Member States to employ that concept in a manner contrary to general principles of Community law, in particular to fundamental rights.’<sup>61</sup> The Court has addressed the protection against expulsion afforded to LTR TCNs under the LTRD in several cases where member state law fell short of such protection.<sup>62</sup> In *P and S*,<sup>63</sup> the Court found that the integration test of Article 5(2) LTRD concerns integration conditions before LTR status is granted, but integration measures imposed after the acquisition of LTR status fall outside that provision.<sup>64</sup> While member states may impose integration requirements after LTR status has been obtained, failure to comply with those requirements does not entail the revocation of LTR status.<sup>65</sup> In *Commission v. Netherlands*,<sup>66</sup> the CJEU ruled that the fees for applying for LTR status must not be so high as to prevent TCNs from applying.<sup>67</sup> Arguably, the same goes for integration tests that are too demanding. In both cases, the LTRD would be deprived of any *effet utile*.

#### D Differences among TCN Workers

Even among TCNs there are substantial differences in their legal positions under the various sources of EU law. The differences in treatment can be attributed to the nexus between external relations and migration policies.<sup>68</sup> All TCN migrants who reside in the Union enjoy human rights protection under both international law instruments (e.g. the UN Migrant Worker Convention) and regional frameworks such as the ECHR, where the prohibition of discrimination plays a central role.<sup>69</sup> A large group of TCNs also benefit from more specific equal treatment guarantees under relevant association, cooperation and partnership agreements that the EU, the E(E)C and individual member states have concluded with third countries pursuant to what is now Article 217 TFEU. When considering the treatment of TCNs, it is therefore important to draw

<sup>59</sup> See Case C-540/03, *Parliament v. Council* (ECLI:EU:C:2006:429); Case C-579/13, *P and S* (ECLI:EU:C:2015:369); Case C-508/10, *Commission v. Netherlands* (ECLI:EU:C:2012:243); Case C-153/14, *Minister van Buitenlandse zaken v. K and A* (ECLI:EU:C:2015:453).

<sup>60</sup> Case C-571/10, *Kamberaj* (ECLI:EU:C:2012:233). See also Case 303/19, *Istituto Nazionale della Previdenza Sociale* (ECLI:EU:C:2020:958).

<sup>61</sup> Case C-540/03, *Parliament v. Council* (EU:C:2006:429), at para. 70.

<sup>62</sup> See Joined Cases C-503/19 and C-592/19, *Subdelegación del Gobierno en Barcelona* (ECLI:EU:C:2020:629); C-448/19, *Subdelegación del Gobierno en Guadalajara* (ECLI:EU:C:2020:467); Case C-636/16, *López Pastuzano*, (ECLI:EU:C:2017:949).

<sup>63</sup> Case C-579/13, *P and S* (ECLI:EU:C:2015:369).

<sup>64</sup> *Ibid.*, at paras 35, 36, 38.

<sup>65</sup> Thym, *supra* note 33, at 459.

<sup>66</sup> Case C-508/10, *Commission v. Netherlands* (ECLI:EU:C:2012:243). Similarly, Case C-153/14, *Minister van Buitenlandse zaken v. K and A* (ECLI:EU:C:2015:453), at para. 71, concerning the cost of an integration test for TCNs under Directive 2003/86.

<sup>67</sup> See also Case C-309/14, *CGIL and INCA* (ECLI:EU:C:2015:523).

<sup>68</sup> Eisele, *supra* note 55, at 444.

<sup>69</sup> For a detailed analysis, see *ibid.*, at 129–188.

a distinction between those who are subject to such agreements and those who are not. That said, there are also considerable differences between the agreements themselves, resulting in highly differing statuses for the nationals of the associated or partner countries.<sup>70</sup>

The most liberal as regards TCN rights is the European Economic Area (EEA) agreement with Norway, Iceland and Liechtenstein, which extended the EU rules on free movement of persons to EEA nationals.<sup>71</sup> It is largely matched by the bilateral treaty on free movement of persons with Switzerland.<sup>72</sup> For this reason, the position of EEA and Swiss migrant workers will not be taken into consideration in this article. The 'second best' from the viewpoint of the TCNs is the 1973 association agreement with Turkey,<sup>73</sup> Article 12 of which envisaged the possibility of full free movement of workers. That has not been realized, however, and in 1987 the Court ruled that the free movement provisions were only a goal and did not confer 'directly effective' rights on individuals.<sup>74</sup> Turkish workers are granted employment rights that 'grow' with the length of their legal stay in the EU and residence rights connected to their employment. This contrasts with the stabilization and association agreements with Western Balkan countries and the Euro-Mediterranean agreements with Algeria, Morocco and Tunisia, which do not contemplate the free movement of persons.

It must be emphasized that the commitments made by the EU and member states in these agreements relate to TCNs who are 'legally employed in the territory of a Member State' and generally require equal treatment with the member state's nationals in respect of working conditions, remuneration and dismissal.<sup>75,76</sup> The agreements do not provide for any entry, residence or employment rights of TCNs. Such rights are subject to the member states' immigration rules and any bilateral agreements between an individual member state and third countries. Member states have full discretion to decide whether or not to enter into such agreements, and it will generally depend on conditions within their respective labour markets. The post-Lisbon common immigration policy referred to in Article 79 TFEU does not impinge on that freedom.

When discussing the rights of TCNs under the above agreements, the role of the CJEU should not be overlooked. The Court has rendered numerous decisions in which it has interpreted the agreements liberally, to the benefit of TCNs. It has rendered more than 50 decisions in relation to the EEC-Turkey Association Agreement alone.

<sup>70</sup> *Ibid.*, at 189–274.

<sup>71</sup> Agreement on the European Economic Area, OJ 1994 L 1/3. See Case C-92/02, *Kristiansen* (ECLI:EU:C:2003:652), at para. 24.

