Legal Migration to the European Union with special regard to the right to respect family life

Summary of Doctoral Thesis

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I. Research objectives

The large scale of movement of persons in the 21st century is one of the greatest challenge of our globalised world. Receiving states strive to find the proper balance between their interests and the integration of migrants. In developing their immigration policies they have to take into account on one hand their economic and labor market needs, on the other hand the aim to integrate migrants the soonest they can into the host society and to recognise their fundamental rights at the same time. The so called 'managed migration'can also prevent the increasing phenomenon of illegal migration and its negative effects on the host society.

The tension between the above opportunities and threats posed by third country nationals' ('TCN') migration gives rise to various questions to the legislative and politicians: should there be limits on the numbers of TCNs admitted to the Member State? Should they enjoy the right to work? Should they enjoy the right to equal treatment, if so to what extent? Should they enjoy the right to move to another Member State? To what extent their integration into the host society should be required?
The present thesis is looking for answers to the above questions through the detailed analysis of the legal status of TCNs enjoyed in the European Union with a special respect to the fulfillment of the Tampere objectives declaring the requirement of fair treatment of third country nationals residing legally in the territory of the EU.

In the field of migration law the relationship between EU law and national law is quite complex. According to the traditional classification, union law gives EU citizens the right to move freely while national immigration law determines the conditions under which TCNs can enter Member States, have access to labor market, have the right to be joined by their families.

However, due to the recent development occurred in Union law, the latter is increasingly occupying the traditional domain of national law which can result in the strengthening of the legal position of TCN migrants. As a consequence, the traditional view emphasizing the wide gap between the legal status enjoyed by Union citizens and TCNs can be questioned.

The traditional view is mainly based on the fact that Union citizens do enjoy free movement rights directly from the Treaty, they enjoy equal treatment on general grounds and have an increased right of protection from expulsion, while in case of TCNs the security interests of the Member State precede the rights of the individual.

The major change in the field of Justice and Home Affairs took place in 1999 with the implementation of the Treaty of Amsterdam. In order to reach the Treaty of Amsterdam's objective of creating an area of freedom, security and justice, the Heads of States and Governments at the Tampere European Council decided upon a five year programme in the field of Justice and Home Affairs. As it has been mentioned above, the Tampere programme was certainly ambitious, embodying a strong commitment to fundamental rights while stressing the importance of improving the situation of TCNs in the EU. The European Council called upon the development of a more vigorous integration policy, aimed at granting legally resident third country nationals rights and obligations comparable to those of EU citizens.
The Tampere programme is welcomed, however many scholars take the view that its conclusions are highly illusionistic.

In November 2004, the second multi-annual programme in the AFSJ, known as 'The Hague Programme' was endorsed by the European Council for the period 2005–2009. In comparison with the Tampere programme, it is much more restrictive and accentuates security concerns. The 9/11 terrorist attacks and the change of political climate within the Member States led to a heightened emphasis on state control and national security which did not help promoting TCNs' rights in the EU.

In 2009 the European Council adopted a new multi annual policy programme, in the area of Freedom, Security and Justice running under the title of 'an open and secure Europe serving and protecting the citizens'. The Commission has been charged with the challenging task to translate the aims and priorities of the Stockholm Programme into a concrete Action Plan by the end of June 2010.
However, apart from certain concrete commitments, the Stockholm Programme remains a rather vague policy document which contains little novelties.

Despite of the fact that there was no 'political breakthrough' in the field of promoting third country nationals' rights, it seems that TCNs are also entitled to benefit from European citizenship-related and citizenship-like freedoms, benefits and rights in the EU's AFSJ.

The 'freedoms' of TCNs in Europe, and their entitlement to equal treatment and non-discrimination, have been subject to increasing litigation before the CJEU in Luxembourg.
These rulings demonstrate the political relevance of the role of individuals' litigation while showing that some key concepts, benefits and rights of non-EU nationals are often being interpreted in light of European citizenship and free movement law, EU general principles of law and the principle of non-discrimination on the basis of nationality. In this respect, these judgements also question traditionalist divisions between the legal status of EU nationals and TCNs.

