IMMIGRATION LAW AND POLICY

the EU Acquis and Its Impact on the Turkish Legal Order

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Immigration law and policy:
The EU acquis and its impact on the Turkish legal order
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IMMIGRATION LAW AND POLICY:
The EU Acquis and Its Impact on the Turkish Legal Order

Immigratierecht en beleid:
het EU *acquis* en zijn invloed op de Turkse rechtsorde

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Atila
Ertuna'ya

PREFACE

When I look back, I gladly realise that writing a PhD thesis has met the expectations I had before starting with my research. I have learnt a lot about the subject matter of my thesis, about doing research, teaching, but more importantly I have learnt a lot about myself. I have enjoyed every step of the way. There have also been difficulties which are inherent to being engaged in a long-term project and more specifically to doing research outside the country the laws of which are examined. I feel grateful for the support I received in overcoming these difficulties.

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I am blessed with the most wonderful family. The love and support of my parents and my brother is so vital for me that I find it difficult to find words which would be enough to express my gratitude. I want to thank my brother Hakan for being an awesome brother. I had been very lucky in the last year of my PhD as he came to Rotterdam to study his LL.M. degree and we could share the same house. By being close, he miraculously made my last PhD year a fun time. No matter how stressed out I was, my brother always knew how to cheer me up with his unique sense of humor, delicious cooking, sophisticated movie taste and by just being there when I needed family the most. I am grateful to my parents Nazan and Atila Ertuna for supporting me in every decision I make, for being there for me always and for making me feel their warmth even when they are physically far away. Their love makes me strong. *Sizi çok seviyorum. Tüm sevginiz ve desteğiniz için teşekkür ederim.*

How does one thank the person who completes her? The impossibility does not mean one should not try. We are the antithesis of each other. Our characters, likes and dislikes, political views are a complete contrast. How two extreme ends can complete and balance each other! I am thankful to my husband Remi Lagrand for being as kind, caring and thoughtful as he is; for making me concentrate on what is important, for being my biggest source of happiness, peace and safety. The support and faith I receive in all aspects of life from him were also present concerning my PhD study. I would not have been able to come very far in my research if it wasn't for him. *Bedankt voor making my life complete.*

Türkan Ertuna Lagrand
Rotterdam, October 2009

Contents

Chapter One
Introduction

The lingering history of the Turkey-European Union relationship, beginning in 1959 with the Turkish application for membership of the European Economic Community (EEC), received a new dimension when the European Commission recommended the opening of accession negotiations with Turkey in October 2004.[1] On October 20, 2005 the screening process, the first phase of accession negotiations, was officially launched rendering a more legal substance to the dialogue between the parties and promising a more elevated level of political and academic debate rather than the opinionated speculations which have previously dominated the discussions as to the European Union (EU) membership of Turkey.[2] From that moment onwards, the legal and structural preparedness of Turkey for EU Membership became the main theme governing the academic and political deliberations.

The motive of this research is to contribute to the abovementioned academic debate by exploring Turkey's stance in relation to one of the most sensitive areas of the accession negotiations, namely 'Justice, Freedom and Security.'[3] More specifically, the book investigates the level of alignment of Turkish law and policy on immigration to the relevant acquis because the accurate alignment of Turkish immigration law and policy to the EU acquis represents an important challenge for Turkey towards accession. In fact, due to its geographical location, Turkey is, even independent from the European Union nexus, a very interesting country to study when it comes to immigration. Situated at the crossroads between Europe, Asia and Africa, Turkey is at the centre of three very unstable regions, the Balkans, the Caucasus and the Middle East, with which it has strong historical and cultural ties. This unique position puts Turkey in the spotlight concerning immigration. Turkey can, as a matter of fact, be characterized as not only a

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1 Recommendation of the European Commission on Turkey's progress towards accession, COM(2004) 656 final, 06.10.2004.

2 Two statements can be quoted in order to illustrate this: that of Valéry Giscard d'Estaing proclaiming that Turkish membership would mean 'the end of Europe' (New York Times, 09.11.2002); and of Frits Bolkestein connecting Turkish membership with the Islamization of Europe and overdramatically declaring 'the relief of Vienna in 1683 will have been in vain' referring to the defence of Vienna in the face of a siege led by the Ottoman Empire (Turkish Daily News, 08.09.2004).

3 Even though the policy area is referred to as 'the Area of Freedom, Security and Justice' since the Treaty of Amsterdam, it is still commonly referred to as the 'Justice and Home Affairs' cooperation as introduced by the Treaty of Maastricht.

migrant-sending country,[4] but also a migrant-receiving as well as a transit country.[5]

As the aim of the negotiations is to ensure alignment, from an 'EU accession' point of view, the Turkish alignment to the EU immigration acquis is crucial. Just as in any other area of the EU acquis, in the area of immigration law and policy achieving the alignment of Turkish law and policy will bring Turkey closer to accession. In the specific case of immigration, the pressure on the candidate country to align its laws and policies to the acquis is even more pressing as Europe currently has more immigrants as a proportion of its population than any other part of the world with two million migrants each year.[6] This fact makes the upholding of EU standards by candidate countries indispensable for them to be allowed into the European Union, an entity without internal borders within which third-country nationals can move freely once they have been admitted into European territory by any of the Member States. In other words, once Turkey becomes an EU Member State the issue of 'whom Turkey lets in, under what conditions' will become an important item of the agenda of the EU, because every decision of the Turkish authorities will then have direct consequences for the rest of the Member States. Even though this applies to the decisions of the authorities of every single EU Member State, the geographical location of Turkey increases the concerns. The accurate alignment of Turkish law and policy to the EU immigration acquis is also vital from the perspective of ensuring that the rights and obligations of third-country nationals form a level playing field, preventing certain Member States being chosen more intensively for settlement or first entry purposes by immigrants than others.

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4 'With over three million, Turks constitute by far the largest group of third country nationals legally residing in today's EU' according to the Recommendation of the European Commission on Turkey's Progress Towards Accession, COM(2004) 656 final, 06.10.2004, Section 3.

5 A. İçduygu, E. F. Keyman, 'Globalization, Security and Migration: the Case of Turkey', *Global Governance*, Vol.6, Issue 3 (July-September 2000) pp. 383-398; S. Castles and M. Miller, *The Age of Migration: International Population Movements in the Modern World*, 3rd edn. (New York, the Guilford Press 2003) p.127; S. Laçiner, M. Özcan, İ. Bal, *European Union with Turkey: the Possible Impact of Turkey's Membership on the European Union* (Ankara, Publication of USAK 2005) p.117,118.

6 H. Brady, 'EU migration policy: an A-Z', Briefing prepared for the Centre for European Reform, February 2008, available at: http://www.cer.org.uk/pdf/briefing_813.pdf (last visited 21.01.2009).

1.1 Central Questions

This study therefore aims at demonstrating *to what extent Turkish laws and practices are in compliance with the European Union immigration acquis and what the consequences of alignment thereto would be on the Turkish legal system*. In order to be able to answer these questions a number of sub-questions should be answered. These sub-questions are presented below within their relevant contexts, being the three focal points of this book: the European immigration acquis, the relevant Turkish legislation and the assessment of the Turkish law and practice against the EU acquis.

The first focal point is the European immigration acquis. While analyzing the relevant acquis, the guiding question is *whether and to what extent the candidate country law and policy will be affected by EU law in this area. In other words: to what extent are the legislators and policy makers of the candidate country bound by EU immigration laws*. The main aim in this first part of the study is to lay down a complete picture of the European immigration acquis with a view to setting up a scheme against which the Turkish immigration laws can be evaluated. This first focal point consists of a two-tier approach. When the comparative aspect of the study comes into play a mere description of the actual state of the EU immigration laws is not sufficient to form a solid basis for comparison. An additional aspect of the immigration acquis should also be examined in order to set such a base, namely the 'Immigration Policy' which has not yet been transformed into binding legislation or which is not directly attached to the primary concerns of traditional immigration law, but forms part of the future EU immigration acquis. This two-tier approach, consisting of EU immigrations law, on the one hand, and EU immigration policy on the other, will enable a strong groundwork to be built in order to support the comparative structure of the study.

Thus, in the first tier of the analysis of the European immigration acquis the current state of the legislation is the crucial theme. Within this, special attention should be placed on *how much leeway is granted to Member States to regulate the subject-matter in national law*. This approach will facilitate the first step of the comparative section of the study, which is to determine whether Turkish laws and practices are in compliance with the EU acquis, and whether the national rules are within the permitted scope for flexibility.

The European immigration policy constitutes the second tier of the analysis conducted on the first focal point of the present study, namely the European immigration acquis. The estimated lengthy membership negotiations with

Turkey[7] make it necessary that any assessment of the Turkish laws towards accession should take into consideration the changes in the legislation that are likely to take place by the time Turkish membership may be realized. It is a risky attempt to engage in a comparison of legislation and policies which do not yet exist. However, policy documents at EU level provide sufficient material on which to base such a comparison, albeit not with complete reliability. Unexpected developments may lead to changes in the priorities until the moment when these polices are implemented. Nevertheless, such changes would not be detrimental to the assessment at hand, due to the fact that each subject is tracked within policy documents that have been drafted over the years. Thus, they represent the genuine agenda of the EU and not merely temporary tendencies. This means that even if the realization of the principles they contain is set back due to a change of priorities as a result of actual developments, their pursuit will be eventually resumed. Consequently, the aim is to *distill the consistent expressions of future prospects in the area of immigration law from the policy documents.*

The second focal point of this study is the Turkish law and practice on immigration. The purpose of this point is to give an answer to the question of *what is the current state of Turkish legislation on immigration.* This determination is of fundamental importance to the present study. Only after clearly establishing the state of affairs in the area of Turkish immigration law can a comparison, such as the one described above, take place. As much as this point is part of the general comparative scheme of the book, it still possesses a certain degree of wholeness. In the analysis of the Turkish immigration law and practice the descriptive approach is supplemented with a critical view which aims at highlighting the shortcomings of the Turkish legislation irrespective of EU membership prospects.

The third focal point corresponds to the climax of the study. In this section the Turkish immigration law and practice is put to the test. In this respect, the first question to be answered is *to what extent Turkish immigration law and practice fits within the limits of what is left to the competence of Member States.* As for the part which is not in compliance with the acquis the relevant question is *in what way the Turkish legal system will be affected as a consequence of alignment*. Throughout the assessment as to the compatibility of Turkish legislation with the acquis, two forms of ascertainment are made. First of all, the EU policy is, where applicable, also questioned regarding the point *whether Turkish law could set a model for the development of EU immigration policy*. Secondly, recommendations are put forward to ensure the alignment of the relevant Turkish legislation towards accession.

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7 'Issues Arising from Turkey's Membership Perspective', SEC(2004) 1202, 06.10.2004, p.4.

1.2 The Relevance of Studying Turkey in Connection with European Legal Migration: the Membership Bid

As stated at the beginning of this introductory Chapter, the relevance of Turkish legal immigration law and policy for the EU lies in the forthcoming Turkish accession to the EU. The relations between Turkey and the European Union have a protracted history, beginning with the Turkish application for membership of the European Economic Community (EEC) dating back to July 31, 1959. This application was accepted by the EEC on September 11, 1959 and seventeen days later the first preparatory meeting was held between Turkey and the EEC.[8] As a result, the Agreement establishing an Association between the European Economic Community and Turkey (the so-called 'Ankara Agreement') [9] was signed on September 12, 1963. The Additional Protocol was signed on November 23, 1970[10] and was subsequently ratified by the Turkish Parliament on July 5, 1971 and the Senate on the 22nd of the same month. The main objective, the principles of which were laid down in the Ankara Agreement and further specified by the Additional Protocol, was the establishment, in three phases, of a Customs Union between Turkey and the EEC. The parties would continuously reduce customs duties in a gradual manner as was provided for in the Protocol. However, the European Economic Community froze relations with Turkey on January 22, 1982 following the *coup d'etat* of September 12, 1980. EC-Turkey relations remained 'frozen' until September 16, 1986 when the Turkey-EEC Association Council resumed its meetings. Despite the delay, the Customs Union between Turkey and the EC entered its third and final phase on December 31, 1995.[11] In the meantime Turkey had applied for full membership of the European Communities on April 17, 1987. However, the EEC, which was going through intense changes at the time due to the Single European Act revisions, decided that the timing was not right for such an enlargement especially taking into account the political and economic situation in Turkey.[12] Eventually, at the 1999 Helsinki European Council, Turkey was granted candidate status. An Accession Partnership was adopted by the Council of the EU in 2001, which was revised in 2003, 2006 and 2008. In response, Turkey prepared its National Plan

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8 For a chronology of Turkey-EU relations see the Commission website: http://ec.europa.eu/enlargement/candidate-countries/turkey/key_events_en.htm (last visited 21.01.2009).

9 O.J. 217, 29.12.1964, p. 3687-3688.

10 O.J. L 293, 29.12.1972, p. 4–56.

11 Decision No. 1/95 of the EC-Turkey Association Council of 22 December 1995 on implementing the last phase of the Customs Union (96/142/EC).

12 Commission opinion on Turkey's application for membership, 18.12.1989, points 10 and 11.

for the Adoption of the Acquis in 2001, 2003 and 2007. Following the European Council Decision of December 2004, the negotiations started on October 3, 2005 with the drawing up of the Negotiating Framework.

With the initiation of accession negotiations in the form of an analytical examination, which is referred to as the 'screening', the EU acquis is broken down into 33 chapters according to specific policy areas. Consequently, the two parties come together, first of all, to clarify the acquis, and secondly, to discuss the preparedness of the candidate country including the future plans for bringing the national legislation into line with the acquis. Following the completion of the screening phase in October 2006, actual negotiations were initiated on certain acquis chapters.[13] Although the negotiations will be closed with the alignment of Turkish law and policy to the acquis, transitional provisions and special arrangements may also be possible.[14] In other words, accession negotiations are not a process during which the EU dictates and the candidate country solely conforms. Nevertheless, the extent of such arrangements is determined by the acquis itself.[15]

At the point where we are today Turkey, as a candidate country to the EU, is under an obligation to adopt the acquis, with the possibility of agreeing on certain special arrangements. The timetable in which alignment shall be realized, and the transitional periods which may be granted are issues to be determined throughout the negotiations. What is certain is that the process of alignment with the EU acquis shall have an influence on the Turkish legal system, not only with regard to the change taking place in legislation but also with regard to legal mentality, because some legislative amendments cannot be introduced and maintained without a serious change in the way of thinking of the legislator and the authorities in charge of implementation. What is meant by 'change in the way of thinking' becomes clear throughout the book, especially in Chapter four as the comparative assessment unfolds.

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13 The European Council suspended negotiations on Chapter 1 on the Free Movement of Goods, Chapter 3 on the Right of Establishment and Freedom to Provide Services, Chapter 9 on Financial Services, Chapter 11 on Agriculture and Rural Development, Chapter 13 on Fisheries, Chapter 14 on Transport Policy, Chapter 29 on Customs Union, and Chapter 30 on External Relations in connection with the Cyprus issue in December 2006. Nevertheless, negotiations came back on track in January 2007 on chapters that were not suspended such as Chapter 6 on Company Law, Chapter 7 on Intellectual Property Law, Chapter 18 on Statistics, Chapter 20 on Enterprise and Industrial Policy, Chapter 21 on Trans European Networks, Chapter 28 on Consumer and Health Protection and Chapter 32 on Financial Control.

14 Issues Arising From Turkey's Membership Perspective, SEC(2004) 1202, 06.10.2004, p.4.

15 Negotiating Framework, 03.10.2005, point 12.

When it comes to the alignment of Turkish aliens' law to the EU immigration acquis, it is not possible to say what the final deadlines are for this alignment, before the negotiations on the relevant Chapter 24 on Justice, Freedom and Security are opened. As the beginning of Chapter 24 negotiations are not in sight,[16] the only documents which can be made use of to obtain a better insight into the legal amendments Turkey plans to make in the area of regular immigration are 'the programme for alignment with the acquis' and 'the asylum and immigration national action plan'. The downside of being dependent on Turkish documents for determining which legal changes need to be made for alignment to the EU acquis in immigration issues is that legal migration does not constitute one of Turkey's priorities when it comes to negotiating membership. For Turkey, the areas of primary importance are: the visa facilitation agreement between Turkey and the EU,[17] the readmission agreement which the EU wants to sign with Turkey and the biometric standards which Turkey has to comply with. As a result, matters other than those three areas of primary importance emerge only rarely in the relevant texts.

Towards accession, the Instrument for Pre-Accession Assistance (IPA)[18] aims at financially supporting the pre-accession strategy by assisting candidate countries in their alignment with the standards and policies of the EU. Within the scope of the IPA migration and asylum policy together with border management, visa policy and practice is cited among the priorities for the 'Institution Building' component.[19] Nonetheless, Turkey has been criticized for demonstrating limited progress in alignment with EU migration law and policy.[20] Turkish officials[21] attribute the slow pace of progress in the general alignment to the EU acquis to the portrayal of the Turkish accession by the EU as an 'open-ended process whose outcome cannot be guaranteed beforehand.'[22] The incentive to engage

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16 In the interviews conducted, officials from the EU Commission have refrained for indicating any possible date for the opening of negotiations on Chapter 24.

17 It can be argued that in the light of the Judgment dated 19.02.2009 of the ECJ in the Case C-228/06, *Soysal and Savatlı* [2009], the visa facilitation agreement has partially become a redundant discussion as the visa requirement itself can no longer be maintained towards Turkish citizens who are providing services on behalf of undertakings established in Turkey. See *infra* 2.3.2.5.

18 Council Regulation 1085/2006 of 17 July 2006 establishing an Instrument for Pre-Accession Assistance (IPA), O.J. L 210, 31.07.2006, pp.82-93.

19 Commission Decision C(2007)1835 of 30 April 2007 on a Multi-Annual Indicative Planning Document (MIPD) 2007-2009 for Turkey.

20 Turkey 2007 Progress Report, 06.11.2007, SEC(2007) 1436, Section 4.24.

21 According to the interview conducted with the spokesperson of the permanent delegation of Turkey to the EU, Mr Çağlar Çakıralp on June 24, 2008.

22 Recommendation of the European Commission on Turkey's progress towards accession,

wholeheartedly in the alignment process is weakened not only by the likelihood of accession not taking place, but also by the possibility mentioned by the Union of introducing a permanent safeguard clause regarding the movement of persons from Turkey into the EU.[23] The lack of trust created on the Turkish side by such statements resulting Turkey's alignment being at an early stage in most areas[24] can especially be felt in the area of immigration law and policy due to the high sensitivity thereof. This, in turn, places yet another obstacle to the Turkish accession. First of all, within the general context of accession negotiations, since the pace of the reforms are set as the determining factor of the progress in negotiations, the slowing down of reforms harms the negotiation process. Secondly, in most areas of immigration, the EU would require to see proof of complete commitment to aligning the law, policy and practice to the EU immigration acquis at all stages of the accession negotiations due to the fact that the functioning of a sustainable EU immigration policy, as well as the Area of Freedom, Security and Justice in general, 'depends to a very large extent on trust'[25]. It follows that Turkey should endeavour to confirm at every opportunity its sincere dedication to absolute alignment to the EU immigration acquis. However, this enthusiasm is lacking on the part of Turkey due to the parallel lack of enthusiasm on the EU side in promising full membership as a final result of negotiations.[26] This vicious circle brings us to where we are now, namely having to work with little documentation as to what exactly will need to change in the Turkish law and practice concerning aliens within the framework of EU accession.

An accession as challenging as that of Turkey is not to be judged against previous enlargements.[27] The negotiation process which is yet to be fully unveiled will bring with it peculiar discussions which were not relevant in previous

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COM(2004) 656 final, 06.10.2004; Negotiating Framework for Turkey, 3 October 2005.

23 Recommendation of the European Commission on Turkey's progress towards accession, COM(2004) 656 final, 06.10.2004.

24 2005 Enlargement Strategy Paper, COM(2005) 561 final, 09.11.2005, Section 2.1.

25 J. Apap, 'Problems and Solutions for New Member States in Implementing the JHA Acquis', Centre for European Policy Studies, CEPS Working Document, No.212, October 2004.

26 From the interview conducted with the spokesperson of the Permanent Delegation of Turkey to the EU on 24.06.2008; M.A. Tuğtan, 'Possible Impacts of Turkish Application of Schengen Visa Standards', *Journal of Southern Europe and the Balkans*, Vol.6, No.1 (April 2004) pp.27-39.

27 The Commission in its staff working document 'Issues Arising From Turkey's Membership Perspective', (SEC(2004) 1202, 06.10.2004) explains the reasons for the Turkish accession being different: 'the combined impact of Turkey's population, size, geographical location, economic, security and military potential, as well as cultural and religious characteristics'.

enlargements. One of the reasons given for Turkish accession being different from previous accessions, the geographical location of the country, is a concern for the EU due to various aspects, an important one being 'immigration'. The accession will extend the EU external land border by 2,477 km to Iran, Iraq, Syria, Georgia, Armenia and Azerbaijan; the Aegean-Mediterranean EU blue border by 4,768 km and the Black Sea EU Blue Border by 1,762 km.[28] A combination of factors such as the Turkish approach to border management not being in line with the EU acquis[29] and the easy access into its territory currently allowed by Turkey to the nationals of countries on its periphery[30] makes the Turkish alignment with the EU immigration acquis especially decisive concerning the Turkish accession.

The EU will be exceptionally strict on bringing Turkey into line with the EU way of managing immigration before Turkey can become an EU Member State. Or will it? The geographical location, in combination with Turkey's capacity to contribute to the stability of its neighbouring regions and the multidimensional ties it has with the countries of such regions offer new horizons for the EU. In this respect, Turkey does possess some level of bargaining power in requesting special arrangements, especially those relating directly to its relations with neighbouring regions such as immigration matters. It must here be pointed out that, even though bargaining for special arrangements is possible during the membership negotiations,[31] it is the EU acquis that ascertains the limits of this bargaining. It is for this reason important to take the EU acquis as the starting point when debating what types of compromises can be made on both sides. However, before embarking upon any analysis concerning the EU immigration acquis or the relevant Turkish legislation, 'sovereignty', a concept at the heart of any regulation in the area of immigration, should be briefly studied. The study of the concept of sovereignty within this book has the limited scope of examining solely the relationship which this concept has with the notion of 'immigration'.

1.3 Consolidating Sovereignty Concerns and the Need for Europeanization

It should not come as a surprise to the reader that throughout the book two

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28 Issues Arising From Turkey's Membership Perspective, SEC(2004) 1202, 06.10.2004, p.41.

29 *Ibid.*, Section 6.1.

30 K. Kirişçi, *'Turkey: A Transformation from Emigration to Immigration*', Migration Policy Institute (November 2003).

31 Issues Arising From Turkey's Membership Perspective SEC(2004)1202, 06.10.2004, p.4.

recurring features will become evident. First of all, within the 'fragmented'[32] authority structure of the EU, in which the existence and level of EU competence differs according to the policy field, immigration policy remains one of the fields where the EU does not possess far-reaching competence. This holds true regarding both the subjects of competence and decision-making procedures. Secondly, in the area of legal migration Turkish alignment to the EU acquis is in a very preliminary stage. Turkey is holding on to its laws on the policy regarding aliens until amending them becomes inevitable. The reason for a narrow field of competence for the EU in immigration matters is customarily explained simply by the sensitivity of immigration matters for states.[33] The same can be said about the level and enthusiasm of alignment from the Turkish side to the immigration acquis. Without going into the theoretical discussions concerning any of the concepts involved, it is useful to give a brief explanation as to what is meant by 'the sensitivity of immigration matters'.

Why any policy field would constitute a sensitive matter for states is a question the answer of which is deeply rooted in the notion of a 'state'. The 'state' as we know it[34] is built upon the concept of territorial sovereignty, the origins of which can be traced back to the Peace of Westphalia of 1648.[35] Notwithstanding the fact that the concept of sovereignty is the essence of the Westphalian State system, attempting to define it is a tricky task, which would fill up this book on its own. For the concept is not only continuously changing through time,[36] but also from

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32 A. van Staden, H. Vollaard, 'The Erosion of State Sovereignty', in G. Kreijen, ed., *State, Sovereignty, and International Governance* (Oxford, Oxford University Press 2002) p.180.

33 P. Craig, G. de Búrca, *EU Law: Text, Cases, and Materials*, 4th edn. (Oxford, Oxford University Press 2008) p.230; K. Schiemann, 'Europe and the Loss of Sovereignty', *International and Comparative Law Quarterly*, Vol. 56 (July 2007) pp.475-490.

34 See J. Crawford, *The Creation of States in International Law*, 2nd edn. (Oxford, Oxford University Press 2006) Chapter 2 for the criteria for statehood.

35 A. van Staden, H. Vollaard, 'The Erosion of State Sovereignty', in G. Kreijen, ed., *State, Sovereignty, and International Governance* (Oxford, Oxford University Press 2002) p.165; J. F. Hollifield, 'Migration, Sovereignty and Nationality', presented at the annual meeting of the International Studies Association (Chicago, March 2006); D. Philpott, 'Sovereignty: an Introduction and Brief History', *Journal of International Affairs*, Vol. 48, No. 2 (Winter 1995) pp. 353-368; C. Joppke, 'Immigration Challenges the Nation State', in C. Joppke, ed., *Challenge to the Nation-State: Immigration in Western Europe and the United States* (Oxford, Oxford University Press 1998) pp.5-46. For an opposing view as to the link between the 1648 Peace and the creation of the sovereign state see A. Osiander, 'Sovereignty, International Relations, and the Westphalian Myth', *International Organization* Vol.55, No.02 (Spring 2001) pp.251-287; S. D. Krasner, 'Westphalia and All That' in J. Goldstein, R. O. Keohane, eds., *Ideas and Foreign Policy: Beliefs, Institutions, and Political Change* (Ithaca, Cornell University Press 1993).

36 H. Schermers, 'Different Aspects of Sovereignty', in G. Kreijen, ed., *State, Sovereignty, and*

society to society as it is 'used and misused' to fit the needs of that society.[37] Nevertheless, the principles of this 'sponge concept'[38] can, in very simple terms, be laid down as follows: 'final control over a bounded territory and populace.'[39]

Even this basic definition of sovereignty allows us to grasp the core of the 'sensitivity' of immigration matters. Sovereignty lies at the foundation of immigration law[40] as it is 'the mechanism through which nationalism and the separation of the citizen from the immigrant takes place'[41] by passing laws determining which individuals are citizens and which are foreigners, as well as what their rights will be. Immigration, being the 'process by which non-nationals move into a country for the purpose of settlement',[42] trespasses the realm of sovereignty in both of its fundamental fronts: territory and populace. State sovereignty entails the exercise of supreme and exclusive authority within state territory while controlling and regulating the movement of persons autonomously.[43] Sovereignty is interested in 'control over access to and stay within territory',[44] and in the 'distribution of membership'[45] of the community. It follows that immigration policy, which deals with the entry and residence of 'non-members', is directly within the national sovereignty of a state. This is even more so in today's world where 'multiculturalism' is high in demand making it even more important who is allowed in.[46] Multiculturalism, as opposed to traditional assimilation, makes the profile of immigrants even more significant for states.[47]

International Governance (Oxford, Oxford University Press 2002) p.185.

37 M. Brus, 'Bridging the Gap between State Sovereignty and International Governance: The Authority of Law', in G. Kreijen, ed., *State, Sovereignty, and International Governance*, (Oxford, Oxford University Press 2002) p.7.

38 J. Bartelson, *A Genealogy of Sovereignty* (Cambridge, Cambridge University Press 1995) p.237.

39 C. Joppke, *Immigration and the Nation-State*, (Oxford, Oxford University Press 1999), p.5.

40 S. Sassen, 'The *de facto* Transnationalizing of Immigration Policy, in C. Joppke, ed., *Challenge to the Nation-State: Immigration in Western Europe and the United States* (Oxford, Oxford Universisty Press 1998), p.49.

41 E. Guild, 'Cultural Identity and Security: Immigrants and the Legal Expression of National Identity', in E.Guild and J.van Selm, eds., *International Migration and Security: Opportunities and Challenges*, (Oxford, Routledge 2005), p.106.

42 IOM, 'International Migration Law: Glossary on Migration', (2004).

43 A. van Staden, H. Vollaard, 'The Erosion of State Sovereignty', in G. Kreijen, ed., *State, Sovereignty, and International Governance* (Oxford, Oxford University Press 2002), p.166.

44 C. Joppke, *Immigration and the Nation-State*, (Oxford, Oxford University Press 1999), p 5.

45 *Ibid*., p 17.

46 *Ibid*., p.7; P. Manning, *Migration in World History*, (New York, Routledge 2005), p.178.

47 For ideas on the importance of a common culture in the well-functioning of a society see C. Joppke, *Immigration and the Nation-State*, (Oxford, Oxford University Press 1999), p.7.

Sovereignty today is being challenged on various fronts. The literature commonly refers to the totality of these fronts as 'globalization'.[48] It is, at least, not feasible to announce the death of the sovereign state as some have done,[49] if nothing else, just because there has not yet been any viable alternative to it.[50] On the other hand, what can realistically be said is that the nature of sovereignty is yet again changing.[51]

This change in the nature of sovereignty comes down to a 'diminished' sovereignty in areas such as economic policy and trade.[52] Member States of the EU, the organization which is seen as a 'challenge'[53] to or a 'violation'[54] of Westphalian sovereignty, are particularly experiencing a loss of competence in the mentioned areas due to the exclusive competence of the EU in these fields. It is therefore contended that the limited scope of EU immigration competence relates to the EU Member States' fear of letting go of their 'last bastion of

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48 A. van Staden, H. Vollaard, 'The Erosion of State Sovereignty', in G. Kreijen, ed., *State, Sovereignty, and International Governance*, (Oxford, Oxford University Press 2002), p.181; C. Dauvergne, 'Challenges to sovereignty: Migration Laws for the 21st Century', UNHCR New Issues in Refugee Research, Working Paper No.92 (July 2003) p.3; S. D. Krasner, 'Compromising Westphalia', *International Security*, Vol.20, No.3 (Winter 1995/1996) pp.115-151; J. A. Caporaso, 'Changes in the Westphalian Order: Territory, Public Authority, and Sovereignty', *International Studies Review*, Vol.2, No.2 (Summer, 2000) pp.1-28, S. Sassen, *Losing Control? Sovereignty in an Age of Globalization* (New York, Columbia University Press 1996) p.98; C. Joppke, 'Immigration Challenges the Nation State', in C. Joppke, ed., *Challenge to the Nation-State: Immigration in Western Europe and the United States* (Oxford, Oxford University Press 1998) pp.5-46; S. Sassen, 'The *de facto* Transnationalizing of Immigration Policy, in C. Joppke, ed., *Challenge to the Nation-State: Immigration in Western Europe and the United States* (Oxford, Oxford University Press 1998) p.49-85.

49 N. MacCormick, 'Beyond the Sovereign State', *the Modern Law Review*, Vol.56, No.1 (January 1993), pp. 1-18; K. Ohmae, *The End of the Nation State: the Rise of Regional Economies* (New York, Free Press Paperbacks 1995).

50 A. van Staden, H. Vollaard, 'The Erosion of State Sovereignty', in G. Kreijen, ed., *State, Sovereignty, and International Governance* (Oxford, Oxford University Press 2002) p.183.

51 C. Dauvergne, 'Challenges to sovereignty: Migration Laws for the 21st Century', UNHCR New Issues in Refugee Research, Working Paper No.92 (July 2003) p.3; R. Jennings, 'Sovereignty and International Law', in G. Kreijen, ed., *State, Sovereignty, and International Governance* (Oxford, Oxford University Press 2002) p.42; S. Sassen, *Losing Control? Sovereignty in an Age of Globalization* (New York, Columbia University Press 1996) p.30.

52 C. Dauvergne, 'Challenges to sovereignty: Migration Laws for the 21st Century', UNHCR New Issues in Refugee Research, Working Paper No.92 (July 2003) p.8.

53 D. Philpott, 'Sovereignty: an Introduction and Brief History', *Journal of International Affairs*, Vol. 48, No. 2 (Winter 1995) pp. 353-368.

54 S. D. Krasner, 'Compromising Westphalia', *International Security*, Vol.20, No.3 (Winter 1995/1996) pp.115-151.

sovereignty', which is the 'hardest to surrender'.[55] This is, however, not to say that these fears are well founded.[56] Nor does it mean that the cooperation on immigration at EU level is destined to be a fruitless one. There is, first of all, the development to date of the EU immigration law to prove otherwise. Secondly, next to the fear of losing control over this 'sensitive' policy field, EU Member States also have just as central advantages in opting to cooperate. To put it in very basic terms, the EU immigration policy is the result of a balance attained between the sensitivity of the subject and the need for Europeanization.

The reasons for and the advantages of the Europeanization of immigration policy are to be found throughout this book. The imperative reason, without doubt, is the abolition of internal border controls making standardized admission procedures obligatory. Various other reasons supporting the need for Europeanization have been put forward at different times, mostly influenced by current events, such as terrorist attacks or the discovery of ships carrying hundreds of illegal immigrants.[57] The extent of the organizational structure behind such events renders individual efforts by states insufficient. These reasons are emphasized when appropriate as they are meaningful within a certain context. Especially where the development of the European immigration acquis is discussed, these reasons inevitably come up. Furthermore, the Europeanization of immigration policy cannot be detached from the general trend towards Europeanization in all policy fields. For these reasons the widely recognized[58] need for Europeanization is not further evaluated in a separate subparagraph, but

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55 C. Dauvergne, 'Challenges to sovereignty: Migration Laws for the 21st Century', UNHCR New Issues in Refugee Research, Working Paper No.92, (July 2003), p.9.

56 See A. Geddes, 'International Migration and State Sovereignty in an Integrating Europe', *International Migration*, Vol.39, No.6 (2001) pp.21-42; C. Joppke, 'Immigration Challenges the Nation State', in C. Joppke, ed., *Challenge to the Nation-State: Immigration in Western Europe and the United States* (Oxford, Oxford University Press 1998), pp.5-46; G.P. Freeman, 'the Decline of Sovereignty? Politics and Immigration Restriction in Liberal States', in C. Joppke, ed., *Challenge to the Nation-State: Immigration in Western Europe and the United States* (Oxford, Oxford University Press 1998) pp. 86-108; C. Joppke, 'Asylum and State Sovereignty: a Comparison of the United States, Germany and Britain', in C. Joppke, ed., *Challenge to the Nation-State: Immigration in Western Europe and the United States* (Oxford, Oxford University Press 1998), pp.109-152.

57 G. Lahav, A.M. Messina and J.P. Vasquez, 'the Immigration-Security Nexus: a view from the European Parliament', EUSA Tenth Biennial International Conference (Montreal, May 17-19, 2007); D. van Dijck, 'Is the EU Policy on Illegal Immigration Securitized? Yes Of Course! A study into the dynamics of institutionalized securitization', 3rd Pan-European Conference on EU Politics (Istanbul, 21-23 September 2006).

58 See S. Sassen, 'The *de facto* Transnationalizing of Immigration Policy', in C. Joppke, ed., *Challenge to the Nation-State: Immigration in Western Europe and the United States* (Oxford, Oxford University Press 1998), p.59.

instead, the reasons are highlighted throughout the book as they are relevant.

This brief explanation of the 'sensitivity' of immigration policy within the 'state-sovereignty' context will prove to be useful, first of all, in appreciating the steps taken towards the construction of the EU immigration policy. The pace of the development of EU immigration policy, which at first sight is disappointingly slow, makes sense when considered in relation to what the concerns of the EU Member States were. Secondly, as has already been mentioned, the sovereignty perspective of immigration also sheds some light on the reluctance which any candidate country would have in aligning its legislation to the relevant acquis just as the Member States themselves had during the establishment of this acquis.

1.4 Scope

Immigration is a subject-matter with a vast scope which is difficult to draw borders around. Legal studies on immigration have varying contents. What is to be incorporated into a study on immigration depends on the point of view that is chosen. In the broad sense of the word 'immigration' would encompass all movements resulting in a foreigner moving to the target country. From a legal point of view such an approach would expand the scope of the relevant study to rules governing legal as well as illegal immigrants, asylum seekers and trafficked persons.

Especially in a comparative study it is crucial which subjects are selected to be studied as the subject-matter must be relevant for both of the analyzed legal systems and there must be enough substance at both sides to conduct a viable comparison. In determining the scope, this study takes the EU law and policy on legal migration as its basis.[59] For this reason, the rules that shall apply to third-country nationals wishing to enter and reside in an EU Member State through legal channels are dealt with, to the extent that these rules on admission and residence are regulated at EU level. Thus, next to the rules on admission, visa policy and the border management regime, within the broader topic of legal

[59] The use of the term 'legal migration' has been criticized by some academics who insist that the term 'regular migration' should be used instead in order to refer to policies on admission and residence. See S. Carrera, 'Integration as a Process of Inclusion for Migrants? The Case of Long Term Residents in the EU', in H. Schneider, ed., *Migration, Integration and Citizenship: A Challenge for Europe's Future* (Maastricht, 2005) p.110. However, 'legal migration' is the most commonly used term in order to refer to the topics dealt with in this book. As the EU has also chosen to use the term 'legal migration', the same is done throughout this book.

residence the issues of family reunification, long-term resident status, and the situation of economic migrants, researchers and students are examined. Furthermore, with the purpose of offering a comprehensive account of the EU immigration acquis, EU-level measures relating to third-country nationals which are not part of traditional immigration legislation and the areas on which EU policies are currently being shaped are also investigated. Such areas comprise: remittances, circular migration, mobility partnerships, immigration within the external relations of the EU, the fair treatment of third-country nationals and integration. Consequently, the Turkish legislation corresponding to the examined areas of the EU acquis is dealt with in order to make a comparison in the final chapter.

1.5 Methodology

Given that this book concerns the alignment of Turkish immigration legislation to the EU acquis, immigration law and policy is inspected at two levels: the EU level and the national level, namely Turkish law. The first and central subject of the assessment is EU law. To this end, the relevant EU secondary legislation is scrutinized. In doing so, various policy documents, such as Commission Communications and Green Papers, have also been utilized in clarifying the secondary legislation. Secondly, the national legislation of Turkey in the area of immigration is examined. In this regard, Laws, Directives, By-Laws, Council of Ministers Decisions and Circulars are utilized. Furthermore, as in the case of the EU law investigation, policy documents which do not have a binding nature are also utilized while assessing Turkish legislation.

It must be mentioned that policy documents have three main uses in this research. First of all, to complement EU legislation on immigration in constituting the totality of the EU acquis which is dealt with in this book, by examining documents such as Commission Communications, Green Papers and Proposals. Secondly, to shed some light on EU-Turkey relations due to the nature of the study which finds its basis in the candidacy of Turkey for EU membership as well as to identify the prospective amendments which Turkey has committed to undertake due to its membership bid, by examining Progress Reports, National Plans for the Adoption of the EU Acquis and other documents. Finally, to distill the 'sustainable' future prospects of the EU in the area of immigration law which are not the product of temporary trends but represent the consistent EU view of how immigration law should be shaped, also by examining mainly Commission Communications and Proposals.

Next to the legislation and policy documents, other sources are also exploited in conducting this research. The most important part of these other sources consists of the relevant scholarly writings. The entirety of the consulted literature can be found in the footnote references throughout the book; the most essential literature is also listed at the end of this book in the 'Selected Bibliography'. Furthermore, some case law of the ECJ and Turkish courts is also dealt with; however, these cases are of limited importance within the entirety of the study, as the subject-matter of this book concerns the legislation. Finally, interviews with EU and Turkish officials are conducted in order to clarify certain aspects of Turkish legislation or points relating to what the EU expects from Turkey.

1.6 Structure

The central questions which this book aims to answer already hint at how the main body of the work is structured. This is because, to a great extent, the order of introducing the several questions answered by this study has been respected while drawing the structure of the book. Owing to the comparative character of the study, first of all the objects of the comparison are scrutinized separately.

Following this first, introductory chapter, Chapter two is devoted to the EU immigration acquis and policy. In order to give a complete picture of the EU-level regulation in the field of immigration the chapter begins with a historical digest elucidating the evolution of EU Immigration Law. After having laid the ground for a better understanding of the law itself, an in-depth analysis of the EU acquis on immigration is provided. This analysis of the EU immigration acquis is conducted in two parts, namely the immigration law and immigration policy. Within the scope of the first part on EU immigration law, visa and border management are examined under the title 'Admission', and a uniform format for residence permits, family reunification, long-term resident status, economic migration, as well as the rules relating to researchers and students are examined under the title 'Residence'. As for the second part on EU immigration policy, the relationship between development and migration, the place of immigration within the external relations of the EU, the fair treatment of Third-Country Nationals and the issue of integration are examined.

Chapter three engages in analyzing the Turkish legislation on foreigners. To this end, first of all the general principles of Turkish aliens' law are introduced. Subsequently, the legislation itself is investigated. Here, following the presentation of who an immigrant is under Turkish law by explaining the relevant legislation, an approach identical to that in Chapter two is adopted. Accordingly,

first of all rules relating to admission are examined, then those on residence. Parallel to Chapter two, in Chapter three, the visa policy and the border management structure are examined under the title 'Admission', and the right to reside, access to the labour market as well as the rules relating to researchers and students are examined under the title 'Residence'. However, the practice of the Turkish authorities relating to immigration as well as the Turkish alignment programme to the EU acquis is mostly dealt with in Chapter four, instead of Chapter three. The reason for this choice is the relevance of these two elements to the comparison itself.

Chapter four is where the EU and Turkish immigration laws and polices are placed side by side in order to determine to what extent Turkish legislation is in compliance with the EU acquis and how the Turkish legal system will be influenced by alignment. In doing so, policy documents laying down the future developments planned in the Turkish immigration legislation are also taken into consideration apart from the legislation itself. This approach allows for a realistic display of the Turkish laws at the time of accession. Following the same reasoning, the practice of the Turkish authorities on immigration is also incorporated in this chapter in order to make the comparison more realistic. The evaluation conducted in Chapter four follows the order of Chapters two and three, and consists of an in-depth assessment of 'Admission', 'Residence', and 'Policy' related legislation and documents. The findings are inseparably intertwined to this assessment itself. Thus, the detailed answers to the Central Questions can be find in this chapter.

Chapter five is the concluding chapter where the most essential findings and recommendations contained in Chapter four are presented purely in order to demonstrate, isolated from the line of reasoning in Chapter four, the extent to which Turkish laws and practices are in compliance with the EU immigration acquis and the possible consequences of aligning the Turkish legal system thereto.

Chapter Two
European Immigration Law and Policy

2.1 Introduction

This chapter provides a detailed roadmap of the EU acquis on immigration. This roadmap constitutes the groundwork for the assessment of to what extent the Turkish immigration law is in conformity with that of the EU, as well as what the consequences are of non-conformity. Setting up a scheme against which the Turkish immigration laws can be checked with a view to determining the country's readiness for accession requires a comprehensive approach. The parameter which determines the level of comprehensiveness is the extent to which the EU immigration law and policy will affect the Turkish immigration law towards accession. What is relevant for Turkey, like for any other candidate country, in a given area of EU law is what the acquis sets as being compulsory to implement, how much leeway is given to Member States and how the EU approaches aspects of candidate state legislation and practices which exceed the permitted leeway within the acquis. Consequently, the guiding question in this chapter is whether and to what extent the law and policy of the candidate state will be affected by EU law in this area and thus the legislators and policy makers are bound by the EU immigration laws.

As already discussed in Chapter one, the function of the present chapter is to provide a footing for an extensive evaluation of Turkish immigration law as explained above and for this reason a two-tier approach is chosen for the analysis of the EU immigration acquis. The first tier contains an analysis from a purely legal angle. This examination concerning the point of law entails the study of the EU legislation on immigration law. Keeping in mind the central question, which channels the attention of this chapter to determining the extent to which candidate country laws and policies will be affected by the EU immigration acquis, the examination concentrates on the degree of flexibility permitted to Member States to regulate the subject-matter in national law.

The second tier approaches the area of EU immigration from a policy angle. The reason for this lies in the fact that policy documents, though not binding, are of great significance from mainly two aspects. First of all, for showing the point of view of the EU on certain issues, which will also be dealt during negotiations. Therefore, by examining policy documents, one acquires an insight as to what the attitude of the EU party will be during negotiations on the relevant issue. Secondly, policy documents contain indications concerning the future of EU

immigration law. EU immigration law progresses at a rather gradual pace. The Commission engages in crafting feasible polices on various features of immigration regulation long before these efforts result in binding legal instruments at the EU level. Considering that Turkish accession does not seem likely in the very near future, identifying the EU's plans for the mid and long-term in the immigration field places Turkey in an advantageous position for membership as it gives the policy makers a hint as to which direction to go.

Before going on to examine the present state of the EU immigration acquis the steps towards the creation of this area of the acquis are traced in order to define the setting for the current state of affairs. In this way the acquis currently in effect will be placed in context. This short historical overview will construct the bridge to 'where the EU immigration law is today'.

2.2. The bumpy road leading to today's immigration acquis

From the outset, the EC Treaty envisaged the establishment of a common market where barriers to the movement of factors of production were to be abolished. Originally this strictly economic policy choice was aimed solely at integrating national markets. Yet, as the Commission indicated in the White Paper on completing the internal market,[1] measures on immigration are one of the 'essential and logical consequences' of accepting the commitment to the completion of the common market.[2] The approach was still an economically-oriented one. Immigration controls at the borders, like other physical barriers, were described as an 'obvious manifestation of the continued division of the Community' which are equally important to trade and industry, commerce and business.[3]

The necessity of drawing up immigration measures was shadowed by the highly sensitive nature of the topic. Some insisted that the concept of the free movement of persons should apply to citizens of the EU Member States only, and not to Third-Country Nationals.[4] Due to the proximity of immigration-related issues to the very concept of sovereignty[5] there is an everlasting disagreement between the supporters of intergovernmental and supranational methods, which is very

1 COM (85) 310 final of 14 June 1985.
2 White Paper, paragraph 3.
3 *Ibid*., paragraph 24.
4 P.J. van Krieken, *The Consolidated Asylum and Migration Acquis* (The Hague, T.M.C. Asser Press 2004) p.11.
5 See *supra* 1.3.

clearly illustrated in the difficulties in going forward with the creation of immigration policy. How foreigners are to be treated within the territory of a state has traditionally been a competence exclusively in the hands of the state in question.

While thirty years of economic recovery in post-war Europe created a web of treaties concluded with the sending countries,[6] it did not amount to any sort of coordination on the side of the European receiving countries.[7] Cooperation and policy making in the field of Justice and Home Affairs involve ideological concepts and argument on basic values which may be conceived differently in different national settings.[8] Immigration specifically gives rise to varying sensitivities for different states, depending on their respective experiences with immigration.[9] Due to this highly sensitive nature of the topic, Member States found it impossible to reach a consensus as to the level of cooperation in this field. This is how the Schengen Agreement was concluded outside the Community framework.[10]

The Schengen Agreement defines a single external border concerning third countries. Checks at the internal borders within the Schengen area were thereby gradually abolished with a deadline of January 1, 1990. The Agreement refers to the harmonization of visa and immigration policies as part of the measures to be taken in order to realize the abolition of border controls.

Against this background the Commission issued Decision 85/381 setting up a prior communication and consultation procedure on migration policies in relation to non-member countries.[11] The need to promote consultation on immigration policies vis-à-vis third countries was already acknowledged in the

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6 In relation to immigration law, the 'sending country' is the immigrant's country of origin, whereas the 'receiving country' is the country of destination.

7 G. Sciortino, F. Pastore, 'Immigration and European Immigration Policy: Myths and Realities', in J. Apap, ed., *Justice and Home Affairs in the EU: Liberty and Security Issues AfterEnlargement* (Cornwall, Edward Elgar Publishing 2004) p.193.

8 P. de Hert, 'Division of Competencies between National and European Levels with regard to Justice and Home Affairs', in J. Apap, ed., *Justice and Home Affairs in the EU: Liberty and Security Issues After Enlargement* (Cornwall, Edward Elgar Publishing 2004) p.69.

9 J. Apap, *The Rights of Immigrant Workers in the European Union: an evaluation of the EU public policy process and the legal status of labour immigrants from the Maghreb countries and the new receiving states*, (The Hague, Kluwer Law International 2002) p.4.

10 Agreement between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common border, dated 14 June 1985.

11 O.J. L 217, 14.08.1985 p.25-26.

Council Resolution of 1974 concerning a social action programme,[12] in which the political will to adopt relevant measures was expressed. In its 1985 decision, the Commission stressed the importance of ensuring that Member States' migration policies take into account common policies and actions taken at Community level. The Decision envisaged common positions to be reached by facilitating the exchange of information and views in these areas. The 'unprecedented'[13] reaction from the Member States to this Decision was once more reminiscent of why the Schengen cooperation was initiated at inter-governmental level and it illustrated how difficult it was to take action at Community level on immigration. Germany, France, the Netherlands, Denmark and the United Kingdom brought a legal action before the Court of Justice claiming that the Commission Decision should be declared void.[14] The claim was supported by two submissions; one relating to procedural infringement, the other relating to a lack of competence on the part of the Commission to adopt the decision at issue. The legal basis of the Commission Decision was the former Article 118 (now Article 137) of the Treaty which gives the Commission the task of promoting close cooperation between Member States in the social field. The ECJ declared the Decision void on the ground that the Commission lacked competence in matters relating to the cultural integration of third-country national workers.[15] However, the Court did not agree with the argument that the whole area of policy on foreign nationals falls within the exclusive jurisdiction of Member States[16] and maintained that the integration of third-country national workers into the workforce and measures connected with problems relating to the employment and working conditions of third-country nationals must be held to be within the social field.[17] The Court further stressed that powers of the Member States in the social field must be exercised within the framework of cooperation between Member States, which is to be organized by the Commission.[18] Consequently, a revised version of the Decision was adopted by the Commission, in which the reference to cultural integration was deleted.[19]

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12 Council Resolution of 21 January 1974 concerning a social action programme, O.J. C 13, 12.02.1974, p.1-4.

13 E. Guild, *Immigration Law in the European Community* (The Hague, Kluwer Law International 2001) p.215.

14 Joined Cases 281, 283, 284, 285 and 287/85, [1987] ECR 3203.

15 *Ibid.*, paragraph 42.

16 *Ibid.*, paragraph 25.

17 *Ibid.*, paragraph 21.

18 *Ibid.*, paragraph 29.

19 Commission Decision of 8 June 1988 setting up a prior communication and consultation procedure on migration policies in relation to non-member countries, (88/384/EEC), O.J. L 183, 14.07.1988, pp. 35-36.

The reaction given to the Commission Decision even by some States which had signed the Schengen Agreement signalled the difficulties the Community would face in related issues in the coming years. The objections of immigration ministries to the Single European Act were therefore not surprising. What was depicted in the Schengen Agreement found its Community level expression with the Single European Act (SEA) of 1986. The SEA inserted in the EEC Treaty the definition of the internal market. The immigration ministries perceived the new Article 14 of the EEC Treaty as the loss of their control over the movement of persons within the Community.[20] A Declaration annexed to the SEA once again stressed the relationship between creating an area without internal borders and cooperating in the field of immigration.[21]

As the timetable set in the Schengen Agreement could not be met, the Convention Implementing the Schengen Agreement (the Schengen Implementation Convention) was concluded on June 19, 1990. The Schengen Implementation Convention has been described as putting 'flesh on the bones of the original agreement.'[22] As the analogy makes it very clear, the Schengen Implementation Convention provided for the technical details of how to achieve the objectives of the original Schengen Agreement. Apart from detailed provisions on visas, it also includes provisions setting up the Schengen Information System, which is discussed below.[23]

Also influenced by the changing political structures of the Central and Eastern European Countries at the beginning of the 1990s, the Member States realized that they could no longer be bogged down in the discussion as to which authorities should be competent to take measures in the area of immigration.[24] There was clearly a desire to act jointly. This is evidenced by the adoption of common positions at the Vienna Conference on the movements of Eastern and Central European Populations under the auspices of the Council of Europe in January 1991 and at the Migration Conference in Rome organized by the Organisation for Economic Co-operation and Development (OECD) in March

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20 E. Guild, *Immigration Law in the European Community* (The Hague, Kluwer Law International 2001) p.249.

21 Political Declaration by the Governments of the Member States on the Free Movement of Persons: "In order to promote the free movement of persons, the Member States shall cooperate, without prejudice to the powers of the Community, in particular as regards the entry, movement and residence of nationals of third countries."