<sup>72</sup> OJ 2002 L 114/6. See Peers, 'The EC-Switzerland Agreement on Free Movement of Persons: Overview and Analysis', 2 *EJML* (2000) 127; Kochenov and Van den Brink, *supra* note 11, 19–20.

<sup>73</sup> OJ 1973 C 113/1.

<sup>74</sup> Case-12/86, *Demirel* (ECLI:EU:C:1987:400).

<sup>75</sup> See, e.g., Articles 47(1)(a) and 49(1)(a) of the Stabilization and Association Agreements with Bosnia and Serbia; Article 17(1) of the Association Agreement with Ukraine; Articles 23 and 20 of the Partnership and Cooperation Agreement with Moldova, Russia and Georgia; Article 64(1) of the Association Agreement with Morocco.

<sup>76</sup> Carrera and Wiesbrock, *supra* note 45, at 346; Eisele, *supra* note 55, at 440.

The Court was disposed to attribute extensive rights to Turkish nationals, beyond those provided for under the EEC Treaty.<sup>77</sup> In *Demirel*,<sup>78</sup> it held that the EEC Treaty provided the Community the competence to regulate the entry and stay of nationals of EC-associated states. The Court inferred from Article 238 TEEC (now Article 217 TFEU) that an association agreement creates a special relationship between the EC and the associated state, covering all areas regulated in the EEC Treaty, including the freedom of movement for workers.<sup>79</sup> In *Sevince*,<sup>80</sup> the Court ruled on the direct effect of Article 6(1) of Decision No. 1/80 of the Association Council created by the EEC-Turkey Association Agreement. The direct effect of provisions concerning rights for persons in association and partnership agreements was also confirmed in later cases, such as *Kziber*<sup>81</sup> relating to a provision in the EEC-Morocco Cooperation Agreement, *Gloszczuk*<sup>82</sup> relating to Article 44(3) of the Association Agreement with Poland, *Wählergruppe Gemeinsam*<sup>83</sup> relating to Article 10(1) of Decision No. 1/80 and *Simutenkov*<sup>84</sup> relating to Article 23(1) of the Partnership and Cooperation Agreement with Russia.

It should be noted that even the association agreement with Turkey, which is the most liberal,<sup>85</sup> does not provide for any (free) movement rights *between* member states. Turkish and other TCN workers remain tied to the first member state that accepted them.<sup>86</sup> The LTRD was the first piece of EU legislation to grant certain categories of TCN workers a very limited right to move to another member state.

### 3 Arguments For and Against the Equal Treatment of TCNs with EU Migrant Workers

The relevant differences of treatment between EU and LTR migrant workers having been identified, the question now arises as to whether those differences are legitimate or necessary in light of the consistency and rationality requirements implicit in the principle of equality. Are there any good reasons to restrict intra-EU mobility rights of TCNs and to treat TCNs who have been legally resident in the host member state for five years differently from EU workers? To answer these questions, we will analyse arguments for and against distinguishing between those two categories of workers and show how these arguments push in different directions. The relevant arguments fall

<sup>77</sup> Hailbronner and Polakiewitz, 'Non-EC Nationals in the European Community: The Need for a Coordinated Approach', 39 *Duke Journal of Comparative and International Law* (1992) 49, at 55.

<sup>78</sup> Case-12/86, *Demirel* (ECLI:EU:C:1987:400).

<sup>79</sup> *Ibid.*, at para. 9.

<sup>80</sup> Case C-192/89, *Sevince* (ECLI:EU:C:1990:322), at para. 26.

<sup>81</sup> Case C-18/90, *Kziber* (ECLI:EU:C:1991:36), at para. 29.

<sup>82</sup> Case C-63/99, *Gloszczuk* (ECLI:EU:C:2001:488), at para. 38.

<sup>83</sup> Case C-171/01, *Wählergruppe Gemeinsam* (ECLI:EU:C:2003:260).

<sup>84</sup> Case C-265/03, *Simutenkov* (ECLI:EU:C:2005:213), at para. 29.

<sup>85</sup> Tezcan/Idriz, 'Free Movement of Persons between Turkey and the EU: To Move or Not to Move? The Response of the Judiciary', 46 *CMLRev* (2009) 1621, at 1622.

<sup>86</sup> Association Council Decision 1/80 did not grant such a free movement right. See *ibid.*, at 1644.

into five broad areas, largely interconnected: the political, the social, the cultural, the human and the economic.

To frame our analysis of those arguments, we will use a set of competing and contrasting interests and narratives. They characterize the current configuration of the EU legal migration *acquis*, which is pervaded by two thematic strands: the individual rights and the national sovereignty (discretion) narratives.<sup>87</sup> Although not entirely contradictory, these two narratives reflect the tension between, on the one hand, sensitivity to individual rights and, on the other hand, sensitivity to the limits of EU competence and the preservation of national autonomy.<sup>88</sup>

These competing and contrasting interests and narratives can be related to broader thematic issues. First, they are linked to the principle of conferral, and further to the vertical and horizontal competence conundrum in the Treaties. To this end, the contrast between the member states' and the Union's interests in this field is addressed through the competing theories of intergovernmentalism and Europeanization.<sup>89</sup> Second, in examining the EU migration *acquis*, reference will also be made to the contrasting visions of trust. Mutual trust, and the related principle of mutual recognition, is a fundamental regulatory mechanism in the context of the internal market and the AFSJ.<sup>90</sup>

To examine the lack of free movement rights for TCNs in terms of its coherence and consistency with the EU legal framework, we adopt a purposive perspective which squares well with the aforementioned thematic issues. To this end, we examine the unequal treatment of TCNs through the lens of the objectives of the EU legal migration *acquis*. The very first sentence of Article 1 TEU highlights that the member states confer competences on the EU 'to attain objectives they have in common'. According to the CJEU case law, it is crucial to consider the objectives of relevant rules when analysing the presence of differential treatment in comparable situations.<sup>91</sup>

## A The Political

We will examine the political aspect from the perspective of the EU's constitutional constraints, and especially the principle of conferral and the EU's purposive competences.<sup>92</sup> We will focus on the vertical dimension of competence issues as reflected in approaches to the question of EU legal migration at EU institutional and member state levels.