Similarly, increasing importance is given by the EU to the 'freedom of movement' or 'cross-border situations' of TCNs (intra-EU mobility and while exercising it benefiting from equal treatment compared with nationals of the receiving Member State) in the EU Directives on long-term residents' status, the blue card, researchers and students.

The present thesis, thus seeks to answer the question as to whether the Tampere objectives of having a uniform immigration policy based on the fair treatment of third country nationals have been met and if not, whether the role of an individual in initiating litigation before courts, in claiming the recognition and enforcement of EU freedoms and rights, and in exercising the act of mobility could help realizing the goals set by Tampere.

The analysis extends to another aspect of EU migration law. It focuses on the respect of human rights standards - particularly the right to respect family life as it is laid down in Article 8 of the European Convention on Human Rights ('ECHR') - applicable in the area of EU immigration law which goes partially beyond the Tampere objectives and provides the basis for a rights based approach in respect of the treatment of third country nationals.

With respect to this, it is far not irrelevant which categories of third country nationals fall under the definition of a "family member" in the field of internal market or immigration law, thus enjoying the extensive protection of Union law.

Human rights oblige national authorities and courts to take into account the legitimate interests of the individuals concerned. Immigration law, on the contrary, has long been characterized by its focus on the public interest. Human rights law holds the potential to reverse the immigration law's traditional orientation at the public interest and redirect it towards the individual.

The present thesis thus pays particular attention to the appearance of the right of respect for family life recognized by Article 8 of European Convention on Human Rights in migration issues.
In the first 30 years of their existence, the Strasbourg institutions remained largely silent on matters of migration. This was no coincidence, since the Convention contains to this day no reference to immigration. Applications relating to immigration law may therefore reach the Court only indirectly. The obligation to permit subsequent immigration for purposes of family reunification with members of the nuclear family already residing on the territory of a Contracting Party is a prime example of this indirect application. The Contracting Party is under no obligation to admit the foreigner on its own right, but may be obliged to do so in respect for the human rights of its family members. The indirect relationship between the Convention and immigration law is the principal justification for the general margin of appreciation which the Contracting Parties enjoy in this policy field and which has consistently been upheld by the ECtHR.

Respect for the margin of appreciation and the corresponding default in the application of national immigration law are enhanced by the Court's focus on the adjudication of hardship cases where the individual circumstances of the persons concerned may at least partly explain the Court's finding of a violation of the Convention. The thesis seeks answer to the question whether such an orientation of the ECtHR's jurisprudence towards the circumstances of the individual case and the broadening of the protective reach of Article 8 ECHR to the network of personal, social and economic relations that make up the private life of every human being may have an influence on the Luxembourg case-law regarding the legal status of TCNs.

II. Structure of the Thesis and Methodology

The thesis focuses on three different fields, each of them capable of reflecting the potential changes in the legal position of TCNs in Union legislation and enforcement.

The first part of the thesis focuses on "privileged" third country nationals comprising family members of EU citizens who have made use of their free movement rights. In such cases, the situation of the third country national is governed mainly by EC Directive 2004/38 and by the EEC Regulation 1612/68.

The second part concerns third country nationals of a particular nationality who enjoy preferential treatment on the basis of specific agreements concluded between the EU and their country of origin with a special respect to the legal status of Turkish workers.

The third part provides a detailed analysis of the secondary legislation constituting the Community acquis on legal migration, which includes the Directive 2003/86/EC on the right to family reunification, Directive 2003/109/EC on the status of long term residents, Directive 2004/114/EC on the conditions of admission of students, pupils, unremunerated trainees and volunteers, Directive 2005/71/EC on a specific procedure for admitting third country national researchers, Directive 2009/50/EC on the conditions of entry and residence of third country nationals for the purposes of highly qualified employment.

