

An Empty Shell? The Protection of Social Rights of Third-Country Workers in the EU after the Single Permit Directive

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Abstract

This article critically assesses the effectiveness of third-country nationals' social rights protection in the EU following the adoption of Directive 2011/98/EU (the Single Permit Directive). This instrument establishes a single permit for work and residence and sets up a common set of rights for third-country workers legally residing in a Member State. This article argues that despite being an important instrument allowing for a better protection of social rights of third-country nationals, the directive still reveals significant inconsistencies. First, due to difficult negotiations at the Council, the final text of the directive maintains the fragmented approach to legal immigration, excluding several categories of third-country nationals from its personal scope. Second, it also allows Member States the opportunity to impose important restrictions on social rights while implementing the directive. Finally, these restrictions can have considerable implications for the integration of immigrants in the host Member State. Accordingly, the argument is advanced that in reality the protection of third-country workers' social rights in the EU still largely depends on the Member States' political will.

Keywords

Single Permit Directive, common set of rights, social rights, integration, third-country nationals, labour immigration

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1. Introduction

Labour immigration has been often seen as a constraint and a burden for Member States and for the European Union (EU). However, labour immigration may bring an important beneficial economic element to host societies.¹ Shortage of labour and natural decrease of the European population may indeed push Member States to open their job markets to candidates from abroad.² This is not a new situation in Europe;³ cycles of immigration have been noted in different European countries at different periods followed by a certain degree of management and control of immigration by individual States.⁴

The adoption of the Directive 2011/98 (the ‘Single Permit Directive’ or the ‘directive’),⁵ a hybrid instrument aiming at establishing not only a simplified sole procedure for both work and residence permit but also a common set of rights, is deemed to encourage controlled and

¹ OECD, ‘International Migration Outlook 2013’, 13 June 2013, available at: <http://www.oecd.org/els/mig/imo2013.htm>; OECD, ‘The Fiscal and Economic Impact of Migration’, Policy Brief, May 2014, available at: <http://www.oecd.org/migration/the-fiscal-and-economic-impact-of-migration.pdf>; See also OECD statistics on fiscal impact of international migration per country, available at: <http://www.oecd.org/statistics/compare-your-country.htm>; Christian Dustmann and Tommaso Frattini, ‘The Fiscal Effects of Immigration to the UK’ (2013) Centre for Research and Analysis of Migration Discussion Paper Series CDP No 22/13, available at: http://www.cream-migration.org/publ_uploads/CDP_22_13.pdf.

² OECD, ‘Labour Shortages and the Need for Immigrants: a Review of Recent Studies’ (2003) available at: <http://www.oecd.org/els/mig/31857112.pdf>; OECD, ‘Management of low-skilled migration’ (2008) International Migration Outlook SOPEMI, available at: <http://www.oecd.org/els/mig/41286041.pdf>; OECD, ‘International Migration and the Economic Crisis: Understanding the Links and Shaping Policy Responses’ (2009) available at: <http://www.oecd.org/els/mig/46292981.pdf>; European Commission, ‘Employment in Europe’ (2008), available at: <http://ec.europa.eu/social>; Martin Ruhs and Bridget Anderson (eds), *Who needs Migrant Workers? Labour Shortages, Immigration and Public Policy* (Oxford: Oxford University Press, 2010).

³ Observing that cycles of labour immigration in Europe are not only a contemporary issue: Elspeth Guild and Helen Staples, ‘Labour Migration in the European Union’ in Philippe de Bruycker (ed), *L’émergence d’une politique européenne d’immigration* (Bruxelles: Bruylant, 2003) 123; Timothy J. Hatton and Jeffrey G. Williamson, *Global Migration and the World Economy: Two Centuries of Policy and Performance* (Cambridge: MIT Press, 2008).

⁴ For instance, during the 20th century, France has had several ‘waves’ of authorised labour immigration from 1938 to the present day. In Austria, labour immigration policies were put into execution in the early 1960s due to a specific need for additional labour forces. In the Netherlands, labour immigration has played an important role since the 1950s, and in the UK, management of immigration has been a concern for policy makers since 1945. See Patrick Weil, *La France et ses étrangers: l’aventure d’une politique d’immigration de 1938 à nos jours* (Paris: Gallimard, 2005); European Migration Network, ‘Impact of Immigration in Europe’s Societies’ (2006) Office for Official Publications of the European Communities, available at: http://ec.europa.eu/dgs/home-affairs/e-library/documents/policies/immigration/pdf/general/emn_immigration_2006_en.pdf.

⁵ European Parliament and Council Directive 2011/98/EU of 13 December 2011 on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State [2011] OJ L 343/1 (Single Permit Directive).

efficient labour immigration into the EU.⁶ This instrument establishes a single permit for work and residence⁷ and sets up a common set of rights for third-country workers legally residing in a Member State.⁸ Therefore, it encompasses both procedural measures and material rules applicable to third-country workers and those who have been admitted to a Member State for purposes other than work, and who hold a residence permit and are allowed to work in this Member State,⁹ such as a member of the family of a third-country worker.

It is suggested that the establishment of simplified procedural rules for a single work and residence permit by the directive is very positive. It facilitates the mobility of workers from third-countries into the EU while allowing for better control of immigration influx, which is one of the main concerns of Member States and institutions at EU level.¹⁰

However, this article argues that the outcomes of the substantive rules relating to the establishment of a common set of rights to third-country nationals by the Single Permit Directive are insufficient in their effect in comparison with those relating to procedural matters.

The common set of rights is concerned with equal treatment of immigrants vis-à-vis the nationals. Article 12 (1) of the directive provides a list of situations in which third-country nationals should receive equal treatment with nationals. These situations relate to working conditions (including pay, dismissal, and workplace health and safety); freedom of association; education and vocational training; recognition of diplomas, certificates and other qualifications; social security; tax benefits; access to goods and services and the supply of goods and services (including housing); and advice services provided by employment offices.¹¹ This is an ideal catalogue of basic social rights that third-country workers should enjoy when legally residing and

⁶ Preamble, recitals 3 and 14, Single Permit Directive.

⁷ Articles 4-11, Single Permit Directive.

⁸ Article 12, Single Permit Directive.

⁹ Article 1 (b), Single Permit Directive.

¹⁰ European Commission, 'Report on the implementation of the Global Approach to Migration and Mobility 2012-2013' (Communication) COM(2014) 96 final; See also Sergio Carrera, 'The EU Border Management Strategy' Centre for European Policy Studies Working paper No. 261/March 2007.

¹¹ Article 12 (1), Single Permit Directive.

working in a Member State. The directive engages with the concept of fair treatment,¹² aligning with what Member States have agreed since the Tampere Summit in 1999,¹³ that there was a need to treat fairly¹⁴ third-country nationals regularly staying in a Member State.¹⁵ Notwithstanding, important restrictions to equal treatment are provided by article 12 (2) of the Single Permit Directive. They relate to tax benefits, social security, education and vocational training, and access to goods and services. It is submitted that if implemented by the Member States, these restrictions may reduce the scope and the degree of protection of third-country workers' rights in the EU, decreasing their effectiveness.

In order to analyse the Single Permit Directive's implications for the protection of third-country workers' social rights in the EU, first, this article will critically discuss the background of the adoption of the directive, as restrictions of the common set of rights were at that stage important trade-offs for its adoption by Member States. Second, the article will argue that the directive permits a considerable leeway to Member States in the implementation of the common set of rights, via a subtle game of restrictions of rights. Third, the argument will be put forward that this margin of appreciation left to Member States may have significant implications for the integration of third-country workers in the host Member State. It is suggested that the adoption of a common set of rights by the Single Permit Directive can be seen as a positive step towards better integration of immigrants, insofar as States do not unreasonably restrict the rights set forth by this instrument. Finally, the article will draw conclusions on the balancing of individual

¹² Preamble, recital 2, Single Permit Directive.

¹³ European Council, Tampere Summit conclusions, 1999, available at: http://www.europarl.europa.eu/summits/tam_en.htm.

¹⁴ This is a crucial point that EU institutions and particularly the European Commission have constantly emphasized. See European Commission, 'Community immigration policy' (Communication) COM (2000) 757 final; European Commission, 'Policy Plan on Legal Migration' (Communication) COM (2005) 669 final; European Commission, 'The global approach to migration one year on: towards a comprehensive European migration policy' (Communication) COM (2006) 735 final; European Commission, 'Towards a Common Immigration Policy' (Communication) COM (2007) 780 final; European Commission, 'Communication on migration' (Communication) COM (2011) 248 final; European Commission, 'Maximising the Development Impact of Migration. The EU contribution for the UN High-level Dialogue and next steps towards broadening the development-migration nexus' (Communication) COM (2013) 292 final.