Immigration matters have always been at the very heart of state sovereignty and to this day continue to be a particularly sensitive policy area for governments and

<sup>87</sup> See Strumia, *supra* note 17; Thym, *supra* note 17; see also D. Chalmers, G. Monti and G. Davies, *European Union Law: Text and Materials* (2nd ed., 2010), at 518.

<sup>88</sup> S. Weatherill, *Law and Values in the European Union* (2017), at 390.

<sup>89</sup> Carrera, 'Integration of Immigrants in EU Law and Policy: Challenges to Rule of Law, Exceptions to Inclusion', in L. Azoulai and K. de Vries (eds), *EU Migration Law: Legal Complexities and Political Rationales* (2014) 149, at 150. See also Farcy, 'Labour Immigration Policy in the European Union: How to Overcome the Tension between Further Europeanisation and the Protection of National Interests?', 22 *EJML* (2020) 198.

<sup>90</sup> Strumia, *supra* note 17, at 26.

<sup>91</sup> See, e.g., Joined Cases C-443/14 and C-444/14, *Alo* (ECLI:EU:C:2016:127), at para. 54.

<sup>92</sup> Davies, 'Democracy and Legitimacy in the Shadow of Purposive Competence', 21 *ELJ* (2015) 2, at 2.

societies.<sup>93</sup> The national sovereignty narrative is concerned with security issues and borders. Non-EU nationals are considered in terms of their perceived cultural, political and social risks, be it as potential sources of crime, political threats or threats to local public services or labour markets.<sup>94</sup> Another important concern of member states is the potential burden that TCNs can place on their social welfare systems. Advocates of equal treatment for TCNs must bear in mind that freedom of movement for EU nationals means not only the right to reside but also to receive the full range of social rights – minimum salary, financial assistance for families with children, unemployment payments, etc.<sup>95</sup> While this may be a legitimate concern, given the limited competences conferred by the Treaties and the unequal distribution of the burden across the EU, we will not elaborate further on this issue. Currently, the LTRD allows member states to limit equal treatment in respect of social assistance and social protection to ‘core benefits’ (Article 11(4)).

The legal situation of TCNs has only gradually edged towards the centre of EU attention. This trend started with rights granted to TCNs on the basis of EU association agreements or in their capacity as members of EU workers’ families.<sup>96</sup> Since then, the EU legal framework has progressively bestowed on the Union more far-reaching competences in the field of immigration, in particular with the insertion in the TEU in 1997 under the Treaty of Amsterdam of a new title on ‘visas, asylum, immigration and other policies related to free movement of persons’. The Treaty of Amsterdam’s ‘communitarisation’<sup>97</sup> or Europeanization of migration policies led to the adoption of EU secondary legislation in this field. Today, the Treaty of Lisbon explicitly gives the EU the task of developing a common immigration policy aimed at, *inter alia*, ensuring the efficient management of migration flows and the fair treatment of TCNs legally resident in a member state. However, the national sovereignty narrative is strongly present, as Article 79(5) TFEU leaves member states free to determine the volume of TCNs admitted.

As a result, the EU’s power to legislate in respect of TCNs is greater than in the area of EU citizenship, which is dependent on (and additional to) member state nationality and thus, in principle, subject to the autonomy of the member states. So far, however, this power has proved to be only apparent, as the secondary legislation introduced on the basis of Article 79 TFEU does not match the Tampere programme’s commitment to ‘near equality’.<sup>98</sup> Thus, despite calls by the Commission, the Parliament<sup>99</sup> and even several member states, more transnationalism in Treaty rules has in practice not

<sup>93</sup> Eisele, *supra* note 55, at 1.

<sup>94</sup> Chalmers, Monti and Davies, *supra* note 92, at 493, 518.

<sup>95</sup> Hailbronner and Polakiewitz, *supra* note 81, at 80.

<sup>96</sup> See Title III, on workers’ families, of Council Regulation (EEC) No 1612/68 of 15 October 1968 on freedom of movement for workers within the Community, OJ 1968 L 257/2.

<sup>97</sup> Eisele, *supra* note 55, at 8.

<sup>98</sup> Halleskov Storgaard, *supra* note 59.

<sup>99</sup> As early as 1985, the Parliament had demanded that the rights enjoyed by migrant workers from within the Community be extended to workers from third countries. See EP Resolution of 9 May, OJ 1985 C 141/462, at 467.

resulted in LTR TCNs possessing the same rights as EU citizens to move freely and take up employment in any member state. Although the text proposed by the Commission was by and large modelled on the existing rules on freedom of movement of workers, the LTRD as finally adopted takes a much less inclusive approach towards TCNs, as it is based on member states' existing immigration rules.<sup>100</sup> The intergovernmentalism features prevailed in a competing model lying midway between 'more Europe' and the principle of subsidiarity in the field of immigration, borders and asylum. As Walker argued, the LTRD nonetheless marks the most significant development in the membership politics of the EU, as it governs residents with neither member state nor supra-national European citizenship.<sup>101</sup> The grant of LTR status to TCNs is, in his words, 'a significant if still limited watershed in a protracted politics of recognition'.<sup>102</sup>

One of the underlying rationales for the cautious approach of member states might lie in their fear of the Court's activism, based on their experiences with the Court's expansive interpretation of the rights of TCNs in the framework of EU association agreements and the derived rights of TCN family members.<sup>103</sup> The member states might be concerned that granting further residence and free movement rights through amendments to the LTRD would eventually result in widening the rights of the LTR TCNs beyond the limits they agreed to. Already in 1992, Hailbronner and Polakiewitz<sup>104</sup> fiercely criticized the Court's decisions in *Demirel* and *Sevince* for extending the market freedoms to nationals of associated states; it had reasoned as if Turkey were already part of the EEC, since it applied rules identical to those it would have applied to a member state. They found that the Court overlooked the distinction between a progressive and dynamic Community legal order and the limited framework of association law, as well as the rules of international law on the interpretation of treaties and, probably most importantly, the principle of reciprocity.<sup>105</sup> Such a de facto policy resulting from Community action was in their view impermissible, especially given the extent of member state sovereignty over migration policy.<sup>106</sup>

Against this background, although the Commission had hoped for more extensive rights for TCNs in the LTRD, it had to accept the fine-tuning done by member states to accommodate their sovereignty-related concerns. Some saw the LTRD as an intermediate stage, hoping for a directive with more expansive TCN rights in the future, especially in light of the novelties introduced in the Lisbon Treaty.<sup>107</sup> Although almost

<sup>100</sup> Halleskov Storgaard, *supra* note 59, at 302.