22 E. Guild, *Immigration Law in the European Community* (The Hague, Kluwer Law International 2001) p.216.

23 See *infra* 2.3.1.1.

24 Commission Communication on immigration, SEC(91)1855 final, 23.10.1991, paragraph 26.

of the same year.[25] Encouraged by the drive being witnessed in the field, the Commission adopted a Communication on immigration. This Commission Communication lays down three proposals on how to tackle immigration concerns. According to the Commission an approach which combines realism with solidarity should first of all require migration to be made an integral element of the Community's external policy – an idea which was detailed in 2003 in the Commission Communication integrating migration issues in the European Union's Relations with Third Counties.[26] The control of existing migration channels is recognized by the Commission as the second focal point of the joint response to migration. And, finally, the strengthening of integration policies was set as the third proposed measure. Although it will take some time for the Community to take this subject on board,[27] the Commission had in mind, at the beginning of 1990s, the creation of an approach which is designed to achieve equal treatment in living and working conditions between legal migrants and the citizens of the host country.[28]

It must be kept in mind that all the developments which had taken place until this point in time had occurred either at an intergovernmental level or within the framework of a Community which had as its focal point the achievement of economic integration. Even the Single European Act, which generated a momentum for integration, had as its main objective the establishment of the internal market; and the legal integration required by this document was simply the by-product of this central aim.[29] The Treaty on European Union (Maastricht Treaty), which entered into force on November 1, 1993, introduced an entirely different structure.

The Maastricht Treaty widened the competences of the Community by both broadening the scope of already existing competences and bringing new areas within the sphere of Community competence. With the pillar structure created, the never-ending contest between the intergovernmental and supranational methods blended under the European Union umbrella. The migration policy, in particular, is a good illustration of this situation. The Maastricht Treaty granted

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25 *Ibid.*

26 Commission Communication integrating migration issues in the European Union's relations with third countries, COM(2002) 703 final, 03.12.2002.

27 The Hague Programme: Strengthening freedom, security and justice in the European Union, 13.12.2004, 16054/04, Section1.5.

28 Commission Communication on immigration, SEC(91)1855 final, 23/10/1991, paragraph 42.

29 D. Chalmers, *et al., European Union Law* (Cambridge, Cambridge University Press 2006) p. 23.

the Community a level of competence concerning visas by inserting Article 100c into the EC Treaty. According to this provision, the Council was to determine the third countries whose nationals must be in possession of a visa when crossing the external borders of the Member States.[30] Furthermore, the provision gave the Council the task of adopting measures relating to a uniform format for visas.[31] Thus, some parts of the visa policy have been made a Community concern. The remaining part of the immigration policy was placed in the new Third Pillar. The Treaty on European Union (the EU Treaty) adopted, as one of the objectives of the Union, the development of close cooperation between Member States concerning what was then known as Justice and Home Affairs.[32] Justice and Home Affairs were placed in the Third Pillar which comprised Articles K.1 to K.9 of the Treaty on European Union. Article K.1 identified immigration policy and the policy regarding nationals of third countries as matters of common interest.

The Maastricht Treaty was the result of a compromise.[33] Although immigration policies, like other Justice and Home Affairs matters, were not made a Community competence, the subject was included within the Union framework and was thus no longer a purely national field. The tools were given to the Union to create its own model, notwithstanding the fact that they were not as strong as those of the Community Pillar.

Even though the period following the coming into force of the EU Treaty amounted to a number of initiatives, such as Resolutions, Joint Actions and Guidelines relating to immigration, we cannot talk of a significant momentum in this field until the coming into force of the Amsterdam Treaty. Most texts were 'vaguely drafted'[34] and had no binding powers.

It is following the coming into effect of the Amsterdam Treaty that the field of immigration took on true Community features. The Amsterdam Treaty launched a new goal which was to maintain and develop the Union as an Area of Freedom, Security and Justice.[35] What was meant by the 'Area of Freedom Security and Justice' was explained in the Vienna Action Plan.[36] With the central aim of

30 EC Treaty, Ex Article 100c(1).

31 EC Treaty, Ex Article 100c(3).

32 EU Treaty, Article B.

33 E. Guild, *Immigration Law in the European Community* (The Hague, Kluwer Law International 2001) p.256.

34 S. Peers, *EU Justice and Home Affairs Law* (Oxford, Oxford University Press 2000) p.84.

35 EU Treaty, Article 2.

36 Council and Commission Action Plan of 3 December 1998 on how best to implement the provisions of the Treaty of Amsterdam on the creation of an area of freedom, security and justice, OJ 1999 C19/1.

establishing this area, the Amsterdam Treaty has introduced drastic amendments to the structure of the Treaties, especially concerning Justice and Home Affairs.

A Protocol annexed to the Amsterdam Treaty [37] made the Schengen Agreement, the Schengen Implementation Convention, including the decisions of the Executive Committee, part of Community law.

A considerable part of the Third Pillar policies were transferred to the Community Pillar by the introduction of the new Title IV on visas, asylum, immigration and other policies related to the free movement of persons. The Third Pillar was renamed as Police and Judicial Cooperation in Criminal Matters, since with the removal of provisions relating to asylum, immigration and rights of third-country nationals, all that was left in the Third Pillar was policing and judicial cooperation in criminal matters. With different reasons and subject to different procedures Denmark as well as Ireland and the UK chose to stay outside the scope of Title IV, however they do have the right to request to opt in.[38] Iceland and Norway, which are the two non-EU members of the Nordic Passport Union, have been associated with the development of the Schengen cooperation since 1996 and at the EU level since 1999.[39] Most recently, following the Agreement on the Swiss Confederation's association with the implementation, application and development of the Schengen acquis in 2004,[40] and a subsequent Council Decision,[41] Switzerland joined the Schengen area on December 12, 2008. Similarly, Liechtenstein is expected to join the Schengen area by the end of 2009.[42]

With the aim of establishing the Area of Freedom, Security and Justice, the

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37 Protocol integrating the Schengen acquis into the framework of the European Union.

38 Protocol on the position of the United Kingdom and Ireland, Protocol on the Position of Denmark.

39 Council Decision of 17 May 1999 on certain arrangements for the application of the Agreement concluded by the Council of the European Union and the Republic of Iceland and the Kingdom of Norway concerning the association of those two States with the implementation, application and development of the Schengen acquis, L 176, 10.07.1999, pp.31-32.

40 Council Decisions 2004/849, O.J. L 368, 15.12.2004, pp.26-27; and 2004/860, O.J. L 370, 17.12.2004, pp.78-79.

41 Council Decision 2008/903 of 27 November 2008 on the full implementation of the provisions of the Schengen acquis in the Swiss Confederation, O.J. L 327, 05.12.2008, pp.15-17.

42 Commission press release 'European Commission welcomes Switzerland to the Schengen area' dated 12.12.2008 available at: http://europa.eu/rapid/pressReleasesAction.do?reference=IP/08/1955&format=HTML&aged=0&language=EN&guiLanguage=en (last visited 21.01.2009).

Amsterdam Treaty set an ambitious deadline of five years for Title IV measures to be adopted. The Amsterdam Treaty introduced a legislative agenda which needed to be interpreted into tangible objectives. What followed was not merely an 'interpretation' but the first and largest step towards establishing an immigration policy for Europe. The Conclusions of the Tampere European Council of 1999 correspond to the manifestation of a momentous political will on the side of the Member States to achieve a high level of Communitarization in Justice and Home Affairs. The Tampere Milestones, as they are commonly referred to, set the principles that were to govern the Justice and Home Affairs policies which were to be designed.

Completing Article 63 (3) and (4) of the EC Treaty, the Milestones determined that the comprehensive approach to migration, which the EU needs, should address political, human rights and development issues in countries and regions of origin and transit.[43] National legislation on entry and residence conditions in Member States should be approximated.[44] Moreover, an efficient management of migration flows is endeavoured which should be carried out in close cooperation with countries of origin.[45] Regarding third-country nationals, the creation of a vigorous integration policy is aimed at, which should grant third-country nationals comparable rights and obligations to those of EU citizens.[46] This last matter is probably the most striking objective which is determined by the Milestones. The intention to approximate the legal status of third-country nationals to that of Member State nationals[47] constitutes the point which is referred to most often when consequent EU actions are being evaluated in respect of whether they meet Tampere objectives.

Following the Tampere Presidency Conclusions, the Commission adopted the Communication on a Community immigration policy[48] which further deals with the elements of the immigration policy that was envisaged in Tampere. The Commission ascertained that the underlying principle of an EU immigration policy must be that third-country nationals should enjoy the same rights and responsibilities as EU nationals; however, these may be incremental and related to the length of stay.[49]

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43 Presidency Conclusions of the Tampere European Council of 15-16 October 1999, paragraph 11.

44 *Ibid.*, paragraph 20.

45 *Ibid.*, paragraph 22.

46 *Ibid.*, paragraph 18.

47 *Ibid.*, paragraph 21.

48 COM(2000)757 final, 22.11.2000.

49 Communication on a Community Immigration Policy, Section 3.3.

Following September 11, 2001 any progressive trend concerning the rights of third-country nationals had to be discarded. This is because after this date 'security' concerns attained the highest priority. The aspired Area of Freedom, Security and Justice came under danger of becoming a crooked construction with the 'security' aspect far too nurtured in comparison to the other two aspects. Member States, which were already not very pleased with having to share their powers in the immigration field with the EU, used '9/11' as an excuse to promote more restrictive initiatives regarding entry conditions and the rights of third-country nationals.[50] Policies, measures or legislation, which had been waiting for a long time for enough support, were consolidated in the first months following 11 September at the national and European levels.[51] Consequently, in pursuit of securing fundamental principles that would guide the future European Immigration Policy, the focus shifted to 'migration and security'. The Conclusions of the Extraordinary Justice and Home Affairs (JHA) Council of September 20, 2001 contains a section entitled 'measures at the border'[52] calling upon the Commission to urgently examine the relationship between safeguarding internal security and complying with international protection obligations and instruments. This call was interpreted so as to mean 'a re-examination of asylum and refugee guarantees and procedures in the light of the terrorist threat.'[53]

At the time three Commission Proposals for Council Directives were being discussed and Member States were demanding substantial amendments to the texts in order to strengthen the security aspect in these proposals.[54] The Commission reassured the Member States by pointing out that all the Proposals contained 'public order' clauses and that a scrupulous application of these 'public order' clauses would be a more appropriate way of enhancing security than to change the Proposals.[55]

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50 J. Apap and S. Carrera, 'Towards a Proactive Immigration Policy For the EU?', CEPS Working Document No.198 (December 2003) p.42.

51 E. Brouwer, 'Immigration, Asylum and Terrorism: A Changing Dynamic Legal and Practical Developments in the EU in Response to the Terrorist Attacks of 11.9', *European Journal of Migration Law*, Vol.4 (2003) p.422.

52 Other sections of the Conclusions relate to judicial cooperation, cooperation between police and intelligence services, financing of terrorism and other measures.

53 J. Monar, 'The Problems of Balance in EU Justice and Home Affairs and the Impact of 11 September', in M. Anderson and J. Apap, eds., *Police and Justice Co-operation and the New European Borders* (The Hague, Kluwer Law International 2002) p.177.

54 On the right to family reunification, the status of third-country nationals who are long-term residents and the conditions of entry and residence of third-country nationals for the purpose of paid employment and self-employed economic activities.

55 Commission Working Document on the relationship between safeguarding internal

Following 11 September, the prompt adoption at EU level of measures directly related to security was witnessed.[56] Yet, the Community did not altogether abandon its commitment to realize the objectives of Tampere. In the 2001 Laeken European Council and the 2002 Seville European Council, the Member States emphasized the need to speed up the implementation of the Tampere Milestones.[57] The agenda was being implemented, though with some delay. Yet, the principle set in paragraph 21 of the Conclusions, namely that the legal status of third-country nationals should be approximated to that of Member States' nationals, has been neglected to a great extent. This policy choice is further discussed below, within the context of specific legislation.

The 2003 Thessaloniki European Council called upon the need to elaborate a comprehensive and multidimensional policy on integration[58] and to explore legal means for third-country nationals to migrate to the Union taking into account the reception capacities of the Member States.[59]

In the same year the Council Directive on the right to family reunification[60] and the Council Directive concerning the status of third-country nationals who are long-term residents[61] were adopted after years of debate. The adoption of these Directives did certainly not bring an end to the debate on the political and

security and complying with international protection obligations and instruments, COM(2001)743 final, 4.4. It must be noted, however, that the Working Document also talks about the possibility to include various amendments to the Proposal on the status of long-term resident third-country nationals, which would result in the widening of the possibility to reject granting long-term resident status and to expell a long-term resident. Furthermore, the amended proposal for a Council Directive on family reunification of 2002 contained a provision providing the possibility to withdraw or reject the renewal of a residence permit on grounds of public policy or domestic security, when this was not possible under the 1999 proposal. See E. Brouwer, 'Immigration, Asylum and Terrorism: A Changing Dynamic Legal and Practical Developments in the EU in Response to the Terrorist Attacks of 11.9', *European Journal of Migration Law*, Vol.4 (2003) pp.407-408.

56 A political agreement was reached on Proposals for a Framework Decision on combating terrorism, defining a common understanding of terrorist acts (COM(2001) 521) and for a Framework Decision on the European arrest warrant and surrender procedures (COM(2001) 522) three months after the publication of these proposals.

57 Laeken European Council, 14-15 December 2001, Presidency Conclusions, paragraph 37; Seville European Council Presidency Conclusions, 21-22 June 2002, paragraph 26.

58 Paragraph 28 of the Presidency Conclusions clarifies that a comprehensive and multidimensional policy should cover factors such as employment, economic participation, education, language training, health and social services, housing, urban issues, culture and participation in social life.

59 Presidency Conclusions paragraph 30.

60 Council Directive 2003/86.

61 Council Directive 2003/109.

academic grounds. The issues debated are looked into below when EU immigration law is analyzed per subject-matter.[62] As for the third proposal falling in the same category with the two adopted Directives, inasmuch as they deal with third-country nationals, the opposition against it was the strongest. The Proposal for a Council Directive on economic migration[63] was not well received by the Member States which were hesitant towards this attempt to touch upon their absolute competence in the area of determining 'who should be admitted under which conditions'. In order to ensure that the discussions on economic migration were not forgotten, the Commission launched a Green Paper,[64] the response to which was satisfactory. From the more than 130 written submissions received, it was clear that there existed a general accord towards establishing a European policy on economic migration; however, the approach to be utilized appeared to be a thorny subject.[65] The Commission's new approach of including the stakeholders in the creation of a legislative proposal has been a remarkable step, regardless of what the destiny of the Proposal has been. Eventually, the approach chosen was a sectoral one.[66]

As was mandated by the Thessaloniki European Council,[67] the Commission prepared the First Annual Report on Migration and Integration.[68] The document revealed once more the standpoint of the Commission concerning immigration, which is that the expected increase in immigration flows are increasingly necessary to meet the needs of the enlarged EU and that Europe must prepare for this. Accordingly, immigration issues should be taken into account in all relevant policies and measures at EU and national level; in other words they should be 'mainstreamed'.

With a view to ensuring coordination between Member States concerning external border management FRONTEX was established by means of the Council Regulation of October 26, 2004.[69] This Border Management Agency

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62 See respectively *infra* 2.3.2.3. and 2.3.2.4.

63 Proposal for a Council Directive on the conditions of entry and residence of third-country nationals for the purpose of paid employment and self-employed economic activities, COM(2001) 386 final, 11.07.2001.

64 Green Paper on an EU approach to managing economic migration, COM(2004) 811 final, 11.01.2005.

65 S. Bertozzi, 'Legal Migration: Time for Europe to Play Its Hand', CEPS Working Document No.257 (February 2007) p.8.

66 See *infra* 2.3.2.5.

67 Presidency Conclusions, paragraph 33.

68 COM(2004) 508 final, 16.07.2004.

69 Council Regulation No.2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member

became fully operational on October 3, 2005. Contrary to what was expected at the beginning of the discussions concerning the establishment of a European Border Agency,[70] FRONTEX has no competence concerning the actual management of the external borders of the EU. It mainly coordinates operational cooperation between Member States in the field of external border management.[71]

Even though not all the original objectives of the Tampere Programme were accomplished, the first phase of Justice and Home Affairs cooperation yielded considerable progress in the field. The second five-year programme was launched in November 2004 under the Dutch Presidency. The political orientations set by the Hague Programme were further specified by the Action Plan Implementing the Hague Programme.[72] The Commission stressed the need to develop a common immigration policy which would have a balanced approach to migration management by not only focusing on illegal immigration but also addressing the situation of legal migrants, covering admission procedures and criteria, including a set of rights to assist the integration of those who are admitted. The Action Plan was completed with a list of measures and a timetable for adoption, which revealed that 'integration' would be a central issue in this second phase.

The first demonstration of the balanced migration policy envisaged by the Hague Programme is the major package of measures adopted on September 1, 2005. The package consists of a proposal for a Directive on common standards on return[73] and three Communications, on integration,[74] on migration and development[75] and on regional protection programmes.[76] The proposal for a

States of the European Union, O.J. L 349, 25.11.2004, pp.1-11.

70 S. Peers, 'Development of a European Border Guard', Statewatch Submission dated 08.05.2003, available at: http://www.statewatch.org/docbin/evidence/eurbordergdmay03.html (last visited 21.01.2009).

71 Article 1(a) of Council Regulation 2007/2004.

72 The Hague Programme: Ten priorities for the next five years, the Partnership for European renewal in the field of Freedom, Security and Justice, COM(2005) 184 final, 10.05.2005.

73 Proposal for a Directive on common standards and procedures in Member States for returning illegally staying third-country nationals, COM(2005) 391 final, 01.09.2005.

74 Commission Communication on a common agenda for integration: Framework for the integration of Third-Country Nationals in the European Union, COM(2005) 389 final, 01.09.2005.

75 Commission Communication on migration and development: Some Concrete Orientations, COM(2005) 390 final, 01.09.2005.

76 Commission Communication on regional protection programmes, COM(2005) 388 final, 01.09.2005.

Directive on common standards on return was prepared as part of the fight against illegal immigration; the Communication on regional protection programmes as part of European Asylum Policy. The remaining two Communications concern migration policies.

The Communication on migration and development[77] is seen as part of the Commission's contribution to the global debate on migration and development which was the subject to which the United Nations contributed its plenary session on 14-15 September 2006. To demonstrate the increasing importance of migration matters at international level it should be mentioned that The High Level Dialogue on International Migration and Development was the first UN General Assembly plenary session ever on migration issues. The High Level Dialogue also consisted of informal round-table discussions on, among other things, remittances, which the Commission handles at length in its Communication of 1 September 2005. The Commission laid down its envisaged initiatives and recommendations in two policy areas concerning remittances, namely, fostering cheap, fast and secure ways to send remittances; and facilitating the contribution of remittances to the development of migrants' countries of origin.[78]

The Communication on integration, which is analyzed thoroughly below,[79] constitutes the first step towards setting up a coherent framework for integration at European level. In order to provide guidance for EU and Member State integration policies, the Communication suggests actions to be taken both at national and at European level.

In June 2006, the Commission, in a first assessment of the implementation of the Hague Programme, identified the areas needing attention in the Union's work and where further efforts are needed.[80] A set of proposals have been made for action and implementation before 2009, which is when the Hague Programme expires. The proposals emphasize the need to firmly embed migration issues in the Union's external relations with countries of origin and transit; the requirement of coordinating integration policies in order to reach sustainable legal migration policies; and touches upon the problem of the decision-making

77 See *infra* 2.4.2.

78 Other matters discussed in the Communication are: Diasporas as actors of home country development; Circular migration and brain circulation; Mitigating the adverse effect of the brain drain.

79 See *infra* 2.4.5.

80 Commission Communication 'Implementing the Hague Programme: the way forward', COM(2006) 331 final, 28.06.2006.

process in the Area of Freedom, Security and Justice.

The developments witnessed in the area of common immigration policy during the last couple of years are all centred around the 'Global Approach to Migration', which principally means that all aspects of immigration should be dealt with at the same time. This comprehensive approach has received a new outlook with the Commission Communication 'Towards a common immigration policy'[81] laying down the ingredients of the common immigration policy which will be shaped in coordinated and complementing actions by the EU and the Member States bound by the global approach. In June 2008, the Commission introduced a refined version of the commitment that Europe should make in order to establish the common immigration policy. The Communication on a common immigration policy for Europe[82] proposes ten common principles which are grouped under the three dimensions of the immigration phenomenon: 'prosperity' for matters relating to the contribution of legal immigration to the socio-economic development of the EU; 'solidarity' for matters relating to coordination between Member States and cooperation with third countries; and 'security' for matters relating to the effective fight against illegal immigration. The call from the Commission found its response at the European Council of October 2008[83] which adopted the European Pact on Immigration and Asylum forming the basis of the future common immigration and asylum policy. The pact comprises commitments to be implemented by the EU as well as the Member States in five areas, being:

1. To organize legal immigration to take account of the priorities, needs and reception capabilities determined by each Member State, and to encourage integration;
2. To control illegal immigration by ensuring the return of illegal immigrants to their country of origin or a country of transit;
3. To make border controls more effective;
4. To construct a Europe of asylum;
5. To create a comprehensive partnership with countries of origin and transit to encourage synergy between migration and development.

Decision making in the area of Justice and Home Affairs has been a troublesome

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81 Commission Communication 'Towards a Common Immigration Policy', COM(2007) 780 final, 05.12.2007.

82 Commission Communication 'A Common Immigration Policy for Europe: Principles, Actions and Tools', COM(2008) 359, 17.06.2008.

83 Presidency Conclusions of the Brussels European Council of 15 and 16 October 2008, Paragraph 19.

issue from the start. Within the scheme created by the Maastricht Treaty, third-pillar decision making was a sui generis process, not purely intergovernmental but with a tad of supranational influence. Furthermore, decisions did not enjoy binding effect, which made decision making 'suffer from a two-fold structural deficit'.[84] After the Communitarization of visas, asylum and immigration policies by the Treaty of Amsterdam, Article 63 of the EC Treaty became the legal basis of Community action concerning immigration. Article 63 sets a transitional period of five years from the entry into force of the Treaty of Amsterdam, during which the Council shall act unanimously.[85] After the end of this transitional period the Council was to adopt decisions by the co-decision procedure and qualified majority voting pursuant to Article 251. However, legal migration was kept out of this five-year transition period and thus excluded from the realm of the co-decision procedure[86] which has been exercised in the remaining aspects of Article 63 as of 1 January 2005. The unanimity requirement in the Council led to years of delay in the adoption of legislative measures as can be evidenced by the fate of the Proposal for a Council Directive on economic migration. Should the Lisbon Treaty come into force, all aspects of migration will be integrated into one single provision dealing with the common immigration policy[87] and for every aspect the co-decision procedure, or following the new terminology 'the ordinary legislative procedure'[88], will be applied.[89]

One of the mandates of the Hague Programme to the Commission was the preparation of a policy plan on legal migration. Accordingly, in order to pursue the coherent development of a policy in the area, the Policy Plan on Legal Migration was presented by the Commission.[90] The Policy Plan constitutes a road map for the remaining part of the second phase of Justice and Home Affairs cooperation. Proposals, which have been broken down year by year, comprise of measures relating to labour migration, knowledge building and information, integration and cooperation with countries of origin.
Years after the eventful adoption of the Commission Decision setting up a prior communication and consultation procedure on migration policies in relation to non-member countries,[91] the Commission made a proposal for a Council

84 K. Hailbronner, *Immigration and Asylum Law and Policy of the European Union* (The Hague, Kluwer Law International 2000) p.49.
85 Article 67 EC Treaty.
86 Article 63(3) EC Treaty.
87 Consolidated version of the Treaty on the Functioning of the European Union, Article 79.
88 *Ibid*., Article 294.
89 *Ibid*., Article 79(2) and (4).
90 Commission Communication Policy Plan on Legal Migration, COM(2005) 669 final, 21.12.2005.
91 O. J. L 183, 14.07.1988, pp. 35-36.

Decision on the establishment of a mutual information procedure concerning Member States' measures in the areas of asylum and immigration,[92] which was adopted by the Council in October 2006.[93] The information and consultation mechanism created by the 1988 Decision was never effectively used by the Member States,[94] even though the need for such a mechanism was already expressed back in 1974.[95] The Council Decision aims at establishing a mechanism for the mutual exchange of information concerning national measures in the areas of asylum and immigration that are likely to have a significant impact on several Member States or on the European Union as a whole.[96] It is suggested that, as a result of this mechanism, exchanges of views and debates on the relevant measures can be expected to take place.[97] It seems that now, more than 30 years after the idea of setting up an information system was first voiced, the possibility of establishing a functioning information mechanism does not seem to be remote. This is thanks to political support from all Member States,[98] which replaced the collective dissent voiced against the original Commission Decision of 1985.[99]

2.3 EU Immigration Law

2.3.1 Admission

2.3.1.1 The Schengen Cooperation and its Groundwork: SIS

Admission into the EU territory largely falls within the legal framework which developed around the 1985 Schengen Agreement and the Schengen Implementation Convention which came into effect in 1995. When the Treaty of Amsterdam came into force on May 1, 1999, the Schengen acquis which had been created before this date was Communitarized.[100] The Treaty of Amsterdam also conferred new legislative powers upon the Community by introducing Title IV of the EC Treaty. This is how the Schengen acquis, which until that date was formed at an intergovernmental level, was further developed by Community

92 COM (2005) 480 final, 10.10.2005.

93 Council Decision 2006/688 of 5 October 2006, O.J. L 283, 14.10.2006, pp.40-43.

94 COM (2005) 480 final, Explanatory Memorandum point 2.

95 Council Resolution of 21 January 1974 concerning a social action programme, O.J. C 13, 12.02.1974, pp.1-4.

96 Council Decision 2006/688, Article 1(1).

97 *Ibid*., Article 1(2).

98 COM (2005) 480 final, Explanatory Memorandum point 1.

99 Commission Decision 85/381, O.J. L 217, 14.08.1985 p.25-26.

100 Protocol annexed to the Treaty of Amsterdam integrating the Schengen acquis into the framework of the European Union.

institutions.

Apart from being a collection of legal rules governing, inter alia, the entry into the EU territory of third-country nationals, Schengen also corresponds to a complex information exchange system, upon which the legal rules are based. This system becomes relevant every time a visa or residence permit is going to be issued and, moreover, during border checks. The Schengen Information System (SIS), established by the Schengen Implementation Convention Title IV, is a joint information system consisting of national sections in every Member State containing data on persons for whom an alert has been issued[101] and a technical support function which ensures that the data files of the national sections contain identical information.[102] The conditions under which an alarm can be issued for someone[103] and the types of information to be contained[104] are indicated by the Convention. As the pooling of information on who is 'wanted' and who is 'not wanted' by Member States becomes crucial in the absence of internal border checks, SIS constitutes the backbone of the entire Schengen system setting aside checks at borders.

The right to access the data entered in the Schengen Information System was originally only accorded to national authorities responsible for border checks, visas and residence permits.[105] This right was later extended to Europol and Eurojust.[106] This amendment was triggered by the increasing need to set up more efficient counter-terrorism measures.[107] Amending the existing Schengen Information System in order to better suit changing needs did not suffice when it came to the accession of 10 new Member States to the Union.

The Schengen Information System, as it was established by the Schengen Implementation Convention, had the capacity to serve no more than 18 participating States.[108] When the accession of the new Member States drew nearer, it became inevitable to set up a developed version of the original SIS. Furthermore, there had been developments in the field of information

101 Schengen Implementation Convention, Article 94(2)(a).

102 *Ibid.*, Article 92(3).

103 *Ibid.*, Articles 95-99.

104 *Ibid.*, Article 94(3).

105 *Ibid.*, Article 101.

106 Council Decision 2005/211 of 24 February 2005 concerning the introduction of some new functions for the Schengen Information System, including the fight against terrorism, O.J. L 68, 15.03.2005, pp.44-48.

107 As explained in the Preamble to Council Decision 2005/211.

108 Council Decision 2001/886 of 6 December 2001 on the development of the second generation Schengen Information System, O.J. L 328, 13.12.2001, pp.1-3.

technology since the creation of SIS, in particular making the inclusion of biometric data possible. Notwithstanding the concerns raised by experts on the reliability and security of biometrics and the human rights impact of using such data,[109] the Community found it to be beneficial to make use of these developments.[110]

For the above-mentioned reasons, after some delays caused by the magnitude of the project and legal proceedings associated therewith,[111] the second generation Schengen Information System was established in 2007 with the purpose of ensuring a high level of security within the Area of Freedom, Security and Justice of the European Union.[112] It includes a central system and national applications and a communication infrastructure which ensures the encrypted transfer of data entered into the systems.[113]

The operational aspects of SIS II are yet to be seen as the original deadline set for it to be fully operational, which was December 31, 2008,[114] has not been met and the new deadline of September 2009 is reported to be impossible.[115] In any event the Schengen Information System II has been legally set up and is the mechanism that Member States trust when it comes to 'keeping the unwanted out, and preventing the wanted from leaving'.[116] The legal aspects of admission into the EU that are dealt with below are knit around this concrete structure ensuring the transfer of information that is crucial in order to create a truly integrated European admission acquis, including issues concerning border controls and visas.

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109 House of Lords, European Union Committee, 9th Report of Session 2006-07, 'Schengen Information System II: Report with Evidence', published on 2 March 2007, p.24.

110 Preamble to Council Decision 2001/886.

111 Case T 447/04 *Capgemini Nederland BV v Commission* [2005].

112 Council Decision 2007/533 of 12 June 2007 on the establishment, operation and use of the second generation Schengen Information System (SIS II), O.J. L 205, 07.08.2007, pp.63-84.

113 Council Decision 2007/533, Article 4.

114 Council Regulation 1988/2006 amending Council Regulation 2424/2001 on the development of the second generation Schengen Information System (SIS II), O.J. L 411, 30.12.2006, pp.1-5, Article 7.

115 M. Vasconcelos, 'The EU is wasting millions of Euros in a system that does not work', *the European Journal,* 21.01.2009, available at: http://europeanjournal.typepad.com/my_weblog/2009/01/the-eu-is-wasting-millions-of-euros-in-a-system-that-does-not-work.html (last visited 21.01.2009).

116 House of Lords, European Union Committee, 9th Report of Session 2006-07, 'Schengen Information System II: Report with Evidence', published on 2 March 2007, p.7.

2.3.1.2 With or Without a Visa

When admission into the European Union is the topic, it is safe to presume that nearly all there is to be said relates to 'visas' in one way or the other. Being in possession of a valid visa is one of the conditions of entry for 'some' third-country nationals.[117] Before anything can be said on the issue of admission into the territory of the Community, the question to be answered is: 'which third-country nationals are under the obligation to possess a visa'.

Since the Schengen States have abolished internal border controls and have undertaken to harmonize their visa policies[118] there have been a number of documents both in the framework of the Schengen cooperation and at Community level aiming to determine the list of countries whose nationals must be in possession of visas when entering the Member States.[119] The first Community listing in its true meaning,[120] however, was adopted in 2001. Council Regulation 539/2001[121] contains two Annexes; Annex 1 containing the list of third countries whose nationals shall be required to be in possession of a visa when crossing the external borders of the Member States,[122] and Annex 2 containing the list of third countries whose nationals shall be exempt from that requirement for stays up to three months.[123] These lists are commonly referred to as the 'negative' and 'positive' lists, or the 'black' and 'white' lists. The determination of which third country shall be placed in which list is done by a case-by-case assessment of factors such as illegal immigration, public policy and security, and according to the EU's external relations with third countries taking into account the implications of regional coherence and reciprocity.[124] The Regulation has been amended on four occasions.[125] The last amendment, which

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117 Schengen Borders Code, Article 5(1)(b).

118 Schengen Implementation Convention, Article 9(1).

119 Council Regulation 2317/95 (O.J. L 234, 03.10.1995, pp.1-3), which was annulled by the ECJ (C-392/95) due to procedural matters, and was replaced by Council Regulation 574/1999 (O.J. L 72, 18.03.1999); Decisions of the Executive Committee on the harmonization of visa policy (O.J. L 239, 22.09.2000, p.186); and on the abolition of the grey list of States whose nationals are subject to visa requirements by certain Schengen States (O.J. L 239, 22.09.2000, p.206).

120 As it was adopted after the promotion of the 'visa policy' to Community level with the Treaty of Amsterdam and had as its legal basis Article 62(2)(b)(i) of the EC Treaty.

121 Council Regulation 539/2001 of 15 March 2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement, O.J. L 81, 21.03.2001, pp.1-7.

122 Council Regulation 539/2001, Article 1(1).

123 *Ibid.*, Article 1(2).

124 *Ibid.*, Preamble point 5.

125 Council Regulation 2414/2001 of 7 December 2001 (O.J. L 327, 12.12.2001, pp.1-2), Council Regulation 453/2003 of 6 March 2003 (O.J. L 69, 13.03.2003, pp.10-11), Council

took place in 2006, represents a shift from a restrictive to a balanced and proportionate visa regime, by not only adding States to Annex 2 for the first time after five years, but also allowing for the first time some countries with a black population majority to appear on this 'white' list.[126] This relatively permissive approach which is new to the European visa policy might be seen as the consequence of increasing technical facilities concerning the transfer of information on persons for whom an alert has been issued. As the exchange of information between Member States increases there will be less reason for black-listing extensive categories of persons; because the trust afforded to the information transfer mechanisms to ensure safety renders it more and more unnecessary to resort to the black list as it stands.

It follows that a third-country national who wishes to enter Community territory should first check whether his country appears in Annex 1. If that is the case, then he or she shall become familiar with the Community rules on visas such as which visa should be applied for from which authority. Below a description is given of the Community visa regime as it applies to those who are citizens of a country belonging to the visa 'black' list.

2.3.1.3 The Uniform Visa

The Schengen Implementation Convention envisaged the introduction of a 'uniform visa' for the entire Schengen territory, to be issued for visits not exceeding three months.[127] As for visits exceeding three months the relevant type of visa would be the long-term visas which are national visas issued in accordance with national legislation.[128] The uniform visa is defined in the Common Consular Instructions as an authorization or decision 'granted in the form of a sticker affixed by a Contracting Party to a passport, travel document or other document which entitles the holder to cross the border.'[129] It consists of four types of visas: airport transit visas, transit visas, short-term or travel visas and group visas.

The airport transit visa constitutes an exception to the rule that a visa shall not be required to pass through the international transit area during a stop-over or

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Regulation 851/2005 of 2 June 2005 (O.J. L 141, 04.06.2005, pp.3-5), and Council Regulation 1932/2006 of 21 December 2006 (O.J. L 405, 30.12.2006, pp.23-34) together with its Corrigendum (O.J. L 29, 03.02.2007, pp.10-13).

126 S. Peers, 'Key Legislative Developments on Migration in the European Union', *European Journal of Migration and Law*, Vol.9 (2007) pp.229-251.

127 Schengen Implementation Convention Article 10(1).

128 Common Consular Instructions on visas for the diplomatic missions and consular posts, O.J. C 326 , 22.12.2005, pp. 1–149, point 2.2.

129 Common Consular Instructions, point 2.1.

transfer between two sections of an international flight.[130] The visa was established by the Joint Action on airport transport arrangements dated 4 March 1996.[131] It ensures that the third-country nationals who are required to obtain the visa can pass through the international transit area, without actually entering the national territory of the country concerned.[132] The list of countries whose nationals are subject to an airport transit visa requirement is Annexed to the Common Consular Instructions.[133] The list may be amended by the Council.[134] One does not necessarily have to be a national of one of the countries listed to be required to obtain an airport transit visa. The requirement also applies to the holders of travel documents issued by the authorities of one of the listed countries.[135]

Transit visas are for third-country nationals who are travelling from one non-member country to another through the Schengen countries. This visa allows the third-country national to pass through the Schengen territory, provided that the transit does not exceed five days.[136]

The short-term visa (travel visa) is issued for reasons other than to immigrate, to carry out a continuous visit or several visits, the duration of which does not exceed three months. It may take the form of a multiple entry visa where the third-country national frequently needs to travel to one or several Schengen States. In this case, the short-term visa is issued for several visits, subject to the condition that the total length of these visits does not exceed three months in any half-year. [137]

The final type of a uniform visa is the group visa. Even though the Schengen visa is as a rule issued individually, it is also possible to obtain a group visa. This type of visa can be issued to groups of five to 50 people for visits not exceeding 30 days.[138]

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130 Annex 9 to the Chicago Convention on International Civil Aviation establishes the principle of free transit passage through the international areas of airports.

131 Joint Action on airport transit arrangements, O.J. L 63/8, 13.3.1996.

132 Common Consular Instructions, point 2.1.1(1).

133 Joint list of third countries whose nationals are subject to an airport transit visa requirement, where holders of travel documents issued by these third countries are also subject to this visa requirement.

134 Joint Action on airport transit arrangements Article 8(2).

135 Common Consular Instructions, point 2.1.1(2).

136 *Ibid.*, point 2.1.2.

137 *Ibid.*, point 2.1.3.

138 *Ibid.*, point 2.1.4.

Once the uniform visa has been issued it can only be extended in the event that new facts have arisen since the issue of the visa, which have to be duly substantiated.[139] The grounds for the extension of a visa may be force majeure, humanitarian reasons or serious occupational or personal reasons.[140] In any event, the purpose of the visa cannot be altered and the extension of a visa shall not result in the total duration of the stay exceeding 90 days.[141]

All four types of uniform visas may only be issued if a third-country national fulfils the entry conditions. These conditions used to be listed in the Schengen Implementation Convention,[142] until the related Article was repealed by the Schengen Borders Code.[143] Consequently, one needs to refer to Article 5 of the Schengen Borders Code entitled 'entry conditions for third country nationals', which has basically maintained the requirements that were set out in the Schengen Implementation Convention. It follows that the third-country national must be in possession of a valid travel document or documents authorizing them to cross the border;[144] must be in possession of a valid visa if so required except if he or she holds a valid residence permit;[145] he or she must justify the purpose and conditions of the intended stay, and have sufficient means of subsistence, both for the duration of the intended stay and for the return to his or her country of origin or transit to a third country into which they are certain to be admitted, or must be in a position to acquire such means lawfully;[146] he or she must not be among the persons for whom an alert has been issued in the SIS for the purposes of refusing entry;[147] he or she must not be considered to be a threat to public policy, internal security, public health or the international relations of any of the Member States, in particular where no alert has been issued in the Member States' national databases for the purposes of refusing entry on the same grounds.[148]

A third-country national who does not fulfil the entry conditions set out in Article 5 shall be refused entry to the territories of the Member States[149] by a

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139 Decision of the Executive Committee of 14 December 1993 extending the uniform visa, as mandated by the Schengen Implementation Convention Article 17(3)(e).

140 Decision of the Executive Committee of 14 December 1993, Common Principle 2.

141 *Ibid.*, Common Principle 3.

142 Schengen Implementation Convention, Article 5.

143 Regulation 562/2006 of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders, O.J. L 105, 13.04.2006, pp.1-32.

144 Schengen Borders Code, Article 5(1)(a).

145 *Ibid.*, Article 5(1)(b).

146 *Ibid.*, Article 5(1)(c).

147 *Ibid.*, Article 5(1)(d).

148 *Ibid.*, Article 5(1)(e).

149 *Ibid.*, Article 13(1).

substantiated decision stating the precise reasons for the refusal.[150] An appeal may be lodged against the decision to refuse entry.[151]

The uniform visa is governed by a uniform form which was established by Council Regulation 1683/95,[152] which corresponds to Annex 8 of the Common Consular Instructions.[153] The Council Regulation stipulates that the uniform format which shall be in the form of a sticker shall contain secret technical specifications which render the visa difficult to counterfeit or falsify. The sticker shall contain information as to the territory for which the visa is valid, the period of the visa's validity, the number of entries allowed and the total duration of the stay, the place and date of issue, the visa holder's passport number, and the type of visa.[154] Later, Council Regulation 334/2002[155] introduced the inclusion of a photograph in the visas in order to establish 'a more reliable link between the uniform format visa and the holder'.[156] Despite subsequent plans to insert the fingerprints of the holder into the uniform format for the visa,[157] this was found to be not technically feasible.[158]

2.3.1.4 Issue of Visas at Borders: an exception

The general rule is that the uniform visa is issued by the diplomatic and consular authorities of the Member States.[159] One of the exceptions to this rule is the issue of visas at borders. The Schengen Implementation Convention Article 12(1) refers to Article 17 for exceptions to the rule that diplomatic and consular authorities are to issue visas. Article 17(3)(c) indicates that the conditions governing the issue of visas at borders shall be decided by the Schengen Executive Committee.[160] This was the case until a specific Regulation was adopted to lay

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150 *Ibid.*, Article 13(2).

151 *Ibid.*, Article 13(3).

152 Council Regulation 1683/95 of 29 May 1995 laying down a uniform format for visas, O.J. L 164, 14.07.1995, pp.1-4.

153 Annex 8 of the Common Consular Instructions on visas for diplomatic missions and consular posts, O.J. C 326, 22.12.2005, pp. 69-72.

154 Annex to the Council Regulation 1683/95, paragraphs 6-12.

155 Council Regulation 334/2002 of 18 February 2002 amending Regulation 1683/95 laying down a uniform format for visas, O.J. L 53, 23.02.2002, pp.7-8.

156 Preamble to the Council Regulation 334/2002, paragraph 6.

157 Proposal for a Council Regulation amending Regulation 1683/95 laying down a uniform format for visas, COM (2003) 558 final, 24.09.2003.

158 Explanatory Memorandum of the Modified Proposal for a Council Regulation amending Regulation 1030/2002 laying down a uniform format for residence permits for third-country nationals, COM(2006)110 final.

159 Schengen Implementation Convention, Article 12(1).

160 Substituted by the Council according to Article 2(1) of the Protocol integrating the Schengen acquis into the framework of the European Union.

down standard rules on the issue of visas at borders, in 2003. The Schengen Executive Committee Decision of 26 April 1994[161] governed the issue of visas at borders. The Decision[162] has been repealed with the adoption of Council Regulation 415/2003.[163] The principles governing the issue of visas at borders have basically remained unchanged; however, the Regulation brought a more clear-cut approach as one no longer has to browse the pages of the Schengen Implementation Convention to see what the relevant rules are.

According to Council Regulation 415/2003, in exceptional cases, a third-country national who is required to be in possession of a visa when crossing the external borders of the Member States may be issued with a visa at the border under certain conditions. Accordingly, he or she should fulfil the following conditions laid down in Article 5(1)(a),(c), (d) and (e) of the Schengen Borders Code, which repealed the corresponding provisions of the Schengen Implementation Convention: he or she should not have been in a position to apply for a visa in advance; if required, he or she must submit supporting documents substantiating unforeseeable and imperative reasons for entry; and return to his or her country of origin or transit to a third State should be assured.[164] The visa issued at the border may be either a transit visa – the validity of which should not exceed five days – or a travel visa – the validity of which should not exceed 15 days, in both cases the visa will be valid for not more than one entry.[165]

It should be borne in mind that the issuing of visas at borders constitutes an exception. This is why Council Regulation 415/2003 refers to Article 5(2) of the Schengen Implementation Convention to shed some light as to what is meant by 'exceptional cases'.[166] Accordingly, a visa may only be issued at the border on humanitarian grounds, in the national interest or on account of international obligations.[167] Even though this Article has been repealed by the Schengen Borders Code, the Code itself provides for effectively the same provision.[168] The visas which are issued at the border should be recorded on a list.[169]

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161 O.J. L 239/163, 22.9.2000, which corresponds to Annex 14 of the Common Manual O.J. C 313/333, 16.12.2002.

162 Together with Annex 14.

163 Council Regulation of 27 February 2003 on the issue of visas at the border, including the issue of such visas to seamen in transit, O.J. L 64/1, 07.03.2003, pp.1-8.

164 Council Regulation 415/2003, Article 1(1).

165 *Ibid.*, Article 1(2).

166 *Ibid.*, Article 1(4)(2).

167 Schengen Implementation Convention, Repealed Article 5(2).

168 Schengen Borders Code, Article 5(4)(c).

169 *Ibid.*, Article 5(4)(b)(2).

2.3.1.5 Local Border Traffic Permit instead of the Uniform Visa

Parallel to the general rules on admission into EU territory there also exists a recently created European local border traffic regime laying down a special regime for crossing the external borders of the Union with a special permit. The regime relates to the creation of a facilitated border-crossing regime for those lawfully resident in a border area and it is not subject to the general rules on border crossing.[170] A facilitation of this sort was essential in order to find a compromise for the new Member States of the 2004 enlargement which had to comply with the restrictive European visa policy at the expense of the historic links they have with neighbouring third countries. A year before the mentioned enlargement, the Commission stressed that most countries neighbouring the new Member States would be countries whose nationals must be in possession of a visa when entering the EU and proposed a Council Regulation on the establishment of a regime of local border traffic at the external land borders of the Member States.[171] The proposal was for the adoption of two Council Regulations; one for a regime of local border traffic at external borders and one at the temporary external land borders between Member States. The second proposal aimed to create a facilitated border-crossing regime at 'temporary external borders' until the full Schengen external border controls regime would apply at borders between the new and old Member States, and among the new Member States themselves. The Commission envisaged the adoption of the Council Regulation before 1 May 2004, when the 10 new Member States would accede to the Union; however, this was not possible due to difficult discussions that took place within the Council concerning the proposal.[172] Following the extension of the co-decision procedure to measures relating to external borders,[173] a new proposal was drafted to replace the 2003 proposal.[174] Accordingly, Regulation 1931/2006 was adopted on 20 December 2006 with the co-decision procedure.[175]

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170 *Ibid.*, Article 35.

171 COM(2003) 502 final, 14.08.2003.

172 Proposal for a Regulation laying down rules on local border traffic at the external land borders of the Member States and amending the Schengen Convention and the Common Consular Instructions, COM(2005) 56 final, 23.02.2005, Explanatory Memorandum point 1.

173 Council Decision 2004/927 of 22 December 2004, providing for certain areas covered by Title IV of Part three of the Treaty establishing the European Community to be governed by the procedure laid down in Article 251 of that Treaty, O.J. L 396, 31.12.2004).

174 COM(2005) 56 final, 23.02.2005.

175 Regulation 1931/2006 of the European Parliament and of the Council of 20 December 2006 laying down rules on local border traffic at the external land borders of the Member States and amending the provisions of the Schengen Convention, O.J. L 405, 30.12.2006.

'Local border traffic' was defined, for the first time at the European level, by Regulation 1931/2006 as 'the regular crossing of an external land border by border residents in order to stay in a border area, for example for social, cultural or substantiated economic reasons, or for family reasons'.[176] In connection with this, a 'border area' is defined as the area that extends, as a rule, no more than 30 kilometers from the border. However, under certain circumstances this area might stretch to 50 kilometers.[177] Border residents, who are third-country nationals who have been lawfully resident in the border area for at least one year,[178] shall be issued with a local border traffic permit if they are in possession of a valid travel document;[179] if they produce documents proving their status as border residents and proving the existence of legitimate reasons for frequently crossing an external land border under the local border traffic regime;[180] if they are not persons for whom an alert has been issued in the SIS for the purpose of refusing them entry;[181] if they are not considered to be a threat to public policy, internal security, public health or the international relations of any of the Member States, and in particular where no alert has been issued in Member States' national databases for the purposes of refusing entry on the same grounds.[182] This local border traffic permit shall only be valid in the border area of the issuing Member State[183] for at most three months.[184] The European visa policy has been amended in accordance with this regime to ensure that holders of a local border traffic permit are exempt from the visa requirement.[185]

The European local border traffic regime is based on bilateral agreements with neighbouring third countries.[186] Member States have been vested with a broad scope of competence while negotiating bilateral agreements in order to implement the local border traffic regime. This competence encompasses issues

176 Regulation 1931/2006, Article 3(3).

177 The extension of the 'border area' to 50 kilometers is explained in Regulation 1931/2006 Article 3(2), which is also the provision that lays down the rule. Accordingly, this will be the case if part of a local administrative district, which is considered as the border area, lies between 30 and 50 kilometers from the border line.

178 Regulation 1931/2006, Article 3(6) furthermore states that this one-year period may be reduced in exceptional and duly justified cases which shall be specified in bilateral agreements.

179 *Ibid.*, Article 9(1)(a).

180 *Ibid.*, Article 9(1)(b).

181 *Ibid.*, Article 9(1)(c).

182 *Ibid.*, Article 9(1)(d).

183 *Ibid.*, Article 7(2).

184 *Ibid.*, Article 5.

185 Council Regulation 1932/2006, Article 1(1)(b).

186 Regulation 1931/2006, Articles 1(2) and 13.

such as the determination of circumstances which would enable a border resident to be able to apply for a local border traffic permit without being resident in the area for at least one year;[187] the specification of the maximum permissible duration of each uninterrupted stay, as long as it does not exceed three months;[188] the designation of authorities which shall issue the local border traffic permits;[189] the easing of border crossings[190] and the subjection of abuses of the local border traffic regime to effective, proportionate and dissuasive penalties by national law.[191]

It must be noted, however, that this competence is not exercised without supervision. The bilateral agreements should be in compliance with the Regulation.[192] The Commission retains a central role in ensuring that this shall be the case. This central role stems from the obligation on the side of the Member States to consult the Commission as to the compatibility of the bilateral agreement with the Regulation before each time an agreement is concluded or amended and again from the obligation of the Member States to take all appropriate steps to amend the agreement so as to eliminate the incompatibilities that were established by the Commission during its assessment.[193]

If there is no readmission agreement with the third country with which a bilateral agreement on local border traffic is being concluded, the bilateral agreement should include readmission rules.[194] In any event, the bilateral agreements should ensure that persons enjoying the Community right of free movement and third-country nationals lawfully resident in the border area of the Member State receive at least comparable rights to those granted to border residents of the third country concerned.[195]

2.3.1.6 Work in Progress: Visa Information System

The common visa policy that has been created over the years should be managed in a way that ensures security, prevents visa shopping and facilitates checks at external border checkpoints. One of the ways to achieve this is to facilitate the exchange of data between Member States concerning visa applications and the

187 *Ibid.*, Article 3(6).
188 *Ibid.*, Article 5.
189 *Ibid.*, Article 12(1).
190 *Ibid.*, Article 15.
191 *Ibid.*, Article 17.
192 *Ibid.*, Article 13(1).
193 *Ibid.*, Article 13(2).
194 *Ibid.*, Article 13(3).
195 *Ibid.*, Article 14.

relevant decisions. It is precisely for this reason that the Visa Information System (VIS) was designed.[196]

The origins of the idea to establish a Visa Information System can be traced back to 2002 when the European Council called upon the Council and the Commission to attach top priority to the introduction of a common identification system for visa data.[197] The system for the exchange of visa data between Member States, namely the Visa Information System, was established two years later by a Council Decision[198] which provided the legal basis for the inclusion in the budget of the EC of the necessary funds in order to develop the VIS. The Decision also defined the architecture of the VIS. Accordingly, the Visa Information System would consist of a central information system, an interface in each Member State and the communication infrastructure between the Central Visa Information System and the National Interfaces.[199] The further development of these elements constituting the VIS was mandated to the Commission and the Member States.[200]

Following the establishment of the VIS, the Commission issued a proposal for a Regulation[201] which will constitute the core instrument for the elaborate legal framework which is needed to set up the system. According to the Proposal, the third-country national shall immediately be part of the VIS once he or she applies for a visa.[202] This will take the form of a personal file containing personal information including his or her photograph and fingerprints.[203] In cases where consultation between central authorities will take place, the information in the personal file of the applicant shall be even more detailed and shall include data such as occupation, details on the applicat's employer and the names of the applicant's parents.[204] If the third-country national has made previous applications for a visa from other Member States, his or her recent application file will be linked with the previous application file.[205] The Proposal lists the

196 Proposal for a Regulation concerning the Visa Information System (VIS) and the exchange of data between Member States on short stay visas, COM(2005) 835 final, 28.12.2004, Article 1(2).

197 Seville European Council 21-22 June 2002, Presidency Conclusions, point 30.

198 Council Decision 2004/512 of 8 June 2004 establishing the Visa Information System (VIS), O.J. L 213, 15.06.2004, pp. 5-7.

199 Council Decision 2004/512, Article 1(2).

200 *Ibid.*, Article 2.