The first two parts concentrates on the case law of the Luxembourg Court, not just because of the significant amount of judgements delivered by the Court in the relevant field in recent years, but also due to the assumption of the Thesis that the CJEU followed an extensive approach in its jurisprudence concerning TCNs of a privileged legal status enjoyed under EU law.
In contrast, due to the limited number of judgements delivered by the Court in the field of immigration law, and due to the assumption that members sates endeavour to restrict the scope of application of the Directives, the examination of the immigration law rather provides the detailed analysis of the secondary law itself and its transposition into the national law.

III. Research Outcomes and Applicability

1. Definitions, basic concepts

European migration and integration law are characterized by two principles, which are in latent tension with one another: the principle of progressive inclusion and the principle of congruence between a state's territory, authority and citizenry. All of them are substantiated by public international law. The legal principle of progressive inclusion emanates from the basic idea of the universal protection of human rights, i.e. the idea that individuals have rights independent from their location—whether they are in their home state or in any other state. The principle of progressive inclusion says that migrants are to be included in the host society by approximating their rights progressively to the rights of the citizens of the receiving country.

The legal principle of progressive inclusion is in latent tension and sometimes even in conflict with a much older international legal principle. This principle can be labelled as the principle of congruence of a state's territory, its authority and its citizenry. According to this principle, providing rights to foreigners is always geared by the ideal image that the persons permanently living on a territory are—in reality—part of the citizenry of that state and subject to the state authority.

Both of the legal principles referred above appear in EU migration law simultaneously. The progressive inclusion principle becomes manifest in the EU immigration Directives' mobility provisions by uncoupling the residence status of migrants from the strict requirement of territorial presence—thereby facilitating substantially the legal conditions for transnational mobility. Even as a structural principle of European migration and integration law, the principle of progressive inclusion is still counterbalanced by the principle of congruence of a state's territory, authority and citizenry. This can be illustrated by the strict rules of acquiring the long term resident status by the TCN. The Long term residence Directive requires a legal residence of five consecutive years in the host state while stays abroad interrupt this period and are not taken into account if they exceed six consecutive months. Moreover, migrants who want to acquire the long-term resident status are expected to integrate into the host society first before they are granted permanent rights.

The definition of 'family' under EU law was initially established in the 1960s under the secondary legislation regulating the free movement of persons within the Union. It arose primarily out of a desire to promote and facilitate the mobility of migrant workers which necessitated the extension of the right of residence and other valuable social rights to members of their family who are accompanying them. The threshold of family life under this Regulation (and the Directive amending it) is, therefore, firmly connected to legal marriage. under the Union law the term 'family' therefore, entails heterosexual partnerships which are accorded the status of 'family' only via marriage and it prefers the nuclear family model.
The Strasbourg institutions, for their part, although still limited in their interpretation of 'family' for the purposes of Article 8 ECHR (in that they too favour the legally married, heterosexual union), have gone some way towards acknowledging modern patterns of family life. For instance, they apply what is commonly referred to as the 'reality test' whereby de facto family relationships are taken into account when considering whether or not 'family life' exists.

However, there seems to be a slight change in the recent case law of the courts in question as regards the conception of "European family". The CJEU in its Eyup decision although falls short of accepting that unmarried couples generally can be members of each other's family and enjoy family life that union law can and will protect, seemingly accepts that the provisions of Decision 1/80 is intended to protect de facto family unity.
The ECtHR in its Slivneko et Latvia decision re-defined the understanding of family life with gave a new focus on the 'nuclear family' of spouses and minor children (the 'core family' in the terminology of the ECtHR).
Finally, both Courts seem to give way to a certain extent to the homosexual concept of family (the ECtHR in its case E.B v. France, the CJEU in its case Maruko).

2. The principle of non-discrimination on the basis of nationality

The principle of non-discrimination on the basis of nationality has been part of Community law since the Treaty of Rome signed in 1957. The logic that supports its inclusion is identical to that behind the creation of the European Communities—namely, the creation of a Common Market. While the letter of Article 12 EC (now Article 18 of TFEU) does not expressly state that it does not apply to TCNs, it has been interpreted in this way by doctrine. This therefore represents the classic position as to the scope of Article 12 EC. But with the evolution of Community law, -the Treaty of Amsterdam's partial 'Communitarisation' of policies on visas, asylum and immigration, which tend to apply principally to TCNs - we can nevertheless ask whether it is now time to revisit this classic interpretation.