¹⁵ This was reaffirmed by the Stockholm Programme adopted in 2010. See: European Council, 'The Stockholm Programme. An open and secure Europe serving and protecting citizens', OJ C 115 of 4.5.2010.

interests of immigrants and general interests of Member States by the Single Permit Directive. It is suggested that the protection of social rights of third-country workers in reality still largely depends on the Member States' political will.

2. The difficult consensus around the adoption of the Single Permit Directive

Negotiations leading to the adoption of the directive took more than four years. An initial version of the text was proposed by the European Commission on 27 October 2007,¹⁶ but the final version of the Single Permit Directive was not adopted by the Council and the European Parliament until 13 December 2011.¹⁷ EU Member States have always showed their resistance to full 'communitarisation' of labour immigration, but have agreed to pursue sectorial harmonisation insofar as a certain leeway in the management of entry and stay of third-country nationals could somehow remain intact.¹⁸ This was not different in relation to the harmonisation of unskilled labour immigration in the context of the Single Permit Directive (section 2.1). Another important accommodation was seen in relation to the restrictions on rights that third-country nationals can benefit from. It is suggested that a trade-off between openness of labour immigration and restriction on equal treatment of third-country nationals was imposed during negotiations, leading to important limitations of the scope of the protection of their social rights (section 2.2).

¹⁶ European Commission, 'Proposal for a Council Directive on a single application procedure for a single permit for Non-EU Member Country nationals to reside and work in the territory of a Member State and on a common set of rights for Non-EU Member Country workers legally residing in a Member State' COM (2007) 638 final.

¹⁷ See *supra* note 5.

¹⁸ See Sergio Carrera, 'Building a Common Policy on Labour Immigration. Towards a Comprehensive and Global Approach in the EU?' (2007) CEPS working document 256, available at: <http://www.ceps.be> (for a general overview of the topic).

2.1. *A fragmented approach to EU legal immigration maintained*

The difficulties arising during the negotiations related to the reluctance of Member States to adopt horizontal common measures on conditions of entry and stay of third-country nationals for the purposes of work.¹⁹ This unwillingness to adopt such horizontal instruments is not new. The Commission had already proposed in 2001 a directive on ‘the conditions of entry and residence of third-country nationals for the purpose of paid employment and self-employed economic activities’.²⁰ This proposal was not well received and after a first reading in the Council, the proposal was officially withdrawn in 2006.²¹ Generally, the regulation of labour immigration remains a sensitive topic in the EU, even though its positive role for the reinforcement of the EU’s economy is actively emphasised by the European Council²² and the European Commission,²³ notably through the Lisbon Strategy²⁴ and the Strategy EU 2020.²⁵

Therefore, the EU’s approach to labour immigration can be defined as fragmented and sectorial;²⁶ in other words, the EU does not impose a common and horizontal treatment to all third-country workers regularly established in the territory of a Member State. On the contrary, each category of third-country national will be treated differently according to their skills level,

¹⁹ See Gisbert Brinkmann, ‘Opinion of Germany on the Single Permit Proposal’ (2012) 14 *European Journal of Migration and Law* 351 at 360-364.

²⁰ European Commission, *supra* note 16 at explanatory memorandum, section 1.

²¹ *Ibid.*

²² European Council, ‘The Hague Programme (2005-2010): strengthening freedom, security and justice in the European Union’ [OJ C 53, 3.3.2005]; European Council, ‘The Stockholm Programme’, *supra* note 15.

²³ European Commission, ‘The global approach to migration one year on: towards a comprehensive European migration policy’, *supra* note 14.

²⁴ Strategy adopted during the European Council Summit of Lisbon in March 2000 aiming to make the EU the world’s most competitive economy by 2010. This strategy had three pillars: an economic pillar, a social pillar and an environmental pillar. This strategy has been replaced by the EU 2020 Strategy, available at: http://ec.europa.eu/europe2020/index_en.htm.

²⁵ European Commission, ‘Europe 2020. A strategy for smart, sustainable and inclusive growth’ (Communication) COM (2010) 2020 final; European Commission, ‘Taking stock of the Europe 2020. A strategy for smart, sustainable and inclusive growth’ (Communication) COM (2014)130 final.

²⁶ See generally Kees Groenendijk, ‘Access of third-country nationals to employment under the new EC migration law’ in François Julien-Laferrrière, Henry Labayle and Orjan Edstrom (eds) *La politique européenne d’immigration et d’asile : bilan critique cinq ans après le Traité d’Amsterdam* (Bruxelles: Bruylant, 2005) 141; Elspeth Guild and Helen Staples, ‘Labour Migration in the European Union’ in Philippe de Bruycker (ed), *L’émergence d’une politique européenne d’immigration* (Bruxelles: Bruylant, 2003) 171.

family situation, country of origin, or length of residence in the host State.²⁷ On a spectrum, high-skilled immigrants and long-term residents would enjoy a more comprehensive and attractive status than low-skilled immigrants.²⁸ It is suggested that the main reason for this lack of horizontal legislation on EU labour immigration lies in the fact that access to job markets is still seen as a primarily domestic issue that is constantly reviving old disputes over loss of States' sovereignty.²⁹

This situation was not different during the negotiations of the Single Permit Directive. Member States showed their opposition to a total horizontal harmonisation of labour immigration. They failed to reach unanimous agreement on the Commission proposal as revised by the Parliament in 2008.³⁰ Negotiations were then suspended until the entry into force of the Lisbon Treaty in December 2009 and the clarification of the EU's competences in the field of immigration and asylum.³¹ Since the proposal fell under the ordinary legislative procedure with qualified majority required in Council, the negotiations resumed in 2010, but certain adjustments were put forward by the Council.³² These adjustments notably concerned the personal scope of application of the directive and the content of equal treatment set forth by article 12 of the directive.

²⁷ Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents [2003] OJ L 16/44; Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification [2003] OJ L 251/12; Council Directive 2004/114/EC of 13 December 2004 on the conditions of admission of third-country nationals for the purposes of studies, pupil exchange, unremunerated training or voluntary service [2004] OJ L 375/12; Council Directive 2005/71/EC of 12 October 2005 on a specific procedure for admitting third-country nationals for the purposes of scientific research [2005] OJ L 289/15; Council Directive 2009/50/EC of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment [2009] OJ L 155/17.

²⁸ Article 11, Directive 2003/109, *supra* note 27; Articles 12-17, Directive 2009/50, *supra* note 27.

²⁹ The opt-out positions of the UK, Denmark and Ireland in matters of immigration and asylum are very expressive of the malaise created by this subject in Europe. See Steve Peers, 'The UK Opt-out from the EU Immigration and Asylum Law in Practice' in Jean-Yves Carlier and Philippe de Bruycker (eds) *Actualité du droit européen de l'immigration et de l'asile* (Bruxelles: Bruylant, 2005) 89.

³⁰ See negotiation documents available at: <http://eur-lex.europa.eu/legal-content/EN/HIS/?uri=CELEX:32011L0098>.

³¹ Articles 78 and 79, Treaty on the Functioning of the European Union (TFEU).

³² Council of the European Union, Position at first reading with a view to the adoption of a Directive of the European Parliament and of the Council on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State, 25 November 2011(13036/3/11 REV 3 ADD 1).

In relation to the first set of amendments, the Council added categories of third-country nationals to be excluded from the personal scope of the directive. These were third-country nationals benefiting from international protection, temporary protection or protection under national law, seafarers, self-employed workers and students.³³ The European Parliament approved the Council position and adopted the text in accordance with this position.³⁴

Hence, the EU's fragmented approach to labour immigration persists. The directive does not apply horizontally and leaves several important categories of immigrant workers outside of its personal scope,³⁵ for instance, students,³⁶ seasonal workers and au pairs.³⁷ The directive corroborates this construction of the EU common immigration policy which abides by a peculiar logic according to which different instruments apply to each of the categories of immigrants. Instead of horizontally regulating the situation of all third-country workers and establishing a minimal standard of protection of rights, EU institutions will keep producing a number of different instruments only applicable to a set of predefined categories of third-country workers. For instance, the Commission has proposed two new directives in 2010, one in the field of seasonal work, the other on intra-corporate transfer of skilled workers. Both have been adopted in 2014.³⁸

Accordingly, what could have been seen as a factor of standardisation of the protection of social rights of third-country workers is in reality another piece of the giant puzzle of EU

³³ Ibid, at 5.