201 COM(2005)835 final, 28.12.2004.

202 *Ibid.*, Article 5(1).

203 *Ibid.*, Article 6.

204 *Ibid.*, Article 7.

205 *Ibid.*, Article 5(3).

different categories of information which shall be contained in the third-country national's file upon lodging the application for a visa,[206] for a visa issued,[207] in the case of a refusal to examine the application,[208] for a visa refused,[209] for a visa annulled or revoked[210] and for a visa extended.[211]

The competent authorities which have been designated by each Member State shall have access to enter, amend, delete, or consult the VIS as allowed by the Proposed Regulation.[212] The files and the links concerning the third-country national shall be deleted from the VIS after a five-year 'storage' period[213] or if he or she acquires the nationality of any Member State.[214]

Until the Proposed Regulation is adopted and especially in the period after adoption until the Commission determines the date from which the VIS will start operations, which will be 2012 at the earliest,[215] a heavy workload awaits both the Commission and the Member States concerning the establishment of the Central Visa Information System and the National Interface, the communication infrastructure between these two systems. With currently some 20 million visa applications made yearly, the VIS is believed to be the largest biometric project currently in existence, even compared to that of the United States' FBI.[216]

2.3.1.7 Community Code on Visas: a new complexion for the European Acquis on Visas

As the present title on Admission reveals, the legal instruments constituting the European Visa Acquis are not scarce in number. To simplify the legal framework governing visas, the Commission has proposed a Regulation establishing a Community Code on Visas.[217] The Proposal incorporates legislation governing conditions and procedures for issuing visas into a single instrument.[218] By doing

206 *Ibid.*, Article 5.
207 *Ibid.*, Article 8.
208 *Ibid.*, Article 9.
209 *Ibid.*, Article 10.
210 *Ibid.*, Article 11.
211 *Ibid.*, Article 12.
212 *Ibid.*, Article 4 (3).
213 *Ibid.*, Article 20(1).
214 *Ibid.*, Article 22(1).
215 Preparing the Next Steps in Border Management in the European Union COM(2008) 69 final, 13.02.2008.
216 'EU Visa System Could be World's Biggest Biometric Project', Biometric Technology Today (September 2003).
217 Draft proposal for a Regulation establishing a Community Code on Visas, COM(2006)403 final, 19.07.2006.
218 The Common Consular Instructions including Annexes; the decisions of the Schengen Executive Committee of 14 December 1993 (SCH/Com-ex (93), 21), (SCH/Com-ex (93)

so it 'tidies up' the visa acquis, as it intends to restructure the relevant acquis within four legal instruments.[219] It is necessary that the four Regulations remain separate legal instruments as they do not share the same legal basis.

Apart from taking into consideration the changes that will take place in the visa issuance procedures after the VIS becomes operational,[220] the Proposal goes one step further and brings new obligations for the Member States. An example of such an obligation is that the diplomatic missions and consular posts of Member States should decide upon visa applications, as a rule, within 10 working days from the date of submitting the application, or after the completion of the file. However, in individual cases such as when further scrutiny of the application is needed, for instance because the diplomatic or consular post envisages the refusal of the visa application, the period to decide on the application may be extended to a maximum of 30 days.[221] There is also an obligation for the Member States to inform the general public as to the criteria, conditions and procedures for applying for a visa;[222] if applicants are required to obtain an appointment for the submission of an application,[223] the means of obtaining such an appointment;[224] and where the application should be submitted.[225] The Member States shall also be under an obligation to state the precise reasons for the refusal of a visa

24), (SCH/Com-ex (94) 25), (SCH/Com-ex (98) 12), (SCH/Com-ex (98) 57); Joint Action 96/197/JHA of 4 March 1996 adopted by the Council on the basis of Article K.3 of the TEU on airport transit arrangements; Regulation 789/2001 reserving to the Council implementing powers with regard to certain detailed provisions and practical procedures for examining visa applications; Regulation 1091/2001 on freedom of movement with a long-stay visa; Regulation 415/2003 on the issue of visas at the border, including the issue of such visas to seamen in transit.

219 Council Regulation 539/2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement; Council Regulation 1683/95 laying down the uniform format for visas; Council Regulation 333/2002 on a uniform format for forms for affixing the visa issued by Member States to persons holding travel documents not recognized by the Member State drawing up the form; and the Proposed Regulation.

220 Explanatory Memorandum of the Draft Proposal indicates that with the Member States automatically gaining access to information on all persons having applied for a visa and with the introduction of biometric identifiers as a requirement for applying for a visa, the visa issuance procedure will be facilitated (point 2).

221 COM(2006) 403 final, Article 20(1).

222 *Ibid.*, Article 41(1)(a).

223 As a rule, the appointment shall take place within two weeks; however, in appropriately justified cases or justified cases of urgency applicants shall be allowed to submit their application either without prior appointment or an appointment shall be given immediately (COM(2006) 403 final, Article 10 (2) and (3).

224 COM(2006) 403 final, Article 41(1)(b).

225 *Ibid.*, Article 41(1)(c).

application by means of a standard form.[226] This is accompanied by an obligation to inform the general public that negative decisions on visa applications must be notified to the applicant, that such decisions must state the reasons on which they are based and that applicants who are refused have a right to appeal.[227] The Common Consular Instructions had previously left the procedure and possible channels of appeal against the refusal of visa application to the national law of the Schengen State, including whether or not grounds for refusal should be given.[228]

The Proposal presents the 'inadmissibility' of a visa application as a new notion, which shall be the case when an in-depth examination was not carried out because the applicant failed to provide additional information which was required from him or her because the information supplied in support of the application was incomplete.[229] There is currently no distinction between such cases and cases where visa applications have been formally refused after a full examination of the file.[230] If the Proposal is accepted as it stands, there should also be some amendments to the VIS as the 'inadmissible' status will be entered into the system for such applications.[231]

As even accompanying persons included in the applicant's travel document have to complete separate application forms,[232] and children above the age of 6 shall be subject to the requirement to provide fingerprints for the biometric identifiers,[233] group visas can no longer be used.

Concerning the administrative structure of visa sections of national diplomatic missions, the Proposal states that for staff dealing directly with applicants, rotation schemes should be set up. According to these rotation schemes, the staff should rotate at least every six months. What is aimed at with this provision is to prevent any decline in the level of vigilance and to protect staff from being exposed to pressure at the local level.[234]

Thus far, the core aspects of the EU visa regime have been examined. The following section of this Chapter concerns the residence of third-country

226 *Ibid.*, Article 23(2).
227 *Ibid.*, Article 41(5).
228 Common Consular Instructions, V.2.4.
229 COM(2006) 403 final, Article 19(1).
230 *Ibid.*, Explanatory Memorandum, point 3.1.2.
231 *Ibid.*, Article 19(2).
232 *Ibid.*, Article 13(1).
233 *Ibid.*, Article 11(5)(a).
234 *Ibid.*, Article 34(1).

nationals. However, in between acquiring a visa and becoming residents of the EU, third-country nationals encounter the border guards of EU Member States and they become subject to the EU border practices, which are becoming increasingly harmonized. For this reason, before moving on to investigating the EU acquis on residence, border management is dealt with.

2.3.1.8 Border Management

The Schengen Implementation Convention listed a set of common uniform principles guiding the checks carried out at external borders.[235] Accordingly, third-country nationals would be subject to a thorough check upon entry which not only verifies the travel documents and other entry conditions but also detects and prevents threats to the national security and public policy of the Schengen States. What exactly the uniform principles entailed was explained in a detailed manner in the Common Consular Instructions of 1999.[236]

In 2002, with the idea of providing an example for the States which were candidate countries at the time, the Schengen Catalogue was adopted.[237] The main aim was to clarify the requirements which the candidate countries would be called upon to meet upon accession, as implementing an area of EU Law as technical as the Schengen acquis is a demanding task for candidate countries. A good grasp of what exactly is expected from them is the first step of accurate implementation. To this end the Catalogue put forward a non-exhaustive set of recommendations and best practices concerning the correct and optimal application of the Schengen acquis. As may already be concluded from the explanation above, the Catalogue was not a legally binding text.

The Schengen Catalogue presented the Integrated Border Security Model as a system covering all aspects of border policy and suggested the principles by which to achieve this. Consequently, the Catalogue set as one of the key elements for the correct application of this model that persons performing border police duties should be specialized, trained professionals. This very principle was

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235 Schengen Implementation Convention, Article 6.

236 Decision of the Executive Committee of 28 April 1999 on the definitive versions of the Common Manual and the Common Consular Instructions, O.J. L 239, 22.09.2000, pp.317-404, which obtained a Community dimension in accordance with Council Decision 1999/436 of 20 May 1999 determining, in conformity with the relevant provisions of the Treaty establishing the European Community and the Treaty on European Union, the legal basis for each of the provisions or decisions which constitute the Schengen acquis**,** O.J. L 176, 10.07.1999, pp.17-30.

237 EU Schengen Catalogue – External borders control, removal and readmission: Recommendations and best practices, Presented by the Council of the EU, 28 February 2002.

previously laid down by the Tampere Conclusions.[238] According to the Schengen Catalogue, especially for persons who have access to personal data, this principle should be applied very strictly. Persons who have auxiliary duties may have less experience if they assist professionals only temporarily.

As for the structure of the border management organization a centralized supervision has been recommended. This centralized structure should be in the form of a non-military police/border guard force under a single national ministry. Border checks and surveillance should be performed by the same administration that organizes border management. The staff should enjoy a high level of professionalism and should be able to speak a foreign language that is useful for their work, which might be the language(s) of the neighbouring countries or of the countries of origin.

In the same year as the publication of the EU Schengen Catalogue, the Commission presented its Communication towards integrated management of the external borders of the Member States of the European Union.[239] This Communication proposed the initiation of a common policy on the management of external borders and identified the components that such a common policy should comprise. According to the Commission these components were a common corpus of legislation; a common coordination and operational cooperation mechanism; common integrated risk analysis; staff trained in the European dimension and inter-operational equipment; and burden sharing between Member States in the run up to a European Corps of Border Guards.

In the years following the Communication towards integrated management of the external borders, three important developments have taken place realizing, to a great extent, the Commission's vision of a common policy on border management. The first development took place in 2004 with the setting up of FRONTEX, the European Agency for the Management of operational cooperation at the external borders of the Member States of the European Union.[240] FRONTEX, which became operational in October 2005, was an answer to the Commission's fundamental dissatisfaction regarding the acquis on the crossing of external borders, namely the lack of proper operational coordination. Accordingly, while the responsibility for controlling the external

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238 Presidency Conclusions of the Tampere European Council of 15-16 October 1999, Section III, point 25.

239 COM(2002)233 final, 07.05.2002.

240 Council Regulation No.2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, O.J. L 349, 25.11.2004, pp.1-11.

borders remains with the Member States, FRONTEX coordinates the actions of Member States in the implementation of Community measures on the management of external borders.[241] Next to coordinating operational cooperation between Member States,[242] FRONTEX also assists the Member States regarding the training of national border guards by establishing common training standards[243] and by carrying out risk analysis based on a common integrated risk analysis model which supplies adequate information for determining appropriate measures for identified threats.[244] The Commission is of the view that the tasks of FRONTEX should be expanded as necessary in response to concrete needs and that in the future FRONTEX could also provide added value to the overall Schengen framework which covers areas beyond the mandate of FRONTEX such as visas.[245]

Following the establishment of FRONTEX, the common corpus of legislation, the implementation of which FRONTEX is to coordinate, was adopted as called upon by the Communication towards the integrated management of the external borders. The Schengen Borders Code[246] contains detailed rules governing the border control of persons crossing the external borders of the Member States. These rules relate not only to the way in which border controls are to be carried out, such as the detailed rules concerning the thorough checks to be carried out upon entry and exit,[247] but also to the authorities which are to execute the checks. It follows that border guards should be specialized and properly trained professionals and Member States should encourage them to learn languages, in particular the languages which are necessary for them to carry out their tasks.[248] The Schengen Borders Code has developed the uniform principles laid down by the Schengen Implementation Convention and has furthermore enriched them by passing the recommendations and best practices contained in the EU Schengen Catalogue into law.

The two developments dealt with so far, namely the establishment of FRONTEX and the adoption of the Schengen Borders Code, cover all the components established by the Commission which should comprise the common policy on

241 Council Regulation 2007/2004, Article 1.
242 *Ibid.*, Article 2(1)(a).
243 *Ibid.*, Article 2(1)(b).
244 *Ibid.*, Article 2(1)(c).
245 Commission Communication 'Report on the evaluation and future development of the FRONTEX Agency', COM(2008) 67 final, 13.02.2008.
246 Regulation No.562/2006 of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders, O.J. L 105, 13.04.2006, pp.1-32.
247 Schengen Borders Code, Article 7(3).
248 *Ibid.*, Article 15(1)(3).

external borders, except one: 'burden sharing between Member States in the run up to a European Corps of Border Guards'. This last component, or rather the creation of a 'European Border Guard' has been described as 'one of the most ambitious and controversial projects which has come up in the context of the EU's area of freedom, security and justice so far' whether in the form of a fully-fledged integrated force or of a more or less developed network of national forces.[249] Member States have initially reacted very reluctantly towards creating the European Border Guard; however, their approach towards FRONTEX shows an increasing acceptance of developing EU intervention in the sphere of external border management.[250] This trend is reflected in the establishment of the Rapid Border Intervention Teams by Regulation 863/2007.[251]

The Rapid Border Intervention Teams (RABIT), comprising of experts from the Member States, provide support to a requesting Member State for a limited period of time in exceptional and urgent situations. The key principle governing the RABIT structure is that the responsibility for the control of the external borders lies with the Member States.[252] Secondly, the members of the Teams are national experts from Member States who, upon being made available by each Member State, are pooled (the Rapid pool) in order to be deployed at the request of FRONTEX.[253] Members of the Teams are experts in particular aspects of border control, and are trained by FRONTEX.[254] Even though they remain national border guards of their home Member States,[255] are paid by them and wear their uniforms,[256] once deployed they may only perform tasks and exercise powers under instructions from and in the presence of border guards of the host Member State.[257] The third principle is the request of a Member State, within the

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249 J. Monar, 'The Project of a European Border Guard: Origins, Models and Prospects in the Context of the EU's Integrated External Border Management', in M. Caparini and O. Marenin, eds., *Borders and Security Governance: Managing Borders in a Globalised World*, Geneva Centre for the Democratic Control of Armed Forces (DCAF) (Zurich, Lit Verlag 2006) Chapter 10.

250 H. Jorry, 'Construction of a European Institutional Model for Managing Operational Cooperation at the EU's External Borders: Is the FRONTEX Agency a Decisive Step Forward?', CEPS Challenge Research Papers No.6, March 2007.

251 Regulation No.863/2007 of 11 July 2007 establishing a mechanism for the creation of Rapid Border Intervention Teams and amending Council Regulation No.2007/2004 as regards that mechanism and regulating the tasks and powers of guest officers, O.J. L 199, 31.07.2007, pp.30-39.

252 Regulation 863/2007, Preamble paragraph 4.

253 *Ibid*., Article 4.

254 *Ibid*., Article 7(2).

255 *Ibid*., Article 7(1).

256 *Ibid*., Article 6(4).

257 *Ibid*., Article 6(3).

framework of FRONTEX, in exceptional and urgent situations such as a mass influx of third-country nationals attempting to enter the territory of the respective Member State illegally.[258] Currently, the training sessions for border guards are ongoing at FRONTEX, together with real-life exercises held within the framework of fictional scenarios.[259]

The integrated border management policy is continuing its progressive development. Member States as well as EU institutions deliberate on what is to be included in integrated border management, consequently triggering further debate among academics and practitioners on the future of the EU border management policy. The JHA Council of 4 and 5 December 2006 redefined integrated border management as a concept consisting of border control as defined in the Schengen Borders Code, including relevant risk analysis and crime intelligence; the detection and investigation of cross-border crime in coordination with all component law enforcement authorities; the four-tier access control model (measures in third countries, cooperation with neighbouring countries, border control, control measures within the area of free movement, including return); inter-agency cooperation for border management and international cooperation; and coordination and coherence of the activities of the Member States and Institutions and other bodies of the Community and the Union.

Furthermore, in February 2008, the Commission presented the Communication 'Preparing the next steps in border management in the European Union'[260] laying down the shortcomings of the current system. It follows that, except for the rules on local border traffic, Community law does not contain possibilities for simplifying checks for certain categories of travellers slowing down the checks at borders; dates for the movement of third-country nationals across the external borders are not recorded making it difficult to identify visa overstayers, who currently constitute the biggest category of illegal immigrants in the EU; and those third-country nationals who are citizens of countries in the positive visa list are not subject to any systematic check for border control purposes before arriving at the border, which from a security point of view is alarming.[261]

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258 *Ibid.*, Preamble paragraph 7.

259 For an account of two exercises which have been carried out see: 'Rapid Border Intervention Teams First Time in Action' at: http://www.frontex.europa.eu/newsroom/news_releases/art29.html and 'Rapid Border Intervention Teams Exercise in Slovenia' at: http://www.frontex.europa.eu/newsroom/news_releases/art35.html (last visited 21.01.2009).

260 COM(2008) 69 final.

261 Commission Communication 'Preparing the next steps in border management in the European Union', COM(2008) 69 final, 13.02.2008, Section1.3.

Subsequently, the Commission has put forward three proposals regarding the possible future steps in the area of border management. First of all, the border crossings of bona fide travellers, who are low-risk third-country nationals travelling frequently to and from the Schengen area for legitimate reasons could be facilitated. The proposed means to achieve this end is to set up a Registered Traveller Status for those who voluntarily apply to be subject to a pre-screening process. Holders of this status, who could be both those who require a visa and those who do not, would benefit from a simplified and automated border check. In this way, the two competing aims of the common visa policy, namely to facilitate the entry of bona fide visitors and to enhance security,[262] will be promoted simultaneously. Secondly, a system registering the time and place of the entry and exit of third-country nationals, including citizens from the negative as well as positive visa lists, could be created. This system would contribute to the fight against visa overstayers with an alert being issued once the validity of an individual's stay in the EU has expired and no exit data have been registered. Finally, there is the introduction of an electronic system of travel authorization (ESTA), which would require citizens of countries on the positive visa list to make an electronic application supplying data identifying the traveller prior to the travel.

With the portrayal of what the integrated border management of the EU consists of and what it is likely to encompass in the future concludes the section on admission into the EU. The following section relates to the EU acquis on the residence of third-country nationals.

2.3.2 Residence

2.3.2.1 Introduction

What is hereby examined under the 'residence' title essentially corresponds to the legal immigration aspects of Article 63(3) and (4) of the EC Treaty. These provisions give the EC the competence to adopt measures on immigration policy concerning the conditions of entry and residence, and standards concerning the procedures for the issue by Member States of long-term visas and residence permits, including those for the purpose of family reunification, as well as measures defining the rights and conditions under which nationals of third countries who are legally resident in a Member State may reside in other Member States.[263]

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[262] Commission Communication 'A Common Immigration Policy for Europe: Principles, Actions and Tools', COM(2008) 359 final, 17.06.2008, Section II(7).

[263] Article 63(3)(a) and 63(4).

The common legal basis of the relevant legislation is not the only thing which the items dealt with below have in common. The topics which are dealt with constitute the complete array of legal immigration possibilities which can be utilized by third-country nationals. It is important to note that what is meant by 'legal immigration possibilities' are instruments at the EU level which entitle the third-country national to stay in the Union territory for a period longer than three months. Before going on to scrutinize these legal instruments, a brief overview of the rules concerning the uniform format for residence permits shall be given as this relates to all of the categories of legal means of immigration.

2.3.2.2 Uniform Format for Residence Permits

Residence permits, described as any authorization issued by the authorities of a Member State allowing a third-country national to stay legally on its territory,[264] were for the first time dealt with by the Union in 1996. The Joint Action of 16 December of that year[265] represents the first step taken by the EU in the area of setting up a uniform format for residence permits. The underlying idea was to standardize the necessary information contained in residence permits and to ensure that this format meets very high technical standards. The brief text of the Joint Action lays down the technical specifications which are not kept secret as a safeguard against counterfeiting. According to these specifications a residence permit shall include certain mandatory information such as the name of the card holder, the period of the permit's validity, the type of permit; as well as some information which may be included by each Member State regarding the nature of the permit and the person concerned, such as whether the person is permitted to work. Due to a number of technological uncertainties the format is not defined[266] and it is indicated that the permits shall either be in the form of a sticker or a stand-alone document.

After the Community gained competence to regulate the area of residence permits[267] the Joint Action needed to be replaced by a Community measure.[268] For this reason, a Council Regulation laying down a uniform format for residence

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264 A definition which has been adopted by Article 4 of the Joint Action and which has been maintained since then (Article 1(2)(a) of Council Regulation 1030/2002).

265 Joint Action of 16 December 1996 concerning a uniform format for residence permits (97/11/JHA).

266 Opinion of the European Data Protection Supervisor on the modified proposal for a Council Regulation amending Regulation 1030/2002, O.J. C 320, 28.12.2006, pp.21-23.

267 EC Treaty, Article 63(3)(a).

268 Preamble to the Proposal for a Council Regulation laying down a uniform format for residence permits for third-country nationals, COM(2001)157 final, O.J. C 180, 26.6.2001, pp. 304-309.

permits for third-country nationals was adopted in 2002.[269] Regulation 1030/2002 was, to a large extent, identical to the Joint Action adopted in 1996. Regulation 1030/2002 did include the provision of a photograph in the residence permit;[270] however, no other reliable means of identification was mentioned. This led the Commission to work on a proposal for amendments to Regulation 1030/2002 as after September 11, 2001 document security became an issue which the Union aimed to improve. The way forward, according to the Union, is integrating 'biometric identifiers' into the uniform format for visas and residence permits. These are pieces of information that encode a representation of a person's unique biological make-up.[271] As the EU aimed to achieve total harmonization concerning biometric identifiers which does not leave any room for discretion to the Member States, the medium chosen was a regulation instead of a directive.[272] Various biometric identifiers exist, such as an iris scan, hand geometry, vein patterns, signature verification, key-stroke dynamics, voice verification or retina scanning.[273] Among all the options, the Commission chose to make the storage of facial images and fingerprints mandatory in the Proposal it drafted for a Council Regulation amending Regulation 1030/2002.[274] The Commission assumes that these two identifiers are a means to guarantee a very high level of security and the best technical results.[275] Even though some concerns are being voiced against the use of biometrics in general, facial image and fingerprints are relatively less disputed and more socially acceptable than iris scans.[276] It is however not possible to say anything definite about the reliability of

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269 Council Regulation 1030/2002 of 13 June 2002 laying down a uniform format for residence permits for third-country nationals, O.J. L 157, 15.6.2002, pp.1-7.

270 Regulation 1030/2002 Article 9(3).

271 Glossary on Migration, IOM, 2004.

272 Explanatory Memorandum of the Proposal for a Council Regulation amending 1030/2002 laying down a uniform format for residence permits for third-country nationals, COM(2003)558 final.

273 P. de Hert, A. Sprokkereef, 'An Assessment of the Proposed Uniform Format for Residence Permits', paper written at the request of the European Parliament's Committee on Civil Liberties, Justice and Home Affairs, 2006, available at: www.libertysecurity.org.

274 Proposal for a Council Regulation amending 1030/2002 laying down a uniform format for residence permits for third-country nationals, COM(2003)558 final.

275 Explanatory Memorandum of the Proposal for a Council Regulation amending Regulation 1030/2002 laying down a uniform format for residence permits for third-country nationals, COM(2003)558 final.

276 R. Thomas, 'Biometrics, International Migrants and Human Rights', *European Journal of Migration and Law*, Vol.7 (2005) pp.377-411. It should also be added that in the document COM(2003)558 final, the Commission explained that iris recognition had not been chosen as a biometric identifier as the patent on the concept is held by one single US company, and as a new technology developed as from 1992, it had not yet proved mature enough for large-scale database performance.

any biometric identifier as the debate in the world of biometric technology is ongoing.[277]

According to the Proposal, the uniform format for residence permits shall contain a facial image and two fingerprints of the holder which shall be kept on a storage medium which shall be highly secured and which shall have sufficient capacity.[278] The deadline set for the integration of the photograph into the residence permits was set at August 14, 2005; additionally, the integration of the storage of the facial image and the two fingerprints was determined to be at the latest respectively two and three years after the adoption of the required technical measures.[279]

The Proposal for a Regulation amending Regulation 1030/2002 was modified in 2006,[280] following the report of the European Parliament.[281] This modified version of the Proposal sets a stand-alone card as the format which the residence permits shall have.[282] This amendment has been introduced due to the determination that it was technically not feasible to integrate biometrics into the sticker version of the residence permit.[283] The new Proposal gives the Member States the opportunity to integrate a contact chip into the residence permit for national use. This modification is stimulated by the necessity to extend the accessibility of possible national services, such as e-government and a digital signature, to third-country nationals living legally on the territory of a Member State.[284] The Proposal further states that biometric features in residence permits shall only be used in order to verify the authenticity of the document and the

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277 The inventor of iris recognition, John Daugman, was reported as saying that fingerprint information would lead to individuals being wrongly matched with other people's details, something which, according to him, could potentially be avoided with iris recognition technology. 'Iris Still in the Wilderness', *Biometric Technology Today* (September 2007).

278 Proposed Article 4a.

279 Proposed Article 9(3).

280 Modified Proposal for a Council Regulation amending Regulation 1030/2002 laying down a uniform format for residence permits for third-country nationals, COM(2006)110 final.

281 Report of the European Parliament on the Commission proposal for a Council regulation amending Regulation 1030/2002 laying down a uniform format for residence permits for third-country nationals, A6-0029/2004, 28.10.2004.

282 Proposed Article 1(1), Modified Proposal for a Council Regulation amending Regulation 1030/2002 laying down a uniform format for residence permits for third-country nationals, COM(2006)110 final.

283 Explanatory Memorandum of the Modified Proposal for a Council Regulation amending Regulation 1030/2002 laying down a uniform format for residence permits for third-country nationals, COM(2006)110 final.

284 *Ibid.*

identity of the holder.[285] In other words, the main reason for introducing biometric features in the uniform residence permit, which is to establish a closer link between the holder and the residence permit, cannot be neglected. The deadline to integrate a photograph into the residence permit had been extended until August 30, 2006 by the Proposal.

Currently, Regulation 1030/2002 is still the legal text governing the format of residence permits. Whatever the outcome of the process of amending this regulation will be, the point remains that the common format of the European residence permits will include biometric features. With no reliable evidence that biometrics contributes to reducing terrorism or illegal migration[286] it is very important not to sacrifice the 'human' aspect of immigration to 'security' concerns, as it is not even clear whether the use of biometrics will serve any security goal. The aspired aim of creating a more reliable link between the residence permit and its holder by the introduction of biometrics may backfire as the more areas of biotechnology are used,[287] the higher the risk that a world in which one's DNA determines one's status in life will become more than a movie plot, as will the development of technologies which are designed to assume the biological identity of others.[288]

2.3.2.3 Family Reunification

INTRODUCTION

Family reunification is a key element of immigration law as it has a two-fold function. First of all, family reunification is a tool which is to be used by the immigrant in order to exercise the fundamental right to family life. Secondly, it accounts for the main route to legal immigration.[289] It is the clash of these two

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285 Proposed Article 4(2).

286 R. Thomas, 'Biometrics, International Migrants and Human Rights', *European Journal of Migration and Law*, Vol.7 (2005) pp.377-411; P. de Hert, A. Sprokkereef, 'An Assessment of the Proposed Uniform Format for Residence Permits', paper written at the request of the European Parliament's Committee on Civil Liberties, Justice and Home Affairs, 2006, available at: www.libertysecurity.org.

287 The recent trend of using biometrics in schools in order to run cashless lunch queues, school libraries and to record pupils' attendance at each class reveals the scale of the concern. 'UK Schools Get Lessons in Biometric Usage', *Biometric Technology Today* (September 2007).

288 In the movie GATTACA (1997, directed by Andrew Niccol), society is obsessed with genetic perfection. The social class to which one belongs in life is determined according to one's genetic profile; discrimination and prejudice is no longer based on gender, race or religion but on DNA significance. Against this background a young man who was born with poor eye-sight and a heart condition resorts to 'buying' the identity of another man with an impressive genetic profile, in order to realize his life-long dream of becoming an astronaut.

289 Explanatory Memorandum of the Proposal for a Council Directive on the right to family

aspects of family reunification that shape the legal rules governing the matter.

The existence of a right to family reunification for foreigners was, for a long time, not accepted at the international level.[290] Even though most European countries have acknowledged, in their national laws, the right to family reunification for third-country nationals, this consensus was not reflected in international instruments.[291] The right to respect for family life which is covered by Article 8 of the European Convention of Human Rights (ECHR) does not go as far as to recognize the right to family reunification. In family reunification matters, the European Court of Human Rights (ECtHR) has traditionally taken the principle of state sovereignty as a starting point and has applied a wide margin of appreciation.[292] The European Union adopted a similar view when it first embarked upon family reunification in 1993 with the adoption of the Resolution on the harmonization of national policies on family reunification.[293]

The ground-breaking step came from the Commission in 1999, as the Proposal for a Council Directive on the right to family reunification[294] defined family reunification as a right. Even though the Proposal was amended twice before the Council Directive on the right to family reunification[295] was adopted in 2003, Article 1 still stated that the purpose of the Directive is to determine the conditions for the exercise of the 'right' to family reunification by third-country nationals residing lawfully in the territory of Member States. Nevertheless, the conditions for exercising family reunification, explained below, create confusion as to whether the EU truly considers family reunification to be a right.

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reunification COM (1999) 638 final; K. Groenendijk, 'Family Reunification as a Right under Community Law', *European Journal of Migration and Law*, Vol.8 (2006) pp.215-230; R. Cholewinski, 'Family Reunification and Conditions Placed on Family Members: Dismantling a Fundamental Human Right', *European Journal of Migration and Law*, Vol.4 (2002) pp.271-290; P. Boeles, 'Directive on Family Reunification: Are the Dilemmas Resolved?', *European Journal of Migration and Law*, Vol.3 (2001) pp.61-71.

290 K. Hailbronner, *Immigration and Asylum Law and Policy of the European Union* (The Hague, Kluwer Law International 2000) p.279.

291 R. Cholewinski, 'Family Reunification as a Constitutional Right?', J. Apap, ed., *Justice and Home Affairs in the EU: Liberty and Security Issues after Enlargement* (Cornwall, Edward Elgar Publishing 2004) p.260.

292 S. van Walsum, 'Comment on the Sen Case. How Wide is the Margin of Appreciation Regarding the Admission of Children for Purposes of Family Reunification?', *European Journal of Migration and Law*, Vol.4 (2003) pp.511-520; K. Groenendijk, 'Family Reunification as a Right under Community Law', *European Journal of Migration and Law*, Vol.8 (2006) pp.215-230.

293 Document SN 282/1/93 WGI 1497 REV 1.

294 COM (1999) 638 final.

295 Council Directive 2003/86 of 22 September 2003, O.J. L 251, 03.10.2003, pp.12-18.

PRINCIPAL DEFINITIONS

According to the Directive, family reunification is the 'entry into and residence in a Member State by family members of a third-country national residing lawfully in that Member State in order to preserve the family unit, whether the family relationship arose before or after the resident's entry.'[296] The legally resident third-country national who applies to be united with his/her family or whose family members apply to be joined with him/her is defined as the 'sponsor'.[297] The 'sponsor' is a concept which replaced the 'applicant' in the earlier versions of the Directive proposed by the Commission. The preferred wording suggests economic and financial implications.[298]

REQUIREMENTS

The Directive contains certain requirements which have to be met by the sponsor in order to exercise the right to family reunification. First of all, the sponsor must hold a residence permit from a Member State which is valid for one year or more and he/she should have reasonable prospects of obtaining the right to permanent residence.[299] The condition of having 'reasonable prospects' of having their residence permits renewed was introduced by the 2002 Amendments to the Proposal with a view to excluding from the scope of the Directive temporarily resident third-country nationals such as au pairs, exchange and placement students.[300] In addition to the requirement that the residence permit should be valid for at least one year, the Member States may require the sponsor to have stayed lawfully in their territory for a period not exceeding two years before authorization can be given for the entry of his/her family members.[301] Another derogation which is allowed by the Directive relates to Member States whose legislation on family reunification on the date of adopting the Directive takes into account its reception capacity. Such Member States may provide for a waiting period not exceeding three years before a residence permit is issued to the family members.[302] Furthermore, when the family reunification application is made, the Member States may require evidence that the sponsor has suitable accommodation; health insurance; and stable and regular resources sufficient to maintain himself/herself and his/her family without recourse to the social

296 Directive 2003/86, Article 2(d).

297 *Ibid.*, Article 2(c).

298 J. Apap and S. Carrera, 'Towards a Proactive Immigration Policy for the EU?', CEPS Working Document No.198 (December 2003) p.8.

299 Directive 2003/86, Article 3.

300 Explanatory Memorandum of the Amended Proposal for a Council Directive on the right to family reunification, 02.05.2002, COM(2002) 225 final.

301 Directive 2003/86, Article 8(1).

302 *Ibid.*, Article 8(2).

assistance system of the Member State concerned.[303]

SCOPE OF THE 'FAMILY'

The question of with whom the sponsor can be 'reunified', or, in other words, who are considered to be 'family' leads us to a debated aspect of the Directive. The lack of a universally accepted definition of the 'family'[304] results in the Directive's adoption of a narrow scope for the concept. To put it very bluntly in three categories, those who can be 'reunited' with the sponsor as family members are the sponsor's spouse, the children and the first-degree relatives in the ascending line. However, there are so many complications surrounding each of these categories that they should be looked at separately.

THE SPOUSE

The first category of family members who can be reunified with the sponsor is the sponsor's spouse.[305] The original Proposal for a family reunification directive and the first amended version of this Proposal did not differentiate between the spouse and an unmarried partner with whom the immigrant had a durable relationship which provided that the relevant Member State treated unmarried couples as corresponding to married couples.[306] The regimes applying to married and unmarried partners have been separated in the third Proposal and it was made optional for Member States to admit unmarried partners.[307] According to the Directive, the Member States may authorize family reunification with the unmarried partner of the sponsor if the sponsor is in a duly attested stable long-term relationship with him/her.[308] Any reliable means of proof shall be examined by the Member States in determining family relationship such as a common child, previous cohabitation and the registration of the partnership.[309] The optional character of whether or not to allow reunification also applies in situations where the sponsor has a registered partnership with the person who applies to join him/her in the Member State.[310]

The fact that allowing for the entry and residence of unmarried partners is not

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303 *Ibid.*, Article 7(1).

304 G. Brinkmann, 'Family Reunion, Third Country Nationals and the Community's New Powers', in E. Guild and C. Harlow, eds., *Implementing Amsterdam: Immigration and Asylum Rights in EC Law* (Oxford, Hart Publishing 2001) p.242.

305 Directive 2003/86, Article 4(1)(a).

306 Article 5(1)(a) of COM(1999) 638 final of 01.12.1999 and COM(2000) 624 final of 10.10.2000.

307 Article 4(3) of COM(2002)225 final of 02.05.2002 and Council Directive 2003/86.

308 Directive 2003/86, Article 4(3)(1).

309 *Ibid.*, Article 5(2)(3).

310 *Ibid.*, Article 4(3)(2).

obligatory for Member States also has negative repercussions for same-sex couples. Having said that, however, in the case of same-sex couples even a marriage tie does not guarantee family reunification.[311] There is no clarification as to whether same-sex spouses can also enjoy the right to family reunification. The issue of same-sex marriages is being ignored by the EU.[312] This negligence can be explained by the strong public opinion against same-sex marriages within the Union.[313] In any event, as confirmed by the words of the Commission, the EU does not recognize that same-sex spouses have the same rights as "traditional" spouses for the purposes of Community law,[314] as a result of which the Directive on family reunification does not even consider it necessary to clarify the situation of same-sex spouses in relation to family reunification demands with Member States which allow same-sex marriages.[315] Even if the granting of family reunification rights to same-sex spouses would proceed without problems in the Member States which do recognize same-sex marriages, the silence of Community law on the issue[316] creates problems for such couples when they would like to move to a Member State which does not recognize same-sex marriages or any form of recognition of same-sex couples for that matter.[317]

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311 It must be clarified that this same problem also exists for EU nationals due to the provision of Article 2(2)(b) of Directive 2004/38 of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, O.J. L 158, 30.04.2004, pp.77-123.

312 Despite two years of negotiations on whether or not to including same-sex spouses within the definition of the 'family' the question has also been overlooked in Directive 2004/38 of 29 April 2004 on the Rights of Citizens of the Union and their family members to move and reside freely within the territory of the Member States, O.J. L 158, 30.04.2004, pp.77-123. Article 2(2) of the mentioned Directive defining a "family member" lists 'the spouse' as the first group of family members, but does not mention whether this will include a same-sex spouse. Ironically, this issue represents one of the few similarities concerning the approach towards family members of EU citizens and third-country nationals. See H. Toner, 'Immigration Rights of Same-Sex Couples in EC Law', in K. Boele-Woelki and A. Fuchs, eds., *Legal Recognition of Same-Sex Couples in Europe* (Antwerp, Intersentia 2002) pp.178-193.

313 Eurobarometer 66 of December 2006 indicates that 44% of EU citizens agree that such marriages should be allowed throughout Europe with acceptance rates being higher in countries such as the Netherlands (82% in favour) than countries like Greece, Latvia and Poland where opposition is the strongest (84%, 84% and 76% opposed respectively).

314 Communication from the Commission on free movement of workers – achieving the full benefits and potential, COM(2002)694 final, p.8.

315 These countries being the Netherlands, Belgium, Spain.

316 Council Regulation 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation 1347/2000, O.J. 338, 23.12.2003, pp.1-29, deals with the mutual recognition of divorces but not of marriages.

317 See M. Bell, *Anti-Discrimination Law and the European Union* (Oxford, Oxford University

Member States may determine a minimum age condition for the sponsor and his/her spouse, which can be a maximum of 21 years.[318] The relevant paragraph justifies the permission for this derogation by concerns of ensuring better integration and the prevention of forced marriages.

The Directive also lays down a rule concerning polygamous marriages according to which a Member State shall not authorize the family reunification of a further spouse when one spouse is already living with him in the territory of the Member State concerned.[319] This provision has considerable disadvantages for the wife who is denied admission, similar to various other disadvantages of the non-recognition of polygamous marriages such as those concerning welfare benefits, post-divorce financial protection, and the general result of this practice being driven underground making women in polygamous marriages even more vulnerable.[320] Yet, allowing for the admission of such spouses would mean the endorsement of polygamous marriages by the EU legal system, which in turn would again only have negative consequences for women.

THE CHILDREN

The Directive makes a distinction between different levels of 'closeness' which it deems to exist between the second category of family members, namely, children. The joint minor children of the sponsor and the spouse, including their adopted children, shall be admitted with no additional conditions concerning dependency.[321] As for the reunification of minor children of either the sponsor or his/her spouse, respectively the sponsor or his/her spouse has to have custody and the children must be dependent on them. In the case of shared custody, the Member States may authorize the reunification provided that the other party sharing custody has given approval.[322] In any case, minor children falling within any of the above-mentioned categories must be below the age of majority set by the law of the Member State concerned and must not be married.[323] Still, even for minor children there exists a derogation which the Member States may make use of. Where a child is over 12 years old and arrives independently of his/her family, the Member State may, before authorizing entry and residence, verify whether he or she meets a condition for integration provided for by its existing

Press 2002) pp.88-120.

318 Directive 2003/86, Article 4(5).

319 *Ibid.*, Article 4(4)(1).

320 C. McGlynn, 'Family Reunion and the Free Movement of Persons in European Union Law', *International Law FORUM du droit international*, Vol. 7 (2005) pp.159-166.

321 Directive 2003/86, Article 4(1)(b).

322 *Ibid.*, Article 4(1)(c) and (d).

323 *Ibid.*, Article 4(1)(2).

legislation on the date of the implementation of the Directive. The provision is peculiar as it is not clear what is meant by a 'condition for integration'. The Member States may also authorize the entry and residence of the adult unmarried children of the sponsor or his/her spouse, if they are objectively unable to provide for their own needs on account of their state of health.[324] Here, it must also be mentioned that the Directive provides for a possibility to authorize the entry and residence of the unmarried minor children, including the adopted children of unmarried partners and those who are bound to the sponsor by a registered partnership, as well as their adult unmarried children, as long as they are objectively unable to provide for their own needs on account of their state of health.[325] It must, however, be stressed that the authorization of their entry and residence is left to the discretion of the Member States. A final distinction in the category 'children' is the minor children of the sponsor from the second wife in a polygamous marriage. Member States may limit the family reunification of such children.[326] In any event, the Member States were given the competence to request that the applications concerning the family reunification of minor children have to be submitted before the age of 15, as provided by its existing legislation on the date of the implementation of the Directive.[327] What is striking is that both for the derogation concerning the verification of the condition for integration for children over 12 years, and for the derogation concerning the family reunification application being made before the age of 15, the determining Member State legislation will be the legislation which existed on the date of the implementation of the Directive. These provisions permitted Member States to introduce such rules after the adoption, but prior to the implementation of the Directive.[328]

FIRST-DEGREE RELATIVES IN THE ASCENDING LINE

As a third category of family members that can be reunified with the sponsor, the Directive presents first-degree relatives in the direct ascending line of the sponsor or his/her spouse. These relatives may be admitted by the Member States if they are dependent on the sponsor and his/her spouse and do not enjoy proper family support in the country of origin.[329]

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[324] *Ibid.*, Article 4(2)(b).

[325] *Ibid.*, Article 4(3).

[326] *Ibid.*, Article 4(4)(2).

[327] *Ibid.*, Article 4(6).

[328] R. Lawson, 'Case Note: Family Reunification and the Union's Charter of Fundamental Rights, Judgment of 27 June 2006, Case C-540/03, Parliament v. Council', *European Constitutional Law Review*, Vol. 3 (2007) pp.324-342.

[329] Directive 2003/86, Article 4(2)(1).

PROCEDURAL ASPECTS

APPLICATION

If the family members with whom the sponsor wants to be reunited are amongst the above mentioned, then either the sponsor or the family members concerned may submit an application for entry and residence to the competent authorities of the relevant Member State.[330] This application has to be accompanied by documentary evidence of the family relationship and of compliance with the necessary conditions.[331] As a rule, the application should be made while family members are still outside the territory of the Member State in which the sponsor resides.[332] However, a Member State may accept an application which is made when the family members are already on its territory.[333] Unlike the first two versions of the Directive, the criterion for such a permission is completely left up to the Member States. In the first two versions of this provision the existence of exceptional circumstances or humanitarian grounds were required in order for a Member State to allow a family reunification application to be made when the family members are already within its territory.

DECISION

Written notification of the decision concerning the family reunification application shall be given to the person who has applied as soon as possible and in any event no later than nine months from the date on which the application was lodged.[334] This provision is a progressive move as Member States can take considerably longer than nine months to examine applications for family reunion.[335] The nine-month deadline is not an exact rule, however, as this time-limit can be extended by the Member State in parallel with the complexity of the examination of the application.[336] It is remarkable to see that the final version of the Directive has abandoned the rule that the extension shall in no case exceed 12 months. If the application is rejected, the Member State shall give the reasons for this. The national laws of the relevant Member State shall determine the consequences of no decision having been taken by the end of the period.[337]

REJECTION OF THE FAMILY REUNIFICATION APPLICATION

The rejection of a family reunification application as well as the withdrawal or

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330 *Ibid.*, Article 5(1).
331 *Ibid.*, Article 5(2).
332 *Ibid.*, Article 5(3)(1).
333 *Ibid.*, Article 5(3)(2).
334 *Ibid.*, Article 5(4)(1).
335 R. Cholewinski, 'The Need for Effective Individual Legal Protection in Immigration Matters', *European Journal of Migration and Law*, Vol. 7 (2005) pp.237-262.
336 Directive 2003/86, Article 5(4)(2).
337 *Ibid.*, Article 5(4)(3).

refusal to renew a family member's residence permit can be based on grounds of public policy, public security or public health.[338] In the case of either of the negative decisions mentioned above, the sponsor and/or the family members have the right to mount a legal challenge.[339] However, it is not explained what is meant by the term 'legal challenge' leaving it up to the Member States to determine what opportunities will be at the disposal of third-country nationals when they are faced with negative decisions by the Member State concerning their family reunification application or decision.

The family reunification application may be rejected and the family member's residence permit may be withdrawn or the renewal thereof may be refused in the following circumstances: where the conditions laid down by the Directive are not or are no longer satisfied;[340] where the sponsor and his/her family members do not or no longer live in a real marital or family relationship;[341] where it is found that the sponsor or the unmarried partner is married or is in a stable long-term relationship with another person;[342] where it is shown that false or misleading information, false or falsified documents were used, fraud was otherwise committed or other unlawful means were used;[343] or where it is shown that the marriage, partnership or adoption was contracted for the sole purpose of enabling the person concerned to enter or reside in the Member State.[344] The Member States may also withdraw or refuse to renew the residence permit of a family member when the sponsor's residence comes to an end and the family member does not yet enjoy an autonomous right of residence.[345]

MARRIAGES OF CONVENIENCE

The provision contained in Article 16(2)(b), concerning marriages contracted for the sole purpose of enabling the person concerned to enter or reside in a Member State, should be considered in conjunction with the Council Resolution on measures to be adopted on the combating of marriages of convenience.[346] The Resolution defines a 'marriage of convenience' as a marriage concluded between a national of a Member State or a third-country national legally resident in a Member State and a third-country national, with the sole aim of circumventing

338 *Ibid.*, Article 6(1) and (2).
339 *Ibid.*, Article 18(1).
340 *Ibid.*, Article 16(1)(a).
341 *Ibid.*, Article 16(1)(b).
342 *Ibid.*, Article 16(1)(c).
343 *Ibid.*, Article 16(2)(a).
344 *Ibid.*, Article 16(2)(b).
345 *Ibid.*, Article 16(3).
346 Council Resolution of 4 December 1997, O.J. C 382, 16.12.1997, pp.1-2.

the rules on the entry and residence of third-country nationals and obtaining for the third-country national a residence permit or authority to reside in a Member State. The Council Resolution contains some situations that may provide grounds for believing that a marriage is one of convenience: the fact that matrimonial cohabitation is not maintained; the lack of an appropriate contribution to the responsibilities arising from the marriage; the spouses have never met before their marriage; the spouses are inconsistent about their respective personal details (name, address, nationality and job), about the circumstances of their first meeting, or about other important personal information concerning them; the spouses do not speak a language understood by both; a sum of money has been handed over in order for the marriage to be contracted (an exception is made of money given in the form of a dowry for nationals of countries where this is common practice); the past history of one or both of the spouses contains evidence of previous marriages of convenience or residence anomalies.

The Resolution on the combating of marriages of convenience sanctions marriages of convenience by providing for the withdrawal, revocation or non-renewal of the residence permit granted on the basis of the third-country national's marriage. It is seen that this measure of the Resolution is in line with the measure contained in the Family Reunification Directive.

The Directive on Family Reunification tackles marriages of convenience in a balanced way, as it makes the conducting of specific checks and inspections conditional upon the existence of a reason to suspect,[347] and thereby making it not acceptable for immigration officials to justify checks on their 'intuition'.[348] Specific checks may also be conducted on the occasion of the renewal of family members' residence permits.[349]

AUTHORIZATION OF THE FAMILY REUNIFICATION APPLICATION

If the family reunification application results in a positive decision, the Member State concerned shall authorize the entry of the family members granting such persons every facility for obtaining the required visas.[350] Once they enter the Member State, they will be granted a first residence permit the validity of which shall not be shorter than one year.[351] The duration of the residence permits of the

347 Directive 2003/86, Article 16(4).

348 B. de Hart, 'Introduction: The Marriage of Convenience in European Immigration Law', *European Journal of Migration and Law*, Vol.8 (2006) pp.251-262.

349 Directive 2003/86, Article 16(4).

350 *Ibid*., Article 13(1).

351 *Ibid*., Article 13(2).

family members shall not, in principle, be longer than that of the sponsor. There exists a distinction concerning the discretion of the Member State in issuing autonomous residence permits to family members. The Member States do not have an option as to whether or not to issue autonomous residence permits to the spouse or unmarried partner and a child who has reached majority not later than after five years of residence and provided that the family member has not been granted a residence permit for reasons other than family reunification. The issuing of the autonomous residence permit may, however, be made conditional upon the application by the family member.[352] On the other hand, the Member State does have a discretionary power to determine whether autonomous residence permits shall be issued to adult children and to relatives in the direct ascending line.[353]

Once joined with the sponsor, the family members shall have access, in the same way as the sponsor, to education, employment and self-employed activity, vocational guidance, initial and further training and retraining.[354] The Member States preserve the right to determine under which conditions the family members may exercise an employed or self-employed activity. The Member States may examine the situation on the labour market before authorizing family members to exercise such activity. This period during which the family members of the sponsor shall not have access to the labour market can in no case exceed 12 months.[355] The access to the labour market for first-degree relatives in the direct ascending line or adult unmarried children may be restricted by the Member States.[356]

CONCLUSION

The Directive on Family Reunification is the first legislative act adopted in the EU which deals with legal immigration. Despite the criticism surrounding some of the provisions it contains, the Directive is, in general, a positive step representing only 'the first stage necessary to achieve the desired harmonization on family reunification at EU level'.[357] The reason why the Directive can only amount to a first step towards desired harmonization is the wide degree of discretion allowed to Member States within the general framework of the Directive and the

352 *Ibid.*, Article 15(1).
353 *Ibid.*, Article 15(2).
354 *Ibid.*, Article 14(1).
355 *Ibid.*, Article 14(2).
356 *Ibid.*, Article 14(3).
357 J. Apap and S. Carrera, 'Towards a Proactive Immigration Policy for the EU?', CEPS Working Document No.198 (December 2003).

restrictive character of some of the optional provisions.[358] The sensitivity of the policy area leads to a broad freedom for national authorities to manoeuvre[359] which in turn impedes the integrity of the title of the Directive presenting family reunification as a right. While the criticisms are to a large extent justified, it must be realized that although the Directive leaves a broad freedom to manoeuvre for national authorities, it is binding with respect to the hard core of the provisions and so it brings along an enforceable right to family reunification.[360] Furthermore, in the years following the adoption of the Directive, national policies became even stricter which led the attitude towards the Directive to soften as 'at least it provided for a common minimum standard'.[361] Thanks to these common standards the Directive 'acts as a barrier to several of the more extreme policy measures proposed or introduced over the past years by national governments'.[362] Even though it has been reported that the absence of a general standstill clause, which had been what was called for before the adoption of the Directive,[363] allowed some Member States to reduce their national standards, the general effect of the Directive on the national laws of the Member States has been a liberalizing one.[364]

2.3.2.4. Long-term Residents

INTRODUCTION

For a long time, the residence rights of third-country nationals legally residing in the territory of Member States only had Community relevance as long as they

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358 Such as the provisions contained in Article 4(1)(3) on an integration test for children above 12 years, Article 4(5) on setting a minimum age for the sponsor and his/her spouse, Article 4(6) on making it a condition that family reunification applications for minor children should be submitted before the age of 15, Article 8(2) on setting a waiting period in connection with reception capacity.

359 R. Lawson, 'Case Note: Family Reunification and the Union's Charter of Fundamental Rights, Judgment of 27 June 2006, Case C-540/03, Parliament v. Council', *European Constitutional Law Review*, Vol. 3 (2007) pp.324-342.

360 P. Boeles, 'What Rights Have Migrating Third Country Nationals?', in J.W. de Zwaan and F.A.N.J. Goudappel, eds., *Freedom, Security and Justice in the European Union: Implementation of the Hague Programme* (The Hague, T.M.C. Asser Press 2006) p.156.

361 R. Lawson, 'Case Note: Family Reunification and the Union's Charter of Fundamental Rights, Judgment of 27 June 2006, Case C-540/03, Parliament v. Council', *European Constitutional Law Review*, Vol. 3 (2007) pp.324-342.

362 K. Groenendijk, 'Family Reunification as a Right under Community Law', *European Journal of Migration and Law,* Vol.8 (2006) pp.215-230.

363 P. Boeles, 'Directive on Family Reunification: Are the Dilemmas Resolved?', *European Journal of Migration and Law*, Vol.3 (2001) pp.61-71.