<sup>101</sup> Walker, 'Denizenship and Deterritorialisation in the European Union', in H. Lindahl (ed.), *A Right to Inclusion and Exclusion? Normative Fault Lines of the EU's Area of Freedom, Security and Justice* (2009) 261, at 265.

<sup>102</sup> *Ibid.*

<sup>103</sup> For examples in the field of EU association agreements, see Section 2.D above. For examples of alleged judicial activism concerning the rights of family members, see, e.g., Case C-127/08, *Metock* (ECLI:EU:C:2008:449); Case C-133/15, *Chavez-Vilchez* (ECLI:EU:C:2017:354); Case C-200/02 *Zhu and Chen* (ECLI:EU:C:2004:639). See also Luedtke, 'One Market, 25 States, 20 Million Outsiders? European Union Immigration Policy' (2005), available at [http://aei.pitt.edu/4555/1/05\\_Luedtke.pdf](http://aei.pitt.edu/4555/1/05_Luedtke.pdf), at 27.

<sup>104</sup> Hailbronner and Polakiewitz, *supra* note 81, at 57.

<sup>105</sup> *Ibid.*, at 58.

<sup>106</sup> Hailbronner and Polakiewitz, *supra* note 81, at 59.

<sup>107</sup> See, e.g., Luedtke, *supra* note 108, at 27.

20 years have passed since the LTRD negotiations and almost 15 since the adoption of the Lisbon Treaty, there are still no signs of real supranationalism in the field of the EU migration *acquis*. However, the Commission has not given up. Towards the end of 2020, it published its communication on the New Pact on Migration and Asylum.<sup>108</sup> Given that ‘the EU is currently losing the global race for talent’,<sup>109</sup> the Commission saw legal migration as a means of providing the skills and talents that the EU needs. It therefore proposed, *inter alia*, a ‘Skills and Talent package’ that would include a revision of the LTRD to provide LTRs with a right to intra-EU mobility.

To sum up, the competence conundrum is still largely permeated by the discretion narrative, despite the safeguards in the Treaty and in the secondary legislation.<sup>110</sup> Moreover, that narrative is fuelled by member state fear of Court activism and by limited mutual trust in the field of EU legal migration and the AFSJ more generally. Thus, the political considerations, as expressed in the legal framework and political reality, push in the direction of more control for member states at the expense of the free movement of LTR TCNs, though this could soon change on account of the negative demographic trend in the EU.

## B *The Social and the Cultural*

In assessing the social and cultural arguments, we will focus on the question of civic integration, which is the dominant immigrant integration policy in Europe.<sup>111</sup> This policy, as its name implies, promotes integration as opposed to assimilation, which would evoke forced identity change.<sup>112</sup> Integration coheres with the discretion narrative, which emphasizes state discretion rather than individual rights.<sup>113</sup> It suggests that member states may legitimately guard the boundaries of their national communities. A second theme corroborates this impression: inclusion presupposes integration, as the entrant is required to fit into the social and cultural fabric of the host member state.<sup>114</sup>

The introduction of EU citizenship in 1992 shattered prevailing economic approaches to European integration and kindled debate over issues of polity formation, such as European democracy and legitimacy, European constitutionalism and the formation of a European demos.<sup>115</sup> It is beyond the scope of this article to discuss the different conceptions of European membership. We accept the ‘hard’ version

<sup>108</sup> See Commission, *supra* note 53.

<sup>109</sup> *Ibid.*, at 23.

<sup>110</sup> E.g. Article 79(5) TFEU and the public policy and public security exceptions.

<sup>111</sup> Joppke, ‘Civic Integration in Western Europe: Three Debates’, 40 *West European Politics* (2017) 1153.

<sup>112</sup> *Ibid.*

<sup>113</sup> Strumia, *supra* note 17. In the rights narrative, respect for the substance of European citizenship provides another driver of inclusion, distinct from integration.

<sup>114</sup> *Ibid.*

<sup>115</sup> Kostakopoulou, ‘Ideas, Norms and European Citizenship: Explaining Institutional Change’, 68 *Modern Law Review (MLR)* (2005) 233. See also Weiler, ‘Does Europe Need a Constitution? Reflections on Demos, Telos and the German Maastricht Decision’, 1 *ELJ* (1995) 219; Weiler, ‘To Be a European Citizen: Eros and Civilization’, 4 *Journal of European Public Policy* (1997) 495.



of the no demos thesis, according to which, as Weiler explained, integration is not about creating a European nation or people, but about an ever-closer union among the peoples of Europe.<sup>116</sup> To this end, the integration requirements imposed on LTR TCNs could be understood as serving to protect 'a shared European way of life'.<sup>117</sup>

Member state security rights, which are the main driver behind the constraints placed upon the intra-EU mobility of LTRs, should be examined in the light of the fact that LTRs have been legally resident in the host member state for at least five years. Thus, LTRs could be seen as the least controversial group of TCNs from the point of view of member states and integration standards. They are, at least to some extent, already integrated into a member state – by its own choice.<sup>118</sup> For this reason, LTRs are the group of TCNs in respect of which one might expect a high degree of mutual trust between member states. However, member states still treat LTRs with caution, even though they have arguably developed some degree of 'Europeanness'.<sup>119</sup> The question is whether there are convincing reasons for the strikingly different operation of mutual trust between member states when it comes to granting LTR status (no or very limited mutual trust in other member states despite the adoption of harmonization measures) as compared to the granting of EU citizenship (full mutual trust in other member states despite nationality laws not being harmonized).