³⁴ European Parliament legislative resolution of 13 December 2011 on the Council position at first reading with a view to the adoption of a directive of the European Parliament and of the Council on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State (13036/3/2011 – C7-0451/2011 – 2007/0229(COD)).

³⁵ Article 3 (1), Single Permit Directive.

³⁶ Article 3 (3), Single Permit Directive.

³⁷ Article 3 (2) (e), Single Permit Directive.

³⁸ European Commission, 'Proposal for a Directive of the European Parliament and the Council on the conditions of entry and residence of third-country nationals for the purposes of seasonal employment' COM (2010) 379 final; This proposal has been adopted on the 24 February 2014: European Parliament and Council Directive 2014/36/EU of 26 February 2014 on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers [2014] OJ L 94/375; European Commission, 'Proposal for a Directive of the European Parliament and the Council on conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer' COM (2010) 378 final; This proposal has been adopted on the 15 May 2014: European Parliament and Council Directive 2014/66/EU of 15 May 2014 on the conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer OJ L 157/1.

common policy on legal immigration. The apparent unity sought by the European Commission while proposing a common set of rules has in reality contributed to a unified fragmentation of the third-country workers' status in the EU.

2.2. *Limitations to the scope of equal treatment*

The definition of the scope of the common set of rights applicable to all third-country workers was another important issue around the adoption of the Single Permit Directive. The initial proposal by the Commission was quite generous vis-à-vis third-country workers. It aimed to establish full equal treatment, affirming that 'equal treatment with own nationals in principle would apply to all third-country workers legally residing and not yet holding long-term resident status'.³⁹ Some possibilities of restrictions of equal treatment were provided, but the cases of limitations were sufficiently circumscribed. As indicated by the Commission, 'the main purpose of the proposal is to grant equal treatment to third-country workers who reside legally. (...) [T]hird-country nationals do not even have to be in actual employment in order to be covered by the equal treatment provisions of this proposal'.⁴⁰

The Council amended the Commission proposal by further extending the possibilities for Member States to limit the right of third-country workers to equal treatment with nationals.⁴¹ These limitations were later approved by the European Parliament.⁴² These limitations to equal treatment concerned: education and vocational training, branches of social security, goods, services and advice services afforded by employment offices, tax benefits, and statutory pensions.⁴³ The justifications for such limitations were to be found in the viewpoints of Member States in relation to social rights. For instance, according to the Council's position, limitations to family benefits 'stems from the fact that several Member States regard family benefits as a

³⁹ European Commission, *supra* note 16 at recital 9.

⁴⁰ *Ibid*, at article 12.

⁴¹ Council of the European Union, Position at first reading with a view to the adoption of the Single Permit Directive, *supra* note 32, at 7.

⁴² European Parliament legislative resolution of 13 December, *supra* note 34.

⁴³ Council of the European Union, Position at first reading with a view to the adoption of the Single Permit Directive, *supra* note 32, at 8-9.

measure with long-term demographic impact directed at those residing in a country over a longer period of time'.⁴⁴

Accordingly, the restrictions of third-country workers' rights by Member States, together with the amendments to the personal scope of application of the directive, may be seen as powerful trade-offs in this process of negotiation. On the one hand, a common set of rights could be adopted, but, on the other hand, main aspects of equal treatment in relation to social rights, such as tax benefits, could be considerably reduced.

As suggested by Ruhs, in general, a 'trade-off between openness and restrictions on some social rights as well as the right of free choice of employment is based on the likely effects of immigration on residents in high-income countries'.⁴⁵ It is argued that in the specific case of the Single Permit Directive, this trade-off related to the growing negative public opinion on labour immigration in several Member States such as France or the Netherlands.⁴⁶ Nationals, considered as the 'good citizens'⁴⁷ tax payers, would not agree to maintain full equality with immigrants, notably low-skilled workers, as they may be perceived as impermanent and undeserving.⁴⁸

Accordingly, the directive corroborates the viewpoint that only international immigration that can serve a beneficial purpose or represent an advantage to the host country society should be tolerated. Low-skilled immigrants are notably welcomed in developed western societies when these are facing problems related to labour shortages.⁴⁹ The utility of the immigrant worker is then highlighted. Emphasis is given to the instrumentalisation of low-skilled immigration, which

⁴⁴ Ibid, at 8.

⁴⁵ Martin Ruhs, *The Price of Rights. Regulating International Labor Migration* (Oxford: Oxford University Press, 2013) at 49.

⁴⁶ OECD, 'International Migration Outlook SOPEMI 2010', available at: <http://www.oecd.org/migration/mig/48328734.pdf>, at 120.

⁴⁷ Bridget Anderson, *Us & Them? The Dangerous Politics of Immigration Control* (Oxford: Oxford University Press, 2013) at 3.

⁴⁸ See opinion polls on the perceptions nationals have of immigrants: IPSOS-MORI, Social Research Institute, *Perceptions and Reality. Public Attitudes to Immigration*, available at: https://www.ipsos-mori.com/DownloadPublication/1634_sri-perceptions-and-reality-immigration-report-2013.pdf; Pew Research Centre, *global attitudes survey*, available at <http://www.pewresearch.org/fact-tank/2014/05/14/in-europe-sentiment-against-immigrants-minorities-runs-high/>.

⁴⁹ See Ruhs and Anderson (eds), *supra* note 2, at 41 (discussing the implications of staff shortage in immigration policy).

is encouraged at EU level insofar as more flexible admission systems ‘are responsive to the priorities, needs, numbers and volumes determined by each Member State’.⁵⁰

3. A subtle game of restrictions of social rights

Restrictions of social rights of third-country workers were seen as a powerful bargaining chip for the adoption of the Single Permit Directive in 2011. The adoption of this instrument should certainly be welcomed as it establishes for the first time a common set of rights applicable to third-country workers in the EU. However, the argument put forward by this article is that the Single Permit Directive allows Member States to impose far-reaching restrictions on certain social rights, and that those restrictions may ultimately reduce the proclamation of the common set of rights. Two main points support this argument. First, the restrictions of rights provided by the directive touch the very essence of social rights, handicapping their uniform application to all third-country workers (discussed in section 3.1). Second, the directive succumbs to domestic law when sensitive areas, such as volumes of admission of third-country nationals, are engaged (discussed in section 3.2).

3.1. Restrictions of social rights

It is submitted that, although legitimate in theory, the leeway allowed by the directive to Member States may undermine, in practice, the effectiveness of the proclamation and protection of third-country workers’ rights. Article 12(2) of the Directive establishes that Member States may restrict equal treatment in relation to education and vocational training, social security benefits, tax benefits, and access to goods and services. Quantitatively, this means that four out of the eight rights provided by this directive may have their exercise restricted by Member States. Qualitatively, States may considerably reduce the scope of equal treatment.

⁵⁰ Council of the European Union, Position at first reading with a view to the adoption of the Single Permit Directive, *supra* note 32, at 3.

Not all restrictions proposed by the directive are equivalent. First, limitations on access to tax benefits may be justified as they concern ‘cases where the registered or usual place of residence of family members of the third-country worker for whom he/she claims benefits, lies in the territory of the Member State concerned’.⁵¹ The application of the territorial principle to tax matters is in general quite well accepted by the Court of Justice of the European Union (CJEU) insofar as a balance is struck between States’ tax sovereignty and their obligations under EU law.⁵² This can also be the case concerning the Single Permit Directive.

Second, restrictions on equal treatment relating to access to goods and services are quite severe. States may limit the application of equal treatment to third-country workers who are in employment and may also restrict access to housing.⁵³ As there is no recognised ‘right to a home’,⁵⁴ restrictions on access to housing may seem in principle justified. However, the Charter of Fundamental Rights of the European Union provides for the right to social and housing assistance.⁵⁵ This right is addressed to ‘all those who lack sufficient resources’,⁵⁶ which may, in principle, include third-country nationals.⁵⁷ Admittedly, the exercise of this right should respect ‘the rules laid down by Community law and national laws and practices’.⁵⁸ Domestic authorities would thus enjoy a considerable leeway while determining the extent of the restriction. However, they may be required to do so in respect with the objective of the directive, which is the establishment of an adequate common set of rights to third-country workers. Comparatively, this is what the CJEU decided in relation to third-country nationals who were long-term residents

⁵¹ Article 12 (2) c), Single Permit Directive.