364 K. Groenendijk, et al., eds., *The Family Reunification Directive in EU Member States: the First Year of Implementation* (Nijmegen, Wolf Legal Publishers 2007) p.59,61.

had some type of connection to an EU citizen.[365] Otherwise it was the national law that regulated the residence rights of third-country nationals. Concerning the rights of third-country nationals, an important aspect is the special treatment granted to those who have resided legally in the territory of a state for longer than a certain period.

The EU awareness concerning the situation of third-country nationals who are long-term residents was first displayed with a Council Resolution on the status of third-country nationals residing on a long-term basis in the territory of the Member States.[366] However, this document, apart from being a soft law instrument, was based on the national legislation of the Member States. It codified the existing national principles concerning long-term residents at the level of the most restrictive national legislation.[367] The Resolution states that the long-term residence status should be given to third-country nationals who have lived in a Member State for a period specified in the national legislation, in any event after 10 years of legal residence.[368] Long-term residents should be granted a residence authorization for at least 10 years or an unlimited residence authorization.[369] Those who are granted long-term residence should have access to the entire territory of the respective Member State, and should enjoy no less favorable treatment than is enjoyed by nationals of that Member State with regard to working conditions, membership of trade unions, public policy in the housing sector, social security, emergency health care and compulsory schooling.[370]

The Resolution of 4 March was certainly not an innovative text; however, it is interesting as it reveals the approach prevailing in Member Sates concerning long-term residents in the era after the Treaty of Maastricht. During this period the system, or rather the 'patchwork' as Groenendijk referred to it[371], was not at all homogenous. Apart from the fact that each Member State was free to

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365 K. Groenendijk, 'Security of Residence and Access to Free Movement for Settled Third Country Nationals under Community Law', in E. Guild and C. Harlow, eds., *Implementing Amsterdam: Immigration and Asylum Rights in EC Law* (Oxford, Hart Publishing 2001) p.228.

366 Council Resolution of 4 March 1996, O.J. C 80, 18.03.1996, pp.2-4.

367 K. Groenendijk, 'Security of Residence and Access to Free Movement for Settled Third Country Nationals under Community Law', in E. Guild and C. Harlow, eds., *Implementing Amsterdam: Immigration and Asylum Rights in EC Law* (Oxford, Hart Publishing 2001) p.230.

368 Council Resolution of 4 March 1996, section III (1).

369 *Ibid*., section III (2).

370 *Ibid*., section V.

371 K. Groenendijk, 'Security of Residence and Access to Free Movement for Settled Third Country Nationals Under Community Law', in E. Guild and C. Harlow, eds., *Implementing Amsterdam: Immigration and Asylum Rights in EC Law* (Oxford, Hart Publishing 2001) p.228.

determine which rights should be given to third-country nationals living on their territory for a certain period of time, some third-country nationals were subject to separate regimes within the framework of agreements with countries of origin. The Cooperation Agreements concluded with the Maghreb countries, the Association Agreement concluded with Turkey and the Europe Agreements concluded with the Central and Eastern-European countries gave the respective third-country nationals different levels of residence rights. However, these rights were only guaranteed in the Member State where they were admitted and they did not grant a right to move to another Member State.[372]

This situation of rights of third-country nationals legally resident within the EU being left to the competence of Member States has changed following the adoption of the Treaty of Amsterdam. It is with the Treaty of Amsterdam that the Community acquired competence to regulate the rights and conditions under which nationals of third countries who are legally resident in a Member State may reside in other Member States.[373] The call by the Tampere European Council – to grant third-country nationals holding a long-term residence permit a uniform set of rights which are as near as possible to those enjoyed by EU citizens[374] – found its response in the Proposal for a Directive on the status of long-term residents of 2001.[375]

The Directive on long-term residents,[376] adopted in 2003 as the watered down version of the original Proposal, regulates the conditions for granting and withdrawing long-term residence status and the rights it entails in the Member State which granted the status and the terms of residence in Member States other than the one which granted the long-term resident status (the 'second Member State').[377] Although the Directive applies to third-country nationals residing legally in the territory of a Member State,[378] it must be stressed that not all third-country nationals are included within the scope of the Directive. Students,[379]

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372 *Ibid.*, p.227; J. Apap and S. Carrera, 'Towards a Proactive Immigration Policy for the EU?', CEPS Working Document No.198 (December 2003) p.15.

373 EC Treaty, Article 63(4).

374 Presidency Conclusions of the Tampere European Council of 15-16 October 1999, Section III, point 21.

375 Proposal for a Council Directive concerning the status of third-country nationals who are long-term residents, COM(2001) 127 final, 13.03.2001.

376 Council Directive 2003/109 of 25 November 2003 concerning the status of third-country nationals who are long-term residents, O.J. L 16, 23.01.2004, pp.44-53.

377 Directive 2003/109, Article 1.

378 *Ibid.*, Article 3(1).

379 *Ibid.*, Article 3(2)(a).

those benefiting from temporary[380] or subsidiary protection,[381] refugees and asylum seekers,[382] those residing solely on temporary grounds[383] and those enjoying diplomatic or consular protection[384] are not subject to protection as governed by the Directive.

REQUIREMENTS

In order to profit from a long-term resident status, the third-country national should first of all have resided legally and continuously within the territory of a Member State for at least five years.[385] The choice of setting five years as the term to be completed before long-term resident status can be granted has been received with some criticism.[386] This criticism is concentrated on the fact that a homogenous status is not achieved with the Directive considering the more favourable protection as to the time-limits afforded to Turkish workers under the Turkey-EC Association framework.[387]

The principles governing the calculation of the five-year period are explained in Directive 2003/109. Accordingly, periods of absence from the territory of the relevant Member State which are shorter than six consecutive months and do not exceed in total 10 months shall not interrupt the five-year residence period and shall be taken into account for its calculation.[388] Member States may accept that longer periods of absence from their territory will still not interrupt the five-year residence period when there are specific or exceptional reasons of a temporary nature.[389] The time spent in a Member State on temporary grounds, working, for example, as an au pair or a seasonal worker, and as the member of a third country's diplomatic or consular personnel shall not be taken into account while calculating the duration of the residence.[390] As for residence for study purposes or vocational training, half of these periods of residence may be taken into account, as long as the third-country national has acquired a title which will allow

380 *Ibid.*, Article 3(2)(b).
381 *Ibid.*, Article 3(2)(c).
382 *Ibid.*, Article 3(2)(d).
383 *Ibid.*, Article 3(2)(e) gives au pairs and seasonal workers as examples of those residing solely on temporary grounds.
384 *Ibid.*, Article 3(2)(f).
385 *Ibid.*, Article 4(1).
386 L. Halleskov, 'The Long Term Residents Directive: A Fulfillment of the Tampere Objective of Near Equality?', *European Journal of Migration and Law*, Vol.7 (2005) pp.181-201.
387 The EC-Turkey Association Agreement is examined in detail *infra* 2.3.2.5.
388 Directive 2003/109, Article 4(3)(1).
389 *Ibid.*, Article 4(3)(2).
390 *Ibid.*, Article 4(2)(1).

him or her to be granted long-term resident status.[391] Furthermore, Member States may choose to take into consideration periods of absence for employment purposes, including the provision of cross-border services.[392]

Those third-country nationals who have resided legally and continuously within a Member State's territory for five years must comply with certain conditions in order to acquire a long-term resident status. First of all, the third-country national in question should have stable and regular resources which are sufficient to maintain himself/herself and his/her family members without having recourse to the social assistance system of the Member State concerned.[393] This provision is much more ambiguous than the suggested article in the Proposal,[394] allowing the Member States to have more discretion in deciding whether the resources can be deemed sufficient.[395] Secondly, the third-country nationals should have health insurance in respect of all risks normally covered for the nationals of the Member State concerned.[396]

The third condition which the Member States 'may' require the third-country national to comply with in order to be granted a long-term resident status, concerns 'integration conditions'.[397] This provision, which did not exist in the original Proposal, allows the Member States to demand that the third-country national complies with integration conditions, the form of which shall be determined entirely by the national law of the Member State. This additional requirement poses a serious threat for third-country nationals who aspire to be granted long-term resident status. The seriousness of the threat does not only stem from the fact that what is meant by 'integration' or 'integration condition' is not clarified by the Directive, but also that the provision contains no standstill clause. As a result, Member States are given the liberty of introducing any measure they wish at any time as 'integration conditions'. Furthermore, the

391 *Ibid.*, Article 4(2)(2).

392 *Ibid.*, Article 4(3)(3).

393 *Ibid.*, Article 5(1)(a).

394 Article 6(1)(a) of the Proposal reads as follows: "Stable resources corresponding to the level of resources below which social assistance may be granted in the Member State concerned. Where this provision cannot be applied, the resources shall be considered to be adequate where they are equal to the level of minimum social security pension paid by the Member State concerned. The criterion of stability of resources shall be evaluated by reference to the nature and regularity of the resources enjoyed prior to the application for long-term residence status."

395 L. Halleskov, 'The Long Term Residents Directive: A Fulfilment of the Tampere Objective of Near Equality?', *European Journal of Migration and Law*, Vol.7 (2005) pp.181-201.

396 Directive 2003/109, Article 5(1)(b).

397 *Ibid.*, Article 5(2).

phrasing of the provision is also questionable. The use of the word 'conditions' instead of 'measures', as it was discussed during the negotiations on the Directive, indicates the possibility for Member States to demand that immigrants cover the financial costs of integration measures.[398]

Finally, the Directive contains one last provision which may be regarded as one of the conditions for acquiring long-term resident status. This condition derives from Article 7 which states that the application for long-term resident status shall be accompanied by documentary evidence that the conditions are met, and this evidence may also include documentation with regard to appropriate accommodation.[399] This provision, which did not exist in the 2001 Proposal, indirectly constitutes a condition which the Member States may choose to make use of before deciding on an application for long-term residence status.

PROCEDURAL ASPECTS

APPLICATION

Third-country nationals who fulfil the conditions explained above shall lodge an application with the competent authorities of the Member State in which they reside.[400] The application should be accompanied by documentary evidence that the third-country national meets the conditions for being granted a long-term resident status. Member States may also require that a valid travel document or its certified copy is also attached to the application.[401] Furthermore, as stated above, while laying down the conditions for acquiring a long-term resident status, Member States may also ask for evidence of appropriate accommodation.[402]

DECISION

The Member States have to decide on an application for long-term residence within six months following the date on which the application was lodged.[403] The Directive indicates that this time-limit may be extended in the case of exceptional circumstances linked to the complexity of the examination of the application.[404] However, there is no indication as to the maximum length of time for extending this time-limit.

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398 S. Carrera, "Integration' as a Process of Inclusion for Migrants? The Case of Long Term Residents in the EU', in H. Schneider, ed., *Migration, Integration and Citizenship: A Challenge for Europe's Future*, Vol. II (Maastricht, 2005) p.126.

399 Directive 2003/109, Article 7(1).

400 *Ibid*., Article 7(1).

401 *Ibid*., Article 7(1).

402 *Ibid*., Article 7(1)(2).

403 *Ibid*., Article 7(2)(1).

404 *Ibid*., Article 7(2)(2).

The Directive does not set any sanction for non-compliance with the six-month time-limit. Instead, it authorizes the Member States to determine the consequences thereof.[405] This situation is criticized as it is unlikely that Member States' authorities will take a final decision within this short period of six months.[406]

ACQUISITION OF LONG-TERM RESIDENT STATUS

The third-country national shall be granted a long-term resident status if the conditions are met and the person does not represent a threat to public policy and public security.[407] The Member States were given no discretion by the Directive to reject an application for long-term resident status if the conditions are met.[408]

This status acquired by the third-country national shall be a permanent one.[409] The 'long-term resident's EC residence permit' which shall be issued to the third-country national shall be valid for at least five years and will automatically be renewable upon expiry.[410] However, this renewal may be required to be set off by the third-country national's application.[411] In order to demonstrate an aspect of the Proposal which has been changed to the detriment of the third-country national in the actual Directive, it is worth mentioning that the validity of the residence permit was set at 10 years by the original Proposal.[412]

LOSS OF LONG-TERM RESIDENT STATUS

Article 9 governs the loss of the long-term resident status. According to this provision, third-country nationals shall no longer be entitled to a long-term resident status if a fraudulent acquisition of the status has been detected,[413] if an expulsion measure has been adopted in accordance with the rules of the Directive governing the expulsion of long-term residents,[414] or if the long-term resident

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405 *Ibid.*, Article 7(2)(4).

406 J. Apap and S. Carrera, 'Towards a Proactive Immigration Policy for the EU?', CEPS Working Document No.198 (December 2003) p.18.

407 Directive 2003/109, Article 7(3). The principles which are to be taken into consideration in deciding whether a person constitutes a threat to public policy and public security are laid down in Article 6 of the Directive.

408 P. Boeles, 'What Rights Have Migrating Third Country Nationals?', in J.W. de Zwaan and F.A.N.J. Goudappel, eds., *Freedom, Security and Justice in the European Union: Implementation of the Hague Programme* (The Hague, T.M.C. Asser Press 2006) p.154.

409 Directive 2003/109, Article 8(1).

410 *Ibid.*, Article 8(2).

411 *Ibid.*, Article 8(2).

412 Proposed Article 9(1).

413 Directive 2003/109, Article 9(1)(a).

414 *Ibid.*, Article 9(1)(b).

has spent a period of 12 consecutive months outside Community territory.[415] However, this latter condition for losing long-term resident status is not a definite one, as Member States may provide that absences exceeding 12 consecutive months shall not entail the withdrawal of the status.[416]
In the case of the acquisition of long-term resident status in another Member State the third-country national shall not be entitled to maintain his or her long-term resident status in the first Member State.[417] Such persons who have lost their long-term resident status in the first Member State due to the acquisition of this status in the second Member State, together with those who have lost their status due to being absent from Community territory for a period of 12 consecutive months shall be subject to a facilitated procedure concerning the reacquisition of the long-term resident status.[418] In any event, after six years of being absent from the territory of the Member State that granted the third-country national a long term-resident status, he or she will no longer be entitled to maintain this status,[419] unless the Member State provides that for specific reasons such absences shall not lead to the loss of this status.[420]

The Member State may provide that constituting a threat to public policy in terms of the seriousness of the offences one has committed shall deprive one of his or her long-term resident status, if such a threat does not fall within the ambit of Article 12, which deals with expulsion.[421]

RIGHTS IN THE FIRST MEMBER STATE

In terms of the rights attached to a long-term resident status the Directive takes the nationals laws of Member States as a starting point.[422] This approach is criticized for creating a system which is 'close to the lowest common multiple of the relevant national rules'.[423] Nevertheless, this was the approach chosen by the Council. Accordingly, Article 11, which was one of the most controversial

415 *Ibid.*, Article 9(1)(c).
416 *Ibid.*, Article 9(2).
417 *Ibid.*, Article 9(4)(1).
418 *Ibid.*, Article 9(5)(1).
419 *Ibid.*, Article 9(4)(2).
420 *Ibid.*, Article 9(4)(3).
421 *Ibid.*, Article 9(3).
422 Explanatory Memorandum of the Proposal for a Council Directive concerning the status of third-country nationals who are long-term residents, COM(2001)127 final, Section 3 entitled 'the National Situation' summarizes the national rules concerning long-term residents.
423 P. Boeles, 'Security of Residence and Access to Free Movement', in E. Guild and C. Harlow, eds., *Implementing Amsterdam: Immigration and Asylum Rights in EC Law* (Oxford, Hart Publishing 2001) p.230.

provisions during Council negotiations,[424] lists the areas in which long-term residents will enjoy 'equal treatment' with nationals of Member States. It follows that these areas shall concern employment,[425] education,[426] social security,[427] tax benefits, access to goods and services,[428] freedom of association[429] and free access to the entire territory of the relevant Member State.[430]

After having enumerated the areas in which long-term residents shall be afforded 'equal treatment' with nationals, the same article continues with a number of restrictions which Member States may apply to the so-called 'equal treatment' principle. First of all, the advantages provided in the areas of education, social security, tax benefits, housing and freedom of association may be limited by a Member State to cases where the registered or usual place of residence of the long-term resident, or the family members for whom the benefits are claimed, lies within the territory of the relevant Member State.[431] Secondly, a Member State may maintain restrictions on access to employment or self-employed activities if the activities concerned are reserved for nationals, EU or EEA citizens.[432] Thirdly, access to education and training may be made conditional upon proof of appropriate language proficiency and access to a university upon the fulfilment of specific educational prerequisites.[433] Finally, a Member State may limit 'equal

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424 L. Halleskov, 'The Long Term Residents Directive: A Fulfilment of the Tampere Objective of Near Equality?', *European Journal of Migration and Law*, Vol.7 (2005) pp.181-201.

425 Directive 2003/109, Article 11(1)(a): 'access to employment and self-employed activity, provided such activities do not entail even occasional involvement in the exercise of public authority, and conditions of employment and working conditions, including conditions regarding dismissal and remuneration.'

426 Directive 2003/109, Article 11(1)(b): 'education and vocational training, including study grants in accordance with national law.
Directive 2003/109, Article 11(1)(c): recognition of professional diplomas, certificates and other qualifications, in accordance with the relevant national procedures.'

427 Directive 2003/109, Article 11(1)(d): 'social security, social assistance and social protection as defined by national law.'

428 Directive 2003/109, Article 11(1)(f): 'access to goods and services and the supply of goods and services made available to the public and to procedures for obtaining housing.'

429 Directive 2003/109, Article 11(1)(g): 'freedom of association and affiliation and membership of an organisation representing workers or employers or of any organisation whose members are engaged in a specific occupation, including the benefits conferred by such organisations, without prejudice to the national provisions on public policy and public security.'

430 Directive 2003/109, Article 11(1)(h): 'free access to the entire territory of the Member State concerned, within the limits provided for by the national legislation for reasons of security.'

431 *Ibid.*, Article 11(2).

432 *Ibid.*, Article 11(3)(a).

433 *Ibid.*, Article 11(3)(b).

treatment' regarding social assistance and social protection to core benefits.[434]

In accordance with the approach of the 'lowest common multiple', Member States are allowed to grant access to additional benefits in the areas regulated by Article 11 and to grant equal treatment in areas not covered by this Article.[435] The latter makes it possible for Member States to, for example, grant long-term residents the right to vote.

Directive 2003/109 also ensures a certain degree of protection against expulsion for long-term residents. Accordingly, for a long-term resident to be expelled he or she must constitute an actual and sufficiently serious threat to public policy or public security.[436] The expulsion decision cannot be based on economic considerations[437] and any such decision has to be taken after having regard to the duration of the residence in the territory of the Member State;[438] the age of the person;[439] the consequences for the person concerned and family members;[440] and the links with the country of residence or the absence of any links with the country of origin.[441] When faced with an expulsion decision, the long-term resident can make use of a judicial redress procedure[442] the type and effect of which shall be determined by the Member State. In this case, a long-term resident who lacks adequate resources shall be given legal aid on the same terms as apply to nationals of the respective Member State.[443]

RIGHTS IN THE SECOND MEMBER STATE

The highlight of Directive 2003/109 is without doubt the fact that it introduces certain rights which shall be enjoyed by the long-term resident in the 'second Member State'. The second Member State is described by the Directive as 'any Member State other than the one which for the first time granted long-term resident status to a third-country national and which that long-term resident exercises the right of residence'.[444] Hence, the Member State 'which for the first time granted long-term resident status to a third-country national' is rendered as

434 *Ibid.*, Article 11(4).
435 *Ibid.*, Article 11(5).
436 *Ibid.*, Article 12(1).
437 *Ibid.*, Article 12(2).
438 *Ibid.*, Article 12(3)(a).
439 *Ibid.*, Article 12(3)(b).
440 *Ibid.*, Article 12(3)(c).
441 *Ibid.*, Article 12(3)(d).
442 *Ibid.*, Article 12(4).
443 *Ibid.*, Article 12(5).
444 *Ibid.*, Article 2(d).

the 'first Member State'.[445]

Before the Directive, third-country nationals holding a long-term residence permit did not have the possibility to move to a second Member State as a right ensured by EU law. Consequently, if they wished to settle in another Member State they had to go through all the formalities imposed on first-time immigrants and they would not have been subject to any privileged treatment.[446] Directive 2003/109 grants the right of residence in another Member State to long-term residents under certain conditions. It must be said, however, that whereas the title of the relevant chapter in the Proposal referred to a 'right of residence in the other Member States',[447] the reference to a right of residence was omitted in the final version of the Directive.

Those long-term residents who fulfil the conditions laid down in the Directive may reside in a second Member State for a period longer than three months in order to exercise an economic activity in an employed or self-employed capacity; to pursue studies or vocational training; or for any other purpose.[448] Nevertheless, concerning long-term residents who wish to reside in a second Member State to exercise an economic activity, the Directive identifies some restrictive measures which Member States can take. It follows that Member States are allowed to take the situation of their labour market and their labour market policies into consideration and consequently to give preference to other groups of persons or apply their national procedures regarding requirements for exercising economic activity on an employed or self-employed basis.[449] Furthermore, Member States may continue to limit the total number of persons entitled to be granted a right of residence as long as these limitations were already present in national legislation at the time of the adoption of the Directive.[450]

CONDITIONS FOR RESIDENCE IN A SECOND MEMBER STATE

As mentioned above, the possibility of moving to a second Member State introduced by the Directive is not an unconditional one. There are a number of conditions with which long-term residents have to comply. The exact conditions differ from Member State to Member State as the Directive sets a number of optional conditions which the Member States may choose to adopt.

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445 *Ibid.*, Article 2(c).

446 Explanatory Memorandum of the Proposal for a Council Directive concerning the status of third-country nationals who are long-term residents, COM(2001)127 final, Section 5(7).

447 Proposal for a Council Directive concerning the status of third-country nationals who are long-term residents, COM(2001)127 final, Chapter III.

448 Directive 2003/109, Article 14(2).

449 *Ibid.*, Article 14(3).

450 *Ibid.*, Article 14(4).

First of all, the long-term resident third-country national shall apply for a residence permit with the competent authorities of the second Member State, as soon as possible, and in any case, no later than three months after entering the second Member State.[451] It is up to the second Member State whether or not to accept applications made by long-term residents while still residing in the first Member State.[452]

Secondly, evidence of stable and regular resources and health insurance may be required from long-term residents.[453] 'Stable and regular' resources are explained as resources sufficient to maintain the long-term resident and his/her family members without having recourse to the social assistance system of the relevant Member State.[454] The health insurance demanded can be one that covers all risks in the second Member State normally covered for the nationals of the relevant Member State.[455]

Thirdly, the second Member State may require that integration measures are complied with by the long-term resident.[456] However, if the third-country national concerned has already been required to comply with integration measures in the first Member State in order to be given a long-term resident status he/she cannot be required to comply with such a measure for a second time.[457] Nevertheless, attending language courses may be required from even such third-country nationals who have already been subject to an integration measure in the first Member State.[458]

Finally, the Directive obliges the application for a residence permit to be accompanied by documentary evidence as to the relevant conditions.[459] In this context Member States are also allowed to ask for evidence of appropriate accommodation.[460] The provision furthermore specifies what type of evidence shall in particular be requested respectively from those who want to reside for purposes of employed activity, self-employed activity and study or vocational training.[461]

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451 *Ibid.*, Article 15(1)(1).
452 *Ibid.*, Article 15(1)(2).
453 *Ibid.*, Article 15(2).
454 *Ibid.*, Article 15(2)(a).
455 *Ibid.*, Article 15(2)(b).
456 *Ibid.*, Article 15(3)(1).
457 *Ibid.*, Article 15(3)(2).
458 *Ibid.*, Article 15(3)(3).
459 *Ibid.*, Article 15(4)(1).
460 *Ibid.*, Article 15(4)(2).
461 *Ibid.*, Article 15(4)(3).

FAMILY MEMBERS WHO CAN ACCOMPANY THE LONG-TERM RESIDENT TO THE SECOND MEMBER STATE

Provided that the family was already formed in the first Member State the family members have the possibility to accompany the long-term resident to the second Member State. A distinction is made between two different categories of family members. The Directive lays down the right to accompany the long-term resident for those 'family members' who fulfil the conditions laid down in Directive 2003/86 on family reunification.[462] Member States have no discretion concerning whether or not to accept such family members into their territory to reside with the long-term resident. For 'family members' other than those referred to in Directive 2003/86, Member States maintain the capacity to decide whether to allow their entry and residence.[463]

The issue of family members accompanying the long-term resident takes another turn when it comes to same-sex couples. If the long-term resident has married a third-country national of the same sex in the first Member State which recognizes same-sex marriages or if such a Member State has authorized the family reunification of a same-sex married couple and this couple decide to move to a second Member State which does not recognize same-sex marriages the issue of whether the second Member State will allow the same-sex spouse to accompany the long-term resident arises. To overcome this difficulty a possible solution could be the insertion of a provision into the long-term resident Directive which obliges the second Member State to recognize same-sex married couples moving from the first Member State which recognized such marriages even if the second Member State's legislation itself does not allow for same-sex marriages.[464]

PROCEDURAL ASPECTS OF AN APPLICATION BY FAMILY MEMBERS TO ACCOMPANY THE LONG-TERM RESIDENT

Family members of the long-term resident who wish to accompany him or her to the second Member State should submit their application as soon as possible and

462 *Ibid*., Article 16(1).

463 *Ibid*., Article 16(2).

464 This solution is similar to that proposed by Guild concerning Regulation 1612/68 which governed the family reunification of EU citizens, until the adoption of Directive 2004/38 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States. According to Guild, the Regulation concerned should have been amended in a way as to require 'Member States to recognize same-sex partnerships from other Member States, even if the host Member State has not such legislation' in E. Guild, 'Free Movement and Same Sex Relationships: Existing EC Law and Article 13 EC', in R. Wintemute and M. Andenæs, eds., *Legal Recognition of Same Sex Partnerships: a Study of National, European and International Law* (Oxford, Hart Publishing 2001) p.687.

in any event no later than three months after entering the territory of the second Member State.[465] The Member State may also decide to accept the application which is made while the family members are still living in the territory of the first Member State.[466] It can be seen that concerning an application by family members to accompany the long-term resident, the rules governing the application by the long-term resident to reside in the second Member State will apply.

It is within the second Member State's scope of competence whether or not to require that the family members of the long-term resident should present, together with the application form, their long-term resident's EC residence permit and a valid travel document or their certified copies; evidence as to their residence as members of the family of the long-term resident in the first Member State; and evidence that they have stable and regular resources as well as health insurance covering all risks in the second Member State. The last-mentioned category of evidence which may be required by the second Member State is further explained in the Directive. The stable and regular resources of family members or the long-term resident himself or herself should be sufficient to maintain the family without being a burden to the social assistance system of the Member State concerned. The Member States are given the authority to decide whether such resources are sufficient. In doing so they shall take their nature and regularity into consideration and they may also take account of the level of minimum wages and pensions.[467]

PROCEDURAL ASPECTS OF THE EXAMINATION OF APPLICATIONS AND THE ISSUING OF A RESIDENCE PERMIT

The Member State authorities shall take at most four months to process the applications.[468] This period may be extended for a period of not more than three months if the application is not accompanied by the required documentary evidence or when exceptional circumstances exist.[469] The fact that the waiting time for the long-term resident can become this long is 'unfortunate',[470] especially considering the fact that the Directive does not ensure any specific solution if and when the Member States do not respect these time-limits. If no decision is taken within these periods set by the Directive, it is indicated that the

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465 Directive 2003/109, Article 15(1)(1) by reference to Article 16(3).

466 *Ibid.*, Article 15(1)(2) by reference to Article 16(3).

467 *Ibid.*, Article 16(4)(c).

468 *Ibid.*, Article 19(1)(1).

469 *Ibid.*, Article 19(1)(2).

470 J. Apap and S. Carrera, 'Towards a Proactive Immigration Policy for the EU?', CEPS Working Document No.198 (December 2003) p.20.

national legislation of the Member State shall determine the consequences thereof.[471]

If the conditions set by the second Member State, in compliance with the Directive, are met, the long-term resident and his or her family members shall be issued with a renewable residence permit which shall, upon application, if required, be renewable on expiry.[472] The residence permit issued for the family members of the long-term resident shall be valid for the same period as the permit issued to the long-term resident.[473] If the Member State so requires, the renewal on expiry will be subject to a new application.[474]

If the second Member State rejects the application for a residence permit, the reasons for this decision shall be given and the decision shall be notified to the third-country national.[475] This notification shall include possible remedy procedures which are made available by the Member State and the time-limit within which to take action.[476]

REJECTION OF THE RESIDENCE APPLICATION AND THE WITHDRAWAL OF THE PERMIT

Member States may refuse the applications that the long-term residents or their family members have made where the person concerned constitutes a threat to public policy, public security[477] or public health.[478] For the purpose of certifying that long-term residents do not suffer from any disease that might threaten public health,[479] Member States may require a medical examination, which may be free of charge but shall not be performed on a systematic basis.[480]

If the third-country national has already been allowed residence in the second Member State, the residence permit may be withdrawn or its renewal may be refused until the third-country national obtains long-term resident status, on grounds of public policy or public security; where the conditions to acquire a residence permit are no longer met; or where a third-country national is not

471 Directive 2003/109, Article 20(1)(2).
472 *Ibid.*, Article 19(2).
473 *Ibid.*, Article 19(3).
474 *Ibid.*, Article 19(2).
475 *Ibid.*, Article 20(1)(1).
476 *Ibid.*, Article 20(1)(1).
477 *Ibid.*, Article 17.
478 *Ibid.*, Article 18.
479 The explanation as to what types of diseases may justify a refusal to allow entry or the right of residence in the territory of the second Member State can be found in the second paragraph of Article 18 of Directive 2003/109.
480 Directive 2003/109, Article 18(4).

lawfully residing in the Member State concerned.[481] In this case the second Member State must immediately readmit, without formalities, the long-term resident and his or her family members.
The second Member State may adopt a decision to remove the third-country national from Union territory until he or she obtains a long-term resident status.[482] This decision may only be taken after consulting the first Member State[483] and on grounds of public policy or public security.[484]

The third-country national has the right to mount a legal challenge in the Member State concerned when his or her application for a residence permit is rejected, the permit is not renewed or it is withdrawn.[485]

CONSEQUENCES OF BEING GRANTED A RESIDENCE PERMIT IN THE SECOND MEMBER STATE

When a long-term resident is granted a residence permit in the second Member State, he or she becomes subject to the equal treatment principle in the second Member State in the same way as he or she did in the first Member State.

Long-term residents being able to benefit from the equal treatment principle in the second Member State is not without limitations. The Directive allows Member States to introduce some restrictions concerning access to the labour market. If the residence permit is based on the ground of exercising an economic activity in an employed or self-employed capacity, the second Member State may restrict access to employment to only that economic activity for which he has received his residence permit.[486] This situation, where the long-term resident may not have another job, cannot last longer than 12 months.[487] Furthermore, if the residence permit was granted on the ground of pursuing studies or vocational training or for any other purpose, the second Member State may lay down the conditions under which access to the labour market shall be exercised.[488]

If the long-term resident third-country national fulfils the requirements of being granted a long-term residence permit[489] he or she may apply for a long-term

[481] *Ibid.*, Article 22(1).
[482] *Ibid.*, Article 22(3)(1).
[483] *Ibid.*, Article 22(3)(2).
[484] *Ibid.*, Article 22(3)(1).
[485] *Ibid.*, Article 20(2).
[486] *Ibid.*, Article 21(2)(2).
[487] *Ibid.*, Article 21(2)(2).
[488] *Ibid.*, Article 21(2)(3).
[489] Thus, if he or she complies with the provisions of Articles 3, 4, 5 and 6 of Directive 2003/109.

resident status in the second Member State.[490]

CONCLUSION

As mentioned earlier, the long-term residents Directive is sculpted upon Member State rules on long-term residents. Rights which are not conferred on long-term residents in the majority of Member States are not included within the scope of the Directive. Voting and standing as candidates in municipal elections, which is an important aspect of being integrated into the social and political life of the place where one has been living for many years, is a right which does not appear in the Directive. Neglecting an issue which is as important as voting rights for long-term residents[491] can be explained by the fact that the number of Member States where such rights are granted to long-term residents is rather small.[492] As the example illustrates, Directive 2003/109 is not very progressive in the sense that it takes the legislation of the Member States as the starting point. Likewise, the extent of the discretion allowed to Member States in every aspect of long-term residency dealt with by the Directive is debatable. In particular the restrictions allowed to be made by the Member States in Article 11 indicate a weak safeguard for the equal treatment of long-term residents as this Article already sets a very limited scope of 'equal treatment' to start with. Especially in the absence of standstill clauses, the high level of latitude allowed to Member States is a concern in achieving a high standard of protection at the European level.

In theory, the long-term residents Directive should represent the ultimate level of protection that is guaranteed for third-country nationals. This logic derives from the standing of long-term residents, because they constitute the 'least controversial group'[493] among third-country nationals as in order to obtain this status they already had to meet various conditions, most importantly the five-year legal residency condition. It is disappointing to see that even the treatment of this highly integrated group of third-country nationals is, in broad terms, not in line with the Tampere objective of granting third-country nationals rights which are comparable to those of EU citizens. It is not possible to say that the Directive has

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490 Directive 2003/109, Article 23(1).

491 According to Munro, granting non-citizen residents the right to vote in elections may be the best means available to begin a process of overcoming participation barriers and improving the lives of immigrants; see D. Munro, 'Integration Through Participation: Non-Citizen Resident Voting Rights in an Era of Globalization', *International Migration and Integration*, No. 9 (2008) pp.43-80.

492 Explanatory Memorandum of the Proposal for a Council Directive concerning the status of third- country nationals who are long-term residents, COM(2001)127 final, Section 3(5).

493 L. Halleskov, 'The Long Term Residents Directive: A Fulfilment of the Tampere Objective of Near Equality?', *European Journal of Migration and Law,* Vol.7 (2005) pp.181-201.

achieved equal treatment for long-term residents and EU citizens in terms of the right to free movement throughout the Union territory.[494]

It cannot be concluded, however, that the Directive does not contribute positively to the general framework of the rights of third-country nationals. Prior to the adoption of Directive 2003/109, a third-country national did not enjoy the right to move to a second Member State unless he or she was a family member of an EU citizen. Despite the criticism surrounding it, the long-term residents Directive did manage to put third-country nationals in a more central spot within EU law. Thanks to this Directive third-country nationals enjoy rights, the range of which may be debatable, 'derived' from their own position within the EU territory. All things considered, the Directive should be seen as a step forward for the reason that, next to securing the legal position of third-country nationals in the Member State in which they have gained long-term status, it also ensures the free movement between Member States of long-term resident third-country nationals.[495]

2.3.2.5 Economic migration

INTRODUCTION

Economically-driven migration into the EU constitutes the second largest category of regular migration flows into the Union after migration for the purpose of family reunification.[496] However, the choice made by Member States to keep economic migration close to zero since the 1970s has led many economic migrants to enter the Union illegally or through misusing asylum procedures.[497] Economic migrants resorting to such means to enter the Union demonstrates the unrealistic nature of zero immigration policies. Furthermore, the referred policies are far from being in agreement with labour shortages[498] experienced in a number of Member States. It is appropriate to say that the state of affairs has changed since the Council called for the continuation of the restrictive measures regarding the admission of third-country nationals for employment.[499] The reasoning behind this call was the high employment levels, which made it

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494 P. Boeles, 'What Rights Have Migrating Third Country Nationals?', in J.W. de Zwaan and F.A.N.J. Goudappel, eds., *Freedom, Security and Justice in the European Union: Implementation of the Hague Programme* (The Hague, T.M.C. Asser Press 2006) p.154.

495 S. Peers, 'Implementing Equality? The Directive on Long Term Resident Third Country Nationals', *European Law Review*, No.4, Vol.29 (2004) pp.437-460.

496 Communication on a Community Immigration Policy COM(2000) 757 final, 22.11.2000, Section 3.1.

497 *Ibid.*

498 Policy Plan on Legal Migration, COM(2005)669 final, Section 1.2.

499 Council Resolution of 20 June 1994 on limitations on admission of third-country nationals to the territory of the Member States for employment, O.J. C 278, 19.09.1996, pp.3-6.

necessary, in the eyes of the Council, for Member States to refuse entry to their territories to third-country nationals for the purpose of employment except in purely exceptional cases. However, the labour shortages recently experienced in the Member States guide the current trends of approaching economic migration.

With these in mind, and also following the mandate of the Tampere conclusions concerning the approximation of national legislations on the conditions for admission and residence of third-country nationals, the Commission initiated a discussion on economic migration back in November 2000. In its Communication on a Community Immigration Policy, the Commission advocated 'the development of a common policy for the controlled admission of economic migrants to the EU'.[500] The new approach envisaged by the Commission did, however, fully respect the position of Member States as the sole authority to decide on the volumes of migrant labour.[501]

Following the Communication on a Community Immigration Policy, the Commission set forth a Proposal for a Directive on economic migration.[502] This Proposal set out to regulate the legal regime for third-country national workers and self-employed persons who would be subject to this regime until they would have fulfilled the relevant conditions and applied for a long-term resident status. What the Commission proposed was a horizontal approach, as opposed to a sectoral one, which envisaged common rules for admitting all categories of workers. The Proposal aimed to abolish the 'dual system' of residence permits and work permits and to replace it with a one-stop-shop procedure for the combined titles of 'residence permit – worker' or 'residence permit – self-employed person'.[503]

The Proposal for a Directive on economic migration, which was welcomed by the European Institutions,[504] did not receive any support from the Member States.[505]

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500 Communication on a Community Immigration Policy COM(2000) 757 final, 22.11.2000, Section 4.

501 *Ibid*., Section 3.4.1.

502 Proposal for a Council Directive on the conditions of entry and residence of third-country nationals for the purpose of paid employment and self-employed activities, COM(2001)386 final, 11.07.2001.

503 Proposed Article 2(d) and (e).

504 See the Opinion of the European Economic and Social Committee of 16.01.2002 , O.J. C 80, 03.04.2002, pp. 37-40; the Opinion of the Committee of the Regions of 13.03.2002, O.J. C.192, pp.20-23; European Parliament legislative resolution of 12.02.2003, O.J. C 43, 19.02.2004, pp. 230-242.

505 S. Carrera and M. Formisano, 'An EU Approach to Labour Migration: What is the Added Value and the Way Ahead?', CEPS Working Document No.232 (October 2005); S.

Consequently, the Commission presented the Green Paper on Economic Migration[506] in order to animate a debate 'on the most appropriate form of Community rules for admitting economic migrants and on the added value of adopting such a common framework'.[507] The Green Paper identified two main options as to the scope of any future EU legislation on the issue: a horizontal approach which would cover the conditions of entry and residence of all economic migrants and a sectoral approach focusing on certain categories of economic migrants.[508] This was an important point to open up the discussion as the main critique surrounding the Proposal for a Directive on economic migration was that the Proposal suggested a system of common rules that would apply to all categories of workers.[509] The conclusion reached as a result of the debate launched by the Green Paper was apparent in the Policy Plan on Legal Migration,[510] the preparation of which was announced by the Hague Programme.

The Policy Plan on Legal Migration, defining the roadmap to be followed during the remainder of the Hague Programme timetable, introduces the legislative measures which shall be taken in the area of economic migration. The Policy Plan announces that the approach to be adopted in regulating economic migration is a sectoral one. This choice, which led to the eventual withdrawal of the Proposal for a Directive on economic migration,[511] is due to the fact that, even though the reactions to the Green Paper highlighted the advantages of a horizontal approach, the Member States were not supportive of any horizontal regulation.[512] The package set forth by the Policy Plan, while not exhaustive, consists of one general framework directive and four specific directives targeting different categories of migrants.[513]

Carrera, 'Building a Common Policy on Labour Migration: Towards a Comprehensive and Global Approach in the EU?', CEPS Working Document No.256 (February 2007); S. Bertozzi, 'Legal Migration: Time for Europe to Play Its Hand', CEPS Working Document No.257 (February 2007).

506 Green Paper on an EU Approach to Managing Economic Migration, COM(2004) 811 final, 11.01.2005.

507 Green Paper on an EU Approach to Managing Economic Migration, COM(2004) 811 final, 11.01.2005, Section 1.

508 *Ibid*., Section 2.1.

509 S. Bertozzi, 'Legal Migration: Time for Europe to Play Its Hand', CEPS Working Document No.257 (February 2007) p.6.

510 COM(2005) 669 final.

511 O.J. C 64, 17.03.2006, p.8.

512 Policy Plan on Legal Migration, COM(2005) 669 final, Section 2.

513 On conditions of entry and residence of highly skilled workers, seasonal workers, remunerated trainees and on the procedures regulating the entry into, the temporary stay and residence of Intra-Corporate Transferees (ICT).

Two of the measures envisaged by the Policy Plan, namely a general framework directive and a directive on highly qualified migrants, were presented as Proposals in October 2007.

PROPOSAL FOR A GENERAL FRAMEWORK DIRECTIVE[514]

The Proposed Directive serves a dual purpose. First of all, to set up a single application procedure for issuing a single permit which will enable the third-country national to reside and work.[515] Secondly, to determine a common set of rights for legally resident third-country workers.[516] Therefore, the Proposal covers novelties in both procedural and rights-based aspects of economic migration. Moreover, this dual character of the Proposal makes it relevant for third-country nationals who seek to reside and work in the Union as well as those who already legally reside in the Union territory in the period before they acquire a long-term resident status.[517]

The Single Permit

The envisaged single permit shall allow a third-country national to stay and work legally in the territory of the relevant Member State.[518] A single application shall be made in order to request authorization for residence and work in a Member State.[519] No additional permit, such as work permits, shall be issued by Member States in order to prove access given to the labour market.[520] As for third-country nationals who have been admitted for purposes other than employment, the single permit shall also indicate information relating to whether the person has been given access to the labour market.[521] It should be noted that those who were initially admitted for purposes other than work, but who have been allowed to work are also considered as 'third-country workers' by the Proposal.[522]

The national authorities who shall be designated as the competent authority to receive the application and issue a single permit shall process the permit request as soon as possible and in any event within three months from the date of

514 Proposal for a Council Directive on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State COM(2007) 638 final, 23.10.2007.

515 Proposed Article 1(a).

516 Proposed Article 1(b).

517 Proposed Article 3(1).

518 Proposed Article 2(c).

519 The 'single application procedure' as defined in the Proposed Article 2(d).

520 Proposed Article 6(2).

521 Proposed Article 7(1).

522 Explanatory Memorandum Section 5 on the Proposed Article 2.

application.[523] This period may, however, be extended where exceptional circumstances exist or due to the complexity of the case.[524] The Proposal does not suggest a maximum time period within which the extended processing must be finalized. Should the processing of the application result in a negative outcome the reasoned decision shall be open to a challenge before the national courts.[525]

Right to Equal Treatment

As mentioned earlier the Proposal for a General Framework Directive carries a dual objective: to establish a system of single application, and to set up a system for third-country nationals working legally within the EU in which they shall be afforded equal treatment with Union nationals in specific fields.

The scheme which is proposed ensures equal treatment to third-country nationals in working conditions,[526] freedom of association,[527] education,[528] social security,[529] the payment of acquired pensions when moving to a third country, tax benefits, and access to goods and services.[530] However, equal treatment in these areas does not come without restrictions which the Member States may adopt. The right to equal treatment concerning education and vocational training may be restricted in several ways. First of all, a Member State may require proof of appropriate language proficiency before allowing access to education and training.[531] Secondly, the fulfilment of specific educational

[523] Proposed Article 5(2)(1).

[524] Proposed Article 5(2)(2).

[525] Proposed Article 8.

[526] Proposed Article 12(1)(a): 'working conditions, including pay and dismissal as well as health and safety at the workplace.'

[527] Proposed Article 12(1)(b): 'freedom of association and affiliation and membership of an organization representing workers or employers or of any organization whose members are engaged in a specific occupation, including the benefits conferred by such organizations, without prejudice to the national provisions on public policy and public security.'

[528] Proposed Article 12(1)(c): 'education and vocational training.'
Proposed Article 12(1)(d): 'recognition of diplomas, certificates and other professional qualifications in accordance with the relevant national procedures.'

[529] Proposed Article 12(1)(e): 'branches of social security, as defined in Council Regulation (EEC) No. 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community. Regulation (EEC) No. 859/2003, extending the provisions of Regulation (EEC) No. 1408/71 and its implementing Regulation (EEC) No. 574/72 to nationals of third countries who are not already covered by these provisions solely on the ground of their nationality shall apply accordingly.'

[530] Proposed Article 12(1)(h): 'access to goods and services and the supply of goods and services made available to the public including procedures for obtaining housing and the assistance afforded by employment offices.'

[531] Proposed Article 12(2)(a).

prerequisites may be demanded from those who want to follow university education.[532] Finally, equal treatment in the area of education and vocational training may be allowed excluding those rights relating to study grants.[533]

Access to public housing opportunities may be made conditional upon residence in the territory of the relevant Member State for at least three years.[534] The right to equal treatment in working conditions, freedom of association and tax benefits may be restricted to third-country workers who are in employment.[535] Lastly, social security rights as defined by Regulation 1408/71 may be restricted to third-country workers who are in employment with the exception of unemployment benefits.[536]

PROPOSAL FOR A HIGHLY QUALIFIED MIGRANTS DIRECTIVE[537]

One of the five directives which were to be proposed by the Policy Plan on Legal Migration related to the entry and residence of highly skilled workers. This intention by the Commission was realized on 23 October 2007 when the Proposal on highly qualified migrants was adopted together with the General Framework Proposal.

Why a Proposal on highly qualified migrants?

The regulation of the entry and residence of highly qualified migrants is crucial from two parallel aspects. First of all, it forms an indispensable element of the EU's economic migration policy, even more so since the structure of the common economic migration policy shall be based on a sectoral approach. Secondly, the regulation of highly qualified immigration serves the objectives of the Lisbon Strategy. The conclusions of the Lisbon European Council of March 2000, or the Lisbon Strategy as it is commonly referred to, set the strategic goal of becoming the 'most competitive and dynamic knowledge based economy in the world by 2010'.[538] The increasing need at the EU level for a highly qualified workforce[539] constitutes the key to why the facilitation of highly qualified migrants is being arranged as a priority in economic migration. Indeed, when it comes to economic migration, the EU has opted for a 'needs-based' approach.[540] For some time, the

532 Proposed Article 12(2)(a).
533 Proposed Article 12(2)(b).
534 Proposed Article 12(2)(c).
535 Proposed Article 12(2)(d).
536 Proposed Article 12(2)(e).
537 Proposal for a Directive on the conditions and residence of third-country nationals for the purposes of highly qualified employment COM(2007)637 final, 23.10.2007.
538 Lisbon European Council, 23-24 March 2000, Presidency Conclusions, point 5.
539 Explanatory Memorandum of the Proposal on highly qualified migrants, section 1.
540 The Global Approach to Migration one year on: Towards a comprehensive European

Commission had been signalling the introduction of such an approach which would lead to the facilitation and acceleration of the 'entry into the EU labour market of those third-country workers for whom there is a demonstrated need'.[541] The need to attract a highly qualified workforce has been recently observed not only in Europe but in most developed countries.[542] How to attract such migrants, or how to arrange the 'pull factors' in such a way that a highly qualified workforce is drawn towards a country, requires a construction including measures in various areas such as benefits, remuneration, supply and demand mechanisms and financial facilities. However, of the utmost importance is immigration legislation which attracts highly qualified migrants.[543] With this in mind, most EU Member States had already put legislation in place that facilitated highly qualified migration.[544] Yet, it cannot be expected that individual adjustments by Member States in the area of highly skilled migration can amount to the achievement of the Lisbon Strategy. A unified scheme of highly qualified migration at EU level creating a 'common area for highly skilled migrants'[545] would have a greater possibility of succeeding in the competition for the highly skilled.

The Proposal aims at changing the EU's fate when it comes to attracting highly skilled migration. The fact that such migrants have to face 27 different admission systems, with no prospects of moving easily from one Member State to another, places the EU much behind the USA and Canada in the race to attract highly qualified migrants.[546] The Commission aims at bringing the EU into this race by addressing critical setbacks of the current system. Accordingly, the concrete aim of the Proposal is, first of all, to determine the conditions of entry and residence, for more than three months, within the EU territory, of highly qualified third-

migration policy, COM(2006) 735 final, 30.11.2006, point 3.2.

541 The Commission's Action Plan for skills and mobility, COM(2002) 72 final, 13.02.2002, section 3.2.4.

542 T. K. Bauer and A. Kunze, 'The Demand for High-Skilled Workers and Immigration Policy', IZA – Institute for the Study of Labour – Discussion Paper Seires No.999 (January 2004); S. Mahroum, 'Highly Skilled Globetrotters: the International Migration of Human Capital', OECD, Directorate for Science, Technology and Industry (1999); R. Iredale, 'the Migration of Professionals: Theories and Typologies', *International Migration*, Vol.39, No.5 (2001) pp.7-26.

543 S. Mahroum, 'Highly Skilled Globetrotters: the International Migration of Human Capital', OECD, Directorate for Science, Technology and Industry (1999).

544 S. Mahroum, 'Europe and the Immigration of Highly Skilled Labour', *International Migration*, Vol.39, No.5 (2001) pp.27-43.

545 P. Zaletel, 'Competing for the Highly Skilled Migrants: Implications for the EU Common Approach on Temporary Economic Migration', *European Law Journal*, Vol.12, No.5 (September 2006) pp.613-635.

546 Explanatory Memorandum of the Proposal for a Directive on highly qualified employment, Section 1.

country nationals and their family members; and secondly, to determine the conditions for the residence of highly qualified third-country nationals and of their family members in Member States other than the one in which they were admitted.[547]

Who is a highly qualified migrant?

In order to realize these aims, the first logical step taken by the Proposal is to give a common definition of 'highly qualified employment'. The lack of an internationally accepted common definition of the term is a problem for the highly skilled migrant.[548] The Commission embarks upon first tackling this issue. The proposed definition is as follows: 'the exercise of genuine and effective work under the direction of someone else for which a person is paid and for which higher education qualifications or at least three years of equivalent professional experience is required'.[549] It can be seen that the definition encompasses two elements needed to identify one as a highly qualified migrant. The first element is the exercise of an economic activity under the direction of someone, which rules out the possibility of self-employed persons making use of the directive. The second element is the possession of higher education qualifications or at least three years of equivalent professional experience, which together constitute 'higher professional qualifications'.[550]

The Proposal consecutively provides the definition of 'higher education qualification' as 'any degree, diploma or other certificate issued by a competent authority attesting the successful completion of a higher education programme, namely a set of courses provided by an educational establishment recognized as a higher education institution by the State in which it is situated. These qualifications are taken into account, for the purposes of this directive, on condition that the studies needed to acquire them lasted at least three years'.[551]

It should be noted, however, that the Proposed Directive does not cover those who apply to reside in a Member State as researchers, because Directive 2005/71 on admitting researchers[552] already deals with admission in order to carry out a

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547 Proposed Article 1.

548 P. Zaletel, 'Competing for the Highly Skilled Migrants: Implications for the EU Common Approach on Temporary Economic Migration', *European Law Journal*, Vol.12, No.5 (September 2006) pp.613-635.

549 Proposed Article 2(b).

550 Proposed Article 2(h).

551 Proposed Article 2(g).

552 Directive 2005/71 on a specific procedure for admitting third-country nationals for the purposes of scientific research, O.J. L 289, 03.11.2005, pp. 15-22. For a detailed explanation see *infra* 2.3.2.6.

research project.[553] Other categories of third-country nationals who cannot make use of the Proposed Directive on highly skilled migrants are those who have applied for international protection or who are making use of temporary protection schemes,[554] refugees or those who have applied for a refugee status,[555] family members of Union citizens exercising free movement rights within the EU,[556] long-term residents exercising their right to reside in the second Member State,[557] those entering a Member State under commitments contained in an international agreement facilitating the entry and temporary stay of certain categories of trade and investment-related natural persons,[558] and those whose expulsion has been suspended.[559] The list of categories of persons who cannot make use of the Proposed Directive is probably much more effective in determining the actual scope of the Proposal as the definition provided in this Proposal is not very concrete and it does not solve the problem of qualifications obtained in a third country. For this reason, a European standard should be established on how to evaluate third-country degrees.