There are different arguments, both for and against this 'classic' interpretation. In examining the case-law, various textual arguments arise in favour of the classic interpretation (such as the recently delivered Vatsouras judgement of the Court). Another argument in favour of the classic interpretation could be found following the Lisbon Treaty, which brought Article 12 EC into the second part of the TFEU, entitled 'Non-discrimination and citizenship of the Union'. This development may show the link between non-discrimination and citizenship of the Union, the latter being a condition for benefiting from the former. Finally, there is the existence of non-discrimination clauses in certain association and cooperation agreements concluded by the Community with third countries. Since these clauses do exist, one might legitimately think that without them, nationals of third countries with which the Community concludes agreements, or long-term residents, would not be protected against discrimination based on their nationality.

On the other hand, another theory needs to be mentioned which is against the classic interpretation. According to this, the restrictive scope of application has been ascribed to Article12 EC by likening it to the principle of free movement, which Member States have deemed only to apply to their own citizens. However, it is important to bear in mind that the personal scope of application of free movement has been expanded since 1957, to include, -under certain very strict conditions-, such TCNs who have been resident for a long period.

Indeed, the EC immigration directives adopted under Title IV contain new mobility provisions which entitle legally resident TCNs to move to another Member State. However, in my Thesis I would like to point out that these mobility provisions can not be matched with the free movement rights of the EU citizens.

3. The Court practice relating to TCN family members of Union citizens who have moved to another Member State

Due to the recent development in Union law the latter is increasingly occupying the traditional domain of national law which can result the strengthening of the legal position of TCNs. This statement has particular relevance in case of TCN family members of Union citizens whose rights to enter and reside on the territory of the receiving Member State has been increasingly extended by the recent jurisprudence of the CJEU.

Since the very early days of the Community's existence, the importance of ensuring that the family members of migrant Member State nationals are given certain rights (including family

reunification rights) which are necessary for ensuring that the right to free movement of the migrant is not deprived of all useful effect, has been recognized.

In its early jurisprudence (cases Morson and Jhanjan) the Court followed a 'moderate approach'. Under this approach the Court required that granting family reunification rights were necessary for enabling a Member State national to move between Member States and exercise one of the economic fundamental freedoms.

Later, in the well known cases of Jia and Carpenter, the CJEU seems to have followed a more liberal approach by (implicitly) accepting that EC law may require granting family reunification rights even in situations when this is not necessary for, and in any way linked to, the exercise of free movement from one Member State to another.

This 'liberal approach' seems to have been followed in all of the latest cases before the CJEU (Jia, Eind, Metock and Sahin) and, therefore, it appears that the Court has (implicitly) decided now to adopt this approach to the bestowal of family reunification rights.

The rationale behind the move towards the 'Liberal Approach' is the aim of strengthening the political legitimacy of the Union by the creation of a meaningful status of Union citizenship.

One of the central arguments of the present thesis is that the real purpose of the Court in the 'liberal approach' cases of Carpenter, Jia, Eind, Metock and Sahin may have simply been to protect the (human) right to family life (of which the right to family reunification is an aspect), of the Union citizens involved.

However, distancing from the severe economic viewpoints seems to be a hard task for the CJEU. This is well reflected in the Eind and the Metock decisions of the Court. In Eind the Court basically grounded its decision on Regulation 1612/68/EEC and on Singh Doctrine. It asserted in its judgement, that an EU citizen could be deterred from moving to another Member State if he could not subsequently return to his home state with his family members, even if the family relationship was created while in the host state. However, The Court went further than *Singh* by using the concept of union citizenship as a fundamental status (Grzelczyk formula) to fuse the rights of a union citizen to those of a Member State national.
The effect of Metock was also greatly enhanced by Singh. However, this was not necessary, as the Court could have relied wholly on a literal interpretation of the legislation.

The promotion of Union citizenship to the key consideration in questions of freedom of movement and residence can go a long way toward improving legal certainty. The fact that a person, and not an activity is central certainly makes for a much more seamless convergence with other personal rights, such as the rights to family life conferred respectively by Article 8 ECHR.