⁵² See for example: Case C-204/90 *Bachmann v. Belgium* [1992] ERC I-249 (concerning tax advantages to pension schemes available for insurance companies established in the territory of the Member State only and the justification of the restriction by reason of the need to safeguard the cohesion of the tax system); , Case C-25/10 *Missionswerk Werner Henkelbach v. Belgian State* [2011] ERC I-497 (relating to the application of tax advantages to charitable bodies established in the territory of the Member State).

⁵³ Article 12 (2) d) i) and ii), Single Permit Directive.

⁵⁴ The European Court of Human Rights does not recognise the right to have a home, but the right to respect for one’s home. See *Globo v. Ukraine* (App no 15729/07) ECHR 5 July 2012; *Bab v United Kingdom* (App no 56328/07) ECHR 27 September 2011.

⁵⁵ Article 34 (3), Charter of Fundamental Rights of the European Union.

⁵⁶ *Ibid.*

⁵⁷ See Case C-571/10 *Servet Kamberaj v Istituto per l’Edilizia Sociale della Provincia Autonoma di Bolzano* [2012] OJ C174/9 (acknowledging the application of equality of treatment in relation to third-country nationals who were long-term residents in matters relating to housing benefits).

⁵⁸ Article 34 (3), Charter of Fundamental Rights of the European Union.

when it provided that restrictions on housing benefits should be interpreted strictly, in line with the objective pursued by the directive 2003/109,⁵⁹ namely the integration of third-country nationals in the Member States, and also in line with article 34 (3) of the Charter of Fundamental Rights of the European Union.⁶⁰

In addition, the directive does not indicate whether article 12 (2) d) ii) refers to partial or total restriction on access to housing benefits. Neither does article 12 (2) d) i) provide any indication of the nature of the employment occupied by the third-country worker. It is not clear whether these provisions should encompass full-time jobs under permanent contracts. It is also not clear whether, on the contrary, the provisions should be restricted to temporary employment contracts only. The Single Permit Directive does not define the perimeter of application of this general limitation on access to goods and services vis-à-vis third-country workers who are in employment. Consequently, by virtue of the vagueness of this clause, the directive gives significant leeway to Member States to impose such restrictions in both occasions: when implementing the directive and after implementation if the domestic legislator decides to modify domestic legislation in relation to access to services and goods.

Third, Member States' margin of appreciation is also extended in regard to education and vocational training.⁶¹ In this case Member States may limit the application of equal treatment to 'those third-country workers who are in employment or who have been employed and who are registered as unemployed'.⁶² Member States can exclude students, pupils, unremunerated trainees and voluntary workers from the scope of application of equal treatment.⁶³ They can also exclude 'study and maintenance grants and loans or other grants and loans' from the application of equal treatment.⁶⁴ In addition, Member States may lay down 'specific prerequisites including language proficiency and the payment of tuition fees, in accordance with national law, with respect to

⁵⁹ *Supra* note 27.

⁶⁰ Case C-571/10 *Servet Kamberaj*, *supra* note 57, at paras 80 and 86.

⁶¹ Article 12 (2) a) i) to iv), Single Permit Directive.

⁶² Article 12 (2) a) i), Single Permit Directive.

⁶³ Article 12 (2) a) ii), Single Permit Directive.

⁶⁴ Article 12 (2) a) iii), Single Permit Directive.

access to university and post-secondary education and to vocational training which is not directly linked to the specific employment activity'.⁶⁵ The rationale behind these provisions clearly relates to the method of financing social assistance schemes.⁶⁶ These are explicitly excluded from the definition of branches of social security⁶⁷ given by the Regulation 883/2004.⁶⁸ This is a type of social benefit that is ordinarily non-contributory, as it is not financed by social contributions. For these schemes, the directive correctly grants States more leeway in restricting third-country nationals' access to education and vocational training.⁶⁹ Yet, these restrictions may contribute to the weakening of the common set of rights' reach.

Fourth, limitations on access to social security are certainly better framed by the directive; yet they may be far-reaching in practice. It is true that, according to the directive, Member States shall not restrict rights to branches of social security for 'third-country workers who are in employment or who have been employed for a minimum period of six months and who are registered as unemployed'.⁷⁰ The rationale here is different: branches of social security are generally financed by taxes or social contributions and have a contributory character. Therefore, it is logic that these branches of social security cannot be restricted vis-à-vis third-country nationals legally working in a Member State as they are normally contributing to the funding of social security schemes. In addition, Regulation 859/2003⁷¹ explicitly extends the scope of application of the coordination of social security systems to all third-country nationals.⁷²

⁶⁵ Article 12 (2) a) iv), Single Permit Directive.

⁶⁶ Social assistance is understood as the system of social welfare characterised by the consideration of each individual case within the discretion of public authorities. See: Case 1/72 *Frilli* [1972] ECR 457, at para 14.

⁶⁷ Branches of social security relate to: sickness benefits, maternity and equivalent paternity benefits, invalidity benefits, old-age benefits, survivors' benefits, benefits in respect of accidents at work and occupational diseases, death grants, unemployment benefits, pre-retirement benefits, family benefits. See article 3 (1), Council and European Parliament Regulation (EC) No 883/2004 of 29 April 2004 on coordination of social security systems [2004] OJ L166/1.

⁶⁸ Article 3 (5) Regulation 883/2004, *supra* note 67.

⁶⁹ In this respect, the former European Commission of Human Rights found that imposing higher fees to foreign university students does not violate the right to education. *Karus v Italy* App no 29043/95 (Commission Decision, 20 May 1998) at para 2.

⁷⁰ Article 12 (2) b), Single Permit Directive.

⁷¹ Council Regulation (EC) No 859/2003 of 14 May 2003 extending the provisions of Regulation (EEC) No 1408/71 and Regulation (EEC) No 574/72 to nationals of third countries who are not already covered by those provisions solely on the ground of their nationality [2003] OJ L 124/1.

⁷² Article 1, Regulation 859/2003, *supra* note 71.

However, it is submitted that if these restrictions may be legitimated by the pursuit of the general interests of Member States, which may rightly not want immigrants to become an unreasonable burden to their social welfare systems, they should be necessary and proportionate. EU Member States should comply with the obligations imposed by human rights instruments to which they are parties, notably the European Convention on Human Rights (ECHR). Restrictions of social rights adopted by Member States on the sole grounds of nationality may not pass the test of proportionality,⁷³ as indicated by the European Court of Human Rights in *Gaygusuz v Austria*.⁷⁴ In this decision the Court affirmed that the refusal of Austrian authorities to grant the applicant emergency assistance on the grounds that he did not have Austrian nationality was ‘not based on any objective and reasonable justification’.⁷⁵ Although this decision ‘did not lead to the implementation of an ambitious agenda of social protection benefiting migrants’,⁷⁶ the non-discrimination principle played a very important role. The lack of justification of the Austrian measure was due to the difference of treatment between, on the one hand, the applicant, a third-country worker legally resident in Austria, ‘paying contributions to the unemployment insurance fund in the same capacity and on the same basis as Austrian nationals’,⁷⁷ and, on the other hand, nationals. If the logic of the extension of the scope of application of the ECHR not only to social rights⁷⁸ but also to third-country nationals⁷⁹, is pursued, restrictions of social rights imposed on the sole basis of nationality by Member States

⁷³ See generally Mathias Klatt and Moritz Meister, *The Constitutional Structure of Proportionality* (Oxford: Oxford University Press, 2012); Andrew Legg, *The Margin of Appreciation in International Human Rights Law: Deference and Proportionality* (Oxford: Oxford University Press, 2012); Kai Möller, ‘Proportionality and Rights Inflation’ LSE Law, Society and Economy Working Papers 17/2013, available at: www.lse.ac.uk/collections/law/wps/wps.htm.

⁷⁴ *Gaygusuz v Austria* (App no 17371/90) ECHR 16 September 1996. See also *Koua Poirrez v France* (App no 40892/98) ECHR 30 September 2003.

⁷⁵ *Gaygusuz v Austria*, *supra* note 74, at para 50.