The Blue Card

The Proposal basically deals with the conditions and consequences of acquiring the 'Blue Card' which is the authorization entitling its holder to reside and work legally in the territory of a Member State and to move to another Member State.[560]

Conditions for acquiring a Blue Card

Apart from the more general requirements of holding a valid travel document,[561] having health insurance for the applicant and his or her family members[562] and not being a threat to public policy, public security and public health,[563] the Proposal also sets some specific conditions which have to be fulfilled in order to be issued with a Blue Card. These conditions can be grouped in three main titles: requirements concerning the work contract, professional qualifications and salary.

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553 Proposed Article 3(2)(c).
554 Proposed Article 3(2)(a).
555 Proposed Article 3(2)(b).
556 Proposed Article 3(2)(d).
557 Proposed Article 3(2)(e).
558 Proposed Article 3(2)(f).
559 Proposed Article 3(2)(g).
560 Proposed Article 2(c).
561 Proposed Article 5(1)(d).
562 Proposed Article 5(1)(e).
563 Proposed Article 5(1)(f).

The third-country national who applies to be admitted as a highly qualified migrant must, first of all, be able to present a valid work contract or a binding job offer.[564] This is due to the demand-driven nature of admission as a highly qualified migrant.[565] The work contract or binding job offer has to concern a period of at least one year.[566]

Secondly, the third-country national must fulfil certain conditions relating to professional qualifications. He or she must meet the conditions laid down in the national law of the Member State concerning the exercise by EU citizens of the regulated profession specified in the work contract or binding job offer.[567] As for unregulated professions, the applicant must demonstrate that he or she has the relevant higher professional qualifications[568] in the occupation or sector specified in the work contract or the binding job offer.[569]

Thirdly, the salary specified in the work contract or in the binding job offer must meet certain conditions. This amount must not be less than a national salary threshold which is defined and published for this purpose by the Member States.[570] This threshold must be at least three times the minimum gross monthly wage determined by national law.[571] If the minimum wage is not defined in a Member State, the national salary threshold shall be set to at least three times the minimum income under which citizens of the relevant Member State are entitled to social assistance.[572] Alternatively, the national salary threshold shall be in line with applicable collective agreements or practices in the relevant occupation branches.[573]

Young Professionals

A facilitated scheme concerning the conditions to acquire a Blue Card is envisaged for highly qualified third-country nationals who are below the age of 30. The reasoning behind such a special scheme is that young professionals

564 Proposed Article 5(1)(a).

565 Explanatory Memorandum of the Proposal on a Directive on highly qualified employment, Section 5.

566 Proposed Article 5(1)(a).

567 Proposed Article 5(1)(b).

568 As defined in the Proposed Article 2(h) as 'qualifications attested by evidence of higher education qualifications or of at least three years of equivalent professional experience'.

569 Proposed Article 5(1)(c).

570 Proposed Article 5(2)(1).

571 Proposed Article 5(2)(1).

572 Proposed Article 5(2)(2).

573 Proposed Article 5(2)(2).

mostly lack sufficient professional experience in order to claim high salaries.[574] Accordingly, if the applicant is less than 30 years of age and holds higher educational qualifications certain derogations are envisaged from the main provision regarding the criteria. If the gross monthly salary which is offered to the third-country national corresponds to at least two-thirds of the national salary threshold the Member State is under an obligation to consider that the salary requirement is fulfilled.[575] Furthermore, in the event that the third-country national has obtained a Bachelor's and a Master's degree in a higher education institution situated on Community territory, the Member States may waive the salary requirement.[576] Finally, unless it is a condition to exercise the relevant occupation in national law, Member States cannot require proof of professional experience in addition to the higher educational qualifications.[577]

Procedural aspects of the Blue Card

The Blue Card which shall be granted to those fulfilling the necessary conditions shall have an initial validity of two years, unless the work contract covers a period less than two years. In this case the term of validity shall be the duration of the work permit plus three months. The Blue Card shall be renewed for at least two years. The Blue card shall comply with the uniform format as determined in Regulation 1030/2002.

The fulfillment of the conditions does not create any admission rights for the applicant. The Member States may examine the situation on their labour market and apply their national procedures regarding the requirements for filling a vacancy.[578] As a result of this examination, Member States may decide to give preference to Union citizens or third-country nationals residing legally and receiving unemployment benefits in the relevant Member State.[579] Additionally, the Member States shall naturally reject an application if the applicant does not meet the conditions or if the documents presented have been fraudulently acquired, falsified or tampered with.[580] Similarly, an EU Blue Card shall be withdrawn or its renewal shall be refused if it has been fraudulently acquired, if the holder did not meet or no longer meets the conditions, or for reasons of

574 Explanatory Memorandum of the Proposal on a Directive on highly qualified employment, Section 5.
575 Proposed Article 6(a).
576 Proposed Article 6(b).
577 Proposed Article 6(c).
578 Proposed Article 9(2)(1).
579 Proposed Article 9(2)(2).
580 Proposed Article 9(1).

public policy, public security or public health.[581]

The Member States shall come to a decision about the application and notify the applicant thereof at the latest within 30 days following the date on which the application was lodged.[582] This deadline may be extended by a maximum of another 60 days in the event that the application is a complex one.[583] If the authorities should require any additional information the period within which an application must be finalized is suspended until the required information is received.[584]

In the event that the EU Blue Card application or the renewal application is rejected, or the Blue Card is withdrawn, this decision stating the reasons, the possible redress procedures and the time-limit for taking action shall be notified to the applicant, or if relevant, to his or her employer.[585] Such a decision shall be open to a challenge before Member State courts.[586]

Rights of the EU Blue Card holder

The Blue Card gives its holder an immediate right of entry into the Community. A valid EU Blue Card entitles its holder to enter, re-enter and stay in the territory of the Member State which has issued it.[587] It also allows passage through other Member States in order to exercise the mentioned rights.[588]

The central right regulated by the Proposal is that of labour market access. Following an initial two-year period in which the EU Blue Card holder's access to the labour market shall be restricted to the activity for which he or she has acquired the Blue Card,[589] the person concerned shall enjoy equal treatment with nationals concerning access to highly qualified employment.[590] Furthermore, if the Blue Card holder is granted a long-term resident status he or she shall enjoy equal treatment with nationals as regards access to employment and self-employed activities.[591] Nevertheless, Member States may retain restrictions on access to the labour market if such activities entail even occasional involvement in

581 Proposed Article 10.
582 Proposed Article 12(1).
583 Proposed Article 12(1).
584 Proposed Article 12(2).
585 Proposed Article 12(3).
586 Proposed Article 12(3).
587 Proposed Article 8(4)(a).
588 Proposed Article 8(4)(b).
589 Proposed Article 13(1).
590 Proposed Article 13(2).
591 Proposed Article 13(3).

the exercise of public authority where these activities are reserved for nationals.[592] Likewise, Member States can restrict access to the labour market where the relevant activities are reserved for nationals or EU or EEA citizens.[593] In any event respect to the Community preference principle shall be upheld.[594]

The Blue Card holder shall enjoy the right to remain in the Member State territory to seek and take up employment in case he is unemployed; however, unemployment should not exceed three consecutive months.[595]

Furthermore, Article 15 of the Proposal grants the holders of an EU Blue Card equal treatment rights with nationals in working conditions,[596] freedom of association,[597] education,[598] social security and assistance,[599] the payment of acquired pensions when moving to a third country, tax benefits, access to goods and services[600] and free access to the entire territory of the Member State concerned. The Member States are allowed to impose two restrictions on the equal treatment principle. The first one relates to study grants and public housing. The highly qualified migrant may be required to have lived for at least three years in the territory of the relevant Member State before he or she is given equal

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592 Proposed Article 13(4).

593 Proposed Article 13(5).

594 Proposed Article 13(6).

595 Proposed Article 14.

596 Proposed Article 15(1)(a): 'working conditions, including pay and dismissal, as well as health and safety at the work place.'

597 Proposed Article 15(1)(b): 'freedom of association and affiliation and membership of an organization representing workers or employers or of any organization whose members are engaged in a specific occupation, including the benefits conferred by such organizations, without prejudice to the national provisions on public policy and public security.'

598 Proposed Article 15(1)(c): 'education and vocational training, including study grants in accordance with national law.'
Proposed Article 15(1)(d): 'recognition of diplomas, certificates and other professional qualifications in accordance with the relevant national procedures.'

599 Proposed Article 15(1)(e): 'branches of social security as defined in Council Regulation (EEC) No. 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community. Council Regulation (EC) No. 859/2003 of 14 May 2003 which extends 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 these provisions solely on the ground of their nationality shall apply accordingly.'
Proposed Article 15(1)(f): 'social assistance as defined by national law.'

600 Proposed Article 15(1)(i): 'access to goods and services and the supply of goods and services made available to the public including procedures for obtaining housing and the assistance afforded by employment offices.'

treatment in these areas.[601] The second restriction allows Member States to limit access to social assistance to those Blue Card holders who have been granted long-term residence status.[602]

EU Blue Card holders are granted favourable conditions concerning family reunification, in comparison with the conditions laid down in the Directive on family reunification. Or rather, the conditions laid down in the family reunification Directive shall apply to highly qualified migrants with derogations as laid down in the Proposal. As a result, the family reunification of a highly qualified migrant shall not be made conditional upon the existence of reasonable prospects of obtaining permanent residence or for a minimum period of residence,[603] the decision on family reunification must be given at the latest six months from the date of the application,[604] integration measures may only be applied after family reunification has been granted,[605] the 12-month limit for access to the labour market shall not apply in the case of highly qualified migrants,[606] and residence in different Member States may be cumulated while calculating the five-year residence condition in order for the family members to acquire an autonomous residence permit.[607] Finally, the duration of the validity of the residence permits of the family members shall be tied to that of the EU Blue Card holder.[608]

Third-country nationals who are subject to the Proposed Directive shall also have facilitated conditions regarding the long-term residents Directive. If the highly qualified migrant who is residing in the second Member State has been residing legally and continuously for five years within the Union territory as the holder of a Blue Card and if he or she has legally and continuously resided as a Blue Card holder for two years immediately prior to the submission of the application in the territory of the relevant Member State, then the third-country national concerned shall be allowed to cumulate the periods of residence in different Member States while calculating the five-year period in order to become a long-term resident.[609] If the absence of the highly qualified migrant from EU territory was due to the exercise of an economic activity or performing voluntary service, or to study in

601 Proposed Article 15(2).
602 Proposed Article 15(3).
603 Proposed Article 16(2).
604 Proposed Article 16(3).
605 Proposed Article 16(4).
606 Proposed Article 16(5).
607 Proposed Article 16(6).
608 Proposed Article 16(8).
609 Proposed Article 17(2).

his or her own country of origin,[610] these periods of absence shall not interrupt the calculation of the five-year period as long as they are shorter than 12 consecutive months.[611] Moreover, the Member States shall extend to 24 consecutive months the period of absence allowed once the long-term resident status has been granted.[612] When the EU Blue Card holder is eventually granted a long-term resident status he or she shall be granted a permit which bears the description 'long-term resident – EC/EU Blue Card holder'.[613]

Residence in other Member States

Following two years of legal residence in the first Member State as a Blue Card holder, the third-country national and his or her family members shall be allowed to move to another Member State for the purposes of highly qualified migration.[614] Within one month following the entry into the second Member State, the Blue Card holder shall inform the authorities of the Member State and present all the necessary documents demonstrating that he or she meets the conditions for highly qualified employment for this second Member State.[615]

The second Member State shall notify the applicant as well as the first Member State of its decision to issue or refuse the EU Blue Card.[616] In the case of a refusal, the first Member State shall immediately readmit the Blue Card holder and his or her family members without formalities.[617]

If the application of the Blue Card holder for admission to the second Member State is accepted the family members shall be authorized to accompany him or her into this second Member State.[618] Within one month following the entry into the second Member State, the family members shall notify the authorities of the relevant Member State and apply for a residence permit.[619] The second Member State may ask to see the residence permit of the family members from the first Member State together with their valid travel documents; evidence as to the fact that they have resided as the family members of the Blue Card holder in the first Member State together with him or her; as well as evidence of a valid health

610 Proposed Article 17(5).
611 Proposed Article 17(3).
612 Proposed Article 17(4).
613 Proposed Article 18.
614 Proposed Article 19(1).
615 Proposed Article 19(2).
616 Proposed Article 19(3).
617 Proposed Article 19(3).
618 Proposed Article 21(1).
619 Proposed Article 21(2).

insurance in the second Member State.[620] For the family reunification of families which were not together in the first Member State, the favourable provisions of Article 16 shall apply.[621]

ILLEGAL WORK AMONG LEGALLY RESIDENT THIRD-COUNTRY NATIONALS

One of the aims of the EU in taking on the tasks of government in labour migration by granting economically active migrants a common set of rights is to create a level playing field for third-country nationals legally working in the EU while at the same time protecting them against exploitation.[622] The efforts of the Community in this direction would be significantly undermined if the illegal employment of third-country nationals is not tackled at EU level.

Illegal work among immigrants is a broad concept which can take many forms. The most common type is the work performed by illegal immigrants as a direct consequence of their residence status.[623] This form of illegal work would fall outside the scope of this study as it relates to third-country nationals illegally present in the EU. However, there is also the case of third-country nationals who are legally resident in a Member State, but who resort to working illegally.[624] Their difficulty in finding jobs as third-country nationals correspond with the incentive of employers to hire illegal employees in order to 'minimize costs through non-payment of social contributions, lower salaries, and hiring workers willing to work more flexible hours or with sub-standard working conditions'.[625]

An effective way to combat illegal employment is reducing the incentives for resorting to illegal work both on the side of third-country nationals as well as on the side of the employers. Reducing the incentives for legally resident third-country nationals seeking illegal employment is primarily a matter of integration policy, which shall be discussed below.[626] As for employers, sanctions for illegally employing third-country nationals are important tools in tackling the problem of

620 Proposed Article 21(3).

621 Proposed Article 21(4).

622 Explanatory Memorandum of the Proposal for a Directive on a single application procedure COM(2007) 638 final, Section 3.

623 C. Boswell and T. Straubhaar, 'The Illegal Employment of Foreigners in Europe', *Intereconomics*, Vol.39, No.1 (January/February 2004) pp.4-7.

624 P. Martin, 'Policy Responses to Unauthorized or Irregular Workers', *Intereconomics*, Vol.39, No.1 (January/February 2004) pp.18-20.

625 C. Boswell and T. Straubhaar, 'The Illegal Employment of Foreigners in Europe', *Intereconomics*, Vol.39, No.1 (January/February 2004) pp.4-7. See also: C. Kuptsch, 'The Protection of Illegally Employed Foreign Workers: Mission Impossible?', *Intereconomics*, Vol.39, No.1 (January/February 2004) pp.14-17.

626 See *infra* 2.4.5.

illegal work.

The EU addressed the question of illegal employment among third-country nationals in a Council Recommendation in 1996.[627] The Council's approach, as articulated in the Recommendation, was one that promoted a combination of the integration of lawfully established and employed third-country nationals into the host society and imposing penalties for employing persons without authorization. Accordingly, criminal and/or administrative penalties were recommended to be imposed on those who employ illegal workers as well as those who encourage, facilitate or promote illegal employment. One of the recommended punishments related directly to eliminating the added profits or other advantages obtained by employers regarding wages and charges imposed by the relevant provisions in each Member State.

Even though the Community has, in recent years, been more engaged in tackling illegal work,[628] the efforts have exclusively been in the area of the employment of illegal immigrants.[629] The two Commission Communications of 1998[630] and 2007[631] on undeclared work which is a wider concept encompassing 'any paid activities that are lawful as regards their nature but not declared to the public authorities'[632] confined the description of third-country nationals who may be undeclared workers to those illegally resident in a Member State.[633]
Due to the the lack of attention from the side of the EU, illegal work among third-country nationals in the Community remains a problem which needs to be addressed at the EU level in order not to undermine the efforts of the Community in respect of granting rights to third-country nationals. The Proposal for a Council Directive on a single application procedure touches upon the issue from the legally resident third-country workers' perspective and mentions as one of the benefits of introducing a simplified procedure to reside and work, the fact that it allows easier controls of the legality of the employment of third-country nationals. This first step should be completed with further legislation in the area

627 Council Recommendation of 27 September 1996 on combating the illegal employment of third-country nationals, O.J. C 304, 14.10.1996, pp.1-2.

628 'The fight against illegal employment' was one of the specific orientations determined by the Hague Programme, Section 1.4.

629 See the Proposal for a Directive providing for sanctions against employers of illegally staying third-country nationals, COM(2007) 249 final, 16.05.2007.

630 Communication of the Commission on undeclared work, COM(98) 219, 07.04.1998.

631 Communication stepping up the fight against undeclared work, COM(2007) 628 final, 24.10.2007.

632 Communication of the Commission on undeclared work, COM(98) 219, Section 2.1.

633 *Ibid.*, Section 2.5; Communication stepping up the fight against undeclared work, COM(2007) 628 final, Section 2.

of preventing the illegal employment of legal residents. Furthermore, in a more general manner, as the Commission contends, the insertion of labour migration issues into the discussion on the development of economic and social policy for the EU in the framework of developing a new approach to immigration, shall also contribute to reinforcing policies to combat illegal work and the economic exploitation of migrants.[634]

TURKISH CITIZENS

A section on economic migration would not be complete if the special situation of Turkish citizens were to be omitted. The relevance of the situation of Turkish workers in the EU does not only stem from the subject-matter of this study but also from the recognition of this system as an appropriate model for a Community policy on labour migration when it comes to the security of residence.[635] Indeed, if put on a scale according to the essential rights afforded to different groups of persons in Member States, Turkish citizens would be situated between Union citizens and long-term resident third-country nationals.[636] Having said this, it should be noted that the special regime applying to Turkish citizens does not contain any rights to move from one Member State to the other.

This system, granting Turkish citizens the most extensive rights among third-country nationals legally residing in the EU,[637] is based upon the 1963 EEC-Turkey Association Agreement (the Ankara Agreement). Article 12 of the Ankara Agreement envisaged the realization of the free movement of workers between the Community and Turkey. This aspiration was confirmed and strengthened by the Additional Protocol setting a timetable for the integration process of Turkey and the Community. The Additional Protocol which came into effect on January 1, 1973, provided that the free movement of workers between Member States and Turkey was to be secured between the end of the twelfth and the twenty-second year after the entry into force of the Ankara Agreement.[638] However, Article 12 of the Ankara Agreement and Article 36 of the Additional

634 Commission Communication on a Community Immigration Policy, COM(2000) 757 final, Section 3.2.

635 E. Guild and H. Staples, 'Labour Migration in the European Union' in P.de Bruycker, ed., *The Emergence of a European Immigration Policy*, (Brussels, Bruylant 2003) p.238.

636 K. Groenendijk, 'Citizens and Third Country Nationals: differentiated treatment or discrimination?', presentation at the 4th European Congress For Specialist Lawyers in the Area of Immigration and Asylum in Europe 'The Future of Free Movement of Persons in the EU', 22 April 2005, Louvain-la-Neuve.

637 C. Barnard, *the Substantive Law of the EU: the Four Freedoms*, 2nd edn. (Oxford, Oxford University Press 2007) p.517.

638 Additional Protocol, Article 36(1).

Protocol are not found to be directly applicable.[639]

The development of the regime placing Turkish citizens in a privileged position has developed mainly around Decision 1/80 of the Association Council. Unlike the provisions of the Ankara Agreement and the Additional Protocol, the relevant provisions of Decision 1/80, which shall be discussed below, do possess direct applicability according to the ECJ.[640] Until very recently, it was accepted that this decision of the Association Council did not relate to the first entry of Turkish citizens. In other words, it was agreed that the Member States retained competence 'to regulate both the entry into their territories of Turkish nationals and the conditions under which they may take up their first employment.'[641] The Community rules relating to Turkish citizens solely applied to Turkish workers who had already been integrated into the labour force of a Member State, and their family members. However, in the ECJ Judgment of February 19, 2009 in the case *Soysal*[642] it is stipulated that Member States are precluded from requiring visas from Turkish citizens to 'enter the territory of a Member State in order to provide services there on behalf of an undertaking established in Turkey.'[643] The Court came to this point by interpreting Article 41(1) of the Additional Protocol, which reads: 'the Contracting Parties shall refrain from introducing between themselves any new restrictions on the freedom of establishment and the freedom to provide services.' Consequently, for the first time within the development of the Association Law, the right to regulate the first entry of Turkish citizens into their territories has been limited for Member States.

Returning to the conditions for taking up employment by Turkish citizens already working in the territories of the Member States, the basic rules derive from Decision 1/80. According to Article 6(1) of Decision 1/80 a Turkish worker duly registered as belonging to the labour force of a Member State shall be entitled in that Member State,

(*i*) after one year's legal employment, to the renewal of his permit to work for the same employer, if a job is available;

(*ii*) after three years of legal employment and subject to the priority to be given to workers of Member States of the Community, to respond to another offer of employment with an employer of his choice, for the same occupation;

(*iii*) after four years of legal employment, free access to any paid employment of

639 Case C-12/86, *Demirel v. Stadt Schwäbisch Gmünd* [1987] paragraphs 23 and 25.

640 Case C-192/89, *Sevince v. Staatssecretaris van Justitie* [1990] paragraph 26.

641 Case C-237/91, *Kuş v. Landeshauptstadt Wiesbaden* [1993] paragraph 25.

642 Case C-228/06, *Soysal and Savatlı* [2009].

643 Case C-228/06, *Soysal and Savatlı* [2009] paragraph 62.

his choice.

It can be seen that the main feature of the scheme governing Turkish workers is the increasing rights afforded to them as they stay for many years as a member of the labour force of a Member State. It follows from Article 6(1) of Decision 1/80 that 'once admitted, Turkish workers forming part of the regular labour force are no longer subject to national foreigners' law relating to prolongation of residence permits, temporary residence permits, time limits etc.'[644]

Concerning the determination of the scope of Decision 1/80, the interpretation of two concepts is crucial: the concept of 'being duly registered as belonging to the labour force of a Member State' and that of 'legal employment'. Being duly registered as belonging to the labour force of a Member State can be ascertained by determining whether the legal employment relationship of the person concerned can be located within the territory of a Member State or retains a sufficiently close link with that territory, taking account in particular of the place where the Turkish national was hired, the territory on or from which the paid employment is pursued and the applicable national legislation in the field of employment and social security.[645] The concept applies 'to all workers who have complied with the requirements laid down by law and regulation in the Member State concerned and are thus entitled to pursue an occupation in its territory'.[646] The second concept which is vital to the application of Article 6(1), namely 'legal employment', indicates that a Turkish citizen may only request the renewal of his or her work permit if he or she enjoys 'a stable and secure situation as a member of the labour force of a Member State'.[647] This stable and secure situation entails the 'existence of an undisputed right of residence'.[648]

The ECJ has taken a liberal approach in interpreting the meaning of the concepts comprising Article 6(1) influenced by the case law relating to the free movement

644 K. Hailbronner, 'Immigration and Asylum Law and Policy of the European Union', (The Hague, Kluwer Law International 2000), p.224.

645 Case C-434/93, *Bozkurt v. Staatssecretaris van Justitie* [1995] paragraphs 22 and 23; Case C-36/96, *Günaydın v. Freistaat Bayern* [1997] paragraph 29; Case C-98/96, *Ertanır v. Land Hessen* [1997] paragraph 39.

646 Case C-1/97, *Birden v. Stadtgemeinde Bremen* [1998] paragraph 51.

647 Case C-192/89, *Sevince v. Staatssecretaris van Justitie* [1990] paragraph 30; Case C-434/93, *Bozkurt v. Staatssecretaris van Justitie* [1995] paragraph26; Case C-237/91, *Kuş v. Landeshauptstadt Wiesbaden* [1993] paragraph 12; Case C-188/00, *Kurz v. Land Baden-Württemberg* [2002] paragraph 48.

648 Case C-237/91, *Kuş v. Landeshauptstadt Wiesbade* [1993] paragraph 22; Case C-188/00, *Kurz v. Land Baden-Württemberg* [2002] paragraph 48.

of EU citizens.[649] Accordingly, the Court has found that the activity pursued by a Turkish worker being financed by public funds does not prevent the application of Article 6(1) of Decision 1/80.[650] Neither is the application of Article 6(1) dependent on the status of the Turkish citizen being a worker when he or she first entered the Member State. The relevant provision therefore also applies to those Turkish citizens who, at the time of entry into a Member State, were unemployed,[651] were following vocational training,[652] or were au pairs or students.[653]

Equal Treatment

Once Turkish citizens enter the labour market of the host Member State they enjoy a certain degree of equal treatment with Community workers. The extent of equal treatment is linked to conditions of work, remuneration and receiving assistance in finding employment from employment services. This principle stipulated in Article 10 of Decision 1/80 stems from Article 37 of the Additional Protocol which prohibits discrimination on grounds of nationality between Turkish workers who are employed in the Community and workers who are nationals of other Member States of the Community. It must be noted that 'conditions of work' include the right of Turkish citizens to stand as candidates in elections for bodies representing and defending the interests of workers.[654]

Priority to Turkish workers

In the event that a vacancy cannot be filled by Community workers and the Member States would decide to authorize a call for workers who are not nationals of a Member State in order to fill that vacancy, according to Article 8 of Decision 1/80, in doing so the Member State should endeavour to give priority to Turkish workers. It is inferred that this provision lacks direct effect due to the use of the word 'endeavour'.[655]

Family members

The Ankara Agreement and the body of legal instruments created around it do not contain any rules concerning the right to family reunification of Turkish

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649 F. Weiss and F. Wooldridge, *Free Movement of Persons within the European Community* (The Hague, Kluwer Law International 2002), p.211.

650 Case C-1/97, *Birden v. Stadtgemeinde Bremen* [1998] paragraph 69(3).

651 Case C-1/97, *Birden v. Stadtgemeinde Bremen* [1998].

652 Case C-188/00, *Kurz v. Land Baden-Württemberg* [2002].

653 Case C-294/06, *Payır, Akyüz, Öztürk v. Secretary of State for the Home Department* [2008].

654 Case C-171/01, *Wählergruppe Gemeinsam Zajedno/Birlikte Alternative und Grüne GewerkschafterInnen/UG and Others* [2003].

655 F. Weiss and F. Wooldridge, *Free Movement of Persons within the European Community* (The Hague, Kluwer Law International 2002) p. 215.

citizens. However, once the family members of the Turkish worker have been admitted into the Community they can derive certain rights from the Association Agreement instruments. The most significant set of rights can be found in Article 7 of Decision 1/80. Accordingly, the family members of a Turkish worker, who have been authorized to join him or her,

(*i*) shall be entitled – subject to the Community preference principle – to respond to any offer of employment after they have been legally resident for at least three years in that Member State;

(*ii*) shall enjoy free access to any paid employment of their choice provided they have been legally resident there for at least five years.

As a consequence, after five years of legal residence, the family member acquires an 'individual employment right directly from Decision 1/80' and a parallel right of residence.[656]

The conditions relating to the length of time family members legally reside in the territory of the relevant Member State shall not be applicable to the children of Turkish workers who have completed a course of vocational training in the Member State concerned. They shall be entitled to respond to any job offer provided that their parents have been legally employed in the relevant Member State for at least three years.[657]

Concerning the conditions of access to employment, the situation of the family members of the Turkish worker, as well as the worker himself, has been safeguarded by a standstill clause contained in Decision 1/80. According to Article 13 of this Decision, new restrictions on the conditions of access to employment applicable to workers and their family members may not be introduced by Member States and Turkey.

Family members of Turkish workers shall also benefit from the equal treatment principle concerning receiving assistance from employment services when they are looking for a job.[658] Furthermore, the Additional Protocol ensures that social security measures, including family allowances, are to be adopted for the benefit of Turkish workers and their family members.[659]

CONCLUSION

In sum, the Member States have shown a certain degree of reluctance in adopting

656 Case C-329/97, *Ergat v. Stadt Ulm* [2000] paragraph 40.

657 Decision 1/80, Article 7(2).

658 *Ibid.*, Article 10(2).

659 Additional Protocol, Article 39.

a European-wide management of economic migration as a global concept, thereby forcing the EU to resort to a sectoral approach. The viewpoints of the Member States are backed by the Treaty of Lisbon, which states that determining volumes of admission for third-country nationals for employed or self-employed activity is an exclusive right of the Member States.[660] However, this should not be construed so as to mean that Member States can or should act completely independently from European interests while regulating admission for economic purposes. Economic migration should be managed in a way so as to 'respond to a common needs-based assessment of EU labour markets addressing all skills levels and sectors in order to advance economic growth and to enhance the knowledge-based economy of Europe, to advance economic growth and to meet labour market requirements'.[661] It can be said that while the right to implement labour migration policies and to decide on the number of persons to be admitted is the responsibility of each Member State,[662] their actions should be coordinated and coherent,[663] taking heed of the European Union's needs. Another view would be unacceptable in the view of the long-term residents system as those who have been admitted by a Member State for purposes of economic migration would be able to claim certain rights in another Member State after having obtained long-term resident status. As long as the decision of one Member State as to who should be allowed to enter and in which numbers potentially affects all other Member States the admitting Member State should not be completely free to make that decision.

The reform of the system for the recognition of professional qualifications witnessed in 2005 for the purposes of eradicating obstacles standing in the way of the free movement of EU citizens[664] has not been mirrored in the area of immigration by third-country nationals except for making the recognition of diplomas part of the 'equal treatment' afforded to long-term residents.[665] A true

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660 Consolidated version of the Treaty on the Functioning of the European Union, Article 79(5).

661 Commission Communication 'A Common Immigration Policy for Europe: Principles, Actions and Tools', COM(2008) 359 final, Section II(2).

662 The European Pact on Immigration and Asylum, 16.10.2008, Commitment 1.

663 Commission Communication 'A Common Immigration Policy for Europe: Principles, Actions and Tools', COM(2008) 359 final, Section III(1).

664 The word 'reform' refers to the adoption of Directive 2005/36 of 7 September 2005 on the recognition of professional qualifications, O.J. L 255, 30.09.2005, pp. 22-142, which has repealed Directives 77/452/EEC, 77/453/EEC, 78/686/EEC, 78/687/EEC, 78/1026/EEC, 78/1027/EEC, 80/154/EEC, 80/155/EEC, 85/384/EEC, 85/432/EEC, 85/433/EEC, 89/48/EEC, 92/51/EEC, 93/16/EEC and 1999/42/EC.

665 Until the Proposal for a Council Directive on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and

development of the common immigration policy in line with the Lisbon Strategy would require a more general mechanism concerning the recognition of professional qualifications for all third-country nationals. The Commission has recognized this necessity and has called for the 'promotion of appropriate mechanisms for the recognition of professional qualifications acquired outside the EU'.[666]

2.3.2.6 Researchers

WHY A SPECIAL REGIME FOR RESEARCHERS?

In the face of an increasingly global economy, Europe was seen as not being ready for competition due to the 'worrying' situation of its research.[667] To defeat this fate which would otherwise be awaiting the Union, the Commission launched the European Research Area. The idea behind the creation of this Area was to ensure the better organization of research in Europe by establishing a European policy on research. The principles governing such a policy were laid down by the Commission in its Communication 'Towards a European Research Area'. In this context, 'making Europe attractive to researchers from the rest of the world' was defined as one of the aspects of the aspired research area. It is against this background that some years before the EU announced its new sectoral approach towards labour migration with its Policy Plan on Labour Migration; the Commission had already called for simplifying and harmonizing conditions and procedures of entry and residence for third-country nationals who are researchers.[668]

A parallel approach towards research was adopted by the Lisbon Strategy, which lays down the aim of making the Union the most competitive and dynamic knowledge-based economy in the world. As research is one of the central components of the new economy and knowledge-based society[669] it is highly relevant to the goals of the Lisbon Strategy. Consequently, the Lisbon Strategy endorses the steps to be taken towards attracting and retaining high quality research talent in Europe.[670]

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on a common set of rights for third-country workers legally residing in a Member State and the Proposal for a Directive on the conditions and residence of third-country nationals for the purposes of highly qualified employment are adopted.

666 Commission Communication 'A Common Immigration Policy for Europe: Principles, Actions and Tools', COM(2008) 359 final, Section II(2).

667 Towards a European research area COM(2000) 6 final, 18.01.2000, Section 1.

668 *Ibid.*, Section 6.3.

669 Making a reality of the European Research Area: Guidelines for EU research activities (2002-2006), COM(2000) 612 final, 04.10.2000.

670 Lisbon European Council Conclusions, 23-24 March 2000, Point 13.

Indeed, making Europe attractive to researchers, especially by way of improving the administrative and regulatory conditions for the reception of third-country nationals as researchers, was placed at the centre of the research policy when it was formed.[671] Attracting third-country national researchers has become even more crucial following the Barcelona European Council which announced the aim of increasing the expenditure on research so as to approach 3% of GDP by the year 2010.[672] To attain this objective meant that Europe had to 'attract' 700,000 additional researchers.[673] The implications of such a rise in the demand for researchers in the immigration policy was foreseen shortly afterwards with a set of proposals from the Commission.

In March 2004, the Commission presented a proposal for a Directive and two proposals for Council Recommendations: a Directive on a specific procedure for admitting third-country nationals for purposes of scientific research; a Council Recommendation to facilitate the admission of third-country nationals to carry out scientific research in the European Community; and a Council Recommendation to facilitate the issue by the Member States of uniform short-stay visas for researchers from third countries travelling within the European Community for the purpose of carrying out scientific research.[674] These three proposals, which are commonly referred to as the 'Scientific Visa package'[675], were adopted at the end of the following year.

A SPECIFIC PROCEDURE FOR ADMITTING RESEARCHERS

The Directive on a specific procedure for admitting researchers,[676] promoted as the 'world's first legislative effort supporting researchers' mobility',[677] establishes

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671 The International Dimension of the European Research Area, COM(2001) 346 final, 25.06.2001, Section 3.2.1.

672 Presidency Conclusions of the Barcelona European Council of 15-16 March 2002, Point 47. For a discussion as to the ways and means of reaching the 3% of GDP aim see the Commission Communication 'More Research for Europe: Towards 3% of GDP' COM(2002) 499 final, 11.09.2002.

673 Investing in research: an action plan for Europe, COM(2003) 226 final, 04.06.2003, Section 4.1.

674 Communication on the presentation of a proposal for a directive and two proposals for recommendations on the admission of third-country nationals to carry out scientific research in the European Community, COM(2004) 178 final, 16.03.2004.

675 See the Researcher's Mobility Portal: http://ec.europa.eu/eracareers/index_en.cfm.

676 Directive 2005/71 on a specific procedure for admitting third-country nationals for the purposes of scientific research, O.J. L 289, 03.11.2005, pp.15-22.

677 European Commission's 'Researchers in Europe 2005' Initiative website, Media Fact Sheet dated 1 September 2005, available at: http://ec.europa.eu/research/researchersineurope/documents/media_fact_sheet_scientvisa_en.pdf (last visited 21.01.2009).

the conditions for admitting researchers[678] to the Member States for a period which exceeds three months in order to carry out a research project under hosting agreements with research organizations.[679] It shall be seen that within the scheme adopted for the admission and residence of researchers, the research project and the research organization constitute vital components besides the third-country national and the Member State.

The decisive element as to which third-country nationals shall be covered by the Directive is the activity which shall be carried out, rather than the third-country national him/herself. The importance accorded to the research project can be observed in Article 3(1) defining the scope of the Directive which states that 'third-country nationals who apply to be admitted to the territory of a Member State for the purpose of carrying out a research project' shall be subject to the Directive. The alternative situation of placing the researcher at the starting point would restrict the facilitated admission and residence system to 'persons who already have the status of researcher in their country of origin' which would not contribute considerably to solving the serious shortage of researchers awaiting the Union.[680]

For those covered by the Directive a facilitated admission and residence procedure is established on the basis of a 'hosting agreement' which shall be concluded between the research organization and the researcher. A research organization which can host a researcher by signing a hosting agreement has to be accordingly approved in accordance with the national law of the Member State.[681] This approval relates to their reliability and aims at ensuring that they assume their responsibilities in performing their tasks.[682] The necessity for subjecting research organizations to such an approval arises out of the nature of the system created whereby research organizations assume an important responsibility in the admission process of researchers. Member States shall regularly publish and update the lists of approved research organizations for the

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678 Directive 2005/71, Article 2(d) defines a researcher for the purpose of the Directive as 'a third-country national holding an appropriate higher education qualification, which gives access to doctoral programmes, who is selected by a research organization for carrying out a research project for which the above qualification is normally required.'

679 Directive 2005/71, Article 1.

680 Explanatory Memorandum of the Proposal for a Directive on a specific procedure for admitting third-country nationals for purposes of scientific research, COM(2004) 178 final, 16.03.2004.

681 Directive 2005/71, Article 5(1) and (2).

682 Explanatory Memorandum of the Proposal for a Directive on a specific procedure for admitting third-country nationals for purposes of scientific research, COM(2004) 178 final, 16.03.2004, Section 1.3.

purposes of the Directive.[683]

Research organizations share the role of admitting third-country nationals by way of signing a hosting agreement. The hosting agreement is the document by which the researcher undertakes to complete the research project and the organization undertakes to host the researcher for that purpose.[684] A hosting provides for a facilitated admission for the researcher concerned. In order for this to be the case, the hosting agreement has to fulfil the conditions set out in Article 6. First of all, the research project subject to the hosting agreement should have been accepted by the relevant authorities in the organization.[685] In approving the research project, the organization should examine the two elements constituting the project: the purpose and duration of the research, the availability of the necessary financial resources for it to be carried out;[686] and the researcher's qualifications in the light of the research objectives.[687] Secondly, the researcher should have sufficient monthly resources to meet his or her expenses and return travel costs without having recourse to the Member State's social assistance system.[688] The monthly resources may be ensured by an employment contract or a fellowship.[689] Thirdly, the research organization is also responsible for the health insurance of the researcher.[690] Finally, the hosting agreement shall specify the legal relationship and working conditions of the researcher.[691]

Once the hosting agreement has been signed, and the application is made to the competent authorities of the Member States, the third-country national shall be admitted when certain additional conditions exist. The researcher should present a valid travel document, a statement of financial responsibility issued by the research institution, and he or she should not pose a threat to public policy, public security or public health.[692] It should be noted that the threat does not have to be a threat caused by the specific individual, but also the purpose of the research envisaged shall be scrutinized by the Member State.[693] The terms of the hosting

683 Directive 2005/71, Article 5(5).

684 *Ibid.*, Article 6(1).

685 *Ibid.*, Article 6(2)(a).

686 *Ibid.*, Article 6(2)(a)(i).

687 *Ibid.*, Article 6(2)(a)(ii).

688 *Ibid.*, Article 6(2)(b).

689 Explanatory Memorandum of the Proposal for a Directive on a specific procedure for admitting third-country nationals for purposes of scientific research, COM(2004) 178 final, 16.03.2004, Section 1.1.

690 Directive 2005/71, Article 6(2)(c).

691 *Ibid.*, Article 6(2)(d).

692 *Ibid.*, Article 7(1).

693 Explanatory Memorandum of the Proposal for a Directive on a specific procedure for admitting third-country nationals for purposes of scientific research, COM(2004) 178

agreement may also be checked by Member States; however, such a double-check should be confined to exceptional or problem cases,[694] since the aim is to set up an accelerated procedure which is based on trust between the Member States and research organizations. This responsible and privileged position given to research organizations is in part the consequence of the intentions of the Barcelona European Council which indicated that two-thirds of the investment needed to increase the research expenditures, so as to approach 3% of GDP by 2010, should come from the private sector.[695]

When all conditions are observed, following the assessment made by Member States, the researcher shall be admitted and issued with a residence permit for a period of at least one year. This residence permit shall be renewed as long as the conditions are still met. However, if the research project is scheduled to last shorter than a year, the residence permit shall be issued for the duration of the project.[696] If the Member State allows for the family members to join the researcher in its territory, their residence permits shall have the same duration of validity as the researcher's permit.[697]

The Member States may withdraw or refuse to renew the residence permit when it is established that this permit has been fraudulently acquired or the conditions are no longer met.[698] In such a case, or in a case where the application for a residence permit is rejected, the researcher shall have the right to mount a legal challenge before the Member State authorities.[699]
The issuing of a residence permit to the researcher brings with it three categories of rights: those on teaching, on equal treatment and on carrying out research in other Member States. Accordingly, a researcher who has been admitted for purposes of carrying out a research project may be allowed to teach. The terms of teaching shall be regulated according to the national legislation of the relevant Member State. Similarly, the Member States may set a maximum number of hours or of days for the teaching activity.

Those researchers who have been granted a residence permit shall also enjoy equal treatment with nationals concerning the recognition of diplomas,

final, 16.03.2004, Section 1.2.

694 *Ibid.*

695 Presidency Conclusions of the Barcelona European Council of 15-16 March 2002, Point 47.

696 Directive 2005/71, Article 8.

697 *Ibid.*, Article 9.

698 *Ibid.*, Article 10.

699 *Ibid.*, Article 15(4).

certificates and other professional qualifications in accordance with the relevant national procedures, working conditions, including pay and dismissal, branches of social security, as defined in Regulation 1408/71, tax benefits and access to goods and services and the supply of goods and services made available to the public.[700]

Finally, a researcher who has been granted a resident permit subject to Directive 2005/71 shall be allowed to carry out part of his or her research in another Member State.[701] A distinction should be made between those who shall stay in another Member State for a period shorter than three months and those who shall stay for longer than this period. In the former situation, the research may be carried out on the basis of the hosting agreement concluded in the first Member State.[702] However, in the latter case, a new hosting agreement may be required by the Member State in order to carry out research in its territory.[703]

Envisaging that it would take some years before the Directive will be in full operation, one of the recommendations accompanying Directive 2005/71 calls on the states to already facilitate issues relating to the admission and residence of researchers, before the transposition of the Directive.[704] It was indeed the case that only six Member States had met the deadline of October 12, 2007[705] to transpose Directive 2005/71 into national law.[706] Recommendation 2005/762 therefore becomes an important initiative by the Council to get Member States moving towards achieving the goals set by Directive 2005/71 until the Directive is fully transposed.

SHORT-TERM VISAS FOR RESEARCHERS

As Directive 2005/71 concerns researchers who shall be admitted for a period longer than three months[707] there is a legislative deficiency of secondary legislation facilitating the acquisition of short-term visas for researchers. If every

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700 *Ibid.*, Article 12.

701 *Ibid.*, Article 13(1).

702 *Ibid.*, Article 13(2).

703 *Ibid.*, Article 13(3).

704 Council Recommendation of 12 October 2005 to facilitate the admission of third-country nationals to carry out scientific research in the European Community (2005/762/EC), O.J. L 289, 03.11.2005, pp.26-28.

705 Directive 2005/71, Article 17(1).

706 CORDIS: Community Research and Development Information Service, News item dated 16.10.2007 available at: http://cordis.europa.eu/fetch?CALLER=EN_NEWS&ACTION=D&DOC=7&CAT=NEWS&QUERY=011ef9b965f2:ddae:17fa8c48&RCN=28520 (last visited 21.01.2009).

707 Directive 2005/71, Article 1.

time there is a conference in one of the EU Member States, third-country nationals who are required to have a visa in order to enter the EU would have to tackle lengthy and complicated visa procedures so that it could not be expected that the EU would soon 'become the most competitive and dynamic knowledge-based economy in the world'.

For this reason, a recommendation which deals specifically with the issue of short-term visa was adopted together with the Directive and Recommendation on long-term admission. This Recommendation[708] intends to facilitate short-term visas for researchers by calling upon the Member States to speed up the examination of visa applications; to issue multiple entry visas to researchers who travel frequently within the European Union; to issue visas free of administrative fees for researchers; and to harmonize the approach towards supporting evidence which researchers are required to enclose with their visa application. The Recommendation also aims at developing the exchange of best practices in the area of local consular cooperation and more generally in the facilitation of the issue of uniform visas for researchers.

CONCLUSION

Directive 2005/71 establishing a specific procedure for admitting researchers constitutes a positive development within the immigration law of the EU. With regard to admission, the speedy procedure envisaged by the Directive for researchers is an improvement to the admission rules. Because even if the Directive relates to a limited group of third-country nationals, it is a step towards facilitating the entry conditions of bona fide travellers who genuinely intend to enter the EU for a lawful purpose.[709] The facilitation of entry conditions for researchers does not only represent a trend towards a general relaxation of admission procedures for certain categories of persons but it is also a leap forward in making Europe more attractive to researchers from other parts of the world, which is one of the original implementing measures in order to realize the European Research Area. Concerning this latter aspect, the Directive also contributes with the rights it confers to researchers who are residing in the EU under the provisions of the Directive. However, this second tier of the double objective which the Directive seeks to accomplish, namely the European Research Area, is far from being complete.

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[708] Recommendation of the European Parliament and of the Council of 28 September 2005 to facilitate the issue by the Member States of uniform short-stay visas for researchers from third countries travelling within the Community for the purpose of carrying out scientific research (2005/761/EC), O.J. L 289, 03.11.2005, pp. 23-25.

[709] International Organization for Migration, 'Glossary on Migration', (2004).

The reason why the completion of the European Research Area has not yet occurred lies in several factors such as the fragmentation of research activities.[710] The term 'fragmentation' in the research area is used to define many characteristics such as the complexity of moving across institutions and sectors, but it refers more often than not to the national differences between Member States concerning, *inter alia*, funding, and the difficulty of moving from one Member State to the other. This fragmentation also causes Europe to lose a great deal of its attractiveness which contradicts the basic principle of the envisaged European Research Area. With a view to fully realizing the European Research Area the Commission relaunched the discussion in its Green Paper of 2007.[711] The Green Paper introduces the main features which the Research Area should comprise, 'a wide opening of the European Research Area to the world' being one of them.

The pace of the development of the European Research Area, which is not expected to be fully established before 2020,[712] gives more time to the Member States to create an entry and residence system for researchers that would establish Europe as an area with no impediments for scientific research to take place. The Directive which has been adopted is a step in the right direction which will find its true implications in the way Member States transpose it and apply its principles in a way so as to facilitate the entry and residence of researchers as bona fide travellers.

2.3.2.7 Students

The admission of students into the Community was first made subject to a Council Resolution[713] in 1994. The Resolution invited the Member States to bring their national legislation on the admission of third-country nationals for study purposes in conformity with the principles that it set. Accordingly, a third-country national was to be admitted for study purposes as long as he or she fulfilled the general conditions for entry and residence in a Member State, had a firm offer of admission to a higher education institution for a full-time course of study and had the financial means to cover the cost of studies and subsistence. Member States could also require health insurance. Although as a rule the economic activity of students was not allowed, the Resolution also allowed the

[710] Green Paper on the European Research Area: New Perspectives, COM(2007)161 final, 04.04.2007, Section 1.

[711] Green Paper on the European Research Area: New Perspectives, COM(2007)161 final, 04.04.2007.

[712] *Ibid.*, Section 2.

[713] Council Resolution of 30 November 1994 on the admission of third-country nationals to the territory of the Member States for study purposes, O.J. C 274, 19.09.1996, pp.10-12.

Member States to make exceptions to this rule.

Ten years after the adoption of this Council Resolution, the EU approach towards the admission of students was made clearer and stronger with the adoption of Directive 2004/114 on the admission for the purposes of studies, pupil exchange, unremunerated training or voluntary service.[714] The Directive was drafted principally to regulate the admission of students; yet Member States may also apply it to those applying to be admitted for the purposes of pupil exchange, unremunerated training or voluntary service.[715]

Directive 2004/114 first sets the general conditions for admission, followed by special conditions linked to each category of third-country nationals covered by the Directive. All four categories of persons who fall within the scope of the Directive shall present a valid travel document; present parental authorization for the planned stay if under the age of majority; have health insurance; not be a threat to public policy, public security or public health; if the Member State requires a fee to be paid for the processing of the application, they should provide proof that this fee has been paid.[716] In addition to these conditions, in order to be admitted, a student must have been accepted by a higher education establishment to follow a study; must show that he or she will have sufficient resources during his/her stay; and if the Member States so requires, he or she must provide evidence as to sufficient knowledge of the language of the course, and that he or she has paid the fees charged by the higher education establishment.[717]

School pupils who would like to follow an exchange programme should be within the allowed age limits; should have been accepted by a secondary education establishment; should be accommodated by a family meeting the conditions set by the Member State; the pupil exchange programme should be a recognized one, operated by an organization recognized for that purpose; and the pupil exchange organization should accept responsibility for the pupil throughout his or her study.[718] The specific conditions relating to unremunerated trainees relate to the signing of the training agreement; providing evidence that the trainee will have sufficient resources; and, if the Member State so requires, the

[714] Council Directive 2004/114 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, O.J. L 375, 23.12.2004, pp.12-18.

[715] Directive 2004/114, Article 3.

[716] *Ibid.*, Article 6(1).

[717] *Ibid.*, Article 7(1).

[718] *Ibid.*, Article 9(1).

receiving of basic language training for the purposes of the placement.[719] Finally, volunteers should be within the age limits set by the Member State; they should produce an agreement with the responsible organization describing their tasks, the conditions under which they will be supervised, the working hours and resources available to them; the organization responsible for the voluntary service must have subscribed an insurance policy and must accept full responsibility for the volunteer during his or her stay; and, if the Member State so requires, the volunteer must receive a basic introduction to the language, history and political and social structures of the Member State.[720]

If the third-country nationals covered by the Directive apply for admission in order to participate in Community programmes enhancing mobility towards or within the Community, Member States are under an obligation to facilitate their admission procedure.[721] Likewise, Directive 2004/114 also lays down facilitated conditions for students to move to another Member State for reasons relating to their study, if they have already been admitted as students by one Member State.[722]

The residence permit which shall be issued shall be one of at least one year for students[723] and at most one year for the other categories of third-country nationals covered by the Directive. However, in exceptional cases the residence permit may be valid for a longer period for unremunerated trainees[724] and for volunteers.[725]

There is another distinction which is made between students and other categories of third-country nationals in the Directive concerning the right to work. While students are, as a rule, entitled to be employed, and may be entitled to exercise self-employed economic activity,[726] no such right is ensured for the other categories. The Member States shall set the conditions for the economic activity exercised by students;[727] furthermore, they may also restrict access to the labour market for the first year of residence.[728]

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719 *Ibid.*, Article 10.
720 *Ibid.*, Article 11.
721 *Ibid.*, Article 6(2).
722 *Ibid.*, Article 8.
723 *Ibid.*, Article 12(1).
724 *Ibid.*, Article 14.
725 *Ibid.*, Article 15.
726 *Ibid.*, Article 17(1).
727 *Ibid.*, Article 17(2).
728 *Ibid.*, Article 17(3).

A residence permit issued in accordance with Directive 2004/114 may be withdrawn or its renewal may be refused if the permit has been fraudulently acquired, the holder no longer meets the relevant conditions, or on grounds of public policy, public security and public health.[729] In the case of any decision rejecting an application for a residence permit, or a withdrawal or a refusal to renew it, the third-country national shall have the right to mount a legal challenge before the relevant Member State authorities.[730]

2.4 Immigration Policy

2.4.1 Introduction

The particular nature of the present study lies in the fact that the focal point, which is to *determine to what extent Turkish immigration laws are in line with the European Union immigration acquis from the perspective of being ready for EU membership and to ascertain the impact that alignment will have on the Turkish legal system*, will not become relevant in the very near future. In this respect, by the time the date of Turkish membership is near, the template according to which this study tests the Turkish laws will have changed. What has been portrayed, in this study, as the entirety of the EU acquis on immigration will become one segment of the applicable acquis. This study does not aim to speculate what the exact scope of the future acquis will be. Instead, it is concerned with presenting the significant migration-related issues which shall be regulated or coordinated at the EU level. Moreover, the issues discussed point at the prevailing approach towards immigration law, meaning that even if a moratorium is decided upon, as has been proposed,[731] the issues discussed below will still be relevant in putting the current legislation into perspective and presenting a more complete comprehension of the acquis as it indicates the currently accepted perception of immigration law.

The discussions on migration policy contain facts and concepts which are interlaced to such an extent that clear-cut accounts of which concept is an outcome of which fact or what the factors are of which concept are risky to determine as all the related issues criss-cross each other at numerous angles, resembling the chicken and egg debate. The good news is that all the relevant

729 *Ibid.*, Article 16.

730 *Ibid.*, Article 18(4).