The treatment of LTRs contrasts with statistics on the issuance of Blue Cards in the EU pursuant to the 2009 EU Blue Card Directive. The EU Blue Card is a work and residence permit for non-EU/EEA nationals, which grants more extensive intra-EU mobility rights to TCNs taking up highly qualified employment. While Germany issued almost 80 per cent (29,000) of the total number of EU Blue Cards issued in 2019 and almost 50 per cent (5,600) in 2020, one third of these (9,400 in 2019 and 1,500 in 2020) were issued to Indian nationals. They represented a quarter of all EU Blue Cards issued, followed by nationals of Russia, China, Ukraine, Turkey, Brazil, the United States, Iran, Egypt and Tunisia.<sup>120</sup> In light of these figures, the European way of life argument is inconsistent with the reality, which shows that LTRs are not granted more extensive intra-EU mobility rights despite having lived in the EU for five years.

In practice, therefore, the social and cultural considerations also push in the direction of more control for member states at the expense of mutual trust and free movement rights, even though this seems inconsistent with the approach taken towards EU citizens (full trust) and certain categories of TCNs as compared to LTRs, especially in light of the fact that LTRs have fulfilled integration requirements.

<sup>116</sup> Weiler, *supra* note 120, at 219.

<sup>117</sup> See Chalmers, Monti and Davies, *supra* note 92, at 493. In its current set-up, the Commission includes a commissioner with a portfolio originally – and controversially – named 'Protecting our European Way of Life'.

<sup>118</sup> Halleskov Storgaard, *supra* note 59, at 323.

<sup>119</sup> *Ibid.*, at 324.

<sup>120</sup> Eurostat, *Residence Permits – Statistics on Authorisations to Reside and Work* (2021), available at [https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Residence\\_permits\\_%E2%80%93\\_statistics\\_on\\_authorisations\\_to\\_reside\\_and\\_work](https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Residence_permits_%E2%80%93_statistics_on_authorisations_to_reside_and_work) (26 March 2022).

### C The Human

Our consideration of the human dimension will focus on respect for human rights, which is a value fundamental to both the EU and the member states (Article 2 TEU). It has to be acknowledged that there is a bias in the human rights perspective, since it prioritizes individuals over societies. Thus, what is good for an individual (e.g. an LTR worker) is not necessarily good for the EU, and especially not for member states as it may conflict with their desire to retain at least some degree of sovereignty over immigration matters. Here again, the rights vs. national sovereignty (security) dichotomy surrounding the treatment of TCNs in the EU is evident.<sup>121</sup> The EU institutions (and the preamble to the LTRD) have nonetheless stressed that the intra-EU mobility rights of TCNs contribute to the realization of the objectives of the internal market.<sup>122</sup> Thus, in this context the individual rights narrative seems to be aligned with the transnationalist aspirations of the EU institutions. Be that as it may, the individual dimension of the human rights perspective contrasts with the collective dimension exposed by the political, social and cultural arguments discussed above, where the society is put on a pedestal.

One of the fields in which the impact of EU law is most relevant in terms of fundamental rights is the AFSJ.<sup>123</sup> Immigration law is central to the AFSJ, covering questions that by nature impact on fundamental rights, for the very essence of immigration law is to regulate entry and status, and therefore to establish lines of differentiation between individuals.

International law is progressively coming to consider nationality as a suspect ground for discrimination.<sup>124</sup> The ECtHR has decided several cases brought by TCNs complaining against the differential treatment accorded to them due to their non-EU nationality.<sup>125</sup> In the early cases of *Moustaquim v. Belgium* and *C. v. Belgium*,<sup>126</sup> the ECtHR dismissed their complaints, holding that, where preferential treatment is given to nationals of other member states, 'there is objective and reasonable justification for it, as Belgium belongs, together with those States, to a special legal order',<sup>127</sup> adding in *C. v. Belgium* that the EU had 'established its own citizenship'.<sup>128</sup> Although the Court did not explain what in this special legal order justified the differential treatment, it must be the far-reaching reciprocity obligations between member states regarding the

<sup>121</sup> Strumia, *supra* note 17, at 125; Thym, *supra* note 17, at 730: 'Among lawyers, State discretion in migratory matters is usually described as an expression of sovereignty, while the perspective of migrants is presented on human rights grounds'.

<sup>122</sup> See, e.g., Commission, *supra* note 53.

<sup>123</sup> Iglesias Sánchez, *supra* note 9.

<sup>124</sup> See Human Rights Committee, *Van Oord v. Netherlands*, Communication of 23 July 1997 No. 658/1995, UN Doc. CCPR/C/60/D/658/1995; Human Rights Committee, *Karacurt v. Austria*, Communication of 4 April 2000 No. 965/2000, UN Doc. CCPR/C/74/D/965/2000.

<sup>125</sup> For an in-depth analysis of these cases, see Brouwer and De Vries, *supra* note 9, at 126–135.

<sup>126</sup> ECtHR, *Moustaquim v. Belgium*, Appl. no. 12313/86, Judgment of 18 February 1991; ECtHR, *C. v. Belgium*, Appl. no. 21794/93, Judgment of 7 August 1996.

<sup>127</sup> *Moustaquim v. Belgium*, at para. 49.