⁷⁶ Marie-Bénédicte Dembour, ‘Gaygusuz Revisited: The Limits of the European Court of Human Rights’ Equality Agenda’ (2012) 4 *Human Rights Law Review* 689, at 691.

⁷⁷ *Gaygusuz v Austria*, *supra* note 74, at para 46.

⁷⁸ See Jean-François Flauss, ‘Actualité de la Convention Européenne des Droits de l’Homme’ (2004) *Actualité Juridique du Droit Administratif* 537 (arguing that the scope of the ECHR has been extended towards the inclusion of social rights).

⁷⁹ See Frederic Sudre, *Droit européen et international des droits de l’homme* (10eme edition, Paris: PUF, 2011) at 659 (arguing that the scope of application of the ECHR has been extended towards the indirect protection of foreigners – *protection par ricochet* in the original version)

while implementing the Single Permit Directive may be seen as not proportionate in light of this decision.

It is therefore submitted that restrictions of social rights of immigrants should be considered in the light of a human rights-based approach.⁸⁰ In other words, States should not be allowed to restrict immigrants' rights to such an extent if this would imply a breach of their human rights obligations.

Member States have started implementing the Single Permit Directive. For instance, in Portugal the common set of rights has been transposed⁸¹ and equality with nationals for the rights provided by article 12 of the Directive is in principle fully applied.⁸² This is certainly a very positive step towards better protection of social rights of immigrants in the EU. Nonetheless, in several Member States mainly procedural aspects of the single permit were at stake.⁸³ Transposition laws related in priority to the operational aspects of the transition to the single window or one-stop-shop permit system rather to the implementation of the common set of rights. This is for instance, the case of Italy,⁸⁴ Spain,⁸⁵ the Netherlands,⁸⁶ Luxembourg,⁸⁷ and

⁸⁰ International Labour Office, 'International Labour Migration: A Rights-Based Approach' (2010) available at: www.ilo.org/public/english/protection/migrant/download/rights_based_approach.pdf; IOM, 'International Migration, Health and Human Rights' (2013) at 12 available at: http://publications.iom.int/bookstore/free/IOM_UNHCHR_EN_web.pdf; Bacre Ndiaye, 'Addressing Irregular Migration Through a Human Rights Based Approach' Talk at the Global Forum on Migration and Development (2011) available at: http://www.ohchr.org/Documents/Issues/MHR/StatementBN_HRBA_Irregular_Migration.pdf.

⁸¹ Article 83, Law n.º 29/2012 of 9 August [Primeira alteração à Lei n.º 23/2007, de 4 de julho, que aprovou o regime jurídico de entrada, permanência, saída e afastamento de estrangeiros do território nacional, Diário da República, 1.ª série — N.º 154 — 9 de agosto de 2012].

⁸² Article 83 (2) of the Law n.º 29/2012 establishes that 'Are guaranteed the provisions to ensure equal treatment of foreign nationals, particularly with regard to social security, tax benefits, trade union membership, recognition of diplomas, certificates and other professional qualifications, or access to goods and services available to the public, as well as the application of rules granting them special rights' (free translation) [in the original language: 'É garantida a aplicação das disposições que assegurem a igualdade de tratamento dos cidadãos estrangeiros, nomeadamente em matéria de segurança social, de benefícios fiscais, de filiação sindical, de reconhecimento de diplomas, certificados e outros títulos profissionais ou de acesso a bens e serviços à disposição do público, bem como a aplicação de disposições que lhes concedam direitos especiais.'].]

⁸³ See the compilation of the ad-hoc query regarding the transposition of the Single Permit Directive assembled by the European Migration Network and the European Commission available at: http://ec.europa.eu/dgs/home-affairs/what-we-do/networks/european_migration_network/reports/docs/ad-hoc-queries/eu-acquis/482__emn_ahq_on_transposition_of_directive_2011_98_ec_requested_9_june_2013_wider_dissemination.pdf.

⁸⁴ Article 1 (b), Decree of 4 March 2014 [Decreto legislativo 4 marzo 2014, n. 40 Attuazione della direttiva 2011/98/UE relativa a una procedura unica di domanda per il rilascio di un permesso unico che consente ai cittadini di Paesi terzi di soggiornare e lavorare nel territorio di uno Stato, GU n.68 del 22-3-2014].

France.⁸⁸ In addition, Member States will also be able to impose restrictions on social rights of third-country workers after the implementation of the Directive, as it creates a legal basis for ongoing modification of domestic rules on social security, tax benefits, education and vocational training, and access to goods and services⁸⁹.

If the implementation is partial or insufficient, the European Commission will be able to take action and initiate infringement procedures⁹⁰ against Member States. Furthermore, it is hoped that if the CJEU is asked to interpret the Single Permit Directive's provisions,⁹¹ it will insist that these are to be interpreted in a manner that does not jeopardise its overall effectiveness. This is what the CJEU has decided in relation to cases concerning, for example, the Family Reunification Directive⁹² and the Returns Directive.⁹³ As indicated in its decision *Chakroun*⁹⁴ concerning the interpretation of the concepts of recourse to the social assistance system and family reunification, the CJEU insists on the 'necessity of not interpreting the provisions of the Directive restrictively and not depriving them of their effectiveness'.⁹⁵ The CJEU defends a similar point of view concerning the effectiveness of removals in the Returns

⁸⁵ Additional provision number 4, Law of 27 September 2013 [Ley 14/2013, de 27 de septiembre, de apoyo a los emprendedores y su internacionalización, Boletín Oficial del Estado, 233, Sec. I. Pág. 78788].

⁸⁶ Law of 11 December 2013 [Wet van 11 december 2013 tot wijziging van de Wet arbeid vreemdelingen en de Vreemdelingenwet 2000 in verband met de implementatie van Richtlijn 2011/98/EU van het Europees Parlement en de Raad van 13 december 2011 betreffende één enkele aanvraagprocedure voor een gecombineerde vergunning voor onderdanen van derde landen om te verblijven en te werken op het grondgebied van een lidstaat, alsmede inzake een gemeenschappelijk pakket rechten voor werknemers uit derde landen die legaal in een lidstaat verblijven (PbEU 2011, L 343)].

⁸⁷ Article 2 (3), Law of 19 June 2013 [Loi du 19 juin 2013 portant modification de: 1. la loi modifiée du 5 mai 2006 relative au droit d'asile et à des formes complémentaires de protection; 2. la loi modifiée du 29 août 2008 sur la libre circulation des personnes et l'immigration, Journal Officiel du Grand-Duché de Luxembourg A- 106].

⁸⁸ In France, more alarmingly, the official position is that the implementation of a '*guichet unique*' or 'one-stop-shop' mechanism by the legislator in 2011 at the time of the transposition of the directive 2009/50 (Blue Card Directive) is sufficient. See Law of 16 June 2011 [Loi n° 2011-672 du 16 juin 2011 relative à l'immigration, à l'intégration et à la nationalité, JORF n°0139 du 17 juin 2011 page 10290] and Decree of 6 September 2011 [Décret n° 2011-1049 du 6 septembre 2011 pris pour l'application de la loi n° 2011-672 du 16 juin 2011 relative à l'immigration, l'intégration et la nationalité et relatif aux titres de séjour, JORF n°0207 du 7 septembre 2011 page 15036].

⁸⁹ Article 12 (2), Single Permit Directive.

⁹⁰ Article 258, TFEU.

⁹¹ Under article 267, TFEU.

⁹² Council Directive 2003/86/EC, *supra* note 27.

⁹³ European Parliament and Council Directive 2008/115/EC of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals OJ L 348/98.

⁹⁴ Case C-578/08 *Chakroun v Minister van Buitenlandse Zaken* [2010] ECRI-1839.

⁹⁵ *Ibid* at para 64.