731 K. Groenendijk proposed a moratorium for a certain period of time during which new legislation at EU level shall not be adopted in the area of immigration and asylum law in order to allow the already adopted legislation to be digested by Member States in his Concluding Remarks at the Second Forum on EU Immigration and Asylum Policy, 9-10 November 2007 in Milan, organized by the Europäische Rechtsakademie (ERA).

notions intersect around a few central points corresponding to the main concerns of the European Union, allowing us to sort the required responses. Consequently, the direction from which the issue is approached does not make a difference, as the solutions directed by various concerns are identical.

Having made a note of the complexity of the area of migration policy, it is possible to start from one of the facts acting as a driving force behind initiatives in the immigration area, namely the ageing population of Europe. According to Eurostat projections, the population at the EU level will decline by the year 2030. Although a population decline will affect different regions of the Union at different levels, it is certain that all regions of the EU will age, leading to a decrease at EU level in the share of the population of working age.[732] It follows that the decrease in the population of the Member States, combined with the phenomenon of ageing which will be the trend throughout Europe, will lead to labour shortages. It is mainly from this point of view that the EU derived its interest in immigration. Indeed, the obvious fate of Member States' markets being increasingly dependant on a third-country national work force makes indispensable the creation of an immigration policy which would 'facilitate and accelerate the entry into the EU labour market of those third-country workers for whom there is a demonstrated need.'[733] It is true that there can be no mention of economic growth without population growth.[734] Thus, in order to make sure that the Member State economies operate at full speed, or as it has been put by the Commission, that the full potential of European economies are 'unleashed',[735] migration into the Union should be organized accordingly. This approach fits within the 'need' scenario[736] dominating the economic migration discussion at European level. It is this 'need' for third-country nationals that compels the Union to engage in developing a policy that would accommodate the current and potential demand of the markets. Indeed, the situation of the labour markets have obliged the Union to consider its migration policy 'in terms of supply and

732 Eurostat, 'Long Term Population Projections at Regional Level', Statistics in Focus: Population and Social Conditions, Issue number: 28/2007, 22.03.2007.

733 Commission's Action Plan for skills and mobility, COM(2002) 72 final, 13.02.2002, Section 3.2.4.

734 Green Paper 'Confronting demographic change: a new solidarity between the generations', COM(2005) 94 final, 16.03.2005, Section 1.1.

735 Commission Communication 'European Values in the Globalized World', COM(2005) 525 final, 20.10.2005.

736 Policy Plan on Legal Migration, COM(2005) 669 final, 21.12.2005; Commission Communication 'The Global Approach to Migration one year on: Towards a comprehensive European Migration Policy', COM(2006) 735 final, 30.11.2006, Section 3.2.

demand of labour'.[737]

While the European Union has repeatedly admitted the mitigating effect of immigration on the decline in the workforce[738] and that the Common Immigration Policy should take into account the demographic development of the Union,[739] it also made clear on various occasions that migration alone cannot be the long-term solution to falling birthrates and the ageing of the population,[740] nor can it be a substitute for economic reforms.[741] The reason why replacement migration[742] does not serve as a long-term solution for countries facing a population decline lies in the changing birth rates of immigrant communities. The fertility rates of immigrants which tend to be above that of the local communities are inclined to drop towards the fertility rates of the locals.[743] Combined with the simple fact that immigrants age too, their falling birth rates make replacement migration alone an unreliable solution to a declining labor force. Nevertheless, immigration will continue to be effective in the short and mid-term in mitigating the results of a population decline in combination with other social and economic policies.[744]

Zero immigration policies which have never been realistic also ceased to be

737 E. Guild and H. Staples, 'Labour Migration in the European Union', in P. de Bruycker, ed., *The Emergence of a European Immigration Policy* (Brussels, Bruylant 2003) p.217.

738 Commission Communication on a Community Immigration Policy, COM(2000) 757 final, Section 4; Green Paper 'Confronting demographic change: a new solidarity between the generations', COM(2005) 94 final, 16.03.2005, Section 1.2. 'The Possible Contribution of Immigration'.

739 Commission Communication on a Community Immigration Policy, COM(2000) 757 final, 22.11.2000.

740 Commission Communication 'European Values in the Globalized World', COM(2005) 525 final, 20.10.2005; Policy Plan on Legal Migration, COM(2005) 669 final, 21.12.2005, Section 1.2.

741 Green Paper 'Confronting demographic change: a new solidarity between the generations', COM(2005) 94 final, 16.03.2005, Section 1.2. 'The Possible Contribution of Immigration'.

742 Replacement Migration is defined as "the international migration that would be needed to offset declines in the size of a population, and declines in the population of working age, as well as to offset the overall ageing of population" in 'Replacement Migration: Is It a Solution to Declining and Ageing Populations?', p. 91, prepared by United Nations Population Division (2001).

743 A. Murray, 'Growing Old Gracefully: How to ease population ageing in Europe', Centre for European Reform (CER) (January 2008) p.18.

744 These policies include the promotion of an increase in birth rates, increasing the rate of employment, improving the productivity in Europe and creating sustainable public finances according to the Commission as maintained in Commission Communication: The Demographic Future of Europe – from challenge to opportunity, COM(2006) 571 final, 12.10.2006.

desirable or appropriate.[745] The search for a new approach to immigration resulted in the introduction of the Global Approach to Migration. This approach is the umbrella under which various relevant policy areas are synchronized and translated into coherent policies and action. The 'Global Approach' was introduced by the European Council in December 2005;[746] however, the concept was not new. The roots of the Global Approach can be traced back to documents dating from as early as 1991. In the Communication on Immigration, the Commission drew attention to the multi-dimensional character of the immigration phenomenon proposing the adoption of 'a global approach to the problem'.[747] This call from the Commission found its political support one year later at the Edinburgh European Council. A declaration annexed to the Presidency Conclusions was entitled 'Declaration on Principles of Governing External Aspects of Migration Policy',[748] whereby the Member States expressed their conviction that a number of factors play a role in the reduction of migratory movements and that a coordinated set of policy responses were needed to realize it. If migration was going to be dealt with at the EU level, it should aim at more than just providing short-term solutions. A comprehensive immigration policy should address the root causes of migration, bringing the development aspect of migration into the discussion, which can only be utilized in cooperation with countries of origin. This approach was voiced once more at the Tampere European Council of 1999.[749] According to the Tampere Milestones, a comprehensive immigration policy is to be achieved by not only addressing the root causes of migration but also by managing migration in a more efficient way which also meant informing potential migrants of actual possibilities for legal migration into the EU. Both elements could not be addressed without establishing close cooperation with countries of origin. As for the internal facet of the comprehensive immigration policy the Tampere Milestones set forth the fair treatment of third-country nationals. The European Pact on Immigration and Asylum which was adopted at the October 2008 European Council[750] based on the Communication 'A Common Immigration Policy for Europe' further particularizes what the Global Approach should comprise. However, the

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745 Commission Communication on a Community Immigration Policy, COM(2000) 757 final, 22.11.2000.

746 Brussels European Council Presidency Conclusions, Annex I, 'Global Approach to Migration: Priority Actions Focusing on Africa and the Mediterranean', 17 December 2005.

747 Commission Communication on Immigration, SEC(91) 1855 final, 23.10.1991.

748 Annex 5 to Part A of the Conclusions of the Presidency, Edinburgh European Council, 11-12 December 1992, SN 456/92.

749 Tampere European Council Presidency Conclusions, 15-16 October 1999.

750 Presidency Conclusion of the Brussels European Council of 15 and 16 October 2008, Paragraph 19.

implementation of the commitments contained therein is yet to be seen. Even though the comprehensive or balanced approach to immigration is not a fixed notion with an accepted definition, one thing is clear: it aims at maintaining sustainable migration. Sustainable from the migrants', European Union's as well as the country of origin's point of view. Consequently, the elements of the Global Approach can be organized under four categories, for the sake of clarification keeping in mind that all 'categories' are intertwined: the development aspect, the external relations aspect, the fair treatment of the immigrant, and integration.

2.4.2 Development and Migration

As already explained, the Global Approach to Migration focuses on addressing the root causes of migration through utilizing the proximity of the migration phenomenon for development. Within the context of this relation between migration and development, the EU has ascertained its main challenge to be to tackle the main push factors of migration, which are poverty and the lack of job opportunities.[751] The underlying notion is to 'offer alternatives to emigration' by contributing to the creation of livelihood opportunities.[752] However, as it can be seen from the proposed actions in connection with the development aspect of migration, the 'development' in question is not only the development of the country of origin but also of the EU, in terms of a needs-based approach. It should therefore be made clear that the subject-matter can more correctly be addressed as 'co-development' rather than solely 'development' which suggests that all the proposed actions aim at developing the sending country. Co-development, which is defined as the 'concerted improvement of economic and social conditions at both origin and destination'[753] is a very appropriate target to be promoted by migration. The following analysis of the tools that may be utilized in order to serve development goals make it clear in which respects migration can promote co-development. The explanations below relate to the three, most commonly debated development policy tools at the EU level, namely, remittances, circular migration and mobility partnerships.

2.4.2.1 Remittances

The first tool which can be utilized within the context of the development–

[751] Commission Communication 'The Global Approach to Migration one year on: Towards a comprehensive European migration policy', COM(2006)735 final, Section 3.1.2; R. Cholewinski, *Migrant Workers in International Human Rights Law: Their Protection in Countries of Employment* (Oxford, Clarendon Press 1997), p.19.

[752] Commission Communication 'Priority Actions for Responding to the Challenges of Migration: First follow-up to Hampton Court', COM(2005) 621 final, 30.11.2005.

[753] Report of the Secretary-General to the General Assembly of the United Nations, 'International Migration and Development', 18.05.2006.

migration nexus are remittances. Remittances, which can be described as the 'portion of migrant workers' earnings sent home to their families',[754] amounted to over $318 billion in 2007,[755] up from $206 billion in 2006, and $193 billion in 2005.[756] These figures show that they exceed official development aid in several emigration countries.[757] Reaching approximately ten per cent of the world's population,[758] remittances constitute the 'most tangible and perhaps the least controversial link between migration and development'.[759] The money sent back home by emigrants does not only amount to relief for their families but for the whole country as it is spent in the local economy, thereby increasing the demand for local goods and services.[760] It is for this reason that any discussion on a comprehensive migration policy involving the development aspect of migration would have to contain suggestions as to how to deploy these transfers of money for development purposes. The EU has also devoted attention to the issue of establishing policy action on remittances. What makes policies on remittances problematic, or rather delicate, is the fact that they are private money. The EU approach towards utilizing remittances as policy tools respects this private character of remittances. Accordingly, the Commission proposes two central policy actions: making transfers cheaper, faster and safer, and enhancing their development impact in recipient countries.[761]

In order to foster cheap, fast and secure ways to transfer remittances, the Commission lays down a catalogue of required action. Before anything else, any policy on remittances would need to be based on accurate data, which for the time being is not present.[762] Many remittance senders and receivers remain outside the formal financial system making it very difficult to gather accurate

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754 IFAD (the International Fund for Agricultural Development) Report 'Sending Money Home: Worldwide Remittance Flows to Developing and Transition Countries' (December 2007).

755 The World Bank Migration and Remittances Factbook 2008.

756 D. Ratha, 'Leveraging Remittances for Development', Migration Policy Institute (MPI) Policy Brief (June 2007).

757 OECD, 'The Development Dimension: Migration, Remittances and Development', (November 2005).

758 IFAD (the International Fund for Agricultural Development) Report 'Sending Money Home: Worldwide Remittance Flows to Developing and Transition Countries' (December 2007).

759 D. Ratha, 'Leveraging Remittances for Development', Migration Policy Institute (MPI) Policy Brief (June 2007).

760 P. Legrain, *Immigrants: Your Country Needs Them* (London, Little, Brown 2007) p.165.

761 Commission Communication 'Migration and Development: Some concrete orientations', COM(2005) 390 final, 01.09.2005.

762 *Ibid.*, Annex 2: Initiatives and Recommendations for Fostering Cheap, Fast and Secure Ways to Transfer Remittances.

data.[763] In order to allow informed policy decisions and draw the attention of the business industry to the existing financial opportunities the informal flow of money should also be included in the available data. Correspondingly, so as to allow informed choices by potential remitters, the remittance market should be made more transparent, which means making widely available to the public certain information on the costs and conditions that apply to each remittance channel.[764] Once these foundations in order to create a policy on remittances are laid by way of acquiring and providing more complete information as to remittances, the skeleton of the policy can be built. This skeleton should consist of a combination of a legal and technical framework for remittances. This would mean, on the one hand, creating a level playing field by ensuring the full harmonization of remittance services at the EU level while, on the other, linking the payment systems of the EU to those of developing countries.[765] When the whole structure has been built, the final challenge is to facilitate the access of migrants to banking services; therefore the Commission has taken it upon itself to include the issue of improving access to banking services for people in developing countries and for migrants in the EU in its contacts with relevant stakeholders.[766]

Coming to how all this could contribute directly to the development aspect of migration, the Commission has also had brainstorming sessions as to how remittances can contribute more to the development of countries of origin without going against the private character of the money that is transferred. The focus is placed on motivating immigrants to invest in their countries of origin. To this end, a combination of measures has been proposed by the Commission such as promoting good governance in order to create a sound investment climate, establishing an efficient system of financial intermediation, and supporting collective remittance schemes which Hometown Associations can help accumulate from parts of the savings of individual migrants and consequently direct towards productive activities.[767] In respect of the latter issue of Hometown

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763 IFAD (the International Fund for Agricultural Development) Report 'Sending Money Home: Worldwide Remittance Flows to Developing and Transition Countries' (December 2007); R. Chami, C. Fullenkamp and S. Jahjah, 'Are Immigrant Remittance Flows a Source of Capital for Development?', IMF Working Paper (September 2003).

764 Commission Communication 'Migration and Development: Some concrete orientations', COM(2005) 390 final, 01.09.2005, Annex 2: Initiatives and Recommendations for Fostering Cheap, Fast and Secure Ways to Transfer Remittances.

765 *Ibid.*

766 *Ibid.*

767 Commission Communication 'Migration and Development: Some concrete orientations', COM(2005) 390 final, 01.09.2005, Annex 3: Initiatives and Recommendations for Facilitating the Contribution of Remittances to the Development of Migrants' Countries of

Associations, the primary challenge is to map the diasporas of developing countries. Once the link is established between the countries of origin and the diasporas, Hometown Associations can be established through which the transfer of mainly remittances, as well as skill or know-how, can be systematized. The most celebrated contribution of Hometown Associations to the countries of origin can be seen in the funding of small-scale development projects through collective remittances, which make them 'prime actors in co-development'.[768] These can take the form of road construction and paving and the provision of water, sewerage and electricity facilities.[769] Such basic infrastructural work funded by collective remittances is an essential basis for further economic development in the home towns of immigrant communities.[770] As a result, the Hometown Associations also have a role in reducing migration pressures.[771] However, such contributions by these associations to the development of the sending country are not commonly observed in the European context. With these in mind, the Commission has recommended that developing countries should be aided in mapping their diasporas and in building links therewith.[772] Furthermore, as a follow-up to the established link, the EU is also to encourage the diasporas to contribute to the development of their country of origin.[773] It is significant that the Commission clarified the term 'diaspora' as not only to mean nationals of the developing sending country, but also to include migrants who have acquired the citizenship of the host country and those who were born abroad, whatever their citizenship, as long as they retain some form of commitment to and interest in their country of origin.[774]

Origin.

768 Report of the Secretary-General to the General Assembly of the United Nations, 'International Migration and Development', 18.05.2006.

769 'Pooling resources through Hometown Associations', 31.05.2006, Web Story by the Inter-American Development Bank available at: http://www.iadb.org/news/detail.cfm?language=EN&id=3077 (last visited 21.01.2009).

770 M. Orozco, 'Mexican Hometown Associations and Development Opportunities', *Journal of International Affairs*, Vol. 57, No. 2 (Spring 2004) pp. 31-51.

771 'Mexican Hometown Associations', Citizen Action in the Americas Series, No. 5, March 2003, Americas Program of the Interhemispheric Resource Center (IRC), available at: www.americaspolicy.org.

772 Commission Communication 'Migration and Development: Some concrete orientations', COM(2005) 390 final, 01.09.2005, Annex 4: Initiatives and Recommendations for Facilitating the Involvement of Diasporas in Home County Development.

773 Commission Communication 'Thematic Programme for the cooperation with third countries in the areas of migration and asylum', COM(2006) 26 final, 25.01.2006.

774 Commission Communication 'Migration and Development: Some concrete orientations', COM(2005) 390 final, 01.09.2005, Annex 4: Initiatives and Recommendations for Facilitating the Involvement of Diasporas in Home County Development.

While the elaborate policy surrounding migrant remittances includes long-term projects, the measure that comes to prominence both at the European-level discussions as well as in international documents[775] is the lowering of transaction costs when it comes to remittances. This will not only encourage migrants to turn towards official means of money transfers, but will also simply increase the amount of money that the families of migrants receive. Consequently, remittances can have a very direct and short-term effect on the eradication of poverty, which is the 'primary and overarching objective' of the Community development policy.[776]

Having said that, it should not be assumed that the contribution of migration to development only occurs in terms of the amount of money sent to the sending countries. 'The wealth of migrants is not measured only by money'.[777] Apart from the very direct financial link of migration to development at the point of remittances, there are also other aspects of migration relating to the skills and know-how that immigrants acquire and which, if well managed, may contribute to co-development. These possibilities are discussed below.

2.4.2.2 Circular Migration

The second tool which can be used with the aim of utilizing the development aspect of migration, namely 'circular migration', is quite different from the discussion on remittances, as circular migration concerns the mobility of persons and not their money. Immigration policies, if shaped with a one-dimensional view to solely overcome the negative consequences of labour shortages in the short term, are bound to cause problems to the receiving countries in the long term when the migrants retire from being economically active and become a social security burden. From the country of origin's point of view, emigration may be beneficial in connection with remittances sent home and in reducing the low skilled labour surplus in countries with high levels of unemployment.[778] However, it must be born in mind that migrants that countries experiencing labour shortages try to attract are mostly highly skilled people who tend to send

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[775] Commission Communication 'The Global Approach to Migration one year on: Towards a comprehensive European Migration Policy', COM(2006) 735 final, 30.11.2006; Commission Communication 'Migration and Development', COM(2002) 703 final, 03.12.2002; Report of the Secretary-General to the General Assembly of the United Nations, 'International Migration and Development', 18.05.2006.

[776] 'The European Consensus on Development', joint statement by the Council and the representatives of the Governments of the Member States, 14820/05, 22.11.2005.

[777] Report of the Secretary-General to the General Assembly of the United Nations, 'International Migration and Development', 18.05.2006.

[778] Commission Communication 'Migration and Development', COM(2002) 703 final, 03.12.2002.

relatively less money home.[779] Furthermore, while emigration may be beneficial by reducing the low skilled labour surplus, the migration of highly skilled persons can create significant skills shortages or 'human resource bottlenecks'[780] in certain sectors. This 'brain drain' effect of migration is best seen in sectors that are essential for the social or economic development of the countries of origin such as healthcare and education.[781] In Zimbabwe, for example, three-quarters of all doctors emigrate soon after completing medical school.[782]

A scenario as threatening as summarized above may very well be caused by uncontrolled 'replacement migration' policies. However, it may also be turned into a 'win-win scenario'[783] in which sending and receiving countries together with the migrant benefit from the migration.[784] The return of migrants to their countries of origin brings about a transfer of skills, know-how and new cultural attitudes[785] and consequently contributes to development in terms of finance and human and social capital.[786] Yet, impelling migrants to return is not a viable solution as migrants will mostly choose not to return without the assurance that in the future they will be able to move back and forth between the countries of origin and destination.[787] The solution reveals itself at this very point. If both a permanent type of immigration and emigration are potentially problematic, the answer should lie in temporary immigration or emigration, otherwise known as 'circular migration'.

Within the context of circular migration, neither immigration nor emigration is

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779 R. Faini**, '**Remittances and the Brain Drain: Do More Skilled Migrants Remit More?', *The World Bank Economic Review,* Vol. 21, No. 2 (May 2007) pp.177-191.

780 Commission Communication 'Contribution to the EU position for the United Nations' High Level Dialogue on Migration and Development', COM(2006) 409 final, 14.07.2006.

781 Commission Communication 'Migration and Development: Some concrete orientations', COM(2005) 390 final, 01.09.2005, Annex 6: Initiatives and Recommendations for Mitigating the Adverse Effect of Brain Drain on Developing Countries.

782 P. Legrain, *Immigrants: Your Country Needs Them* (London, Little, Brown 2007) p.189.

783 Commission Communication 'Migration and Development', COM(2002) 703 final, 03.12.2002.

784 Report of the Secretary-General to the General Assembly of the United Nations, 'International Migration and Development', 18.05.2006

785 Commission Communication 'Migration and Development: Some concrete orientations', COM(2005) 390 final, 01.09.2005, Annex 5: Initiatives and Recommendations for Fostering Circular Migration and Brain Circulation.

786 Commission Communication 'Migration and Development', COM(2002) 703 final, 03.12.2002.

787 Commission Communication 'Migration and Development: Some concrete orientations', COM(2005) 390 final, 01.09.2005, Annex 5: Initiatives and Recommendations for Fostering Circular Migration and Brain Circulation.

perceived as a once-only discrete move from the home to the host country and vice versa.[788] Defined as 'a form of migration that is managed in a way allowing some degree of legal mobility back and forth between two countries', circular migration is not only a sustainable version of replace migration, but also 'a credible alternative to illegal immigration'.[789] The ideological groundwork that would enable discussions on circular migration has already been laid by the Commission since the Communication on a Community Immigration Policy.[790] In this Communication the Commission emphasizes the fact that the new trends in migration, which regard migration as a pattern of mobility, call for a flexible legal framework which does not cut the migrants off from their country of origin and allows them to visit it without losing their status in the host country. The restriction of the possibility for migrants to move freely between their country of residence and their country of origin is presented as a barrier to foster development by way of supporting development projects and business ventures. Circular migration also has positive effects on the directly financial aspect of the migration-development nexus, namely, remittances. This is due to the fact that circular migrants tend to send more money to their home countries as they plan to return to their country of origin and make use of the money they have posted themselves.[791]

If properly managed, circular migration can turn the 'catastrophic effects of brain drain'[792] around to create brain gain by way of 'brain circulation'.[793] The key to achieving this end is to ensure the possibility to return. The central point of the debate, therefore, is how to promote voluntary return in order to generate circulation. It is clear that a collection of policy instruments are required to make circular migration possible. One of the first steps would be to ensure that third-country nationals will not lose their status in their absence from the Community.

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788 A. Constant and K.F. Zimmermann, 'Circular Migration: Counts of Exits and Years Away From the Host Country', CEPR (Centre for Economic Policy Research) (September 2007) p.1.

789 Commission Communication on Circular Migration and Mobility Partnerships between the European Union and Third Countries, COM(2007) 248 final, 16.05.2007.

790 Commission Communication on a Community Immigration Policy, COM(2000) 757 final, 22.11.2000.

791 S. Vertovec, 'Circular Migration: the way forward in global policy?', International Migration Institute (IMI) Working Papers, No.4 (2007).

792 J.M.D. Barroso, 'A Bonus or an Onus? Managing Migration to Promote Development', Speech delivered at the Global Forum on Migration and Development, Brussels, 10.07.2007.

793 Commission Communication 'Contribution to the EU position for the United Nations' High Level Dialogue on Migration and Development', COM(2006) 409 final, 14.07.2006; Communication 'Migration and Development', COM(2002) 703 final, 03.12.2002.

On this point, the Directive on long-term residents has followed the direction shown by the Communication on a Community Immigration Policy and made it possible for Member States to allow third-country nationals to retain their long-term resident status even after being absent from the territory of the Member State for longer than a year.[794] Some of the schemes that were tabled by the Commission involve issuing long-term multi-entry visas for returning migrants;[795] giving former migrants priority concerning further temporary employment for workers who have already worked under such schemes and have returned after their contract ended[796] or to give them the possibility to obtain a new residence permit under a simplified procedure.[797] The tool by which such a scheme could be made operational is the proposed setting up of a database of third-country nationals who have left the EU upon the expiry of their residence/work permit. Furthermore, for third-country nationals who wish to start their own businesses in their country of origin, advice and other forms of non-financial assistance should be made available[798] as well as support in finding a job.[799]

If the involvement of the migrant in the development efforts of his or her home country will be in the form of sharing skills and knowledge, an option which is being discussed at the EU level to complement or replace a temporary return is 'virtual return'. What exactly is meant by 'virtual return' and how it is intended to function is best illustrated by the concept of 'tele-lectures'.[800] In the tele-lecturing model, the immigrant academic is given the opportunity to teach students at a university in his or her country of origin by using electronic communication tools. In this way, a virtual return would replace a physical temporary return, while offering the same effect that an actual return would provide. A virtual return can also complement a temporary return if the academic would also travel to his home country for a couple of months each year in order to be physically present at the university.

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794 Council Directive 2003/109, Article 9.

795 Policy Plan on Legal Migration, COM(2005) 669 final, 21.12.2005, Section 5.1.

796 Commission Communication 'Migration and Development: Some concrete orientations', COM(2005) 390 final, 01.09.2005.

797 Policy Plan on Legal Migration, COM(2005) 669 final, 21.12.2005, Section 5.1.

798 Commission Communication 'Migration and Development: Some concrete orientations', COM(2005) 390 final, 01.09.2005, Annex 5: Initiatives and Recommendations for Fostering Circular Migration and Brain Circulation.

799 Commission Communication on Circular Migration and Mobility Partnerships between the European Union and Third Countries, COM(2007) 248 final, 16.05.2007.

800 Commission Communication 'Migration and Development', COM(2002) 703 final, 03.12.2002; Commission Communication 'Migration and Development: Some concrete orientations', COM(2005) 390 final, 01.09.2005.

The success of circular migration depends on to what extent the proposed schemes will differ from the 'guest worker' programmes of pre-1974. It has been argued that the circular migration approach varies significantly from the previous versions of temporary migration.[801] The guest worker approach, which was practised in Europe between 1945 and the early 1970s, was based on the principles of the inferiority and the separation of the foreigner.[802] Temporary workers were seen as the solution to the problem caused by the desire of the local working classes to advance their position in society, as foreign workers had no concerns about earning prestige in the host country, but aimed solely at saving enough money to earn prestige in their home country.[803] Consequently, they were not integrated as equals into the society but were expected to accept relatively poor wages and conditions, to make fewer demands on the social infrastructure and not to become involved in labor disputes.[804] The circular migration schemes of today address a limited number of highly qualified third-country nationals, in contrast to the guest worker programmes which addressed large numbers of low-skilled workers.[805] Therefore, as much as the challenges surrounding the migration of low skilled workers shall not be tackled by the circular migration model, the pitfalls of the guest worker schemes shall also not be revisited. This, however, does not mean that circular migration will function flawlessly. The application and the outcomes remain to be seen.

In whichever way circular migration will be shaped in the future, it is clear that neither circular migration nor any other type of desired migration will deliver the expected advantages as long as legal channels into the Union are not known to the prospective immigrants. In order to put schemes in place to enable informed access to the EU, and thus to obtain the optimal benefits from migration, mobility partnerships have been proposed.

2.4.2.3 Mobility Partnerships

'Mobility partnerships' constitute the third and final tool for employing migration to the benefit of development, which is dealt with in this study. In order to fully utilize immigration to promote co-development, it should be ensured that

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801 S. Castles, 'Back to the Future? Can Europe Meet Its Labour Needs Through Temporary Migration?', International Migration Institute (IMI) Working Papers, No.1 (2006).

802 *Ibid.*

803 N. Abadan-Unat, 'Bitmeyen Göç: Konuk İşçilikten Ulus-Ötesi Yurttaşlığa' [Never-ending Migration: From Guest Worker to Supranational Citizenship] (İstanbul, Bilgi Üniversitesi Yayınları 2002) p.11.

804 S. Castles, 'Back to the Future? Can Europe Meet Its Labour Needs Through Temporary Migration?', International Migration Institute (IMI) Working Papers, No.1 (2006).

805 *Ibid.*

the supply of labour in the countries of origin complement the demand for labor. The idea of mobility partnerships has emerged from this needs-based approach dominating the economic migration policies of the Union. These country-specific partnership schemes will present a catalogue of legal immigration possibilities at Member State and EU level for prospective immigrants in order to enable a better organized and healthier access to the EU.[806]

The need to raise awareness concerning the legal channels for migration to the EU was acknowledged by the Member States at the Tampere European Council in 1999. The Tampere Milestones stress the co-development aspect of partnerships with countries of origin[807] and call for the setting up of information campaigns on actual possibilities for legal immigration.[808] This view was confirmed once again in 2005.[809] Shortly thereafter, the Commission, acting on the political mandate of the Member States, took it upon itself to provide for the possibilities and procedures for legal migration to Member States.[810] At that point no concrete methods on how to raise the awareness were uttered, but it did not take long for the debate to hint at certain actual schemes. By the end of 2006 the recipe was taking shape as the Commission proposed the concept of 'mobility packages'.[811] These were agreements which would be concluded with interested third countries and would aim at enabling the citizens of these third countries to have better access to the EU.[812] Mobility packages were renamed by the Commission as mobility partnerships, and the legal nature and contents of these partnership schemes were concretized.[813]

Apart from the legal concerns inherent in any area of mixed competence, mobility partnerships should take into consideration the current state of the EU's relations with the relevant third country as well as the general approach towards

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806 Commission Communication 'The Global Approach to Migration one year on: Towards a comprehensive European Migration Policy', COM(2006) 735 final, 30.11.2006, Section 3.2.

807 Tampere European Council Presidency Conclusions, 15-16 October 1999, Paragraph 11.

808 *Ibid.*, Paragraph 22.

809 Council Conclusions on Migration and External Relations, 21 November 2005, Brussels, Paragraph 6.

810 Commission Communication 'Priority actions for responding to the challenges of migration: First follow-up to Hampton Court', COM(2005) 621 final, 30.11.2005.

811 Commission Communication 'The Global Approach to Migration one year on: Towards a comprehensive European Migration Policy', COM(2006) 735 final, 30.11.2006, Section 3.2.

812 *Ibid.*

813 Commission Communication on Circular Migration and Mobility Partnerships between the European Union and Third Countries, COM(2007) 248 final, 16.05.2007.

it in the external relations of the EU.[814] At the core of the scheme are the labour needs of the interested Member States.[815] Thus, the mobility partnerships should involve more than simply cataloging the information available on the legal possibilities for admission, which is already part of the EU immigration policy.[816] For purposes of best serving the labour needs of the Member States by way of partnerships two main methods have been proposed. Either the offers from several Member States would be pooled into a consolidated EU offer; or a more favorable treatment would be accorded to the nationals of the third country in question in terms of admission conditions for certain categories of migrants.

The indispensable tool to enable mobility partnerships will be the migration profiles. The migration profiles would bring together all information relevant to migration and development, such as the situation on the labour market, unemployment rates, labour demand and supply and present or potential skill shortages per sector and occupation.[817] This will make it possible for a realistic, country-specific mobility partnership to be drafted by which the Member States construct country-specific offers not only depending on their demand but also on what the third country has to offer.

These three outstanding policies at the migration–development nexus, being remittances, circular migration and mobility partnerships, contribute immensely to the global debate as to how to manage migration in a way which promotes development on the sides of both the sending and receiving countries. The results of the policies are still to be seen. However, it should be borne in mind that successful comprehensive development policies increase migration in the short run. The initial increase in international migration which is then followed by a decrease is referred to as the 'migration hump'.[818] The decrease occurs when 'the

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814 *Ibid.*

815 Although the reference made in the Communication on Circular Migration and Mobility Partnerships (COM(2007) 248 final) to 'the level of commitments which the third country is ready to take on in terms of action against illegal migration and facilitating reintegration of returnees, including efforts to provide returnees with employment opportunities' for determining the scope of mobility partnerships has been seen as an attestation of 'control and security' concerns being the motivation behind the EU efforts for shaping this new policy area. See K. Kirişçi, 'Three Way Approach to Meeting the Challenges of Migrant Incorporation in the European Union: Reflections from a Turkish Perspective', CARIM Research Reports, 2008/03, Robert Schuman Centre for Advanced Studies, San Domenico di Fiesole(FI): European University Institute (2008).

816 Commission Communication on an Open Method of Coordination for the Community Immigration Policy, COM(2001) 387 final, 11.07.2001.

817 Commission Communication 'Migration and Development: Some concrete orientations', COM(2005) 390 final, 01.09.2005, Annex 8: Migration Profiles.

818 P.L. Martin, 'Immigration and Integration: Challenges for the 1990s', *The Social Contract* (Spring 1994) pp.177-181.

advantage of migrating is too small in terms of income differential' between the sending and receiving country.[819] The development policy of the EU, harmonized with the common immigration policy endeavours to reduce the time span of the migration hump[820] and by doing so to bring down the migratory pressure to levels at which the Union would gain the comfort of harvesting solely those third-country nationals that it needs.

None of the policy objectives put forward by the Commission with a view to promoting co-development can be achieved by the EU unilaterally. In order to establish a comprehensive immigration policy which does contribute to and collaborate with the development policy the policies can only be implemented in cooperation with the interested countries of origin.[821] It is at this point that the relevance of the second aspect of the Global Approach, namely the external relations aspect, originates: without it the rest of the immigration policy would not work.

2.4.3 External Relations

Immigration policies always have a great potential to become an item in international relations.[822] Particularly in the case of the EU, it is clear that the development objectives in relation to migration cannot be realized without incorporating migration issues into the external policy of the EU. In the Tampere Milestones partnerships with countries of origin were called for.[823] This call was repeated in the Hague Programme in the stipulation of 'fully integrating migration into the EU's existing and future relations with third countries'.[824] However, these were not the first documents where such a necessity had been voiced.

As early as in 1991, the Commission stated in its Communication on Immigration that migration should be made an integral element of the Community's external policy.[825] A year later in 1992 the Member States

819 H. Olesen, 'Migration, Return, and Development: an Institutional Perspective', *International Migration,* Vol.40 (2002) pp.125-150.

820 Commission Communication 'Migration and Development', COM(2002) 703 final, 03.12.2002.

821 Commission Communication 'Contribution to the EU position for the United Nations' High Level Dialogue on Migration and Development', COM(2006) 409 final, 14.07.2006.

822 S. Sassen, *Losing Control? Sovereignty in an Age of Globalization* (New York, Columbia University Press 1996) p.62.

823 Tampere European Council Presidency Conclusions, 15-16 October 1999, Paragraph 11.

824 Brussels European Council Presidency Conclusions, 4-5 November 2004, the Hague Programme, Section 1.6.1. Partnership with third countries.

825 Commission Communication on Immigration, SEC(91)1855 final, 23.10.1991.

confirmed that in addressing the question of migratory movements, coordinating action in the fields of foreign policy, economic cooperation and immigration and asylum policy would contribute immensely.[826] This consensus reached by Member States on integrating the policy on migratory flows into the EU's foreign policy has been repeated on various occasions since then.[827]

Indeed, internally setting up a system of conditions and procedures on admission is not sufficient in order to attain a comprehensive immigration policy. Such a policy is only possible through partnerships with countries of origin and transit of migrants.[828] Migration flows must be managed 'as an integral element of and comprise a serious investment in relations with third countries'.[829] Looking from the other side of the connection, integrating immigration matters into the relationships with third countries is increasingly important for ensuring good and stable relationships with especially neighbouring countries.[830]

The integration of migration policy into the external policy of the EU requires the former to be coordinated with the external policy of the Union. The unsatisfactory coordination of the two policies will not only prevent migration policy objectives from being successful, but also internationally the EU will lose potential leverage both politically and economically.[831] The external policy of the Union is built upon the principles of democracy and compliance with the law and with human rights.[832] Visibly, the external policy of the EU brings forward the values which lie at the core of the European Union, which are also in line with the Copenhagen criteria.[833]

Current external policy actions of the EU aiming at the reduction of poverty, the

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826 Annex 5 to Part A of the Conclusions of the Presidency, Edinburgh European Council, 11-12 December 1992, SN 456/92, Paragraph ix.

827 Laeken European Council Presidency Conclusions, 14-15 December 2001, Paragraph 40; Seville European Council Presidency Conclusions, 21-22 June 2002, Paragraphs 33-36; Brussels European Council Presidency Conclusions, 21-22 June 2007, Paragraph 16, the European Pact on Immigration and Asylum adopted at the Brussels European Council of 15 and 16 October 2008.

828 Commission Communication on a Community Immigration Policy, COM(2000) 757 final, 22.11.2000.

829 Commission Communication 'The Hague Programme: Ten priorities for the next five years: the Partnership for European renewal in the field of Freedom, Security and Justice', COM(2005) 184 final, 10.05.2005.

830 Commission Communication 'Europe in the World – Some Practical Proposals for Greater Coherence, Effectiveness and Visibility, COM(2006)278 final, 08.06.2006, Section 3.

831 *Ibid*., Section 4.

832 Single European Act, Preamble, O.J. L 169, 29.06.1987, p.2.

833 Copenhagen European Council Presidency Conclusions, 21-22 June 1993, Section 7(iii).

consolidation of democracy and support for human rights have already had an influence on migration flows.[834] With the incorporation of migration policies into the external relations of the EU, the already existing policies have acquired a new dimension, within which migration issues shall be addressed in a more systematic way.

Integrating migration issues into the EU's external relations in solid policy terms implies taking into account the migration dimension when planning and implementing development and cooperation programmes; focusing on measures which maximize the development impact of migration; establishing patterns of mobility between Member States and home countries of migrants through which migrants can maintain links with their home countries; supporting measures to discourage emigration by those third-country nationals whose admission to the EU has not been authorized; supporting third countries' efforts to manage migration flows; and supporting measures to help the social and economic reintegration of victims of smuggling and trafficking in their country of origin.[835]

The external dimension of the immigration policy is an inseparable element of the global approach since if it was not for this dimension which is inherent in international migration, it would not be possible to utilize immigration policies to promote co-development. As migration policy takes its place among the components of the EU's external policy, the external policy in turn offers tools to realize the objectives of the external dimension of immigration policy based on the migration-development nexus. These tools, or rather policy instruments, have been listed by the Commission as follows: bilateral agreements, the enlargement and pre-accession process, European Neighbourhood Policy (ENP) Action Plans, regional cooperation, individual arrangements, operational cooperation, institution building and twinning, development policy, external aid programmes, international organizations and monitoring.[836]

Which tools can be used for which countries or regions should be carefully examined. Even though the same tools might be relevant for different regions, their use should be considered on a case by case basis taking into account the existing frameworks and relations with the relevant countries and regions. The Commission has affirmed that, in the context of African countries, various tools

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[834] Commission Communication 'Migration and Development', COM(2002) 703 final, 03.12.2002.

[835] Commission Communication on an Open Method of Coordination for the Community Immigration Policy, COM(2001) 387 final, 11.07.2001.

[836] Commission Communication 'A Strategy on the External Dimension of the Area of Freedom, Security and Justice', COM(2005) 491 final, 12.10.2005.

have proved useful, such as migration profiles.[837] However, it has still been cautious not to prematurely declare that the same tools would also have an added value for Eastern and South-Eastern regions. It is in any event stimulating to see how this 'most innovative and fast moving area of EU migration policy'[838] will further take shape given the track record thus far.

2.4.4 Fair Treatment of Third-Country Nationals

The fair treatment of third-country nationals has been set as one of the elements of the common immigration policy by the Tampere European Council[839] and has been preserved as part of the common principles underlying the further development of the common immigration policy in the Communication on a common immigration policy for Europe.[840] The concept of fair treatment for immigrants can be substantiated with a diverse variety of policies. The Tampere European Council has clarified the criterion of fair treatment as granting rights and obligations to third-country nationals comparable to those of EU citizens.[841] Additionally, non-discrimination in economic, social and cultural life should be enhanced; and measures against racism and xenophobia should be developed in order to achieve the fair treatment of immigrants. The means for achieving fair treatment is a more vigorous integration policy which should be set up.[842] Indeed, the fair treatment of immigrants cannot be considered in isolation from the general integration policy. The Hague Programme dealt with the issue of fair treatment within the section on the 'integration of third-country nationals' and identified the anti-discrimination policy as one of the basic principles underlying a coherent European integration framework, manifesting once more the interlinked structure of the EU immigration policy. As integration policy is discussed in detail in the following section, and as fair treatment, for the large part, can be considered as a direct element of integration policies, here only a segment of the fair treatment measures are dealt with. It should be kept in mind that these measures equally cover Member State nationals and EU nationals as well as third-country nationals. However, they are very relevant for EU immigration policy as immigrants, almost by default not being part of the

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837 Commission Communication 'Applying the Global Approach to Migration to the Eastern and South-Eastern Regions Neighbouring the European Union', COM(2007) 247 final, 08.06.2007.

838 P. Bosch, E. Haddad, 'Migration and Asylum: an Integral Part of the EU's External Policies', Forum Natolińskie, European Centre Natolin, 3(11)/2007, available at: http://www.natolin.edu.pl/pdf/FN/FN_3_2007_bosh_haddad.pdf (last visited 21.01.2009).

839 Tampere European Council Presidency Conclusions, 15-16 October 1999, Section A(III).

840 Commission Communication 'A Common Immigration Policy for Europe: Principles, Actions and Tools', COM(2008) 359 final, Section II(1).

841 Tampere European Council Presidency Conclusions, 15-16 October 1999, paragraph 18.

842 *Ibid.*

majority groupings in the host societies, very often fall victim to discrimination.

The package of proposals on anti-discrimination, which was tabled directly after the Tampere European Council, was adopted in the following year. The package comprised three documents. The Directive combating discrimination on the grounds of racial or ethnic origin[843] covers conditions for access to employment; access to vocational training; employment and working conditions; membership of and involvement in an organization of workers or employers; social protection; social advantages; education; and access to and the supply of goods and services which are available to the public.[844] Member States are put under an obligation to ensure that persons who consider themselves wronged by a failure to apply the principle of equal treatment, in the areas which have been mentioned, have judicial and/or administrative procedures available to them.[845] In such cases, as long as facts from which discrimination can be presumed are established, the burden of proof shall be on the respondent to prove that there has been no breach of the principle of equal treatment.[846] In addition, according to the Directive, each Member State is to designate a body for the promotion of equal treatment in order to assist victims of discrimination in pursuing their complaints; to conduct surveys on discrimination; and to publish reports and make recommendations on any issue relating to this type of discrimination.[847] In some Member States, such 'equality bodies' have already been in existence for a number of years; in others, they were established shortly before the Directive was adopted.[848] Finally, Member States should ensure that laws, regulations and administrative provisions contrary to the principle of equal treatment are abolished.[849] The prohibition of discrimination extends to the provisions of individual or collective contracts or agreements, internal rules of undertakings,

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843 Council Directive 2000/43 of 29.06.2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, O.J. L180, 19.07.2000, pp.22-26.

844 Council Directive 2000/43, Article 3(1).

845 *Ibid.*, Article 7(1).

846 *Ibid.*, Article 8(1). This principle has already been put into practice by the ECJ in the first case which came before it based on Directive 2000/43. In the Feryn Case (C-54/07), the Court ruled on 10 July 2008 that 'Public statements by which an employer lets it be known that under its recruitment policy it will not recruit any employees of a certain ethnic or racial origin are sufficient for a presumption of the existence of a recruitment policy which is directly discriminatory within the meaning of Article 8(1) of Directive 2000/43. It is then for that employer to prove that there was no breach of the principle of equal treatment. It can do so by showing that the undertaking's actual recruitment practice does not correspond to those statements.' O.J. C 223, 30.08.2008, pp.11-12.

847 Council Directive 2000/43, Article 13.

848 Equality and non-discrimination Annual Report 2004, prepared by the Directorate General for Employment and Social Affairs of the European Commission, p.22.

849 Council Directive 2000/43, Article 14(a).

rules governing profit-making or non-profit-making associations, and rules governing the independent professions and workers' and employers' organizations. Such provisions should be made null and void, or should be amended.[850]

The second instrument of the anti-discrimination package was the Directive establishing a general framework for equal treatment in employment and occupation,[851] which aims at combating discrimination on grounds of religion or belief, disability, age or sexual orientation in employment and occupation.[852] The prohibition on discriminating on these grounds applies to conditions for access to employment; access to vocational training; employment and working conditions; and membership of and involvement in an organization of workers or employers.[853] Judicial and/or administrative procedures should be made available by Member States to those who consider themselves to have been wronged by a failure to apply the principle of equal treatment to them.[854]

Just like in cases concerning discrimination on grounds of racial or ethnic origin, in cases that are subject to Directive 2000/78 the burden of proof is on the respondent to prove that the principle of equal treatment has not been breached.[855] The Member States are to ensure the abolition of laws, regulations and administrative provisions which are contrary to the principle of equal treatment.[856] Similarly, provisions which are contrary to this principle in contracts or collective agreements, internal rules of undertakings or rules governing the independent occupations and professions and workers' and employers' organizations shall be null and void.[857]

Finally, the anti-discrimination package launched an action programme supporting the Directives.[858] The action programme aimed to promote measures to combat discrimination based on racial or ethnic origin, religion or belief, disability, age or sexual orientation, within the time frame of 1 January 2001 to 31

850 *Ibid.*, Article 14(b).

851 Council Directive 2000/78 of 27.11.2000 establishing a general framework for equal treatment in employment and occupation, O.J. L 303, 02.12.2000, pp.16-22.

852 *Ibid.*, Article 1.

853 *Ibid.*, Article 3(1).

854 *Ibid.*, Article 9(1).

855 *Ibid.*, Article 10(1).

856 *Ibid.*, Article 16(a).

857 *Ibid.*, Article 16(b).

858 Council Decision 2000/750 of 27.11.2000 establishing a Community action programme to combat discrimination (2001 to 2006), O.J. L 303, 02.12.2000, pp.23-28.

December 2006.[859] In other words, the action programme represented the practical dimension of the package, making sure that equal treatment will not be an idea which remains on paper and people actually become aware of their rights to be treated without discrimination. To this end, groups of experts were set up to monitor the implementation of the Equality Directives in different countries and comparable statistics on the nature and extent of discrimination in EU countries were developed[860] in order to improve the understanding of discrimination and underlying behaviour;[861] information is exchanged between countries which have experience and good practice in fighting discrimination and NGOs are given support[862] in capacity building;[863] and, finally, seminars and conferences are organized[864] within the scope of awareness-raising activities.[865] As part of awareness-raising campaigns, a decentralized approach has been chosen, requiring the establishment of special working groups for each Member State, which will set up country-specific campaigns which are suitable for the special challenges of the relevant Member State.[866] The five-year programme, which supported anti-discrimination activities worth almost € 100 million,[867] was followed by the European Year of Equal Opportunities for All in 2007, during which Europe-wide and local initiatives worth € 15 million were funded.[868]

The Directives on anti-discrimination have considerably enhanced the provision of legal protection against discrimination in Member States.[869] This progress has also, inevitably, contributed to the situation of immigrants residing legally in Member States. There is a recognized need for further action in order to reach the desired level of equal treatment in the Member States. In order to address the problem of the lack of a uniform minimum level of protection for people who have suffered discrimination[870] and to combat discrimination in areas such as

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859 Council Decision 2000/750, Article 1.

860 Equality and non-discrimination Annual Report 2004, prepared by the Directorate General for Employment and Social Affairs of the European Commission, p.34.

861 Council Decision 2000/750, Article 2(a).

862 Equality and non-discrimination Annual Report 2004, prepared by the Directorate General for Employment and Social Affairs of the European Commission, p.35.

863 Council Decision 2000/750, Article 2(b).

864 Equality and non-discrimination Annual Report 2004, prepared by the Directorate General for Employment and Social Affairs of the European Commission, p.35.

865 Council Decision 2000/750, Article 2(c).

866 Equality and non-discrimination Annual Report 2004, prepared by the Directorate General for Employment and Social Affairs of the European Commission, p.26.

867 Equality and non-discrimination Annual Report 2006, prepared by the Directorate General for Employment, Social Affairs and Equal Opportunities, p.29.

868 *Ibid*., p.30.

869 M. Bell, I. Chopin and F. Palmer, *Developing Anti-Discrimination Law in Europe: the 25 EU Member States compared* (Brussels, European Communities 2007) p.80.

870 'Non-discrimination and equal opportunities: a renewed commitment', COM(2008) 420

health care, social policy and education, the Commission has proposed a directive to combat discrimination on grounds of religion or belief, disability, age or sexual orientation outside the employment sphere,[871] as part of the 'Renewed Social Agenda'.[872] Furthermore, a Council Framework Decision was adopted in November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law.[873] This third pillar instrument calls on the Member States to set effective, proportionate and dissuasive criminal penalties[874] to punish the defined expressions of racism and xenophobia.[875] In the meantime, for the specific case of third-country nationals, as mentioned before, most of the efforts towards achieving equal treatment take place within the policy area of integration.

2.4.5 Integration of Third-Country Nationals

The final element of the Global Approach to Migration to be discussed in this study is the 'integration of third-country nationals'. The concept of integration is a difficult one to define. Its meaning differs in each state and in terms of political ideology.[876] As it relates to those who are 'different', it has a human rights dimension. In both socio-economic and civic terms, the integration of migrants finds its foundation in the concept of equal opportunities for all.[877] From this point of view, integration is the tool which allows immigrants to 'have equal opportunities to lead just as dignified, independent and active lives as the rest of the population', committing 'themselves to mutual rights and responsibilities on the basis of equality.'[878] Accordingly, integration policies should aim at facilitating the inclusion of immigrants into society and ensuring equal

final, 02.07.2008, section 2.2.

871 Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation, COM(2008) 426 final, 02.07.2008.

872 'Renewed social agenda: opportunities, access and solidarity in 21st century Europe', COM(2008) 412 final, 02.07.2008, section 4.6.

873 Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law, O.J. L 328, 06.12.2008, pp.55-58.

874 Council Framework Decision 2008/913, Article 3.

875 *Ibid*., Article 1 defining offences concerning racism and xenophobia.

876 S. Carrera, 'Towards an EU Framework on the Integration of Immigrants', in S. Carrera, ed., *The Nexus Between Immigration, Integration and Citizenship in the EU*, Collection of Papers presented at the CHALLENGE seminar of 25.01.2006.

877 J. Niessen, T. Huddleston and L. Citron, *Migrant Integration Policy Index* (Brussels, British Council 2007) p.4; also recognized by the Hague Programme in Point 1.5.

878 J. Niessen, T. Huddleston and L. Citron, *Migrant Integration Policy Index* (Brussels, British Council 2007) p.4.

treatment.[879] The Directive on combating discrimination on the grounds of racial or ethnic origin and the Directive establishing a general framework for equal treatment in employment and occupation constitute appropriate examples of such integration measures.[880] These Directives, though, do not specifically focus on the integration of immigrants, but are part of the more general social policy. The social policy is precisely where 'integration' was placed until recently.[881] It is the replacement of 'integration' from social policy into the immigration policy which acquaints us with another dimension of integration; one which can be referred to as the 'security dimension'.

The security dimension of integration derives from the tensions which may occur between the immigrant communities of countries and the locals.[882] States have discovered the possibility of (mis)using[883] the integration tool in order to put restrictive immigration measures into practice.[884] In such measures the aim is no longer to ensure equal treatment through integration, but rather to determine who shall be entitled to claim equal treatment. The 'integration test' allowed by the Family Reunification Directive[885] and the 'integration conditions' which migrants are requested to comply with according to the Long-Term Residents Directive[886] are examples of 'integration' being used as a tool for restrictive immigration measures. Particularly one 'innovative' type of such tests, namely the Integration Abroad Test, constitutes a worryingly discriminatory model of restrictive immigration measures. The Integration Abroad Test, introduced by the Netherlands, requires 'non-Western'[887] foreigners wishing to migrate to the

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879 S. Carrera, 'Integration as a Process of Inclusion for Migrants? The Case of Long Term Residents in the EU', in H. Schneider, ed., *Migration, Integration and Citizenship: A Challenge for Europe's Future*, Vol.2 (Maastricht, 2005) pp.109-137.

880 See *supra* 2.4.4.

881 L.F.M. Besselink, 'Unequal Citizenship: Integration Measures and Equality', in S. Carrera, ed., *The Nexus Between Immigration, Integration and Citizenship in the EU*, Collection of Papers presented at the CHALLENGE seminar of 25.01.2006, p.18.