The strengthening of Union citizenship as a key concept in relation to free movement cases can also give explanation to several unanswered questions, such as the different rulings brought by the Court in its Carpenter and Akrich decisions.

If we accept the view taken by Spaventa in relation to the Akrich case, that the Court grounded its decision on the concept of Union citizenship and not on the strict literal interpretation of the secondary law, we can see, the result of the judgment in Metock is not all that different from the decision in Akrich. The reasoning employed in the two rulings is

different in many respects but it should not be forgotten that, in Akrich, after declaring that TCN family members should not have been unlawfully resident in another Member State before entering the present one, the CJEU also placed significant emphasis on the need for the Member State to consider the respect for family life under Article 8 ECHR. Thus, even in Akrich, the Court clearly envisaged that when a TCN family member had been unlawfully present on the territory and was thus outside the scope of Community law in its own right, there are circumstances when a refusal of residence could constitute an interference with the Union citizen's family life.

Assuming this analysis is correct, the main difference between the two rulings would be that, under Akrich, the presumption was that a right of residence does not exist where a TCN family member has been unlawfully present, however this could be rebutted by application of fundamental rights considerations. Under Metock, however, the presumption is that a right of residence is exercisable and this can only be rebutted by evidence of abuse as set out in Art. 35 of Directive 2004/38. Both rulings were based however on the concept of Union citizenship and their free movement right which allows the Court to make a reference to Article 8 of ECHR.

The liberal approach has huge implications. In a time where many Member States make it difficult for their own nationals to bring their family members in the Union from third countries, EU migrants have indeed a significant legal advantage. However we can not take out of consideration its drawbacks either.
Following the “liberalization” of free movement rules Member States might try to exercise greater control of the initial entry and residence of third country nationals who have not yet become family members of EU citizens. Equally Member States might take a harder line as regards the content or implementation of future EC immigration and asylum law, trying to reduce the possibility that asylum-seekers will come into contact with citizens of other EU Member States.

4. The protection of family life in the Luxembourg Court case-law in the field of migration

4.1. The EU Charter of Fundamental Rights

Article 33(1) of the Charter states that: "The family shall enjoy legal, economic and social protection." This article is the first direct reference to the Union's role regarding families, or rather 'the family'. In particular, the focus is on 'the family' as a unit to be protected in its own right, rather than being exploited in the pursuit of other goals. Article 33(1), therefore, represents a recognition of the fact that Union law does impact on families and expresses an aim to seek to 'protect' them.

The EU Charter, which became binding by the Lisbon Treaty may have the effect of restricting the circumstances under which Member States are bound by human rights guarantees, as a matter of EC law. This is because Article 51(1) of the Charter provides that ‘the provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union [...] and to the Member States only when they are implementing Union law’. The lack of clarity in the Court’s case-law as to what constitutes ‘implementation of EC law’ means that it is not clear whether the Charter will consolidate the Court’s case-law and apply, inter alia, to situations involving Member States acting ‘within the scope of application’ of

Community law (including situations involving Member States derogating from EC law (ERT-type situations)); or whether the drafters of the Charter intended to adopt a more restrictive approach than the one currently employed by the Court and limit the Charter's scope of application to agency, Wachauf-type, situations which involve implementation stricto sensu. The latter would allow, within the scope of the Charter, only situations when a Member State applies a Community measure (e.g. a Community Regulation) or applying national legislation which has been drafted in order to implement into national law a piece of Community secondary legislation. Since there is no piece of secondary legislation which governs the grant and restriction of the rights of family reunification of Union citizens wishing to rely on those rights against their State of nationality (e.g. Carpenter), it appears that, in such cases, the Charter will not be applicable.

4.2. The CJEU's reference to the Strasbourg case-law in the field of free movement of EU citizens and their family members

The relationship between the ECtHR and the CJEU is a complex one. There is a general respect on behalf of the Court for established ECtHR jurisprudence. However, the attitude of the CJEU to the interpretation of Article 8 of the ECHR in its free movement case law seems to abandon the ECtHR's approach and develop an autonomous Community law interpretation. It is well reflected in its 'Baumbast' or in recent 'Eind' rulings.