Directive context in its decisions *El Dridi*⁹⁶ and *Achughbabian*.⁹⁷ It is possible to argue, by analogy, that the CJEU could interpret the possibilities of restrictions of social rights provided for by the Single Permit Directive in line with the requirement of effectiveness. This is certainly conceivable, although the CJEU will also need to take into account the specific context of access to domestic labour markets, Member States' employment policies and the EU's competences in the field of common immigration policy.⁹⁸

3.2. Mechanism of referral to domestic law

In addition to allowing for restrictions of social rights, the Single Permit Directive also establishes an interesting mechanism of referral to domestic law in sensitive areas such as volumes of admission of third-country nationals. Article 8(3) of the directive provides that '[a]n application may be considered as inadmissible on the grounds of volume of admission of third-country nationals coming for employment and, on that basis, need not to be processed'. This was an important point during the directive negotiations, Member States wanted to ensure that they would keep the possibility to declare an application inadmissible on the sole grounds of volumes of admission, which is a dimension they can decide on discretionarily.⁹⁹ It is noted that despite the impact it can have on the effectiveness of the directive, this provision is in line with article 79(5) TFEU. The latter provides the EU with competence to develop a common immigration policy and gives Member States a right to determine volumes of admission of third-country workers.

More importantly, article 11 of the directive states that the single permit should authorise its holder at least to exercise the specific provided employment activity in accordance with national law. Domestic law may make provision to allow third-country workers to freely exercise any kind of economic activity. However, the directive establishes only a minimum standard of protection,

⁹⁶ Case C-61/11/PPU *Hassen El Dridi, alias Soufi Karim* [2011] ECR I-3015 at para 53.

⁹⁷ Case C-329/11 *A. Achughbabian v. Prefet du Val-de-Marne* [2011] OJ C 32/12 at para 33.

⁹⁸ Article 79 (2) b), TFEU.

⁹⁹ Council of the European Union, *supra* note 32, at 6.

which is already a limitation upon the economic right to work; in other words, according to the directive the immigrant does not have the right to change his economic activity once in the Member State, unless the domestic law authorises these changes.¹⁰⁰ If this limitation may be seen as necessary, as temporary immigration is often used to alleviate domestic labour shortages, it imposes an unnecessary instrumentalisation of labour immigration in the EU. Certainly, it falls within the general interest of Member States to limit the impact of immigration on the domestic labour market. However, the economic welfare and human development of immigrants is not fully taken into consideration. By leaving it to the domestic legislator to decide about the extent of third-country workers' economic right to exercise an economic activity, the directive certainly opens the door to a more limited application of this right by Member States. This can have, in addition, important implications to third-country workers social integration in host societies.

4. Implications for the integration of third-country nationals in the EU

As discussed above, the Single Permit Directive allows Member States to impose important restrictions on social rights of third-country workers. It is argued that these restrictions of immigrants' rights can have an important impact on their capacity to integrate in the host society. If these limitations are significant, they may prevent immigrants from fully participating in the life of the host society. It is argued that having rights and effectively exercising these rights is a condition for full participation in the life of a society. In this sense, as argued by Castles, 'the equality of human rights laid down in instruments of international law does not exist in social reality, where a *new hierarchy of citizenship* prevails. All people may have certain rights on paper, but many lack the opportunities and resources to actually enjoy these rights.'¹⁰¹ Indeed, the difference between what is provided for in international law and EU law on the one hand, and the social reality of immigrants, on the other hand, is also conditioned by opportunities and resources

¹⁰⁰ Article 11, Single Permit Directive.

¹⁰¹ Stephen Castles, 'Migration, Crisis and the Global Labour Market' (2011) 8 *Globalizations* 311, at 318 (emphasis in original).

allocated by a given country. The Single Permit Directive may provide a comprehensive set of rights to third-country workers. However, the effective exercise of these rights will be conditioned, in reality, by the will of Member States in imposing or not imposing restrictions on these rights.

In order to fully assess the implications of such restrictions of social rights in the context of the Single Permit Directive, this article undertakes analysis in two steps: first, it critically evaluates the definition of the concept of integration, as the content of this concept has been fluctuant in the EU public discourse for the past decades (section 4.1); second, it comparatively examines the extent and limits of integration of third-country workers in the light of citizenship theory, as the directive aims to ensure fair treatment and to grant rights that are comparable to those of EU citizens¹⁰² (section 4.2).

4.1. Definition of integration

Integration seems to be an important aim of EU legislation in the field of labour immigration.¹⁰³ Yet the definition of the concept of integration is not very clear.

The Commission defines integration as ‘a dynamic, two-way process of mutual accommodation by migrants and by the societies that receive them’.¹⁰⁴ The reference to a two-way process implies that on the one hand, immigrants should demonstrate the desire to become a part of the host society, and, on the other hand, Member States should adopt a welcoming attitude towards immigrant workers, showing willingness to accommodate diversity¹⁰⁵ and

¹⁰² Preamble, recital 2, Single Permit Directive.

¹⁰³ Although it lacks competence to directly legislate in this field according to article 79 (4), TFEU ‘The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may establish measures to provide incentives and support for the action of Member States with a view to promoting the integration of third-country nationals residing legally in their territory excluding any harmonisation of the laws and regulations of the Member States’.

¹⁰⁴ European Commission, ‘European Agenda for the Integration of Third-Country Nationals’ (Communication) COM (2011) 455 final; Council of the EU, ‘Common Basic Principles for Immigrant Integration Policy in the European Union’ no 14615/04.

¹⁰⁵ Canada is often quoted as the best example of multicultural host society. Section 27 of the Canadian Charter of Rights and Freedoms establishes that ‘This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians’, available at: <http://laws->

multiculturalism.¹⁰⁶ For instance, the Commission emphasises that ‘Europe needs a positive attitude towards diversity and strong guarantees for fundamental rights and equal treatment, building on the mutual respect of different cultures and traditions’.¹⁰⁷ The European Commission also highlights the necessity of promoting integration and points out that this can be achieved through access to certain social rights. It affirms that ‘[the] EU must ensure that effective measures are in place to promote integration, with the participation of both migrants and the societies in which they live. Access to education, social and health services is important for integration’.¹⁰⁸

Economic immigration is seen by this institution as a tool for economic growth.¹⁰⁹ It also points out that ‘beyond their contribution to the EU economy and innovation, the positive role of migrants themselves needs be respected.’¹¹⁰ For this reason, third-country workers should be well integrated in the host societies. Effective integration of legal third-country immigrants is set out as a political objective, ‘underpinned by the respect and promotion of human rights’.¹¹¹

However, as highlighted by Solivetti, ‘integration is a more complex and less obvious concept than might appear at first sight’.¹¹² He identifies three forms of integration: social integration, cultural assimilation, and political participation.¹¹³ As assimilation may be seen as the rejection or abandon of the immigrant’s cultural background culture,¹¹⁴ and as political participation implies

lois.justice.gc.ca/eng/const/page-15.html. In addition, the Canadian Multiculturalism Act defines the main principles applying to the Canadian multiculturalism policy, available at: <http://laws-lois.justice.gc.ca/eng/acts/c-18.7/page-1.html>.

¹⁰⁶ Keith Banting and Will Kymlicka, *Multiculturalism and the Welfare State: Recognition and Redistribution in Contemporary Democracies* (Oxford: Oxford University Press, 2006); Christian Joppke and Steven Lukes (eds), *Multicultural Questions* (Oxford: Oxford University Press, 1999); Takanori Sumino, ‘Does Immigration Erode the Multicultural Welfare State? A Cross-National Multilevel Analysis in 19 OECD Member States’ (2014) 3 *Journal of Ethnic and Migration Studies* 436.

¹⁰⁷ European Commission, *supra* note 104, at 3.

¹⁰⁸ European Commission, ‘4th Annual Report on Immigration and Asylum (2012)’ (Communication) COM (2013) 422 final at chapter III-4, 8.

¹⁰⁹ *Ibid.*

¹¹⁰ *Ibid.*

¹¹¹ The Stockholm Programme, *supra* note 15; European Commission, *supra* note 104.

¹¹² Luigi Solivetti, *Immigration, Social Integration and Crime. A cross-national approach* (London: Routledge, 2010) at 132.

¹¹³ *Ibid.*

¹¹⁴ *Ibid.*

the exercise of political rights which are not within the remit of the Single Permit Directive, this article will mainly focus on the concept of social integration.