<sup>128</sup> *C. v. Belgium*, at para. 38.

treatment of their respective nationals.<sup>129</sup> The ECtHR again dismissed the complaint of discrimination based on nationality in *Bigaeva v. Greece*, decided in 2009.<sup>130</sup> This time, the Court found that it fell within the Greek authorities' margin of appreciation to require lawyers to possess Greek nationality or the nationality of another member state.<sup>131</sup> In *Weller v. Hungary*,<sup>132</sup> however, the ECtHR found that exclusion from maternity benefit because the TCN mother did not have Hungarian or another EU nationality amounted to a violation of a combined reading of Article 14 and 8 ECHR. The reciprocity argument was expressly rejected by the ECtHR in *Koua Poirrez v. France*,<sup>133</sup> *Andrejeva v. Latvia*,<sup>134</sup> *Ribač v. Slovenia*,<sup>135</sup> *Fawsie v. Greece* and *Saidoun v. Greece*.<sup>136</sup>

Withholding social benefits from TCNs because of their (non-EU) nationality was at issue in the ECtHR cases *Gaygusuz v. Austria* in 1996, *Luczak v. Poland* in 2007 and *Dhahbi v. Italy* in 2014. All three applicants were LTRs in the respondent states. The Court found that the applicants worked there and contributed to the countries' social security schemes on an equal footing with the states' own nationals.<sup>137</sup> Consequently, their differential treatment amounted to an infringement of Article 14 ECHR read in conjunction with Article 1 of Protocol No. 1. Whereas in the two earlier cases the ECtHR recognized the right of TCNs to be treated equally with the respondent state's own nationals, *Dhahbi v. Italy* was the first case in which it explicitly addressed the position of TCNs in comparison with that of nationals of another EU member state.

With *Gaygusuz v. Austria*, the ECtHR started a line of decisions holding that differences in treatment based solely on nationality require 'very weighty reasons' for them to be justified.<sup>138</sup> Since several cases concerned applicants in specific, precarious situations (*Andrejeva* and *Ribač* were, at least de facto, stateless; *Fawsie* and *Saidoun* were refugees; and *Koua Poirrez* was disabled) which may have influenced the decision of the Court, we will focus on the three social security cases *Gaygusuz v. Austria*, *Luczak v. Poland* and *Dhahbi v. Italy*. All three applicants were migrant workers and had for many years been legally resident in the respondent states. They paid taxes, were affiliated to the local social security schemes and paid their contributions. As affirmed by

<sup>129</sup> See, e.g., Bundesverwaltungsgerichtshof [Federal Administrative Court], 30 March 2010, BVerwG 1 C 8.09, at para. 65; On this decision, see Eisele, 'The External Dimension of the EU's Migration Policy. Different Legal Positions of Third-Country Nationals in the EU', in J. Niessen and E. Guild (eds), *Different Legal Positions of Third-Country Nationals in the EU: A Comparative Perspective* (2014), at 199.

<sup>130</sup> ECtHR, *Bigaeva v. Greece*, Appl. no. 26713/05, Judgment of 28 May 2009, paras 36, 41.

<sup>131</sup> *Ibid.*, at para. 40. See also Brouwer and De Vries, *supra* note 9, at 129.

<sup>132</sup> ECtHR, *Weller v. Hungary*, Appl. no. 44399/05, Judgment of 31 March 2009, paras 38–40.

<sup>133</sup> ECtHR, *Koua Poirrez v. France*, Appl. no. 40892/98, Judgment of 30 September 2003.

<sup>134</sup> ECtHR, *Andrejeva v. Latvia* (Grand Chamber), Appl. no. 55707/00, Judgment of 18 February 2009.

<sup>135</sup> ECtHR, *Ribač v. Slovenia*, Appl. no. 57101/10, Judgment of 5 December 2017, at paras 65–67.

<sup>136</sup> ECtHR, *Fawsie v. Greece*, Appl. no. 40080/07, Judgment of 28 October 2010; ECtHR, *Saidoun v. Greece*, Appl. no. 40083/07, Judgment of 28 October 2010.

<sup>137</sup> ECtHR, *Gaygusuz v. Austria*, Appl. no. 17371/90, Judgment of 16 September 1996, at para. 46; ECtHR, *Luczak v. Poland*, Appl. no. 77782/01 27 November 2007, at para. 55; ECtHR, *Dhahbi v. Italy*, Appl. no. 17120/09, Judgment of 8 April 2014, at para. 52.

<sup>138</sup> *Koua Poirrez v. France*, at para. 46; *Luczak v. Poland*, at para. 48; *Andrejeva v. Latvia*, at para. 87; *Fawsie v. Greece*, at para. 35; *Saidoun v. Greece*, at para. 37.

the Court, their situation in this respect was no different from that of the state's own nationals in the first two cases and that of other EU nationals in *Dhahbi v. Italy*. Since the differential treatment they received was based solely on their nationality, the Court held that the respondent states had breached the prohibition of discrimination laid down in Article 14 ECHR.

We can therefore conclude from the above cases that the ECtHR considers the differential treatment of LTR TCNs solely on the ground of their nationality as discriminatory and a violation of Article 14 ECHR. This applies especially to TCN migrant workers, whose situation does not differ to any significant extent from that of workers who are nationals of the member state or migrant workers from other EU member states. It is debatable, however, whether this approach can be transposed to other aspects of the treatment of migrant workers, such as free movement and residence rights. It could be argued that the above ECtHR cases were mainly related to 'privileged' TCNs who enjoyed various equal treatment rights under the relevant association, partnership and cooperation agreements.

## D *The Economic*

The freedom of movement of persons constitutes one of the four fundamental freedoms underlying the Union's internal market. It developed from the economic logic of setting up a common market as provided for in the Treaty of Rome. Thus, from its inception the EU dealt with immigration matters from an economic point of view.<sup>139</sup>

The Lisbon Treaty places the EU migration *acquis* in the framework of the AFSJ. Thus, TCNs are not covered by the free movement rights as part of the internal market. Most of the rights accorded to TCNs by EU secondary legislation rely on the extension of the qualified equal treatment principle in specific spheres.<sup>140</sup> TCNs are entitled to substantive equality only in the labour market of the host member state that granted them worker status. The question is, should they be covered by the free movement *acquis*?