The Court's stance on family life in Eind was just a secondary consideration. Its primary consideration was that Community legislation on movement and residence cannot be interpreted restrictively. And indeed, in Diatta, the original decision that the Court refers to Eind, not a word is devoted to any obligation to protect family life, pro and contra.

The rights of entry and residence in Metock case are based in the 2004/38/EC Directive. The only fundamental right referred to in the ruling is the fundamental right of residence of Union citizens in a Member State other than that of which they are a national.

It is not surprising if we accept the fact, that the jurisprudence of the two courts build on different principles. While the ECtHR has been reluctant to accept that there has been a violation of Article 8 of the Convention if the family can reasonably be expected to set up home or continue living together elsewhere, the Community/Union law stands on the opposite assumption. The freedom of choice is the cornerstone of the internal market law and thus it assumes that an EU citizen who intends a change of residence should as far as possible be able to choose freely whether to remain in one state, or to migrate across the Community's internal borders.

Moreover, in its Metock ruling, the Court also refers to the possibility that an EU citizen might not just be deterred from moving to another Member State, but might even decide to move to a third country. This gives an indirect critique of the 'elsewhere' thesis developed in the Strasbourg family reunion case-law.

There may be pragmatic reasons for grounding the above rulings on an autonomous Community concept. Were the CJEU uses fundamental rights to support the rights of entry and residence of TCN family members of EU citizens, the universal pull of fundamental rights logic would dictate that the same rights should be enjoyed by family members of TCNs resident within the EU. While such an outcome is compelling in logic, it would run counter to

the CJEU's prior ruling in the C-540/03 case in which the Court rejected a claim by the Parliament that Directive 2003/86/EC had breached the fundamental right of respect of family life.

4.3. The CJEU's Reference to the Strasbourg case law in its C-450/03 decision

As it has been referred above, in 2005 the European Parliament brought an action before the CJEU, questioning the compatibility of certain provisions of the 2003/86/EC Directive with the fundamental rights of respect of family life. However, the Court found that there has been no violation of fundamental rights. The Court referred to the case law of the ECtHR in respect of the right to respect for family life, rather than the much stronger right to family reunification embodied in Community law. As it has already been referred above, according to the established case law of the ECtHR article 8 ECHR does not grant a right to family reunification. It is therefore disputed whether the CJEU in EP v. Council clearly recognized a subjective right to family reunification for third country nationals under EC law or whether it dismissed the opportunity to do so.

5. Special rules under Association and Partnership Agreements

Third Country nationals of a number of countries enjoy special treatment in respect of entry and/or residence rights on the basis of an Association Partnership Agreement. Such association agreements create special, privileged links with a non-member country.
One of the most relevant principles of these agreements is that they aim to grant freedom from discrimination on the basis of nationality in the fields of employment and social security, and in the case of Turkey, to progressively ensure the free movement of workers and improve standards of living. Individuals' litigation before EU courts has clarified and further developed the citizenship related rights of nationals from these countries.

The Association agreement with Turkey constitutes one of the most important agreements with respect to labour mobility. The Court has given a broad interpretation to the rights arising from the Agreement and Decision 1/80 which is based on the Agreement. Concerning the right to work, on several occasions the CJEU has interpreted the obligations arising from the EEC–Turkey Association Agreement and Decision No. 1/80 in a way that has generally enhanced the security of residence and employment status of Turkish migrants.[2]

However, the rights of residence under the Turkey Association agreement, while among the most extensive of all the Union agreements, are still firmly tied to the exercise of economic activity and are far from matching the general rights of residence available to Union citizens. The decision in Bozkurt highlights the unfavourable position in which Turkish nationals may find themselves in the absence of express legislation, equivalent to what was Regulation 1251/70 on the right to remain for EU nationals (now the Citizen's rights Directive) which protects their position.