Social integration can be seen as the ‘changes in immigrants’ conditions, measured on the basis of the positions they occupy in the economy, in consumption, in habitat, and in education’.¹¹⁵ Thus, the central element in this definition is the participation of immigrants in the life of the host society.¹¹⁶ Several indicators of immigrant integration, such as access to education, housing, household income, and civic engagement, can be used to measure to which extent integration is a reality in host societies.¹¹⁷ Certain EU Member States already provide for such possibility of integration through the participation in the society. For instance, in Denmark, country which is not bound by the Single Permit Directive,¹¹⁸ article 1 of the Consolidation of the Act of Integration of Aliens in Denmark establishes that:

An object of the Act is to ensure that newly arrived aliens are given the possibility of using their abilities and resources to become involved and contributing citizens on an equal footing with other citizens of the society. This must be effected, through an effort of integration, by (a) assisting in ensuring that newly arrived aliens can participate in the life of society in terms of politics, economy, employment, social activities, religion and culture on an equal footing with other citizens.¹¹⁹

Accordingly, at the very basis of any eventual integration, immigrants must have access to some basic rights. Once immigrants have access to a common set of rules granting a number of fundamental rights, they might, by exercising these rights, integrate better in the life of the host society. Only then, a ‘change in their conditions’¹²⁰ will become possible. In any event, there

¹¹⁵ Ibid.

¹¹⁶ For a summary of different theories of integration in social sciences see Yan Algan, Alberto Bisin, Alan Manning and Thierry Verdier (eds), *Cultural Integration of Immigrants in Europe* (Oxford, Oxford University Press, 2012) at 4-6.

¹¹⁷ OECD, ‘Settling In: OECD Indicators of Immigrant Integration 2012’, 3 December 2012, available at: <http://dx.doi.org/10.1787/9789264171534-en>.

¹¹⁸ Preamble, recital 34, Single Permit Directive.

¹¹⁹ Consolidation of the Act of Integration of Aliens in Denmark, No. 839, 5 September 2005, available at: http://ec.europa.eu/ewsi/UDRW/images/items/docl_998_399180562.pdf.

¹²⁰ Solivetti, *supra* note 112, at 132.

must be legal provisions providing immigrants with certain fundamental rights in the host society. Therefore, the adoption of the Single Permit Directive and the establishment of a common set of rights, based on comparable treatment with nationals, can be seen as a first positive step towards the accomplishment of this type of integration.

Nonetheless, this concept of social integration and the one proposed by the European Commission seem to be in contradiction with the reality of the political discourse in several European countries. After the events of 9/11 the trend in certain domestic systems is more oriented towards a ‘thickening of national identities’.¹²¹ This trend is exemplified by the French public discourse on national identity.¹²² A further indication of this tendency can be seen in the reversal of the conception of integration in certain Member States such as the Netherlands, Germany and the United Kingdom.¹²³ This conception evolved from free and voluntary participation in the society to a pre-condition of entry and grant of residence permit to aliens, notably attested by language proficiency and proof that the immigrant shares the fundamental and traditional values of the host society.¹²⁴ Language proficiency may be seen, for instance, as a

¹²¹ Dora Kostakopoulou, *The Future Governance of Citizenship* (Cambridge: Cambridge University Press, 2008) at 34.

¹²² The former President Nicolas Sarkozy charged his Minister of Immigration Eric Besson with the task of organising a public debate about the concept of national identity in October 2009. This debate raised several issues relating to integration and to the concept of belonging to a social group. Intellectuals and members of the opposition to the government have strongly criticised this initiative. Despite the criticisms, a governmental seminar on national identity took place on 8 February 2010. Its outcome was modest and only concerned measures with no real legal impact. However, it is submitted that it contributed to the aggravation of the xenophobic and anti-immigration rhetoric. See ‘Débat sur l’identité nationale : "Bon débarras !"’ *Le Monde* (Paris 08 February 2010) available at : http://www.lemonde.fr/politique/article/2010/02/08/debat-sur-l-identite-nationale-bon-debarras_1302919_823448.html; Delphine Dyèvre, ‘Fillon enterre l’identité nationale avec des mesurette’ *L’Express* (Paris 08 February 2010) available at : http://www.lexpress.fr/actualite/politique/fillon-enterre-l-identite-nationale-avec-des-mesurette_847446.html.

¹²³ See Ricky van Oers, *Deserving Citizenship. Citizenship Tests in Germany, the Netherlands and the United Kingdom* (The Hague: Brill/ Nijhoff, 2013); Kees Groenendijk, ‘Integration of Immigrants in the EU: the Old or the New Way?’, in Yves Pascouau and Tinekw Strik (eds), *Which Integration Policies for Migrants? Interaction between EU and its Member States*, Wolf Legal Publishers, 2012, 3-14.

¹²⁴ For instance, basic knowledge of Dutch language and of ‘Dutch society’ is required of newcomers. Their knowledge is attested by a civic integration exam, taken either prior to arrival in their country of origin, or in the territory of the Netherlands within three years from arrival. See government website available at: <http://www.government.nl/issues/integration>. For a comprehensive analysis of integration policies in different European States see MIPEX available at: <http://www.mipex.eu/countries>. In the UK, in addition to language proficiency, those intending to become permanent residents or UK citizens should pass the ‘Life in the UK’ test which encompasses a wide range of detailed questions about population, the role of women in the society, religion, traditions, etc. See official website available at: lifeintheuktest.gov.uk. See also Sergio Carrera and Anja Wiesbrock, ‘Civic Integration of Third-Country Nationals: Nationalism versus Europeanisation in the Common EU Immigration Policy’ (2009) ENACT Report, available at: www.ceps.be/ceps/dld/2179/pdf; Theodora Kostakopoulou, ‘The Anatomy of Civic Integration’ (2010) 73 *The Modern Law Review* 933; Kees Groenendijk,

determinant of the third-country national's willingness to integrate in the host society. However, it is not clear whether the proficiency of the language should be assessed exclusively before the third-country national's entry into the EU Member State territory or if it can be progressively acquired after the entry into its territory.¹²⁵ The second option would be certainly more in line with the concept of integration as a two-way process advocated by the European Commission.¹²⁶ It would also allow for a more inclusive approach to integration of third-country workers, based on the enjoyment of comparable rights to those of nationals and EU citizens.

4.2. Comparative analysis with the concept and theories of citizenship

In order to examine the extent and limits of integration of third-country workers in the context of the Single Permit Directive, a parallel analysis with the concept and theories of citizenship should also be established. Citizenship includes participation in the life of the society. Since the times of Aristotle, participation in the life of the society has been seen as a fundamental aspect of citizenship.¹²⁷ It can be defined as 'equal membership of a political community from which enforceable rights and obligations, benefits and resources, participatory practices and a sense of identity flow'.¹²⁸

'Integration of Immigrants in the EU', *supra* note 123; Nicos Trimikliniotis, 'The Instrumentalisation of EU Integration Policy: Reflecting on the Dignified, Efficient and Undeclared Policy Aspects', in Yves Pascouau and Tinekw Strik (eds), *Which Integration Policies for Migrants? Interaction between EU and its Member States*, Wolf Legal Publishers, 2012, 109-125.

¹²⁵ See Case C-138/13 *Dogan v Germany* opinion of AG Mengozzi 30 April 2014 [46] (about family reunification in the field of the Association Agreement EU/Turkey). It will be interesting to see if the Court will clarify its position vis-à-vis the concept of integration of third-country nationals in the pending cases C-579/13 *P. and S.* (about civic integration obligation of long term residents), and C-153/14 *K. and A.* (about language requirement pre-departure tests in the context of the family reunification directive). See also Kees Groenendijk, 'Pre-departure Integration Strategies in the European Union: Integration or Immigration Policy?' (2011) 13 *European Journal of Migration and Law* 1; Sergio Carrera and Anja Wiesbrock, *supra* note 124; Theodora Kostakopoulou, *supra* note 124.

¹²⁶ European Commission, *supra* note 104.

¹²⁷ In Book III Politics Aristotle defined citizens as 'a man who shares in the administration of justice and in the holding of office'. Although showing a very limited concept of citizenship applying to men of a certain age and status, the central element of this definition is political and civic participation of the citizen in the life of the society. The citizen is 'the one who is able to participate in the deliberative and judicial areas of government': Johnathan Barnes (ed), *The Cambridge Companion to Aristotle* (Cambridge: Cambridge University Press, 1995) 243. See also C. Johnson, 'Who is Aristotle's Citizen?' (1984) 29 *Phronesis* 73 at 74.

¹²⁸ Dora Kostakopoulou, *supra* note 121, at 1.