882 T. Gross, 'Integration of Immigrants: the Perspective of European Community Law', *European Journal of Migration and Law*, vol.7 (2005) pp.145-161.

883 S. Carrera, 'A Comparison of Integration Programmes in the EU: Trends and Weaknesses', CHALLENGE Papers No.1 (March 2006).

884 L.F.M. Besselink, 'Unequal Citizenship: Integration Measures and Equality', in S. Carrera, ed., *The Nexus Between Immigration, Integration and Citizenship in the EU*, Collection of Papers presented at the CHALLENGE seminar of 25.01.2006, p. 18; S. Carrera, 'A Comparison of Integration Programmes in the EU: Trends and Weaknesses', CHALLENGE Papers No.1 (March 2006).

885 Council Directive 2003/86, Article 4(1)(3).

886 Council Directive 2003/109, Article 5(2).

887 Migrants originating from Turkey, Africa, Latin America and Asia (except from Indonesia, South Korea and Japan).

Netherlands for family reunification to pass an 'integration' test before entering the country.[888] This inventive approach to integration creates a paradoxical situation in which those subject to the test are prevented from entering the country, and thus are prevented from actually integrating into society in the event of failing the 'integration' test. The Integration Abroad Test, which should be scrutinized from the point of view of the right to family life, has received further criticism because of its discriminatory nature.[889] Subjecting solely non-Western migrants to such a restrictive scheme, it is illustrative of the apparent linkage between integration and poverty[890] as a consequence of which the poor face more obstacles to integrating. The disturbing part is that the Netherlands is not the only EU Member State opting for this restrictive approach. Inspired by the Dutch model, other Member States such as Germany, Denmark, France and the UK are also preparing new restrictive measures.[891]

Incidents such as the series of riots which took place in various parts of France in October-November 2005[892] have triggered the discussion on immigrant integration. The debate which followed the events of 2005 demonstrated the paradox resulting from the contradiction between the two dimensions of integration. Proposing restrictive integration measures in order to tackle social problems caused by the lack of integration policies ensuring equal opportunities for all will obviously not be a viable solution.

The transformation of integration policies from a 'non-legal'[893] social policy field into the legislative realm of immigration regimes, as a result of which immigrants are obliged to integrate into the host society, results in the initiation of discussions as to the assimilating character of such policies.[894] Assimilation, the process

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888 The Integration Abroad Act [Wet Inburgering in het buitenland, Wib] of 22 December 2005, amending Article 16 of the Law on Aliens, Staatsblad 2006, No.28, Kamerstuk 29 700, 31.01.2006.

889 Human Rights Watch report, 'The Netherlands: Discrimination in the Name of Integration – Migrants' Rights under the Integration Abroad Act', May 2008.

890 S. Carrera, 'A Comparison of Integration Programmes in the EU: Trends and Weaknesses', CHALLENGE Papers No.1 (March 2006).

891 Human Rights Watch report, 'The Netherlands: Discrimination in the Name of Integration – Migrants' Rights under the Integration Abroad Act' (May 2008).

892 Triggered by the deaths of two young boys while being chased by police in a banlieue of Paris, 'unrest' broke out in France involving the burning of thousands of vehicles, attacks on police and power stations from October 28 until November 16, 2005. For a more detailed account of the events see: http://news.bbc.co.uk/2/hi/europe/4413964.stm (last visited 21.01.2009).

893 R. Cholewinski, 'Migrants as Minorities: Integration and Inclusion in the Enlarged European Union', *JCMS*, Vol.43, No.4 (2005) pp.695-716.

894 S. Carrera, 'A Comparison of Integration Programmes in the EU: Trends and Weaknesses',

'whereby newcomers renounce their cultural habits and values in favour of the culture of the receiving society',[895] has been subject to withering criticism in recent decades[896] and is no longer plausible.[897] There is a thin line between assimilation and mandatory integration programmes, which 'depends completely on the kinds of questions posed during the assessment and the method of assessing'.[898] Even though the entire immigration policy may be seen as a balance between the human rights dimension and the security dimension of migration, integration policy, within the broader immigration policy, is the most significant field where striking a balance between the security and human rights dimensions becomes especially important because of this thin line between integration and assimilation.

It follows that, even with the existence of social tension, which seems to be the root cause of establishing restrictive integration policies, the problem cannot be effectively solved by pressurizing one side of the dispute. Such an effort would only add to the assimilation character of integration. It is not without reason that assimilation is also called 'one-way integration'.[899] This is why integration should involve both sides, immigrants as well as natives, as the competence of the natives to smoothly adjust to diversity is equally as important as the ability of the immigrants to adapt.[900]

It is exactly this two-way character, which an integration policy should encompass in order not to be categorized as assimilative, that is endorsed by the European Union.[901] The Member States called for the establishment of a more

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CHALLENGE Papers No.1 (March 2006).

895 World Migration 2003, Chapter 4 'The Challenge of Integrating Migrants into Host Societies – A Case Study from Berlin', IOM, p.72.

896 R. Alba, V. Nee, 'Rethinking Assimilation Theory for a New Era of Immigration', *International Migration Review*, Vol.31, No.4 (Winter 1997) pp.826-874.

897 C. Joppke, 'Multiculturalism and Immigration: A Comparison of the United States, Germany, and Great Britain', *Theory and Society*, Vol.25 (1996) pp.449-500.

898 G.R. de Groot, 'Reflections on Integration and Access to Nationality/Citizenship Through Naturalisation: A Comparative Perspective', in S. Carrera, ed., *The Nexus Between Immigration, Integration and Citizenship in the EU*, Collection of Papers presented at the CHALLENGE seminar of 25.01.2006, p.22.

899 World Migration 2003, Chapter 4 'The Challenge of Integrating Migrants into Host Societies – A Case Study from Berlin', IOM, p.72.

900 U. Davy, 'Integration of Immigrants in Germany: A Slowly Evolving Concept', *European Journal of Migration and Law*, Vol.7 (2005) pp.123-144.

901 Kirişçi proposes a 'three-way approach' which would not only include the immigrant and the host society, but also the sending country in the solution to the integration problem. The sending country can contribute with the experience and information it has to provide as well as its institutions. For a detailed explanation of this proposal and for examples of how

vigorous integration policy to grant third-country nationals rights and obligations comparable to those of EU citizens at the Tampere European Council.[902] This call found its first response the following year in the Commission Communication on a Community Immigration Policy.[903] This Communication, even though it remained very brief on the issue of integration, made clear that any effort by the Member States towards establishing an integration policy should be 'a two-way process involving adaptation on the part of both the immigrant and of the host society'. The Communication further acknowledged Member States as the primary actors in integration, yet also opened up for discussion the possibility of the EU being ascribed a coordinating role in integration matters which could also involve the development of guidelines or common standards for integration measures. The national concerns of Member States would not allow for complete harmonization in the area of integration; however, the frail condition of trust between the Member States would also not allow for the exclusive power of each Member State to determine the entirety of national integration policies when integration provisions in one Member State could affect the others.[904] The solution could, therefore, be the EU coordinating the integration policies of the Member States without directly dictating specific measures to be adopted.

The Thessaloniki European Council of June 2003 strengthened the position of the EU in developing integration policies by contending that such policies should be fleshed out within a coherent EU framework, which should be shaped by defining common basic principles. [905] The European Council further instructed the Commission to present an Annual Report on Migration and Integration in Europe in order to map data, policies and practices on integration and immigration at the EU level.[906] The success of the EU Integration Policy is attached to the efficient involvement of all possible actors.[907] Some issues which were raised by the European Council were elaborated in the Communication on immigration, integration and employment.[908] The Communication shed some

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the Turkish experience can and has contributed to the integration efforts of immigrants in European countries, see K. Kirişçi, 'Three Way Approach to Meeting the Challenges of Migrant Incorporation in the European Union: Reflections from a Turkish Perspective', CARIM Research Reports, 2008/03, Robert Schuman Centre for Advanced Studies, San Domenico di Fiesole(FI): European University Institute (2008).

902 Presidency Conclusions Tampere European Council, 15-16 October 1999, Point 18.

903 COM(2000) 757 final, 22.11.2000.

904 S. Bertozzi, 'Integration: an Ever-Closer Challenge', CEPS Working Document No.258 (February 2007).

905 Presidency Conclusions Thessaloniki European Council, 19-20 June 2003, Point 31.

906 *Ibid*., Point 33.

907 *Ibid*., Point 35.

908 Commission Communication on immigration, integration and employment, COM(2003)

light on the role of the EU within the integration realm as well as the prevailing philosophy behind the integration framework which shall be set up at the EU level. In its Communication, the Commission lays down the key elements and the main actors of the 'holistic approach' which embarks upon integration by taking into account its socio-economic aspects as well as its nexus with cultural and religious diversity, citizenship, participation and political rights. In this regard, the elements of the holistic integration policy which shall also be the subject of the exchange of information and best practices between Member States were listed as: integration into the labour market, education and language skills, housing and urban issues, health and social services, the social and cultural environment, nationality, civic citizenship and respect for diversity.

However, the genuine clarification as to the philosophy behind the European integration framework came with the JHA Council Meeting of November 19, 2004 which agreed on common basic principles for immigrant integration policy[909] as instructed by the Thessaloniki European Council. The non-exhaustive list of 11 common basic principles as agreed by the JHA Council is as follows:

'1. Integration is a dynamic, two-way process of mutual accommodation by all immigrants and residents of Member States.
2. Integration implies respect for the basic values of the European Union.
3. Employment is a key part of the integration process and is central to the participation of immigrants, to the contributions immigrants make to the host society, and to making such contributions visible.
4. Basic knowledge of the host society's language, history, and institutions is indispensable to integration; enabling immigrants to acquire this basic knowledge is essential to successful integration.
5. Efforts in education are critical to preparing immigrants, and particularly their descendants, to be more successful and more active participants in society.
6. Access for immigrants to institutions, as well as to public and private goods and services, on a basis equal to national citizens and in a non-discriminatory way is a critical foundation for better integration.
7. Frequent interaction between immigrants and Member State citizens is a fundamental mechanism for integration. Shared forums, intercultural dialogue, education about immigrants and immigrant cultures, and stimulating living conditions in urban environments enhance the

336 final, 03.06.2003.

909 2618th Council Meeting Justice and Home Affairs, 19 November 2004, 14615/04, Annex 'Common Basic Principles for Immigrant Integration Policy in the EU'.

interactions between immigrants and Member State citizens.

8. The practice of diverse cultures and religions is guaranteed under the Charter of Fundamental Rights and must be safeguarded, unless practices conflict with other inviolable European rights or with national law.
9. The participation of immigrants in the democratic process and in the formulation of integration policies and measures, especially at the local level, supports their integration.
10. Mainstreaming integration policies and measures in all relevant policy portfolios and levels of government and public services is an important consideration in public-policy formation and implementation.
11. Developing clear goals, indicators and evaluation mechanisms are necessary to adjust policy, evaluate progress on integration and to make the exchange of information more effective.'

These common basic principles are along the same lines, in general terms, as the principles established by the Hague Programme for the integration of third-country nationals, yet they go far beyond the foundation determined by the Hague Programme.[910]

The framework for integration within which the national integration policies should take place is presented as a catalogue of possible concrete measures in the Communication on a Common Agenda for Integration.[911] In order to realize the common basic principles on integration, the framework lists suggestions for national and EU-level action under each of the 11 principles, such as the removal of obstacles, like fees or bureaucratic requirements, to the use of voting rights within the scope of Common Basic Principle 9.[912] The framework also consists of material elements which facilitate the establishment of a European Integration Policy by contributing to the exchange of information, the monitoring of developments and the furthering of the policy and actions. These are tools which

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[910] According to the common basic principles set by the Hague Programme integration: is a continuous, two-way process involving both legally resident third-country nationals and the host society; includes, but goes beyond, anti-discrimination policy; implies respect for the basic values of the European Union and fundamental human rights; requires basic skills for participation in society; relies on frequent interaction and intercultural dialogue between all members of society within common forums and activities in order to improve mutual understanding; extends to a variety of policy areas, including employment and education.

[911] Commission Communication 'A Common Agenda for Integration: Framework for the Integration of Third Country Nationals in the European Union', COM(2005) 389 final, 01.09.2005.

[912] Voting rights for third-country nationals at the local level is accepted to be part of the integration process not only by the Commission but also by the Council. See: 2618th Council Meeting Justice and Home Affairs, 19 November 2004, 14615/04.

shall shape the common policy that will be developed around the common basic principles.

The primary tool for the establishment of a coherent EU approach towards integration is the National Contact Points on Integration. Clearly mandated by the Thessaloniki European Council to strengthen the coordination of relevant policies at national and EU level,[913] the National Contact Points constitute a forum for Member States to exchange information and best practices. Next to the coordination of national and EU policies on integration the National Contact Points are given the long-term objective of developing and enhancing the European framework for integration by not only defining common principles but also setting the objectives, targets or benchmarks.[914]

The Handbook on Integration, which can be mentioned as the second tool in establishing a European Integration Policy, is the result of the work of the National Contact Points. The first edition of the Handbook on Integration was published in November 2004, followed by a second edition in May 2007. The Handbooks contain good practices in the area of integration and a rich catalogue of recommendations and proposals. The subjects dealt with in the Handbooks cover a broad range of issues from methodological to substantive such as the introduction of newly arrived immigrants and refugees, civic participation, indicators for measuring integration,[915] mainstreaming immigrant integration, housing and urban environment, economic integration and integration governance.[916]

The Annual Report on Migration and Integration is the third instrument which monitors the development of integration policies in Member States and the EU. The Annual Reports[917] take stock of the migration trends and the changes and actions concerning the admission and integration of immigrants and thus allowing for a review of the development of the entire common immigration policy.

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913 Presidency Conclusions Thessaloniki European Council, 19-20 June 2003, Point 32.

914 H. Urth, 'Building a Momentum for the Integration of Third Country Nationals in the European Union', *European Journal of Migration and Law,* Vol.7 (2005) pp.163-180.

915 Handbook on Integration for policy-makers and practitioners, Directorate General for Justice, Freedom and Security (November 2004).

916 Handbook on Integration for policy-makers and practitioners, Directorate General for Justice, Freedom and Security (May 2007).

917 The First Annual Report on Migration and Integration, COM(2004) 508 final, 16.07.2004; Second Annual Report on Migration and Integration, SEC (2006) 892, 30.06.2006; Third Annual Report on Migration and Integration, COM(2007) 512 final, 11.09.2007.

The integration website is one of the instruments which aims to contribute to the framework of integration. The development of a widely accessible website on the internet was called for by the Hague Programme in relation to integration.[918] The website contains an inventory of good practices and promotes their exchange as was announced by the Commission in 2005.[919] Furthermore, it contains information on funding opportunities, a documentation library, news and country legislation on integration. It was initially announced that the website would be operational in 2008.[920] However, the Commission launched the 'European Web Site on Integration'[921] on April 20, 2009 together with the European Integration Forum. This Forum will act as a platform where representatives of civil society organizations can express their views on integration issues.[922]

The European Integration Fund was established in 2007[923] in order to support the efforts by the Member States to enable third-country nationals of different economic, social, cultural, religious, linguistic and ethnic backgrounds to fulfil the conditions of residence and to facilitate their integration into the European societies, focusing primarily on actions relating to the integration of newly arrived third-country nationals.[924] The Council Decision establishing the Integration Fund lists the characteristics of Member State and Community actions which shall be eligible for funding.[925] For the purposes of the fund, each Member State shall receive a fixed amount of € 500,000 in annual allocations in addition to the amount which shall be calculated according to the total number of third-country nationals legally staying in the Member State and the total new admission of third-country nationals within a certain period.[926]

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[918] The Hague Programme, Point 1.5.

[919] Commission Communication 'A Common Agenda for Integration: Framework for the Integration of Third-Country Nationals in the European Union', COM(2005) 389 final, 01.09.2005, point 3.3.3.

[920] Third Annual Report on Migration and Integration, COM(2007) 512 final, 11.09.2007, point 3.1.

[921] Accessible at http://ec.europa.eu/ewsi/en/ (last visited 21.04.2009).

[922] 'Platform for dialogue: 'European Integration Forum' and interactive 'European Web Site on Integration': two new tools to make integration work' Europa Press Release, 20.04.2009, Brussels.

[923] Council Decision 2007/435 of 25 June 2007 establishing the European Fund for the Integration of third-country nationals for the period 2007 to 2013 as part of the General programme 'Solidarity and Management of Migration Flows', O.J. L 168, 28.06.2007, pp.18-36.

[924] Council Decision 2007/435, Article 2(1).

[925] *Ibid.*, Articles 4 and 5.

[926] *Ibid.*, Article 12.

The success of this framework, consisting of common basic principles, national contact points, handbooks, annual reports, the website and the integration fund, still remains to be seen. While the principal role in establishing integration policies belongs to Member States,[927] the EU can steer such policies to a certain extent with the help of the tools available to it. On the policy front, the Commission continues to remind Member States of the importance of integration. It has defined integration as 'the key to successful immigration'; 'successful immigration' meaning the extraction of an optimum contribution from legal immigration to the socio-economic development of the EU.[928] On the legislative front, the EU shall continue to contribute to the integration of third-country nationals by enacting measures which respect the principle of equal treatment. Moreover, the best manner in which the EU can legislate is to make sure that immigrants are afforded a secure legal status. Ensuring a secure legal status of the basic qualities which integration policies must possess[929] has already been the predominant perspective followed in EU migration law,[930] even though occasionally compromised for the benefit of national concerns. This approach also ensures that the novel attempts at establishing a European Integration Policy are not tainted with assimilation criticism. For the same reason, the EU should equally pay special attention so as not to promote one-sided integration policy features such as mandatory integration programmes.

2.5 Conclusions

This chapter presents a complete account of the EU immigration law and policy, which together form the legal migration side of the Global Approach to Migration.[931] In this regard, the visa policy and border management, as well as rules governing the admission and residence of family members of the third-country national, long-term residents, economic migrants, researchers and students will continue to be fundamental areas of EU immigration acquis.

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927 Commission Communication on an Open Method of Coordination for the Community Immigration Policy, COM(2001) 387 final, 11.07.2001.

928 Commission Communication 'A Common Immigration Policy for Europe: Principles, Actions and Tools', COM(2008) 359 final, 17.06.2008, Section II(3).

929 J. Niessen, 'Immigration, Citizenship and the Benchmarking of Integration in the EU', in S. Carrera, ed., *The Nexus Between Immigration, Integration and Citizenship in the EU*, Collection of Papers presented at the CHALLENGE seminar of 25.01.2006.

930 K. Groenendijk, 'Legal Concepts of Integration in EU Migration Law', *European Journal of Migration and Law*, Vol. 6 (2004) pp. 111-126.

931 The Global Approach to Migration is a wider concept consisting of not only legal migration matters but also measures relating to fighting illegal migration, trafficking in human beings, return, readmission, asylum and refugees.

However, they will be complemented with a set of novel policies which focus on extracting the greatest benefit out of the migration-development nexus and on the place migration occupies within the external relations of the EU, as well as the fair treatment and integration of third-country nationals.

Even though the precise content of most of these policy areas is not yet very clear, the trend which becomes obvious after analyzing the relevant EU-level debates is that the future of the European immigration acquis can be characterized as having a constructive character. This is because instead of a restrictive view, the new policies concentrate on getting the best out of the immigration phenomenon; the best for the immigrant by ensuring fair treatment and integration into the host society, the best for the immigrant's family left in the sending country by facilitating the sending of remittances, but also the best for the host Member State and the sending country by way of circular migration and mobility partnerships.

The description of the various aspects of EU legal immigration law and policy form the basis of the assessment to which Turkish foreigners' law will be made subject. For this reason the present chapter is of fundamental importance. However, this chapter, just like the following chapter, is intended to serve a purpose of its own, which is to examine the current state of EU legal immigration law and policy and to point to its shortcomings and added value. In other words, as much as this chapter is an indispensable element in the comparison which is made in Chapter four in order to assess the Turkish laws on foreigners, it is equally valid as a detached account of the current European legal migration acquis, its past and future.

Chapter Three
Turkish Law and Practices on Immigration

3.1 Introduction

This Chapter aims at indexing the rules relating to foreigners in Turkish law. This catalogue of rules is subsequently tested against the EU acquis on immigration in the following Chapter in order to determine the extent to which Turkish laws are in compliance with the European immigration law and policy and consequently to ascertain what the impact will be of alignment with the EU acquis in the area of immigration on the Turkish legal system. To this end, the first focal point of the chapter is the general principles of Turkish foreigners' law. In Section 3.2 entitled 'General Principles of Turkish Foreigners' Law', next to introducing the basic notions which are predominant in the foreigners' law, the manner in which this area of law is structured is also explained. Subsequently, in Section 3.3 the question of 'who an immigrant is' under Turkish law is answered and the logic behind this traditional understanding of the concept is explained. Next, the law which has governed the entry and residence of immigrants in the traditional sense is analyzed. This is followed by Section 3.4 where the focus shifts to immigration in the internationally accepted sense. In this section, the Turkish legislation which regulates the entry and residence of foreigners is investigated.

3.2 General Principles of Turkish Foreigners' Law

Foreigners living in Turkey do not form a homogenous group. This group consists of aliens with different reasons for being in Turkey such as students or asylum seekers. Their legal status is governed by various legal texts; for instance by the Law on Foreign Students Pursuing Their Studies in Turkey[1]and the Asylum Regulation[2]. However, not all categories of foreigners fall within the

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1 Law on Foreign Students Pursuing Their Studies in Turkey [Türkiye'de Öğrenim Gören Yabancı Uyruklu Öğrencilere İlişkin Kanun], Law No. 2922 dated 14.10.1983, published in the Official Gazette No. 18196 dated 19.10.1983.

2 Regulation on the procedures and principles related to population movements and aliens arriving in Turkey either as individuals or in groups wishing to seek asylum either in Turkey or requesting residence permits in order to seek asylum in another country [Türkiye'ye İltica Eden veya Başka Bir Ülkeye İltica Etmek Üzere Türkiye'den İkamet İzni Talep Eden Münferit Yabancılar ile Topluca Sığınma Amacıyla Sınırlarımıza Gelen Yabancılara ve Olabilecek Nüfus Hareketlerine Uygulanacak Usul ve Esaslar Hakkında Yönetmelik], with Cabinet Decree No. 94/6169 dated 14.09.1994, published in the Official Gazette No. 22127 dated 30.11.1994.

scope of this study. The focus of this chapter is on the legal status of foreigners who migrate to Turkey, in the internationally accepted definition,[3] for an indefinite period of time. The exclusion from the scope of this study of the rights and obligations of refugees under Turkish law is connected with the research choices which are applicable to the entirety of the book. Nevertheless, the Turkish policy on refugees still deserves some attention not only because this unique regime is very telling as to the general approach under Turkish law towards foreigners who enter Turkey for purposes of residing there, but also because the modification of this regime constitutes one of the core subjects of the EU demands from Turkey in the area of Justice, Freedom and Security.[4] This is due to the fact that Turkey made use of the opportunity provided in Article1.B (a) of the 1951 Geneva Convention Relating to the Status of Refugees[5] which provides for a Geographical Limitation. Article 1.B of the Convention provided that contracting parties could have chosen to apply the Convention to people fleeing their country as a consequence of events occurring in Europe before January 1, 1951. Turkey signed the Convention by making use of both the geographical and the time limitations. However, when it signed the 1967 Protocol relating to the Status of Refugees,[6] Turkey lifted the time limitation but preserved the geographical limitation. As a consequence of this limitation, a refugee is defined as "an alien who is outside his/her country and cannot or is reluctant to enjoy the protection provided by his/her country of origin; or in case of stateless persons who are reluctant to go back to the country in which he/she previously resided, due to a well founded fear of prosecution based on his/her race, religion, nationality, membership of a particular group or political opinion as a result of events taking place in Europe".[7] It follows that when an asylum seeker coming from outside Europe enters Turkey, the United Nations High Commissioner for Refugees (UNHCR) is informed about the application. Such asylum seekers are registered and interviewed by the UNHCR. If they are granted refugee status, they enjoy only temporary residence in Turkey, until the UNHCR office in Turkey places them in a third country. As nearly all asylum seekers in Turkey come from non-European countries[8] they are temporarily resident in the country until they are placed in countries such as the United States, Canada, Germany and

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3 The IOM's definition of immigration is: '*a process by which non-nationals move into a country for the purpose of settlement*',(International Migration Law: Glossary on Migration (IOM, 2004).

4 2004 Regular Report on Turkey's Progress Towards Accession, SEC(2004) 1201, 06.10.2004, p. 147.

5 Entry into force: 22.04.1954.

6 Entry into force: 04.10.1967.

7 Article 3 of the Asylum Regulation No.94/6169.

8 Statistics on asylum applications in Turkey broken down by country of origin can be found at http://www.unhcr.org.tr/.

Australia.[9] In this case, asylum seekers do not form a group which can be considered together with the other third-country nationals who come to Turkey with the aim of living in Turkey for an indefinite period of time. It must be added that the European Union wants Turkey to lift the geographic limitation to the Geneva Convention.[10] However, the Turkish side is very reluctant regarding this issue. In the National Action Plan for the Adoption of the EU Acquis in the Field of Asylum and Migration[11] it is stated that a 'proposal for lifting the geographical limitation may be expected to be submitted to the Turkish Grand National Assembly in 2012 in line with the completion of Turkey's negotiations for accession to the EU'. It is obvious that Turkey does not want to be subjected to such a heavy burden without knowing for certain that the EU will accept Turkey as a member and even then Turkey wants the EU to place more stress on burden sharing. It is for us to see how the EU will react to Turkey's reluctance.

It should be mentioned that even the relatively more specific group of foreigners who are living in Turkey for an indefinite period of time are not wholly governed by the same laws and regulations. Some are subject to a more favorable legal regime. Foreigners of Turkish descent have an advantageous status regarding the right to work.[12] They have been given freedom to work in any public or private institution, except for the Turkish Armed Forces and Security Forces.[13] The citizens of the Turkish Republic of Northern Cyprus (TRNC) used to be governed by the same regime applying to foreigners of Turkish descent, but were excluded from the scope of the relevant Law and were granted an even more favourable status with the Agreement Between the Governments of the Turkish Republic and the Turkish Republic of Northern Cyprus Regarding the Granting of Additional Facilitations to the Citizens of the Two Countries.[14] In the preamble to this Agreement it is stated that the objective is to make sure that the TRNC citizens enjoy all economic and social rights granted to Turkish citizens. Another instance where a group is granted an advantageous status even though

9 Statistical information on in which third countries the refugees are placed can be found at: http://www.unhcr.org.tr/.

10 Recommendation of the European Commission on Turkey's Progress Towards Accession, Brussels, 06.10.2004, COM(2004) 656 final Annex: Conclusions of the Regular Report on Turkey.

11 Adopted by the Prime Ministry on 25.03.2005.

12 The law relating to the employment of foreigners of Turkish descent in public or private institutions and workplaces, and their right to carry out their jobs and crafts freely in Turkey [Türk Soylu Yabancıların Türkiye'de Meslek ve Sanatlarını Serbestçe Yapabilmelerine, Kamu, Özel Kuruluş veya İşyerlerinde Çalıştırılabilmelerine İlişkin Kanun], Law No. 2527 dated 25.09.1981, published in the Official Gazette No. 17473 dated 29.09.1981.

13 Law No. 2527 Article 1.

14 International Agreement ratified by Law No.4465 on 03.11.1999.

they are technically foreigners is to be found in the Turkish Citizenship Law.[15] Article 29 of the Turkish Citizenship Law first determines that those who lose Turkish Citizenship in accordance with the Citizenship Law shall be regarded as foreigners. However, the provision then separates a group from this category and gives them a special position. Accordingly, those who have acquired Turkish nationality by birth but have lost it by way of obtaining permission to renounce their citizenship from the Council of Ministers shall continue to enjoy rights granted to Turkish citizens.[16] This provision lays down the rule concerning the legal regime to be applied to such foreigners. Yet, they do not enjoy all the rights granted to Turkish citizens as the article goes on to underline that they shall not be subject to obligatory military service and shall not enjoy the right to vote and to be elected and the right to work in public service or to import vehicles and furniture with a privileged procedure.

The Turkish regime concerning foreigners is not compiled in a systematic manner in the form of a foreigners' law. Moreover, in the Turkish positive law the definition of a 'foreigner' was only made in 2003, in Article 3 of the Law on Work Permits for Foreigners.[17] According to this provision, a foreigner is "a person who is not deemed to be a Turkish citizen according to the Turkish Citizenship Law No.403".[18] This provision includes not only third-country nationals, but also stateless persons, refugees, foreigners with a special status such as corps diplomatique and NATO personnel.[19] However, the definition has been criticized on the ground that it takes no notice of other legislation, such as the Law on Settlement,[20] which leads to the acquirement of Turkish citizenship.[21] The wording of the provision may be interpreted so as to lead to an ambiguous situation where those who have acquired Turkish citizenship according to laws other than the Turkish Citizenship Law will be considered as foreigners. It is suggested that a complete definition should include reference to all Turkish legislation relating to the acquisition of Turkish citizenship.[22] By doing so, the

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15 Turkish Citizenship Law [Türk Vatandaşlığı Kanunu], No. 403 dated 11.02.1964, published in the Official Gazette No. 11638 dated 22.02.1964.

16 Turkish Citizenship Law, Article 29.

17 R. Aybay, *Yabancılar Hukuku* [Foreigners' Law] (İstanbul, Bilgi Üniversitesi Yayınları 2005) p.69.

18 Article 3 of the Law on Work Permission for Foreigners [Yabancıların Çalışma İzinleri Hakkında Kanun], No. 4817, published in the Official Gazette No.25040 dated 06.03.2003.

19 G. Tekinalp, *Türk Yabancılar Hukuku* [Turkish Foreigners' Law] (İstanbul, Beta 1998) p.7.

20 The Law on Settlement is discussed in detail *infra* 3.3.2.

21 R. Aybay, Yabancılar Hukuku [Foreigners' Law] (İstanbul, Bilgi Üniversitesi Yayınları 2005) p.70.

22 R. Aybay suggests the definition of a foreigner should be 'a person who is not deemed to be

confusing wording of the provision can be corrected.

The fact that a 'foreigner' has only very recently been defined in Turkish positive law, actually reveals an important aspect of Turkish foreigners' law. The creation of the Turkish foreigners' law intersects with the efforts of the Turkish Republic to create a fully independent political and economic system. Abolishing all privileges granted to foreigners with the Treaty of Lausanne[23] was the first step towards achieving this aim as capitulations are seen as one of the reasons why the Ottoman Empire collapsed. Having learned from the mistakes made in the past, the Republic adopted a policy which kept foreign activities in Turkey at a minimum level, in a nationalist and protective manner.[24] Starting from the 1950s, Turkey adopted a more liberal economic model, and the legislation was shaped in order to facilitate activities of foreign investment especially in areas such as banking, insurance, mining, the petroleum industry and civil aviation.[25] The legal developments concerning foreign investment did not find their reflection in the scope of rights for foreign individuals. This is due to the fact that there was no comparable need for foreign individuals in Turkey as there was for foreign investment.[26] As a result, the restrictive provisions for foreigners have been preserved to a large extent and the Turkish law on foreigners remained an under-developed part of the law. The recent modifications to the foreigners' law, such as those witnessed in access to the labour market,[27] mainly relate to the Turkey-EU integration process.

Provisions relating to the rights and obligations of foreigners can be found in various pieces of legislation.[28] In the midst of this chaotic structure, the first place to start looking for provisions relating to the situation of foreigners is the Turkish Constitution.

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a Turkish citizen according to the Turkish laws' in *Yabancılar Hukuku* [Foreigners' Law] (İstanbul, Bilgi Üniversitesi Yayınları 2005) p.70.

23 Treaty of Peace with Turkey signed at Lausanne on July 24, 1923 which took effect with Law No. 341, dated 23.08.1923.

24 A. Çelikel, 'Türk Yabancılar Hukukunun Genel İlkeleri' in *Vatandaşlık ve Yabancılar Hukuku Alanında Gelişmeler (Bilimsel Toplantı)* [Developments in the Area of Citizenship and Foreigners' Law (Scientific Meeting)] (Ankara Üniversitesi Hukuk Fakültesi 1998) p.94.

25 *Ibid.*

26 *Ibid.,* p.95.

27 See *infra* 3.4.2.2.

28 Law on the Residence and Travel of Foreigners in Turkey, Passport Law, Law on Work Permission for Foreigners, The Law relating to the employment of foreigners of Turkish descent in public or private institutions and workplaces, and their right to carry out their jobs and crafts freely in Turkey, Law Regarding Crafts and Services Allocated for Turkish Citizens in Turkey, Law on Foreign Students Studying in Turkey, etc.

Part two of the Constitution of the Republic of Turkey, which covers articles 12 to 74, is entitled Fundamental Rights and Duties. The General Principles which apply to the system of fundamental rights and duties can be found between Articles 12 and 16. This is followed by the chapter dealing with the Rights and Duties of the Individual (Articles 17-40) and the chapter on Social and Economic Rights and Duties (Articles 41-65). Part two of the Constitution ends with Chapter four on Political Rights and Duties (66-74).

The main provision governing the legal status of foreigners is Article 10 (1) of the Constitution stating that "all individuals are equal without any discrimination before the law, irrespective of language, race, colour, sex, political opinion, philosophical belief, religion and sect, or any such considerations". As the provision concerns 'all individuals' it also governs the situation of foreigners. Concerning the fundamental rights and freedoms of foreigners, it was the 1961 Constitution which incorporated, for the first time in the Turkish constitutional system, a basic principle concerning the rights to be granted to foreigners.[29] This principle which was to be found in Article 13 of the 1961 Constitution appears in Article 16 of the 1982 Constitution, without changing at all in essence, but only with minor changes in the wording. The provision provides the conditions for derogating from the general principle in Article 12 which reads: "Everyone possesses inherent fundamental rights and freedoms which are inviolable and inalienable".[30] A reservation is made in Article 16 to this general principle. Article 16 of the Turkish Constitution is entitled 'Status of Aliens' and indicates that "the fundamental rights and freedoms of aliens may be restricted by law in a manner consistent with international law". Accordingly, the fundamental rights and freedoms, as have been regulated between Articles 12 and 74, can be limited for foreigners under certain conditions. These conditions are consistent with international law and limitation by law.

The condition set in Article 16 as to the consistency of the restriction with international law should be interpreted broadly. It should not be understood only as a reference to the international agreements to which Turkey is a party, but all sources of international law should be taken into consideration.[31] The restrictions should be acceptable under principles of international law. The traditional principles of international law do not require foreigners to enjoy the same rights

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29 R. Aybay, *Yabancılar Hukuku* [Foreigners' Law] (İstanbul, Bilgi Üniversitesi Yayınları 2005) p.70.

30 An official English translation of the Constitution of the Republic of Turkey can be found at: http://www.byegm.gov.tr/mevzuat/anayasa/anayasa-ing.htm (last visited 21.01.2009).

31 R. Aybay, *Yabancılar Hukuku* [Foreigners' Law] (İstanbul, Bilgi Üniversitesi Yayınları 2005) p.72.

as citizens under every condition;[32] thus the point of concern is whether the extent of any limitation on foreigners' rights can be tolerated within the general context of international law.

The other condition set in Article 16 concerns the instruments by which the fundamental rights of foreigners can be limited. Article 16 indicates that such limitations should be made 'by law'. The term 'law' is subject to a restrictive interpretation and be construed as acts enacted by the legislative organ as 'laws' in the technical sense. If a restriction is introduced by a Regulation, this would constitute a violation of Article 16 of the Constitution. As for a restriction by a Decree Law, this should only be permitted in exceptional cases as such restrictions can also be placed on the rights and freedoms of Turkish citizens. Such restrictions are only permitted concerning social and economic rights, except during periods of martial law and states of emergency.[33] According to an opposing view based on certain judgments of the Constitutional Court[34], the legislative body cannot act as speedily as the executive in reacting to the actual needs which can swiftly change. Accordingly the executive body can impose restrictive regulations based on a competence granted by law and in compliance with the Constitution, as long as the limits and proportions of the restrictive measures are explicitly and unambiguously laid down in the law.[35]

The remainder of the present chapter can be classified under two themes: the regime governing immigrants and the regime governing foreigners. In connection with the first theme, the definition of an 'immigrant' according to Turkish law is primarily dicussed and the reasons behind the adoption of such a definition will be looked at. Consequently, the central legislation concerning 'immigration' within the meaning of Turkish law – the Law on Settlement – is analyzed. Regarding the second theme, the rules relating to the admission and residence of foreigners are dealt with.

3.3 The Notion of an 'immigrant' in Turkish Law

Reaching common definitions should be the starting point when a phenomenon is to be challenged at an international level. This comes as a logical result of the

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32 *Ibid.*, p.43.

33 Turkish Constitution, Article 91 (1).

34 Judgments of the Constitutional Court in E.1962/232, K.1963/9 and in E.1962/281, K.1963/52.

35 R. Aybay, *Yabancılar Hukuku* [Foreigners' Law] (İstanbul, Bilgi Üniversitesi Yayınları 2005) p.78.

fact that when it comes to issues of such a great magnitude as to obligate states to take common measures, a successful end result cannot be put in jeopardy just because of basic technical inconsistencies in different legal systems, such as different definitions. It is, by now, beyond doubt that managing migration is a phenomenon which cannot be left to the sole discretion of states[36]; and following the general rule, any common action would require a universally agreed upon definition of immigration. To this effect, the International Organization for Migration (IOM) has codified the international definition of immigration as "*a process by which non-nationals move into a country for the purpose of settlement*".[37] However, an internationally accepted definition of an 'immigrant' does not exist. How states define and perceive immigrants varies; and so do the policies which states have adopted regarding those whom they call immigrants.

The specific case of Turkey is very interesting starting from this very first step, the definition. The definition, the reasoning behind this definition and the policy surrounding it are very peculiar and deserve special attention. The Law on Settlement which is the primary legislation relating to immigration defines an immigrant as follows: "*individuals and groups of Turkish descent who are committed to the Turkish culture, who come to Turkey for settling purposes and who have been accepted in accordance with the Law on Settlement*"[38]. Even this conception of 'who an immigrant is' gives an inkling as to the basic characteristics of Turkish immigration policies.

3.3.1 The Reasons for the Narrow Definition of an 'Immigrant'

Turkish immigration policy, argued to resemble Israel's law of return or Germany's policy towards ethnic Germans,[39] is very much shaped by the events prior to the establishment of the modern Turkish Republic. To understand the reasoning behind this policy it is essential to look back in time and to identify some traumatic experiences of the predecessor of the Turkish Republic that led to the formulation of immigration policies in such a particular way. This is why it is accurate to start with a brief historical digest.

The Ottoman Empire, at its peak in the 16th century, covered an area comprising of the Balkans, the arch embracing the whole Black Sea Coast stretching from central Hungary to the Caspian Sea, arriving at the Gulf of Basra; from the Gulf

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36 P. Boeles, *Fair Immigration Proceedings in Europe* (The Hague, Nijhoff 1997), p.3.

37 International Migration Law: Glossary on Migration (IOM, 2004).

38 Law on Settlement [İskan Kanunu], No.5543 dated 19.09.2006 published in the Official Gazette No.26301 dated 26.09.2006, Article 3(1)(d).

39 S. Castles and M. Miller, *The Age of Migration: International Population Movements in the Modern World*, 3rd edn (New York, the Guilford Press 2003), p.127.

reaching the Red Sea by including Baghdad, Damascus and most of the Arab lands, the South-West of the Arab Peninsula, Egypt, the Mediterranean coast of Africa, Cyprus and most other islands of the Mediterranean.[40] At the centre of this multinational, multicultural empire was today's Turkey. This was where the Empire was founded and governed. Turkish was the language of government and the reign primarily depended on the Turks as the 'most reliable of the Sultan's subjects'.[41] However, the Ottoman Empire did not have an ethnic feature; considering its multinational structure, this would have been impossible to uphold. The only loyalty demanded from any subject was 'no more than not rebelling and paying taxes'.[42] The acquisition of Ottoman upper-class status was also not dependent upon ethnic criteria.[43]

The Ottoman territory was vast and population movements within this territory were only natural. The Empire had a tradition of accepting immigrants and refugees from outside its territories. In the sixteenth and seventeenth centuries thousands of Marranos and Moriscos, Jews and Muslims who were suffering under the rule of the Spanish Inquisition sought refuge in the Ottoman Empire.[44] The failure of the second Ottoman siege of Vienna in 1683 marked the beginning of a new process of immigration. Following the Treaty of Karlowitz (1699), ending the war between the Habsburgs and the Ottoman Empire, thousands of Muslims and Jews escaping the Habsburg invasion of Serbia and Bulgaria were settled in the Ottoman territories. In this period 130,000 Muslim refugees left their homes in the Balkans to settle in the lands still forming part of the Empire.[45] As the Ottoman Empire gradually reduced in size this new wave of immigration continued as flows of people from Central Asia, Crimea, Crete and Eastern Europe settled in today's Turkey. While at the beginning of the nineteenth century the Ottoman population consisted of 40% non-Muslims;[46] between

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40 C. Imber, *The Ottoman Empire, 1300-1650: the Structure of Power* (Hampshire, Palgrave Macmillan 2002) p.1.

41 *Ibid.,* p.3.

42 *Ibid.*

43 O. Zirojević, 'On the Distinctive Features of the Bosniacs', in M.Koller and K.H. Karpat, eds., *Ottoman Bosnia: A History in Peril* (Madison, University of Wisconsin Press 2004) p.170.

44 S.J. Shaw, *Turkey and the Holocaust: Turkey's Role in Rescuing Turkish and European Jewry from Nazi Persecution, 1933-1945* (New York, New York University Press 1993) p.1.

45 M. Koller, '*Introduction: An Approach to Bosnian History*', in M.Koller and K.H. Karpat, eds., *Ottoman Bosnia: A History in Peril* (Madison, University of Wisconsin Press 2004) p.12;
S.J. Shaw, *Turkey and the Holocaust: Turkey's Role in Rescuing Turkish and European Jewry from Nazi Persecution, 1933-1945* (New York, New York University Press 1993) p.2.

46 M. B. Altunışık and Ö. Tür, *Turkey: Challenges of Continuity and Change* (New York, Routledge 2005) p.9.

1876 and 1927 1,994,999 Muslim immigrants came into Turkey from the Balkans and the Black Sea region.[47] Migration turned the old society of Anatolia, which was predominantly Turkish, into the true Ottoman ethnic and linguistic mixture that has become the present-day Turkish nation.[48]

The lack of a national sentiment led to dramatic consequences when the Empire was faced with a series of nationalistic uprisings in the Balkans in the nineteenth century. The rise of Balkan nationalism was a phenomenon that shook the Ottoman Empire to its roots. The effects of this nationalistic movement can still be seen in the founding characteristics of the Turkish Republic. The Ottomans did not understand Balkan nationalism. They saw it simply as treason by rebellious subjects; instead of a demand for full independence from the Empire for all parts in which persons of their nationality formed the majority.[49] The rise of nationalism eventually led to the disintegration of the Ottoman state.[50] As a result Turkish society was forced into the channel of Turkish nationalism, an association which has remained until the present day in the modern Turkish Republic.[51] So Turkish nationalism, probably the first example of Muslim ethnic nationalism, started as a self-defensive measure against the Greek, Serbian and Bulgarian ethnic nationalist uprisings.[52] However, Turkish nationalism was not the awakening of Turks to national consciousness; but rather a project undertaken by intellectuals.[53]

The Turkish Republic was established against this background. Atatürk's young republic had accepted a civic definition of citizenship. The 1924 Constitution established that all citizens of Turkey irrespective of their religious or ethnic affiliations were 'Turks'. This definition was preserved in Article 66 of the 1982

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47 S. Çağaptay, 'Kemalist Dönemde Göç ve İskan Politikaları: Türk Kimliği Üzerine Bir Çalışma' [Migration and Settlement Policies in the Kemalist Era: A Study on Turkish Identity], *Toplum ve Bilim,* No.93 (Summer 2002) pp.218-241.

48 K.H. Karpat, *Studies on Ottoman Social and Political History: Selected Articles and Essays* (Boston, Brill 2002) p.23.

49 S.J. Shaw, *Studies in Ottoman and Turkish History: Life With the Ottomans* (İstanbul, ISIS Press 2000), p.63, 64.

50 K.H. Karpat, *Studies on Ottoman Social and Political History: Selected Articles and Essays* (Boston, Brill 2002) p.17.

51 S.J. Shaw, *Studies in Ottoman and Turkish History: Life With the Ottomans* (İstanbul, ISIS 2000) p.64.

52 K.H. Karpat, *Studies on Ottoman Social and Political History: Selected Articles and Essays* (Boston, Brill 2002) p. 20-22.

53 A. Kadıoğlu, 'The Paradox of Turkish Nationalism and the Construction of Official Identity', in S. Kedourie, ed., *Turkey: Identity, Democracy, Politics* (London, Frank Cass Publishers 1996) p.185.

Constitution. According to the Atatürk nationalism, the Turkish nation is a political concept rejecting all discrimination on the basis of ethnicity, religion and language. The fear of ethnic rebellion inherited from the Balkan trauma in the previous century demonstrated itself in the creation of this unifying definition of the Turkish nation. However, 'against such a formal definition of citizenship and national identity that emphasizes territoriality rather than ethnicity, actual state practice has been very different.'[54] This argument finds its best support in the Turkish immigration policy, which, despite the embracing character of the Atatürk nationalism, is rather particular when it comes to who will become a member of the society.

The migration movements in the traditional sense have taken place in order to homogenize the population within the context of creating a nation state. Bilateral treaties have been concluded with the Balkan countries (the most significant being the 1923 population exchange agreement between the Turkish Republic and Greece as a result of which 500,000 people had to move).[55] However, the most important legal text, which regulated all immigration into Turkey, was the Law on Settlement dated 1934[56], which has been replaced with the new Law on Settlement in 2006.

3.3.2. Law on Settlement

When we talk about the Law on Settlement being a legal text dealing with immigration, it must be kept in mind that we are not talking about the internationally accepted definition of 'immigration', being 'a process by which non-nationals move into a country for the purpose of settlement'.[57] In the case of the Turkish Law a narrow definition is used. The term immigration as it is used in the Law on Settlement should be understood within the context of the 'nation-building' efforts of the young Turkish Republic.

In the framework of the 1934 Law on Settlement 'immigrants' are individuals and groups who are of Turkish descent and who are committed to the Turkish culture and who wish to come to Turkey for settling purposes.[58] This principle

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54 K. Kirişçi, 'Disaggregating Turkish Citizenship and Immigration Practices', *Middle Eastern Studies*, Vol. 36, No.3 (July 2000) pp.1-22.

55 Z. Şahin, 'Change and Continuity of External Immigration to Turkey', *Stradigma.com,* No.3 (April 2003).

56 Law on Settlement, No.2510 dated 14.06.1934, published in the Official Gazette No.2733 dated 21.06.1934.

57 International Migration Law: Glossary on Migration, (IOM, 2004).

58 Law on Settlement, Article 7. The 1934 Law on Settlement contained the same principle in Article 3.

has been preserved in the 2006 Law on Settlement.[59] A similar provision also existed in the first Law on Settlement dated 1926. This earlier Law, which was urgently enacted under pressure from a sudden mass influx into the new Turkish Republic from the old Ottoman territory, specified that those who are not of Turkish culture shall not be admitted.[60]

A Council of Ministers' decision determines whether the person or persons in question are committed to the Turkish culture.[61] Therefore, the highly political nature of the Law finds its expression not only in the fact that immigration is given a very limited definition tied to 'Turkishness', but also in the fact that it is the Council of Ministers which determines one's 'Turkishness'.

In practice, consecutive governments have to date followed the spirit of the Law and construed the criterion of 'being committed to the Turkish culture' as a means of assembling once more the Muslim peoples of the Balkans which were once all Ottoman subjects. As of 1923 Turkey has kept records of immigrants who have come to the country to settle. These records are very detailed with country-specific information for immigrants coming from the Balkans; however, this in-depth approach does not apply to immigrants coming from other places. This difference in approach can be demonstrated by the categories of information contained in these records; as they show the number of immigrants who have settled in Turkey coming from Bulgaria, Yugoslavia, Romania, Greece and then from 'Turkmenistan' and 'others'. It is accepted that 'Turkmenistan' refers to the Central Asian countries and East Turkistan or Chinese Turkistan (the Xinjiang autonomous region of the People's Republic of China).[62]

According to the records of the General Directorate of Rural Services, from the 1,650,521 people 'of Turkish descent' who immigrated into Turkey from 1923 to 2004, 791,289 were from Bulgaria, 307,180 were from Yugoslavia, 122,564 were from Romania and 408,625 were from Greece. In the same period, the number of immigrants coming from Turkmenistan amounted to 2,878.[63]

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59 As Article 3(1)(d) of the 2006 Law on Settlement defines immigrants as 'individuals and groups of Turkish descent who are committed to the Turkish culture, who come to Turkey for settling purposes and who have been accepted in accordance with the Law on Settlement'.

60 S. Çağaptay, 'Kemalist Dönemde Göç ve İskan Politikaları: Türk Kimliği Üzerine Bir Çalışma' [Migration and Settlement Policies in the Kemalist Era: A Study on Turkish Identity], *Toplum ve Bilim*, No.93 (Summer 2002) pp.218-241.

61 Law on Settlement, Article 3

62 K. Kirişçi, 'Disaggregating Turkish Citizenship and Immigration Practices', *Middle Eastern Studies,* Vol. 36, No.3 (July 2000) pp.1-22.

63 Tables available at the website of the General Directorate of Rural Services:

Immigrants from Turkmenistan included Kazakhs, Kyrgyz, Uzbeks, Uyghur and Turkmens;[64] and even though their numbers might be higher if they had entered Turkey through countries other than their own, it is still not likely that they could be even close to the number of immigrants coming from the Balkans.

The Council of Ministers has traditionally favoured migration from the Balkans to that coming from any other place. While Christian Orthodox Gagauz Turks were not accepted as immigrants despite them being of Turkish descent; non-Turkish Albanians, Bosnians, Pomaks have been able to migrate to Turkey.[65] It is however not always easy to see what the choices of the Turkish Republic were as we do not have sufficient statistics concerning aspects such as the age, gender, education, profession, and the mother tongue of earlier immigrants. The statistics we do have relate to specific years and groups. For example, the statistics concerning the mother tongue of immigrants coming from Bulgaria between 1950-1951 show that 97.5% had Turkish as their mother tongue; while only 0.3% had Bulgarian as their native language.[66] As interesting as the information provided by such statistics might be, it is unfortunately very rare that we have similar data. Nevertheless, recent practice concerning the Turkish population in Kosovo also demonstrates how political concerns play a role in determining who gets to be an immigrant. Turkey, with the purpose of preserving the Turkish population in Kosovo, has not accepted Turkish Kosovars as immigrants although they were clearly of Turkish descent and culture. It became a routine that those who wanted to migrate into Turkey would first move to Macedonia and having themselves registered as having their domicile in Macedonia, then go to the Turkish embassy in Skopje and obtain an immigrant document.[67] The example is very telling as to how migration policies are used as a tool of external relations.

The definition of an immigrant provided by the Law on Settlement might have been just an inconsistency in terminology without any practical implications. It might have been the case that third-country nationals that are of Turkish descent and culture are referred to as immigrants and others as merely 'foreigners', while

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http://www.khgm.gov.tr (last visited 21.01.2009).

64 K. Kirişçi, 'Disaggregating Turkish Citizenship and Immigration Practices', *Middle Eastern Studies*, Vol. 36, No.3 (July 2000) pp.1-22.

65 *Ibid.*

66 C. Geray, *Türk İktisadi Gelişmesi Araştırma Projesi: Türkiye'den ve Türkiye'ye Göçler (1923-1961)* [Turkish Economic Development Research Project: Migration to and from Turkey (1923-1961)] (Ankara, SBF Maliye Enstitüsü 1962).

67 A. S. Recepoğlu, *Kosova'da Türkçe veya Kimlik Mücadelesi* [Turkish Language or Identity Struggle in Kosovo] (Prizren, Türk Yazarlar Derneği Yayınları 2004) p.4.

being subject to the same regime. However this is not the case, as being accepted as an immigrant brings with it certain consequences of great magnitude.