The Euro-Mediterranean Association Agreements between the EU and the Maghreb states have also been subject to various CJEU rulings. The Member States have tried to limit the

[2]For instance, the CJEU has consolidated the rights of Turkish workers by interpreting the concept of worker under Art. 6(1) of Decision No. 1/80 by analogy with the concept of worker under Article 45 TFEU.

access to social security benefits of workers and family members from the Maghreb states by interpreting the scope ratione materiae and ratione personae of Art. 65 (1) of the Association Agreements restrictively. The CJEU has nonetheless confirmed the broad scope of the principle of non-discrimination laid down in these provisions, there with strengthening the social security rights of workers from these countries in the EU. The CJEU underlined in cases such as Echouik and El Youssfi that the principle of non discrimination implies a right to claim social security benefits 'on the same basis as nationals of the host Member State', barring Member States from imposing additional or stricter conditions for migrant workers than those applicable to nationals of that state.

6. The Directives on legal migration of Third Country nationals and the provisions relating to the inter state mobility of TCNs

The thesis gives an overview on the adoption process and the most important provisions of the Directives on legal migration of TCNs that have been adopted since the Treaty of Amsterdam. With the adoption of the Directives on legal migration one can certainly speak of a shift of competence from the national to the European level. The Directives on legal migration have contributed to the aim of fair treatment of TCNs through their adoption the discretionary power enjoyed previously by the Member States has been restricted to some extent.

National provisions must be drafted in compliance with the minimum standards established in these directives and are subject to scrutiny by the Court. EU principles of law, such as proportionality, legal certainty, and equal treatment as well as the human rights serve as a measure for assessing not only Union legislation, but also national implementation measures.
However, it is doubtful whether one can speak of a fair treatment of TCNs as the adoption of the Directives have led to the development of minimum standards that are the absolute bottom line.

Considering the Tampere objective of approximating the legal position of TCNs to that of Member States' nationals, it must be established that most of the Directives on legal migration contain equal treatment provisions (except of the Students' Directive and the Family Reunification Directive). However, all these provisions can be limited by national law. Moreover, amendments made by Member States to national legislation in order to implement these Directives have been marginal, as many of these provisions have already existed in national legislation before the implementation of the relevant Directives.

As regards the Tampere objective of granting TCNs rights and obligations comparable to those of Union citizens we can establish that the goal has only partially been achieved. Although many of the above directives provide TCNs the opportunity of inter state mobility, free movement rights of TCNs are still restricted as they must comply with a number of requirements in order to become eligible to make use of this right.
Moreover, in contrast to the 2004/38/EC CUP Directive which contains a general equal treatment clause, these directives do only provide a list of those areas where the requirement of equal treatment rights must prevail.

At first sight it seems that the Tampere goal of granting long term residents a set of uniform rights has been achieved by the adoption of Directive 2003/109/EC. However, this conclusion does not reflect truth if we consider the Tampere goal of granting LTR rights as near as possible to those enjoyed by Union citizens. They are also entitled to move to another

Member State if certain conditions are met. However, the rights of long-term residents are still much more limited than those enjoyed by Union citizens who have moved to another Member State. The list of equal treatment rights enjoyed by them is also exhaustive and they have to fulfill several additional conditions, such as an integration test in order to be admitted to the second Member State.

Therefore, when considering in detail the four directives on legal migration and the transposing measures in the Member States, it is obvious that there is still a large gap between the rights granted to TCNs and the rights enjoyed by EU citizens and their family members.

Finally, the aim of facilitating the acquisition of the nationality of the Member State of residence has not been achieved. On the contrary, in the recent years most Member States seem to have made access to their nationality more difficult due to new citizenship requirements (integration and language tests).

With regard the Tampere goals as an overall conclusion it can be said that in certain respects the position of third country nationals who reside legally in a Member State has improved since the Tampere summit, in particular as a result of the streamlining the entry and residence conditions for certain categories of migrants, the opportunity to inter state mobility and the enumeration of clear and enforceable rights of residence and equal treatment at the Community level. However, as opposed to the liberal spirit of Tampere European Council and proposals submitted by the Commission, the Directives finally adopted are far less ambitious and national measures are increasingly restrictive. It is the future task of the Court to find the proper balance between maintaining of a certain scope for discretion for national implementing measures on one hand and the effective application of Union law in compliance with EC principles of law on the other.