In this sense, taking into account Anderson's theory on citizenship and the 'Community of Value',¹²⁹ third-country workers can be compared with the 'tolerated citizen', that is to say, those citizens that are '(not-quite) good-enough citizens'¹³⁰ such as the 'deserving claimant of benefits'¹³¹ but that are not yet 'failed citizens' such as criminals and benefit scroungers.¹³² The introduction of a common set of rights by the Single Permit Directive may provide comfort to the status of tolerated citizens in relation to third-country workers legally residing and working in a Member State of the EU. It may equip them with a legal status in the host society, allowing for more participation and less social exclusion.

According to the matrix proposed by Held,¹³³ citizenship relates indeed to three main elements: rights and duties, membership, and participation. Third-country nationals may benefit from rights and duties provided by legal instruments giving them a formal legal status. In EU labour immigration law, different directives, including the Single Permit Directive, grant different rights to third-country nationals, according to professional skills, family situation, and time spent in the host country.¹³⁴ Membership and participation would be more difficult to obtain, even for those third-country nationals who benefit from a permanent residence status. While membership may be acquired by naturalisation, non-naturalised immigrants will certainly never fully participate in the life of the society as their systematic exclusion from political participation is largely accepted.¹³⁵ They might, however, benefit from what has been referred to as 'civic citizenship'¹³⁶ or 'social citizenship'.¹³⁷

¹²⁹ Anderson, *supra* note 47.

¹³⁰ *Ibid.*, at 6.

¹³¹ *Ibid.*

¹³² *Ibid.*, at 5.

¹³³ David Held, 'Between state and civil society: Citizenship' in G. Andrews (ed), *Citizenship* (Lawrence and Wishart 1991) 20.

¹³⁴ See *supra* note 27.

¹³⁵ On the contrary, EU citizens enjoy some political participation as they benefit from political rights (article 22 TEU). See Jo Shaw, *The Transformation of Citizenship in the European Union. Electoral Rights and the Restructuring of Political Space* (CUP 2007).

¹³⁶ European Commission, 'Community Immigration Policy', *supra* note 14; European Commission, 'Immigration, Integration and Employment' (Communication) COM (2003) 336 final.

¹³⁷ Thomas H. Marshall, *Citizenship and Social Class and Other Essays* (Cambridge: Cambridge University Press, 1950).

The European Commission defines civic citizenship as ‘guaranteeing certain core rights and obligations to immigrants which they would acquire gradually over a period of years, so that they are treated in the same way as nationals of their host state, even if they are not naturalised’.¹³⁸ Civic citizenship is seen as a tool to facilitate integration.¹³⁹ The Commission justifies the development of this concept of civic citizenship by indicating that it has a legal basis in EU law. This legal basis is found in the treaties¹⁴⁰ and in secondary legislation,¹⁴¹ but interestingly also in the Charter of Fundamental Rights of the EU,¹⁴² as the latter ‘establishes a basic framework for civic citizenship, some rights applying because of their universal nature and others derived from those conferred on citizens of the Union’.¹⁴³ Emphasis is put on the enjoyment of a set of rights by third-country nationals. These rights include not only civil rights such as free movement and residence, and the right to petition and to access documents, but also economic and social rights such as the right to work, freedom of establishment, and freedom to provide and to receive services. Consequently, civic citizenship may encompass both civil and social aspects of citizenship. Therefore, the adoption of a common set of rights applicable to third-country workers by the Single Permit Directive may, in principle, contribute to the enjoyment of civic and social citizenship.

The concept of social citizenship was developed for the first time by Marshall in 1950.¹⁴⁴ Social citizenship was defined as ‘the whole range from the right to a modicum of economic welfare and security to the right to share to the full in the social heritage and to live the life of a

¹³⁸ European Commission, ‘Immigration, Integration and Employment’, *supra* n 136 at 23.

¹³⁹ *Ibid.*, at 30.

¹⁴⁰ *Ibid.*, at 23. Reference is made to articles 227, 228 and 15 TFEU (former articles 194, 195 and 255 TEC).

¹⁴¹ *Ibid.* Reference is made to the European Commission’s proposal for a Directive on the status of third-country nationals who are long-term residents (*supra* note 27).

¹⁴² *Ibid.* Not yet recognised as a legally binding instrument back in 2003 when the Commission published its communication (since the entry into force of the Treaty of Lisbon on 1 December 2009, ‘The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties’ article 6 (1) TEU).

¹⁴³ *Ibid.*

¹⁴⁴ Marshall, *supra* note 137.

civilized being according to the standards prevailing in society'.¹⁴⁵ Although his theory was heavily criticised by scholars,¹⁴⁶ it reflects the model of the universal welfare state adopted by the UK.¹⁴⁷ The main criticism relates to its linear and lethargic division of the concept of citizenship in three areas: civil, social, and political life. Despite these criticisms, it is possible to argue that third-country nationals would be entitled to benefit from social citizenship insofar as they would fully benefit from social rights. Once more, if fully implemented by Member States, the common set of rights put forward by the Single Permit Directive could be beneficial for the enjoyment of social citizenship by third-country workers.

In sum, the adoption of the Single Permit Directive equips third-country nationals with a comprehensive set of rights enabling them, in principle, to fully participate in the life of the host society. If Member States do not impose unreasonable restrictions upon these rights, third-country workers will be able to fully enjoy them and by consequence, to integrate the host society when effectively exercising these rights. Accordingly, they will exercise a type of citizenship, the civic or social citizenship, even though they will not be considered as the equivalent of nationals 'good citizens' but only 'tolerated citizens' in Anderson's approach¹⁴⁸.

5. Conclusion

The establishment of a common set of rights for third-country workers by the Single Permit Directive should certainly be welcomed, even though it maintains the EU's fragmented approach in the field of labour immigration.

¹⁴⁵ Ibid.

¹⁴⁶ See especially Bryan S. Turner, *Citizenship and Social Theory* (London: Sage Publications, 1993); Peter Taylor-Gooby, *Reframing Social Citizenship* (Oxford: Oxford University Press, 2008).

¹⁴⁷ Report of the Inter-Departmental Committee on Social Insurance and Allied Services 'Lord Beveridge Report', December 1942. See Brian Abel-Smith, 'The Beveridge Report: Its Origins and Outcomes' (1992) 45 *International Social Security Review* 5.

¹⁴⁸ Anderson, *supra* note 47.

This article has pointed out, however, that the directive allows important restrictions of social rights of third-country workers. It has showed that if these restrictions were a necessary trade-off for the adoption of the directive, they can potentially allow Member States to reduce the common set of rights of part of its substance. Assuredly, as emphasised by Ruhs, not all types of ‘trade-offs between openness and rights’ should be tolerated.¹⁴⁹ His argument relies on a pragmatic approach according to which ‘temporary, limited, and evidence-based trade-off between the two goods of more migration and more rights to promote the interests of both current and potential future migrants’ is possible.¹⁵⁰ The evidence to which he refers relates only to the economic-based concept of ‘net benefits for the receiving country’.¹⁵¹ It was nevertheless submitted in this article that this pragmatic approach can be supplemented with a human rights-based approach, according to which States should respect their human rights obligations while imposing restrictions to social rights of immigrants.

This article has also discussed the possible implications of the establishment of a common set of rights to the integration of third-country workers in the EU. Integration, understood as a two-way process,¹⁵² draws on immigrants’ participation in the host society and is closely linked to the acquisition and exercise of social rights. Accordingly, the establishment of a common set of rights by the Single Permit Directive is to be considered as a positive step towards the integration of third-country workers in the EU, insofar as Member States do not empty these rights of their substance while implementing the restrictions of rights allowed by the directive.¹⁵³

Member States have started implementing the directive and several of them have only adopted changes in procedural rules.¹⁵⁴ The European Commission will be in charge of verifying the correct implementation of the directive and may initiate infringement procedures if

¹⁴⁹ Ruhs, *supra* note 45 at 185.

¹⁵⁰ *Ibid*, at 191.

¹⁵¹ *Ibid*, at 185.

¹⁵² European Commission, ‘European Agenda for the Integration of Third-Country Nationals’, *supra* note 104; Council of the EU, ‘Common Basic Principles for Immigrant Integration Policy in the European Union’ no 14615/04.

¹⁵³ Article 12 (2), Single Permit Directive.

¹⁵⁴ See above section 3.1.

necessary. However, it is to be hoped that the Court of Justice of the European Union will be able to interpret the directive in light of the principle of effectiveness of EU law. By doing so, the Court could help forge the boundaries of the application of the common set of rights put forward by the Single Permit Directive, rendering the protection of third-country workers' social rights in the EU less dependent on the Member States' political will.