It is possible to find strong historical connections between anti-discrimination legislation and the idea of the right to work.<sup>141</sup> Exploring these connections is instructive for determining the objectives of Article 79 TFEU. Although Article 79, situated in the AFSJ, does not explicitly mention labour market measures, it is accepted that it confers competence to adopt rules on economic migration.<sup>142</sup> In fact, the aim of regulating the migration of TCNs is to help fill shortages in the EU labour market, thereby fostering competitiveness and growth in the EU.<sup>143</sup> Thus, although the provisions of the ASFJ are framed in general terms, the EU's legal migration policy is underpinned

<sup>139</sup> Eisele, *supra* note 55, at 2.

<sup>140</sup> Iglesias Sánchez, *supra* note 9, at 137.

<sup>141</sup> Collins, 'Progress towards the Right to Work in the United Kingdom', in V. Mantouvalou (ed.), *The Right to Work: Legal and Philosophical Perspectives* (2014) 227, at 232.

<sup>142</sup> Wilderspin, *supra* note 28, at 842.

<sup>143</sup> See, e.g., Recital 18 LTRD.

by a strong internal market ethos. This is reflected also in the Commission's New Pact on Migration and Asylum.

The situation of TCN migrating workers is very similar to that of EU migrating workers. Early case law<sup>144</sup> shows that during the establishment of the common/internal market, member states tried to discriminate against workers from other member states by denying them rights which the member states were required to respect under the T(E)EC. Those actions were initially regarded as serving the economic aim of permitting intra-EU migration in order to reduce unemployment in the internal market and ensure the availability of skills responding to the needs of member states. Not until the Maastricht Treaty did the right of workers to freedom of movement come to be seen as an aspect of their right to EU citizenship, with the result that as EU citizens they automatically had the right to move to another member state.<sup>145</sup> Now history is repeating itself in relation to TCNs. Just as in the interpretation of the rights of Union citizens several decades earlier, the rights of TCNs based on secondary legislation are steadily expanding beyond the realm of employment-related rights.<sup>146</sup> The path dependency of European integration, as Thym argued, supported the impression that free movement would serve as a model for TCNs.<sup>147</sup> Thus, economically, there might be good reasons for extending EU citizenship rights to long-term TCNs.<sup>148</sup> However, TCNs are still far from enjoying equal treatment with EU citizens generally.

The internal market rationale underpinning the granting of rights to TCNs is confirmed by the case law of the CJEU. In *P and S*, the CJEU ruled on national legislation that imposed on LTR TCNs a civic integration obligation, attested by an examination, under pain of a fine.<sup>149</sup> It recalled that Recitals 4, 6 and 12 of the preamble to the LTRD showed that the LTRD's principal purpose was the integration of TCNs who have settled long-term in the host member state.<sup>150</sup> Further, it highlighted two aspects of the integration of TCNs: firstly, interaction and social relations between TCNs and nationals of the host member state and, secondly, TCNs' access to the labour market and vocational training.<sup>151</sup>

The CJEU seems to follow the functionalist approach to a certain extent, since the principle of non-discrimination on the grounds of nationality is already affecting its interpretation of the many equivalent concepts in EU migration law and in EU law on the free movement of persons.<sup>152</sup> Also Advocates General (AGs) have expressed similar concerns to ours, while highlighting a strong internal market component.<sup>153</sup> In its

<sup>144</sup> See, e.g., Case C-152/73, *Sotgiu* (ECLI:EU:C:1974:13); Case C-33/74, *Van Binsbergen* (ECLI:EU:C:1974:131); Case C-293/83, *Gravier* (ECLI:EU:C:1985:69).

<sup>145</sup> Collins, *supra* note 148, at 248.

<sup>146</sup> Wiesbrock, *supra* note 48, at 89.

<sup>147</sup> Thym, *supra* note 36, at 713.

<sup>148</sup> Hedemann-Robinson, *supra* note 13, at 354.

<sup>149</sup> Case C-579/13, *P and S* (ECLI:EU:C:2015:369).

<sup>150</sup> *Ibid.*, at para. 46.

<sup>151</sup> *Ibid.*, at para. 47.

<sup>152</sup> Case C-311/13, *Tümer* (ECLI:EU:C:2014:2337); Wiesbrock, *supra* note 48, at 63; Iglesias Sánchez, *supra* note 9; Case C-578/08, *Chakroun* (ECLI:EU:C:2010:117), at paras 46, 52.

<sup>153</sup> See, e.g., Opinion of AG Tanchev in Case C-302/19, *Istituto Nazionale della Previdenza Sociale* (ECLI:EU:C:2020:452).

judgment in *Istituto Nazionale della Previdenza Sociale*, the Court relied on the Opinion of the AG and stressed the added value that TCN workers bring not only to the host member state but to the EU economy as a whole.<sup>154</sup>

It has been contended that the fact that rights provided under EU law cannot be exercised throughout the whole of the EU is at odds with the quintessence of the internal market, which is free movement of production factors throughout the entire EU. Scholars have called into question the legitimacy of drawing a distinction, when applying the principle of free circulation, between the free movement of workers and the free movement of goods, which applies to all goods, including those coming from a third country.<sup>155</sup>

It is true that ‘people and products are simply different’.<sup>156</sup> As Roth and Oliver argued, ‘in so far as natural persons are concerned, the Community has moved on from treating them merely as units of production or other economic units to considering them as human beings’.<sup>157</sup> In this respect, it has been argued that the free movement of workers should be regarded as having a higher moral value than goods.<sup>158</sup> The introduction into the Treaty of the provisions on the citizenship of the Union has acted as a catalyst in this process.<sup>159</sup> As Roth and Oliver pointed out, there is nothing in the Treaty which allows such a differentiation between commodities and work, except for (now) Article 18 TFEU dealing with discrimination on the basis of nationality.<sup>160</sup> Nonetheless, this differentiation has been regarded as justification for different principles governing the four freedoms and for granting horizontal direct effect to free movement of persons (EU citizens), as opposed to free movement of goods.<sup>161</sup> But should this universal truth result in lesser rights for people who do not hold the appropriate nationality despite their continuous participation in and contribution to the internal market, as is the case with LTRs?