7. Future prospects in the field of legal migration

With the amendments of the Lisbon Treaty such as the “communitarisation” of the three pillars the community decision making becomes the general rule in EU, resulting the extension of EU’s competence in the AFSJ. These amendments can contribute to the efficiency of the individual’s legal protection enjoyed in the EU while diminishing significantly the democracy deficit the EU is suffering from. The limitations laid down in Article 68 of EC Treaty relating to the CJEU’s power will also have ceased to be in effect with the Lisbon Treaty.

The positive change that occurred recently in CJEU’s jurisprudence is well reflected in its Chakroun decision where the Court when interpreting the requirement of having sufficient resources referred to its previous judgement in Eind which concerned a TCN family member of a Union citizen. The question therefore arises as to whether the analogy with case law regarding EU citizen implies that the resource requirement under an EU immigration directive (I.e. the Directive 2003/86 on Family reunification) must be interpreted in the same way as the resource requirement in Directive 2004/38/EC. In its decision it also referred to Metock, which means that the prohibition of the first point of entry principle established in the Metock-case also applies to TCNs relying on Directive 2003/86).

Expectations that might arise from the Stockholme Programme are mixed. The approach taken in respect of labour migration is hesitant. It is stressed that Member States remain

competent to determine the volume of admissions and that the inflow of economic migrants must be fine tuned in accordance with the labour market of the European economy concerned. Moreover, security related concerns dominate the policy programmes.
Little importance is attached to the topic of legal migration, presumably due to the assumption that in this area, sufficient progress has already been achieved. However, it is apparent that still a lot needs to be done in the area of legal migration.

However, the ways in which individuals' litigation before EU courts and the political role granted to the freedom to move in the scope of both European citizenship and migration law sheds light to potential ways forward in rethinking and reshaping citizenship of the Union. Such a citizenship needs to move beyond nationality-based perceptions and legal concepts by placing at the heart of the EU's added value the facilitation and promotion of the freedom to move, and the enjoyment of non-discrimination on the basis of nationality.

In the examination the field of migration law we can not leave out of consideration of its complexity. In the light of the above, the author would like to propose the following recommendations:

In the area of economic (labour) migration the currently applied sectoral approach must give place to a comprehensive one laid down by the original Commission proposal in order to eliminate the future solidification of differential treatment in respect to the various groups of economic actors.

The Union institutions should move away from a labour migration policy based on granting short term economic advantages to the migrant workers instead of providing the possibility of permanent residence rights for them. Thus the blue card Directive must be amended to allow for an approach providing migrants the opportunity of permanent settlement.

Following the amendments made by the Lisbon Treaty[3] empowering legally residing residents to move to another Member State, the Union law maker should also amend the respective free movement provisions allowing TCNs falling under one of the EU immigration Directives to move freely to a second Member State without having to comply with strict requirements.

The EU should endeavour to reduce the minimum harmonization approach and the wide scope of discretion granted to Member States under EU Directives in the field of EU immigration law.

The CJEU shall continue to ensure that the law is observed in compliance with EU general principles of law in the application of the EU immigration Directives, with a special respect to the principles of proportionality and equal treatment, and the protection of fundamental rights.

The EU legislative should embrace a more comprehensive approach in the field of EU immigration law on general terms.

[3] Article 79(2)b:„For the purposes of paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures in the following areas: the definition of the rights of third-country nationals residing legally in a Member State, including the conditions governing freedom of movement and of residence in other Member States."

However, it is questionable whether the CJEU can fill his role and counterweight the deficiencies of EU legislation without a stable and uniform policy on the part of the Member States aiming at the settlement of legal status of TCNs legally residing in the EU.

The CJEU should consider the potential pitfalls of the liberal approach applied in its case law relating to the free movement of EU citizens and their families (such as the deepening of the reverse discrimination).