As revealed by these economic considerations, consistency and rationality demand that equal treatment rights be granted also to LTRs. It seems inconsistent with the goals and functioning of the internal market to exclude TCNs from free movement in the EU when their full participation in the internal market on the demand side as recipients of services and purchasers of goods has long been permitted.<sup>162</sup> Treating

<sup>154</sup> Case C-302/19, *Istituto Nazionale della Previdenza Sociale* (ECLI:EU:C:2020:957), at para. 34.

<sup>155</sup> Kochenov, ‘Ius Tractum of Many Faces: European Citizenship and the Difficult Relationship between Status and Rights’, 15 *Columbia Journal of European Law* (2009) 169, at 224.

<sup>156</sup> N. Nic Shuibhne, *The Coherence of EU Free Movement Law: Constitutional Responsibility and the Court of Justice* (2013), at 203.

<sup>157</sup> Oliver and Roth, ‘The Internal Market and the Four Freedoms’, 41 *CMLRev* (2004) 407, at 439.

<sup>158</sup> *Ibid.*

<sup>159</sup> *Ibid.* See also Cremona, ‘Citizens of Third Countries: Movement and Employment of Migrant Workers within the European Union’, 2 *Legal Issues of European Integration* (1995) 87, at 87–88; Van den Bogaert, ‘Free Movement of Workers and the Nationality Requirements’, in H. Schneider (ed.), *Migration, Integration and Citizenship* (2005) 55, at 60.

<sup>160</sup> Oliver and Roth, *supra* note 166.

<sup>161</sup> See, e.g., White, ‘In Search of the Limits to Article 30 of the EEC Treaty’, 26 *CMLRev* (1989) 235.

<sup>162</sup> Hedemann-Robinson, *supra* note 13, at 332; Wiesbrock, *supra* note 48, at 90.

them thus shows that their role is perceived as instrumental and subordinate to the economic and political interests of the EU and the MS.<sup>163</sup>

## 4 Conclusion

Of the five categories of arguments examined in this article, only the human and the economic unequivocally push in the direction of treating TCN migrant workers and EU national workers equally for the purpose of free movement of workers. The political, social and cultural considerations are to a large extent permeated with the national sovereignty (security) narrative, though this could soon change as a consequence of the negative demographic trend in the EU. However, if looked at through the lens of consistency and rationality, required by the principle of equality and expressly reflected in Article 7 TFEU, the human rights and economic perspectives carry more persuasive legal and normative force. Thus, our analysis strongly suggests that, on balance, there are convincing reasons that push in the direction of treating LTR migrant workers equally with EU national workers.

ECtHR case law helps to clarify the legal standards with which the EU legal framework on the treatment of TCNs must comply following the entry into force of the Lisbon Treaty.<sup>164</sup> An examination of relevant ECtHR case law forms the basis for setting out the legal parameters of the Article 79 TFEU fair treatment obligation, whereby 'very weighty reasons' are required for any differentiation to be able to withstand the Article 14 ECHR prohibition on discrimination. Although Article 14 ECHR does not oblige the EU, or member states, to expand the protection of Article 18 TFEU to TCNs, it may stand in the way of differences of treatment between a state's own nationals and TCNs.

Since measures based on Article 79 TFEU need to fulfil the EU competence objectives in this field, we posit that 'very weighty reasons' need to be assessed against the internal market paradigm. As this article has shown, ECtHR case law supports the argument that there is little room for unequal treatment of TCNs workers and EU migrant workers in a member state when it comes to working conditions and other employment-related matters. Yet, as currently interpreted, ECtHR case law does not seem to support equal treatment in respect of intra-EU mobility rights for TCNs workers. Thus, the pressing question remains as to whether the unequal treatment of TCNs who have been legally admitted and whose connection to the host member state does not otherwise differ from that of EU citizens exercising their mobility rights<sup>165</sup> could be justified by the legal and policy principles underpinning the EU. As the historical and purposive

<sup>163</sup> *Ibid.*, at 347; S. Carrera and R. Hernández Sagrera, *The Externalisation of the EU's Labour Immigration: Towards Mobility or Insecurity Partnerships?*, CEPS Working Document 321 (2009), at 34. See also Weiler, 'Thou Shalt Not Oppress a Stranger: On the Judicial Protection of the Human Rights of Non-EC Nationals – A Critique', 3 *EJIL* (1992) 65, at 69.

<sup>164</sup> Article 6(2) TEU contains the legal basis for the EU to accede to the ECHR. Negotiations for accession are still ongoing.

<sup>165</sup> Morano-Foadi and De Vries, *supra* note 14, at 41.

dimensions of workers' rights in the EU have shown, EU anti-discrimination law and the right to work share common origins. This has been somewhat forgotten in the context of TCN workers. Their status as migrant workers does not differ substantially from the status of EU migrant workers, except in respect of nationality, and the rights attached to their status pursue the underlying market objective. The CJEU has consistently held that when assessing whether situations are objectively comparable, the objective pursued by the relevant rules is crucial.<sup>166</sup> In the light of Article 14 ECHR case law, it is hard to imagine what 'very weighty reasons' could justify (EU and national) measures that treat TCNs workers and EU citizens unequally in comparable situations. Against this background, it is precisely the obligation of 'fair treatment' that will often necessitate 'equal treatment'.

The consistent interpretation of the principle of mutual trust, as the foundation of equal treatment in the EU, requires that the other member states trust the first member state, as happens when EU citizenship is indirectly granted through member states bestowing their nationality on TCNs. The denial of free movement rights to TCNs weakens one of the most significant achievements of European integration. So long as such a large number of economic migrants are excluded, held back by putative borders between member states, there can be no true internal market for persons.

<sup>166</sup> See, e.g., Joined Cases C-443/14 and C-444/14, *Alo* (ECLI:EU:C:2016:127), at para. 54.