Immigrants are obliged to apply to the highest administrative officer of the place where they have settled after they have entered the country and to sign a 'citizenship declaration' and obtain an 'immigrant document, which is regarded as a temporary identification document and which is valid for two years'.[68] Those who are accepted as immigrants are given Turkish citizenship with a Council of Ministers' decision. Minors are connected to their parents or if their parents are not with them to their relatives in this respect. As for minors who arrive alone, they are given citizenship regardless of their age.[69]

As can be seen from these provisions, citizenship is the ultimate consequence of being an 'immigrant' in the sense of the Law on Settlement. When compared to the provision of Article 6 of the Citizenship Law[70], the procedure described in the Law on Settlement demonstrates an exceptional way of acquiring Turkish citizenship.

Article 6 of the Turkish Citizenship Law lists the conditions to be fulfilled in order to acquire Turkish citizenship. According to this Article, the conditions in order to acquire Turkish citizenship are: being of age according to the laws of the national laws or of Turkish laws in case of statelessness; having lived in Turkey for at least five years before the date of application; having confirmed by certain behaviour their intention to settle in Turkey; being of good morality; not having an illness presenting a threat to public health; speaking sufficient Turkish; and having a sufficient income to support himself/herself and those who are dependent on him/her.

Article 7 of the Turkish Citizenship Law entitled Exceptional Granting of Citizenship, refers to those who are of Turkish descent, their spouses and children who are of age among the people that shall exceptionally be granted citizenship.[71] Clearly, this provision coincides with the terms of the Law on Settlement and it is the 'immigrants' that is meant by Article 7. The Citizenship Law does not specify the procedure that is to apply to such exceptional granting of citizenship, thus it is the provisions of the Law on Settlement that show us how citizenship is granted in such circumstances. It follows that for immigrants the conditions for acquiring Turkish citizenship listed in Article 6 of the Turkish

68 Law on Settlement, Article 8(3).
69 *Ibid.*, Article 8(4).
70 Turkish Citizenship Law, No.403 of 22.02.1964.
71 Turkish Citizenship Law, Article 7(c)

Citizenship Law are not relevant; it is sufficient that a person is accepted as an immigrant for him or her to acquire Turkish citizenship as a final result.

At the point where immigrants are granted citizenship, they are no longer foreigners living in Turkey, and thus at that point they fall outside the scope of this research. However, they are in fact third-country nationals who are given preferential treatment in some areas including the acquisition of citizenship.

The immigrant is entitled to request settlement within two years of entering the country, failing which they shall not be settled.[72] How 'settlement' takes place is explained in Article 9 of the Law. According to this provision, 'settlement' is first of all by giving a house together with its land to the immigrant.[73] Secondly, for immigrants who are craftsmen or traders a shop including its land together with operational credit shall be given to earn their livelihood;[74] whereas for farmers, the land shall be given together with the required agricultural input and agricultural premises including the land and pecuniary or in kind operational and supply credits.[75] Immigrants shall pay the state the monetary value of the premises, supplies and credit in accordance with the principles laid down in the By-Law on Settlement.[76]

Originally 'settlement' was complimentary. However, as this system turned out to be impossible to sustain, a fund was set up in 1970 and from then onwards settlement was provided by granting the immigrants a loan which they have to pay back in installments over the years.[77]

For ten years, the allocated property cannot be sold, donated or confiscated and no mortgage can be taken on that property.[78] Each family shall be settled together and the immovable property allocated for every family shall be registered with equal shares to every family member in the land registry.[79] 'Family' according to the Law can be a unit consisting of a husband and wife[80] or the unmarried children together with the parents.[81] Every married child or married grandchild

72 Law on Settlement, Article 10.
73 *Ibid.*, Article 9(1)(a).
74 *Ibid.*, Article 9(1)(b).
75 *Ibid.*, Article 9(1)(c).
76 *Ibid.*, Article 27.
77 From the 'General Justification' of the Proposal for the new Law on Settlement submitted by the Government to the Turkish Grand National Assembly on 10.05.1996
78 Law on Settlement, Provisional Article 2(e).
79 *Ibid.*
80 *Ibid.*, Article 17(1)(a).
81 *Ibid.*, Article 17(1)(b).

comprises a separate family from their parents or grandparents,[82] as well as every childless divorcee or widow.[83] Brothers and sisters without parents shall also constitute a separate family with equal shares in the property.[84]

Even though the Law on Settlement has enumerated the possible members of a 'family' it does not contain any provisions relating to the family reunification rights of immigrants. However, there is a Council of Ministers' decision which has dealt with this issue.[85] According to this decision, the spouse, the minor children, and dependent parents of an immigrant who has acquired Turkish citizenship pursuant to the Law on Settlement shall be allowed to travel to and settle in Turkey.

Making use of this family reunification possibility or not, over 1.6 million immigrants, coming from Bulgaria, Yugoslavia, Romania, Greece, East Turkistan and other countries, have settled in Turkey pursuant to the Law on Settlement. The Law was the 'legal basis of a massive social engineering project aiming to sustain the construction of a Turkish national identity'.[86] It was designed to arrange the return home of the people who were once part of the same country; and this view finds its evidence even in Atatürk's words as he once said 'Turkey should abandon dreams of territorial expansion and instead bring the people left behind in the Balkans to Turkey'.[87] It is a product of the prior era when the young Turkish Republic of 17 million inhabitants had very different concerns.

The 1934 Law on Settlement had been amended on many occasions, as a result of which its objective and scope have become incomprehensible.[88] In the general justifications of the proposed version of the new Law on Settlement it was said that the Law on Settlement of 1934 contained provisions which did not suit today's world and that some provisions could no longer be implemented although they are officially in effect. The 2006 Law on Settlement is a much more structured text, aiming at bringing a better organized structure for migration, even though it does not change the main principles of the 1934 Law.

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82 *Ibid.*, Article 17(1)(c).

83 *Ibid.*, Article 17(1)(c).

84 *Ibid.*, Article 17(1)(ç).

85 Council of Ministers Decision No. 98/11863 of 18.10.1998, published in the Official Gazette No.23512 dated 03.11.1998.

86 K. Kirişçi, 'Disaggregating Turkish Citizenship and Immigration Practices', *Middle Eastern Studies*, Vol. 36, No.3 (July 2000) pp.1-22.

87 *Ibid.*

88 From the 'General Justification' of the proposed Law on Settlement submitted by the Government to the Turkish Grand National Assembly on 10.05.1996

The new Law on Settlement of 2006 states that upon entry into the country, immigrants shall be hosted at immigrant reception centres until their health, customs, administrative and transportation procedures are completed. During this period their food and housing needs will be provided free of charge.[89]

The Law on Settlement is an interesting piece of legislation to study. On the one hand, it is the sole instrument that has been used to organize the movements of more than 1.6 million people into the country, thus it is an important legal document to investigate when Turkish immigration practices are being studied. On the other hand, however, it does not concern immigration as is generally understood by the term. It is a legal document which is not comparable to the immigration acts of other countries as the Law on Settlement deals with a very specific case.

One thing the Law has done very successfully is to integrate the immigrants into society by determining that immigration automatically leads to citizenship. Today, the importance of facilitating immigrants becoming nationals[90] of the country they have chosen to live in has elevated in association with the issue of the integration of immigrants. For immigrants to have citizenship prospects is seen to be one of the factors promoting integration into the host country's social life.[91] It is obvious that the Law on Settlement put citizenship as the ultimate goal of immigration for completely different reasons[92], however the effects on society has been similar to what is aimed to be achieved by modern migration management trends by making citizenship the result of immigration.

It remains a fact that the scope of the Law on Settlement is not very broad and the main focus of this book is to study the regime relating to third-country nationals. The remainder of the present Chapter is devoted to the Turkish legislation concerning foreigners living in Turkey. For this reason, first the general admission conditions and border management are looked into. Then issues concerning residence are dealt with in depth under the themes of the right to reside, access to the labour market, the situation of researchers and the situation of students.

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89 Law on Settlement, Article 8(1).

90 It must be noted that under the Turkish citizenship law, the terms 'national' and 'citizen' can be used interchangeably as there is no distinction in Turkish law between these notions.

91 'Making Migrants Part of Society: the Canadian Experience' EPC-KBF Migration Dialogues, 25 November 2003, Communication to Members S78/03.

92 For why citizenship is the ultimate goal, see above Section 3.3.1.

3.4 Legislation on Foreigners

3.4.1 Admission

The main documents that regulate entry into Turkey are the Passport Law[93] and the Law on the Residence and Travel of Foreigners in Turkey.[94] The conditions to be fulfilled in order to enter the country can be found in the Passport Law. These conditions are that entry and departure can only be made through entry and exit points determined by the Council of Ministers,[95] a valid passport or a document to that effect must be presented upon entry,[96] foreigners must obtain a visa from the Turkish authorities[97] and they should not be among the persons whose entry into the country is forbidden.[98]

The first condition to be fulfilled in order to enter Turkish territory, namely that entry and departure shall be made through the points determined by the Council of Ministers, applies to both Turkish citizens as well as foreigners. To this effect it has been indicated that this provision is not a foreigners' law rule as it is not solely aimed at foreigners.[99] A distinction has not been made between Turkish citizens and foreigners even when it comes to the consequences of entering the country from places other than determined entry points. Both would have to pay a fine or serve a custodial sentence of up to 6 months even if they do possess a proper passport or other documents.[100]

Recognized Travel Documents

According to the second condition for entering the country, Turkish nationals as well as foreigners are obliged to present a valid passport or a document that replaces a passport to the police authorities at the entry and exit points.[101] Although this provision is also addressed to both Turkish citizens and foreigners,

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93 Passport Law [Pasaport Kanunu], Law No. 5682 dated 15.07.1950, published in the Official Gazette No. 7564 dated 24.07.1950.

94 Law on the Residence and Travel of Foreigners in Turkey [Yabancıların Türkiye'de İkamet ve Seyahatleri Hakkında Kanun], Law No. 5683 dated 15.07.1950, published in the Official Gazette No. 7564 dated 24.07.1950.

95 Passport Law, Article 1.

96 *Ibid.*, Article 2.

97 *Ibid.*, Article 5.

98 *Ibid.*, Article 8. See *infra* 3.4.1.1.

99 B. Çiçekli, *Yabancılar ve Polis: Polisin Görev ve Yetkileri Çerçevesinde Yabancıların Hukuki Durumu* [Foreigners and the Police: the Legal Position of Foreigners within the Framework of the Duties and Competences of the Police] (Ankara, Seçkin Yayıncılık 2003) p.33; G. Tekinalp, *Türk Yabancılar Hukuku* [Turkish Foreigners' Law] (İstanbul, Beta 1998) p.36.

100 Passport Law, Article 35.

101 *Ibid.*, Article 2(1).

the consequences of arriving at an entry point without a valid passport or a similar document differs according to who has not produced the travel document. Those who can prove that they are Turkish citizens by producing their identification cards or any other document will be allowed into the country;[102] foreigners will be turned back.[103]

Documents having the effect of a passport are quite a few in number. Here most of these documents, such as a vessel crew certificate, an airline crew certificate and the railway personnel identification document shall not be looked at. However, some of these documents, such as *Pasavans* and Administrative Letters, are very interesting and deserve a closer look. *Pasavans* ('pass checks') and similar documents are regulated in Article 19 of the Passport Law. These are documents which are issued to facilitate travel between Turkey and neighbouring countries in border areas. The provision further states that particularities as to the form, the way they shall be issued, the validity period and to whom they will be given are to be determined jointly by the Interior Ministry and the Ministry of Foreign Affairs in compliance with the provisions of the relevant international agreement. An agreement between Turkey and Iran dated 14.03.1937 created the established practice of issuing *Pasavans*.[104] The *Pasavans* are issued to citizens of both countries living in the border area covering 50kms from the border and are given for a period of 10 days at most.[105] The issuing of a *Pasavan* is a practical solution to certain problems that require an individual to travel to the neighbouring country at short notice. It is issued under specific circumstances such as when it is evident that one's cattle or goods have been stolen and abducted to the neighbouring country and for him to go and look for his goods or cattle; when one's cattle cross the border and are caught by the authorities of the neighbouring country for the person to go and identify and have the animals returned; when one needs to be present at a hearing in a case concerning an event which took place in the border area; or in order to facilitate the crossing of the border by representatives, witnesses and expert witnesses.[106]

Another similar border-crossing document in Turkish practice is the 'Administrative Letter' ('*idari mektup*'). The practice of issuing Administrative Letters is based on an Agreement between France and Turkey dated 20 October 1921 in which the signatory states agreed to create the Administrative Letter

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102 *Ibid.*, Article 3.

103 *Ibid.*, Article 4.

104 A. Asar, *Türk Yabancılar Mevzuatında Yabancı ve Hakları* [Foreigner and Foreigners' Rights in the Turkish Foreigners' Legislation] (Ankara, Emek Ofset 2004) p.41.

105 *Ibid.*

106 *Ibid.*

practice in order to ensure the maintenance of relationships among relatives in families divided in two with the establishment of the border between Syria and Turkey and to facilitate the solution of urgent civil law problems of citizens living on both sides in the border area.[107] The grounds on which an Administrative Letter can be issued mainly correspond to the grounds for issuing a *Pasavan*, with one addition. That is, as the main objective of creating the system was to ensure that family ties are not hampered, for obtaining an Administrative Letter it is also a valid reason for the applicant to proclaim that he or she will go and visit his/her family because either a relative is seriously ill or when a relative has passed away.[108] Furthermore, local authorities of the border towns on both sides of the frontier conclude agreements based on the authorization granted by the Ministry of the Interior for the issuance of special Administrative Letters for purposes of celebrating each other's religious festivals. The Administrative Letter is issued for at most seven days for persons living in the 50 km-wide area on the border which is determined to be the 'border area' by Turkey and Syria in bilateral agreements.[109] Those who do not return to their countries within the allowed time-limit shall be banned from making use of the Administrative Letter practice for three years.

A third example of exceptions to the general rule that entry into the country is only possible with a valid passport can be found in the practice concerning the entry of citizens of the Turkish Republic of Northern Cyprus and Turkey. According to the agreement between Turkey and the Turkish Republic of Northern Cyprus dated June 12, 1991[110]the citizens of Turkey and the TRNC can travel between the two countries on their identification cards.[111]

Another example of a possibility for identification cards to be used instead of passports can be found within the context of the Council of Europe, even though it has no practice concerning Turkey. The European Agreement on Regulations Governing the Movement of Persons Between Member States of the Council of Europe[112] gives the opportunity for the nationals of the contracting parties, whatever their country of residence, to enter or leave the territory of another

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107 *Ibid.,* p.42.

108 *Ibid.*

109 *Ibid.*

110 The Agreement took effect on 02.09.1991, published in the Official Gazette No.20945 dated 30.07.1991.

111 B. Çiçekli, *Yabancılar ve Polis: Polisin Görev ve Yetkileri Çerçevesinde Yabancıların Hukuki Durumu* [Foreigners and the Police: the Legal Position of Foreigners within the Framework of the Duties and Competences of the Police] (Ankara, Seçkin Yayıncılık 2003) p.43.

112 The European Agreement dated 03.12.1957 has been ratified by Turkey (Official Gazette No.10972 dated 01.12.1961).

party by identification documents.[113] Due to the fact that not all of Turkey's neighbours are members of the Council of Europe, and that the citizens of Member States of the Council of Europe would need to carry passports to travel to these countries, the opportunity that the European Agreement presents has no practical use concerning the eastern borders of Turkey.[114] The possibilities presented by the European Agreement only apply to visits of not more than three months.[115]

3.4.1.1 Visa Policy

When it comes to the Turkish visa policy, as a rule foreigners must possess a visa obtained from the Turkish authorities in order to enter the country.[116] This rule constitutes the third condition to be fulfilled in order to enter Turkish territory. Exceptionally, the citizens of some countries are exempt from visa requirements.[117] Despite the fact that Turkey has undertaken to adopt the EU Visa Negative List,[118] there are still some countries whose nationals enjoy a visa exemption regarding Turkey, whereas they are on the list of countries whose nationals must possess a visa in order to enter the EU.[119]

How Turkey came to be a country whose citizens have to acquire a visa in order to enter the territories of the EU Member States is an interesting case. The reason why it is interesting relates to the European Agreement on Regulations Governing the Movement of Persons Between Member States of the Council of Europe. The European Agreement provided for a system of visa-free travel for citizens of the Contracting Parties. Turkey, being one of the Contracting Parties of the European Agreement, originally constituted a part of the visa-free regime created by the Agreement. However, many European countries have taken advantage of a provision in the Agreement which made it possible for each contracting party to suspend the application of the European Agreement in respect of all or some of the other parties on grounds relating to public order,

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113 Article 1 (1).

114 B. Çiçekli, *Yabancılar ve Polis: Polisin Görev ve Yetkileri Çerçevesinde Yabancıların Hukuki Durumu* [Foreigners and the Police: the Legal Position of Foreigners within the Framework of the Duties and Competences of the Police] (Ankara, Seçkin Yayıncılık 2003) p.43.

115 Article 1(2).

116 Passport Law, Article 5.

117 For the lists of countries according to the relevant Turkish visa specification see: http://www.mfa.gov.tr/visa-information-for-foreigners.en.mfa (last visited 21.01.2009).

118 Turkey's Programme for Alignment with the Acquis (2007-2013), April 2007, Section 24.3.

119 Such countries include Georgia, Iran, Kazakhstan, Kyrgyzstan, Morocco, Mongolia, Tunisia, Tajikistan, Turkmenistan and Uzbekistan.

security or public health.[120] Respectively, on 4 July 1980 Germany ended the reciprocal visa exemption, by annulling the visa exemption agreement enacted between Turkey and Germany in 1953.[121] France, followed the German practice on 5 September 1980 and Switzerland in July 1982; the Benelux countries have also annulled the visa exemption.[122] This situation has continued with the Schengen negative list. In any event, when it comes to the Schengen system, Turkey is the only candidate country whose citizens cannot make use of any visa facilitation agreement and are required to be in possession of a visa when crossing the external borders of the EU; this was the case with reference to the acceding countries of the 2004 and 2007 enlargements and it is currently the case with reference to Croatia.[123] The Agreement between the Republic of Macedonia and the European Community on the facilitation of the issuance of visas came into force on January 1, 2007[124] putting the citizens of Macedonia in a privileged position when entering the EU.[125]

Returning to the Turkish visa policy, those who are not citizens of the countries exempted from visa obligations need to obtain a visa in order to enter the territory of Turkey. However, the regime applying to all the countries whose nationals must be in possession of a visa is not uniform. Article 5 of the Passport Law indicates that the acceptance into Turkish territory of those foreigners who have arrived at the borders without possessing a visa is left to the permission of the relevant security authorities. This possibility provided in the law gave rise to the creation of the remarkable system of '*bandrol*' or sticker visas. For the citizens of certain countries, a visa is issued at the border gates when they pay the '*bandrol*' visa charge. There are three categories of countries within the system of '*bandrol*' visas: those countries whose citizens will be given a 3-month, 1-month or 15-day '*bandrol*' visa.[126] Although fees for the '*bandrol*' visa are not the same for all nationalities, the amount is usually around US$ 10 for nationals of the former

120 Article 7(1).

121 R. Aybay, *Yabancılar Hukuku* [Foreigners' Law] (İstanbul, Bilgi Üniversitesi Yayınları 2005) p.126.

122 *Ibid.*

123 Annex I and II of Council Regulation (EC) No. 539/21 of March 2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement (OJ L 81, 21.03.2001, p.1).

124 For information on the visa facilitation see the website of the Ministry of Foreign Affairs of the Republic of Macedonia at: http://www.mfa.gov.mk/default1.aspx?ItemID=388 (last visited 21.01.2009).

125 Agreement between the European Community and the Former Yugoslav Republic of Macedonia on the facilitation of the issuance of visas, O.J. L 334, 19.12.2007, pp.125-135.

126 These countries can be found at: http://www.mfa.gov.tr/visa-information-for-foreigners.en.mfa (last visited 21.01.2009).

Soviet Union, the Balkan states and some Eastern European countries.[127] The citizens of countries which are not listed as countries whose citizens are exempt from visa requirements and those whose citizens can obtain a '*bandrol*' visa at the borders should apply for a visa at Turkish embassies abroad. The practice of issuing visas at the border gates to the citizens of certain countries paved the way for the development of the 'suitcase trade' which is simply the import and export activity undertaken mostly by nationals of Russia, the Ukraine, Georgia, Azerbaijan, Romania, Moldova and the Central Asian Republics who travel into Turkey in order to 'sell their suitcase full of products and in return purchase a wide range of consumer goods'.[128] The volume of the suitcase trade reached an estimated $10 billion at its peak in 1995, leading IMF officials to put pressure on the Turkish Central Bank in 1996 to include the suitcase trade in its current account calculations.[129] Not being at its levels in the mid-1990s, the suitcase trade still forms an important source of Turkey's exports which are levelled at $3 billion a year.[130] The beneficial effects of the suitcase trade are not confined to Turkey as the host country; this form of trade has acted as a saviour for a large number of persons involved in it who were suffering from the economic consequences of the changes taking place in Central and Eastern Europe and in the former Soviet countries to such an extent as to lead Turkish officials to argue that the Turkish visa policy allowing for a continuous practice of suitcase trading has prevented the speculated mass influx of persons into Europe after the collapse of the Soviet Union.[131]

This tolerant visa policy of the Turkish Republic, paving the way for a considerable volume of trade is, in fact, inherited from the Ottoman Empire. Various international trade routes passed through the territory of the Ottoman Empire and most of the foreigners who spent time within Ottoman territory were probably merchants.[132] At no point in its history did the Ottoman

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127 K. Kirişçi, 'Justice and Home Affairs Issues in Turkish-EU Relations: Assessing Turkish Asylum and Immigration Policy and Practice' (TESEV the Turkish Economic and Social Studies Foundation, 2002).

128 J. Apap, S. Carrera and K. Kirişçi, 'Turkey in the European Area of Freedom, Security and Justice', Centre for European Policy Studies, EU-Turkey Working Papers No.3 (August 2004).

129 M. Eder, A. Yakovlev and A. Çarkoğlu, 'The Suitcase Trade Between Turkey and Russia: Microeconomics and Institutional Structure', Working Paper WP4/2003/07, Moscow State University – Higher School of Economics (2003).

130 J. Apap, S. Carrera and K. Kirişçi, 'Turkey in the European Area of Freedom, Security and Justice', Centre for European Policy Studies, EU-Turkey Working Papers No.3 (August 2004).

131 *Ibid.*

132 S. Faroqhi, *The Ottoman Empire and the World Around It* (New York, Palgrave Macmillan

government consider closing the borders or instituting stringent controls at entry points in times of peace.[133] Venetian, Indian, Russian, Polish, French, British and Dutch traders were able to freely go in and out of the territories of the Ottoman Empire unhindered.[134] Thus it is possible to find the confirmation of a liberal visa policy in Ottoman history, comparable to the liberal visa policies of Turkey resulting in generating great volumes of trade for both sides of the commercial traffic.

In Turkish law, we see that entry and transit visas are regulated. Entry visas may be given for one single entry or for multiple entries. A single entry visa enables only one entry into the territory of the country and will lose its validity if not used within one year of issue.[135] A multiple entry visa allows limitless entry for the period of its issue.[136] It can be issued for three months, six months or one year.[137] A type of entry visa regulated by the Passport Law is return visas. Return visas are issued for foreigners who request them when they are leaving the country. They need to be used within one year of the date when they were issued; otherwise they will no longer be valid.[138] Those who have a valid residence permit do not have to obtain a return visa when they want to re-enter the country.[139]

A transit visa facilitates passing through Turkey in order to reach other countries. Both single transit visas and return transit visas expire provided they are not used within three months of their issue.[140]

The competent authority to issue visas differs according to the type of passport the foreigners possess. The Ministry of Foreign Affairs or in urgent cases the provincial authorities are competent to issue visas for Diplomatic and Official Passports.[141] As for Ordinary Passports, the competent authorities are Turkish Consulates abroad and provincial authorities or, with the provincial authority's consent, the district authorities or the police authorities.[142] Permission from the Ministry of the Interior should be sought before issuing visas for stateless

2006) p. 28, 138.

133 *Ibid.,* p. 212, 214.

134 *Ibid.,* pp. 137-160.

135 Passport Law, Article 28(A).

136 *Ibid.*, Article 28(C).

137 A. Asar, *Türk Yabancılar Mevzuatında Yabancı ve Hakları* [Foreigner and Foreigner's Rights in the Turkish Foreigners' Legislation] (Ankara, Emek Ofset 2004) p.55.

138 Passport Law, Article 28(B).

139 Law on the Residence and Travel of Foreigners in Turkey, Article 13.

140 Passport Law, Article 29.

141 *Ibid.*, Article 24(2).

142 *Ibid.*, Article 24(4).

persons, Nansen passport holders,[143] and holders of other travel documents such as a *laissez-passer*.[144]

Alongside the above three conditions that have to be fulfilled in order to enter Turkish territory[145] a foreigner must also not be one of the persons listed in Article 8 of the Passport Law, which lists in 7 subparagraphs those who shall not be allowed into the country. The assessment of whether a person at the border belongs to one of the groups enumerated in the Passport Law as those who are not allowed to enter the country shall be made by the police during passport control at the borders.[146] The list consists of vagabonds, beggars; those who are suffering from mental or contagious diseases; those who have been sentenced for crimes for which extradition is possible according to return agreements; those who have been extradited from Turkey and have not been permitted to re-enter; those who are sensed to have come with the intention of disrupting the security and public order of the Turkish Republic; prostitutes and those who incite women to prostitution, smugglers; those who do not seem to have sufficient means to finance their stay in Turkey and who cannot prove that they have someone in Turkey who could look after them or that they will be engaged in financial activity not forbidden to foreigners.[147] It is not realistically possible for such a provision to be applied in its entirety. In practice a list of persons who are not allowed to enter the country is confirmed by the Ministry of the Interior and is sent to the borders; thus, the procedure regarding a foreigner who is forbidden to enter the country already starts before such a person reaches the border.[148] It is established in the case law of the Council of State (Danıştay) that the name of a foreigner being listed among those possibly engaged in destructive and separatist activity in a document produced by the National Intelligence Agency (Milli Istihbarat Teşkilatı) is not a sufficient reason to forbid that foreigner from entering the country. For a foreigner to be forbidden to enter the country due to the fact that it is sensed that he or she has come to disrupt the security and public order of the Turkish Republic, the threat must be clear from information and

143 The League of Nations Passport which was created in 1922 by Fridtjof Nansen, the first High Commissioner for Russian Refugees, as identification cards for displaced persons.

144 Passport Law, Article 26.

145 Entering through entry and exit points determined by the Council of Ministers, holding a valid passport or a document to that effect, and holding a visa.

146 B. Çiçekli, *Yabancılar ve Polis: Polisin Görev ve Yetkileri çerçevesinde Yabancıların Hukuki Durumu* [Foreigners and the Police: the Legal Position of Foreigners within the Framework of the Duties and Competences of the Police] (Ankara, Seçkin Yayıncılık 2003) p.57.

147 For an explanation of the occupations forbidden to foreigners see *infra* 3.4.2.2.

148 B. Çiçekli, *Yabancılar ve Polis: Polisin Görev ve Yetkileri çerçevesinde Yabancıların Hukuki Durumu* [Foreigners and the Police: the Legal Position of Foreigners within the Framework of the Duties and Competences of the Police] (Ankara, Seçkin Yayıncılık 2003) p.58.

documents obtained as a result of a proper investigation.[149] Nevertheless, the provision still has controversial aspects. Forbidding entry to those who suffer from mental or contagious diseases is a contentious provision; notwithstanding the note made in the Article that those who are in a state that would not disrupt public health and security and who have come for the purpose of treatment or a change of air by their own financial means or under the financial custody of their legal guardians may be exempted from the application of this provision. In practice, no health report is requested upon entry so the application of this provision is very difficult. However, the vague wording of the provision is worrying with regard to which diseases can be deemed to prevent someone being allowed to enter the country.

A similar concern regarding the vague wording arises in connection with subparagraph 5 which prohibits the entry of those who are 'sensed' to have come with the 'intention' of disrupting the security and public order of the Turkish Republic. It has been criticized as unacceptable that the law refers to 'sensing' someone's 'intentions'.[150]

3.4.1.2 Turkey's Border Management Structure

The management of 2,949 km of land border and 6,530 km[151] of sea border which Turkey possesses, constitutes a massive task for the authorities responsible for securing them. The complexity of the structure according to which the Turkish borders are managed corresponds to the diverse features which these extensive borders possess. Turkey shares land borders with the EU Member States of Bulgaria (269 km) and Greece (203 km) on the west and with Syria (911 km), Iraq (384 km), Iran (560 km), Azerbaijan (18 km), Armenia (328 km) and Georgia (276 km) on the east. Article 1 of the Passport Law makes entry into the Turkish territory only possible through entry and exit points of which there are 111 in Turkey. From these 111 border gates, 38 are air border gates, 20 are land border gates, 46 are sea border gates and 7 are railway border gates.

Against the above summarized setting of the Turkish external borders, the

[149] Case Law of the Tenth Chamber of the Council of State in Case E: 1997/4051, K: 2000/248 dated 27.01.2000; Case E:2000/4049, K: 2002/1785 dated 30.05.2002.

[150] B. Çiçekli, *Yabancılar ve Polis: Polisin Görev ve Yetkileri çerçevesinde Yabancıların Hukuki Durumu* [Foreigners and the Police: the Legal Position of Foreigners within the Framework of the Duties and Competences of the Police] (Ankara, Seçkin Yayıncılık 2003) p.59.

[151] This figure excludes the Sea of Marmara, the Bosphorus, the Dardanelles and the islands. If included, the total length of Turkish coast equals 8,333 km. See the National Action Plan Towards the Implementation of Turkey's Integrated Border Management Strategy, 27 March 2006.

structure relating to their checks can be clarified as follows: the General Directorate of Security is responsible for the entry and exit of persons at border gates, the Undersecretary of Customs is responsible for the entry and exit of goods at border gates, the General Command of the Gendarmerie is responsible for the control of 125 km of the Iran border and the whole of the 384 km Iraq border which lie between border gates, the Land Forces Commandership is responsible for the control of the remainder of the land border, the General Command of the Coast Guard is responsible for the control of the sea border.[152]

As the explanation above makes it clear, the management of the Turkish borders is carried out jointly by the police, customs officers, military police (gendarmerie), the army and the coast guard. However, the main task of protecting the land borders and ensuring their security lies with the Land Forces.[153] The cooperation and coordination between ministries, local authorities, security forces and other related institutions are determined by a By-law.[154] The number of total personnel deployed in various facets of border control are around 43,000.[155] At border gates 3,414 police officers are employed by the General Directorate of Security, 1450 of whom are passport police.[156] The number of personnel deployed by the Land Forces and the Gendarmerie for border control purposes is 34,000, 85-90% of whom are soldiers performing their compulsory military service.[157]

3.4.2 Residence

3.4.2.1 Right to Reside

Those foreigners who arrive in Turkey in accordance with the conditions laid down in the Passport Law, and who are not banned from entering the country, possess the right to reside and travel in Turkey subject to the terms and conditions asserted in laws.[158] Article 23 of the Turkish Constitution gives the

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152 National Action Plan Towards the Implementation of Turkey's Integrated Border Management Strategy, 27 March 2006, Section 3.2.

153 The Law on the Protection and Security of Land Borders [Kara Sınırlarının Korunması ve Güvenliği Hakkında Kanun], No.3497,dated 10.11.1988, published in the Official Gazette No.19997, dated 22.11.1988, Article 2(1).

154 The By-Law on the Protection and Security of Land Borders [Kara Sınırlarının Korunması ve Güvenliği Hakkında Yönetmelik], published in the Official Gazette No.20821, dated 21.03.1991.

155 National Action Plan Towards the Implementation of Turkey's Integrated Border Management Strategy, 27 March 2006, Section 2.2.

156 *Ibid*., Section 3.3.1.2.

157 National Action Plan Towards the Implementation of Turkey's Integrated Border Management Strategy, 27 March 2006, Section 3.5.3.

158 Law on the Residence and Travel of Foreigners in Turkey, No.5683, dated 15.07.1950,

right to freedom of residence and movement to everyone. The Article further sets the conditions according to which freedom of residence and movement may be restricted.[159] However, when the question relates to foreigners, sight of Article 16 of the Constitution must not be lost. As discussed earlier, Article 16 indicates that the fundamental rights and freedoms of foreigners may be restricted by law and as is consistent with international law.[160]

The Law on Villages[161]is one of the laws that restrict foreigners' right to reside. The restriction in the Law relates to the residence of foreigners in villages which are described as residential areas with less then 2000 residents.[162] According to the Law on Villages foreigners must obtain an official certificate from the Ministry of the Interior in order to be allowed to reside in villages. The Ministry of the Interior has discretion in deciding whether to issue such certificates and to increase or decrease residence periods.[163]

Another limitation as to the residence and movement rights of foreigners can be found in the Law on Forbidden Military Zones and Security Zones.[164] The law distinguishes between two types of Forbidden Military Zones. First-degree Forbidden Military Zones are established in areas which are obtained by connecting points which are taken from at least 100, at most 400 meters from the outer borders of military facilities crucial for national security; or in areas covering 30 to 600 meters along the land borders and if necessary along the coast lines.[165] Entry into such zones is strictly scrutinized. No one other than officers working in such zones and other officers of Turkish nationality whom the competent command has permitted is allowed to enter or reside in these areas.[166]

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published in the Official Gazette No.7564, dated 24.07.1950, Article 1.

159 'Freedom of residence may be restricted by law for the purpose of preventing offences, promoting social and economic development, ensuring sound and orderly urban growth, and protecting public property; freedom of movement may be restricted by law for the purpose of investigation and prosecution of an offence, and the prevention of offences. A citizen's freedom to leave the country may be restricted on account of civic obligations, or criminal investigation or prosecution.' Article 23 (2).

160 See *supra* 3.2.

161 Law on Villages [Köy Kanunu], No.442 dated 18.03.1924 published in the Official Gazette No.68 dated 07.04.1924.

162 Law on Villages, Article 1.

163 *Ibid.*, Article 88.

164 Law on Forbidden Military Zones and Security Zones [Askeri Yasak Bölgeler ve Güvenlik Bölgeleri Kanunu] No.2565 dated 18.12.1981 published in the Official Gazette No.17552 dated 22.12.1981.

165 *Ibid.*, Article 5.

166 *Ibid.*, Article 7(1-b).

Immovable property located within such zones shall be expropriated.[167] It follows from the highly protected nature of these zones that there are restrictions for the entry and residence of foreigners. The temporary entry and residence of foreigners in such zones is possible only with permission from the Chief of General Staff.[168] Second-degree Forbidden Military Zones are established on the areas surrounding First-degree Forbidden Military Zones at the periphery of 5km[169] or at other areas when necessary for the defence of the country.[170] In such zones foreigners cannot acquire immovable property, they cannot enter, reside, work or rent immovable property without obtaining permission.[171]

Apart from such legislation as illustrated above, foreigners' individual or collective right to reside and travel within the country can be restricted by a Council of Ministers' decision.[172] The Council of Ministers is also competent to decide on the application of such measures towards the citizens of certain states as a means of retaliation ('*mukabele bilmisil*').[173]

As one of the conditions for a restriction of the fundamental rights and freedoms of foreigners to be justifiable is for the restriction to be in accordance with international law, attention should be paid to how the right to freedom of movement is regulated in international law. Article 2 of Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms deals with the freedom of movement. This provision determines that restrictions on the freedom of movement and freedom to chose one's residence shall only be possible in accordance with the law and when necessary in a democratic society in the interests of national security or public safety, for the maintenance of public order, for the prevention of crime, for the protection of health or morals or for the protection of the rights and freedoms of others.[174] Furthermore, the freedom of movement and the freedom to choose one's residence may also be subject, in particular areas, to restrictions imposed in accordance with the law and justified

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167 *Ibid.,* Article 7(1-a). The Article makes an exception relating to forbidden military zones along the borders or coastlines. According to Article 7 (2) expropriation is not compulsory when it comes to forbidden military zones along the borders or coastlines.

168 *Ibid.,* Article 7(1-c).

169 The limit can be extended to 10km for security reasons or if the physical nature of the area so requires. *Ibid.,* Article 8(a).

170 *Ibid.,* Article 8.

171 *Ibid.,* Article 9.

172 Law on the Residence and Travel of Foreigners in Turkey, Article 2(1).

173 *Ibid.,* Article 2(2).

174 Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms Article 2(3).

by the public interest in a democratic society.[175]

Those foreigners who shall stay in Turkey for more than one month are obliged to apply for a residence certificate ('*ikamet tezkeresi*') before the end of this one-month period by filling in the relevant declaration which is not subject to any fee.[176] Thus, if an entry visa does not contain any stipulation as to the period during which it allows a person to stay in the country, as a rule, it grants a residence right for one month. If the entry visa is issued for a term shorter than one month, then the person to whom the visa was issued must apply for a residence certificate at the end of this period. It is sometimes the case that an entry visa also contains a clause as to the purpose of the stay such as work, study, medical treatment. These types of visas ('*meşruhatlı vize*') cannot be issued at the sole discretion of the Turkish embassies or consulates abroad; but the decision must be made after consulting headquarters.[177] In practice it is often the case that such visas are issued with a stipulation as to the duration of the stay.[178] Until recently, this issue gave rise to discussion in legal doctrine. Some authors argued that even if the duration of the stay specified in such visas were longer than one month, this could only be regarded as an advisory clause, and the foreigner would still be obliged to apply for a residence certificate before the end of the one-month period. According to this view, which is also adopted in practice, such clauses in the entry visa shall not be binding on the authorities to issue corresponding residence certificates.[179] According to the opposing view, if the entry visa contains a clause as to the duration of the stay, the obligation to apply for a residence certificate does not apply for the foreigner to whom this visa was issued.[180] This disagreement was due to the complex structure that was generated by the Council of Ministers' Decision No:5/1516 dated August 4, 1961. According to this Decision, the one-month period referred to in Article 3 of the Law on the Residence and Travel of Foreigners in Turkey, was to be applied as three months concerning citizens of states who are a part of NATO and CENTO[181] and of those states with which Turkey has entered into a visa

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175 Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms Article 2(4).

176 Law on the Residence and Travel of Foreigners in Turkey, Article 3.

177 A. Asar, *Türk Yabancılar Mevzuatında Yabancı ve Hakları* [Foreigner and Foreigner's Rights in the Turkish Foreigners' Legislation] (Ankara, Emek Ofset 2004) p.57.

178 B. Çiçekli, *Yabancılar ve Polis: Polisin Görev ve Yetkileri çerçevesinde Yabancıların Hukuki Durumu* [Foreigners and the Police: the Legal Position of Foreigners within the Framework of the Duties and Competences of the Police] (Ankara, Seçkin Yayıncılık 2003) p.51.

179 *Ibid.*

180 G. Tekinalp, *Türk Yabancılar Hukuku* [Turkish Foreigners' Law] (İstanbul, Beta 1998) p.38.

181 The Central Treaty Organization (the Baghdad Pact) was formed by Iran, Iraq, Pakistan, Turkey and the United Kingdom in 1955 and was dissolved in 1979.

exemption agreement. This Decision led to complications in practice because it was not always clear which countries fell within the scope of the Decision.[182]

However, this discussion came to an end with the adoption of a Council of Ministers' Decision on December 22, 2003.[183] This Decision indicates that the one-month period stated in Article 3 of the Law on the Residence and Travel of Foreigners in Turkey shall be applied as 90 days if the visa exemption period or the visa which the foreigner possesses is adequate. So as long as the visa exemption period or the duration of the residence indicated in the visa is at least 90 days, the foreigner can stay in Turkey for at most 90 days without obtaining a residence certificate. The most important achievement of this Decision is that it changed the situation where even if the visa contained a residence period for one year, the foreigner had to apply for a residence certificate unless he or she is a citizen of one of the countries mentioned in the Council of Ministers' Decision of 1961.[184]

This having been said, it should be stated that those who come to Turkey in order to work are not included within the scope of this Council of Ministers' Decision. According to the Law on the Residence and Travel of Foreigners Article 3 (2), those who enter Turkey for work purposes are obliged to obtain a residence certificate within one month following their entry into the country. In any event they should have obtained the certificate before they start working. However, those who have come to Turkey as part of a cultural tour that they are on with purposes, such as lecturing at conferences or performing in concerts, shall be exempt from the obligation to obtain a residence permit, as long as their activities shall not last for more than one month.[185]

The Law on the Residence and Travel of Foreigners has also regulated some diverse terms for specific groups of people regarding the period of time during which these persons shall not be obliged to obtain a residence certificate. Those who enter the country with 'tourist'-stamped entry visas for purposes of attending national or international festivals of a historical, cultural or fine arts character, sporting competitions, congresses and conferences, exhibitions and fairs to carry out visits at places where the Council of Ministers determines or for

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182 A. Asar, *Türk Yabancılar Mevzuatında Yabancı ve Hakları* [Foreigner and Foreigner's Rights in the Turkish Foreigners Legislation] (Ankara, Emek Ofset 2004) p.65.

183 Council of Ministers Decision No. 2003/6641, dated 22.12.2003, published in the Official Gazette No.25340, dated 08.01.2004.

184 A. Asar, *Türk Yabancılar Mevzuatında Yabancı ve Hakları* [Foreigner and Foreigner's Rights in the Turkish Foreigners Legislation] (Ankara, Emek Ofset 2004) p.67.

185 Law on the Residence and Travel of Foreigners in Turkey, Article 3(3).

reasons of medical treatment shall be exempted from obtaining a residence certificate for four months.[186]

Those who enter the country with a joint passport for purposes of travelling or for one of the purposes indicated in Article 5 do not have to obtain a residence certificate for two months. This period may be extended for another two months.[187] Foreign travellers who arrive in Turkey with triptyque certificates and with the customs entry reports from the International Tourism and Automobile Federation (AIT-FIA) are not obliged to obtain residence certificates.[188] Foreign officials working at consular or political representations of their countries and their families are exempt from obtaining residence certificates. Such persons shall be given an identity card by the Ministry of Foreign Affairs in the case of political representatives, and by the Provinces in the case of consular officials.[189] In practice, employees of the United Nations and its agencies and the Organization of the Islamic Conference are given an identity card which takes the place of a residence certificate by the Ministry of Foreign Affairs during their stay in Turkey.[190] The NATO Travel Order is regarded as a residence certificate for members of the military forces of NATO countries for the entire duration of their stay in Turkey.[191] As has been stated above, the citizens of member states of the Council of Europe and the NATO Agreement enjoy the right to reside in Turkey for three months without applying for a residence certificate.

As a rule, residence certificates are issued for five years. However, this period can be determined to be longer or shorter by the Ministry of the Interior after asking the opinion of the Ministry of Foreign Affairs.[192] The duration of residence certificates is to be determined within the scope of the provisions of the relevant legislation and the agreements enacted with third countries by taking into account, as for as possible, the request of the applicant.[193] A 'long-term resident status' is non-existent in Turkish law. The number of years of residence in Turkey does not bring privileges to the foreigner in terms of his or her rights, even if he or she has spent most of his life living and working in Turkey. It has been argued that

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186 *Ibid*., Article 5.

187 *Ibid*., Article 4(1).

188 *Ibid*., Article 6.

189 *Ibid*., Article 28.

190 B. Çiçekli, *Yabancılar ve Polis: Polisin Görev ve Yetkileri çerçevesinde Yabancıların Hukuki Durumu* [Foreigners and the Police: the Legal Position of Foreigners within the Framework of the Duties and Competences of the Police] (Ankara, Seçkin Yayıncılık 2003) p. 67.

191 The Circular of the Ministry of the Interior dated 03.09.2001 No.B.05.1.EGM.0.13.12.03/06-212150, Annex 4 concerning NATO personnel.

192 Law on the Residence and Travel of Foreigners in Turkey, Article 9(1).

193 *Ibid*., Article 8.

the only way a foreigner living in Turkey can acquire a secure residence is for him or her to acquire Turkish citizenship.[194] However, it must be added that in practice one of the factors which is taken into consideration while determining the period for which a residence permit shall be issued is the amount of time spent in Turkey as a resident. Those foreigners who have legally resided in Turkey for many years, and who, within this period, have made Turkey the centre of their lives in terms of their economic and social activities can be given residence certificates which are valid for longer periods than that of other foreigners.[195]

Residence certificates which have lost their validity may be extended on at most four occasions.[196] If the foreigner needs a fifth extension to his or her residence certificate this shall be possible by obtaining a new residence certificate.[197] Those who would like to have their residence certificates extended need to apply within 15 days following the end of the residence period stated in the residence certificate.[198] It is also possible to apply before the end of the period stated in the residence certificate.[199]

The foreign spouse and the minor children of the foreigner are given residence certificates parallel to the duration of the residence certificate of the foreigner.[200] No distinction is made as to whether the foreigner has married before or after starting to reside in Turkey.

Article 7 of the Law on the Residence and Travel of Foreigners lists the persons who shall not be given a residence certificate. Such persons are those who have come to Turkey only for the purpose of working and the job they have chosen to perform is allocated to Turkish citizens;[201] those who are in a state or who are engaged in practices which do not agree with Turkish laws, traditions or political customs;[202] those who definitely do not have the financial sources to be able to live in Turkey by legal means;[203] those who are banned from entering the country

194 B. Çiçekli, *Yabancılar Hukuku* [Foreigners' Law] (Ankara, Seçkin Yayıncılık 2007) p. 99.

195 A. Asar, *Türk Yabancılar Mevzuatında Yabancı ve Hakları* [Foreigner and Foreigner's Rights in the Turkish Foreigners' Legislation] (Ankara, Turhan Kitabevi Yayınları 2006) p.107.

196 Law on the Residence and Travel of Foreigners in Turkey, Article 9(2).

197 B. Çiçekli, *Yabancılar ve Polis: Polisin Görev ve Yetkileri çerçevesinde Yabancıların Hukuki Durumu* [Foreigners and the Police: the Legal Position of Foreigners within the Framework of the Duties and Competences of the Police] (Ankara, Seçkin Yayıncılık 2003) p. 71.

198 Law on the Residence and Travel of Foreigners in Turkey, Article 10(1).

199 *Ibid*., Article 10(2).

200 B. Çiçekli, *Yabancılar Hukuku* [Foreigners' Law] (Ankara, Seçkin Yayıncılık 2007) p.105.

201 Law on the Residence and Travel of Foreigners in Turkey, Article 7(A).

202 *Ibid*., Article 7(B).

203 *Ibid*., Article 7(C).

but who have somehow entered;[204] and those who breach the peace and security during their stay in Turkey.[205]

3.4.2.2 Access to the Labour Market

Article 48 of the Turkish Constitution safeguards the right to work by stating that 'everyone has the freedom to work'. In principle this provision ensures the freedom and the right to work for foreigners as well as citizens. However, based on the opportunity provided in Article 16 of the Constitution, foreigners' right to work is not unconditional like that of citizens. Article 15 of the Law on the Residence and Travel of Foreigners makes it clear that foreigners can only carry out work in Turkey which is not prohibited to them by law. The consequence of this provision is that the laws concerning the particular occupation which the foreigner plans to exercise in Turkey should be consulted to see whether that line of work is allocated to Turkish nationals or if it is explicitly prohibited for foreigners to take up jobs in that occupation. The Law on Attorneyship, for example, requires that in order to become an Attorney, one should be a Turkish citizen.[206] Provisions to the same effect as Article 15 of the Law on the Residence and Travel of Foreigners have been dealt with earlier in this chapter; namely Article 8 of the Passport Law stating that foreigners who cannot prove that they shall not carry out work prohibited for foreigners shall not be allowed into the country and Article 7 of the Law on the Residence and Travel of Foreigners stating that those who come to Turkey to carry out work which has been allocated to Turkish citizens shall also not be allowed to enter.

The Law on the Work Permits of Foreigners[207] lays down the main rule by stating that, as long as it has not been decided differently in bilateral or multilateral agreements to which Turkey is a party, foreigners are obliged to obtain permission before they start working independently or dependently in Turkey.[208] Before this law was enacted the legislation concerning the work permits of foreigners was very disorganized. Until the Law on the Work Permits of Foreigners came into effect the practice concerning the work permits of foreigners had been handled within the framework of 71 Laws and 10 Directives.[209]

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[204] *Ibid.*, Article 7(D).

[205] *Ibid.*, Article 7(E).

[206] Law on Attorneyship [Avukatlık Kanunu], No.1136 dated: 19.03.1969 published in the Official Gazette No.13168 dated 07.04.1969.

[207] Law on the Work Permits of Foreigners [Yabancıların Çalışma İzinleri Hakkında Kanun], No.4817 dated 27.02.2003 published in the Official Gazette No.25040 dated 06.03.2003.

[208] The Law on the Work Permits of Foreigners, Article 4.

[209] General Directorate of Security, Circular No.155 dated 02.10.2003 regarding the work

Before the entry into force of the Law on the Work Permits of Foreigners, a foreigner wanting to work in Turkey had to first obtain a 'work visa' from the Turkish consulates abroad. The request for such a visa would be referred to the Ministry of the Interior via the Ministry of Foreign Affairs and through this channel it would be determined whether the foreigner could fulfil the function for which he or she was requesting permission.[210] However, this procedure would not be applied and the visa would be given without further investigation if the foreigner was an expert in his or her field, if he or she was not going to settle in Turkey and if he or she was not planning to perform one of the professions listed in Law No 2007.[211] Law No 2007 Concerning the Professions and Crafts Allocated to Turkish Citizens in Turkey[212] was a piece of legislation that stayed in effect from 1932 until the Law on the Work Permits of Foreigners annulled it in 2003.[213] This law prohibited foreigners from performing certain professions, which were mostly professions based on physical labour. According to this law, foreigners could not work, for example, as photographers, hairdressers, brokers, translators for travellers, any type of worker, bar singers, waiters and servants.[214] In recent years, certain prohibitions contained in this Law had added to the problem of illegal foreigners, as many came to Turkey to work in the textile, construction and house service sectors, which were forbidden for foreigners.[215] It must however be added that the Council of State indicated, in a judgment from 1944, that the listing of prohibited professions was an exhaustive listing; and the Court of Appeal construed the restrictions in Law No:2007 very narrowly.[216] Furthermore, the Law witnessed changes starting from the 1950s. In the 1980s exceptions had been brought to the law concerning the encouragement of foreign investment, free zones and tourist facilities.[217] Thus, although Law No. 2007 was a product of an outdated stance towards the right of foreigners to work, the courts and the legislator tried to minimize the negative effects thereof, mostly when it threatened the well-functioning of the market rather than for the sole purpose of bettering the rights of foreigners.

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permits, work visas and work residence certificates of foreigners.

210 G. Tekinalp, *Türk Yabancılar Hukuku* [Turkish Foreigners' Law] (İstanbul, Beta 1998) p.116

211 *Ibid.*

212 Law Concerning the Professions and Crafts Allocated to Turkish Citizens in Turkey [Türkiye'de Türk Vatandaşlarına Tahsis Edilen Sanat ve Hizmetler Hakkında Kanun], dated 11.06.1932 published in the Official Gazette No.2126 dated 16.06.1932.

213 Law on the Work Permits of Foreigners, Article 35.

214 Law No.2007, Article 1(A).

215 M. Alp, 'Yabancıların Çalışma İzinleri Hakkında Kunun' [The Law on the Work Permits of Foreigners], *AÜHF Dergisi* [Journal of the Ankara University Faculty of Law], No.53, Vol.2 (2004) pp.33-59.

216 *Ibid.*

217 *Ibid.*

The Law on the Work Permits of Foreigners was enacted in order to create an organized system of work permits for foreigners and it came into effect on September 6, 2003 simultaneously with the Application Directive of the Law on the Work Permits for Foreigners[218]and the Directive on Employment of Foreign Personnel in Direct Foreign Investments[219] which are the main legal sources concerning the right to work for foreigners together with the circular from the General Directorate of Security.[220] The two key objectives of adopting the Law on the Work Permits of Foreigners were to prevent illegal employment and to contribute to the alignment to the EU acquis.

For a foreigner to work legally in Turkey, a three-step procedure has to be followed: First of all, a work permit should be acquired, then a work visa should be issued for the foreigner and, finally, a residence permit must be acquired. The Law creates three types of work permits. A work permit for a definite period is issued for at most a duration of one year relating to work at a specific workplace or undertaking. This permit shall be issued according to the duration of the foreigner's residence permit and the duration of the work contract, taking into account the situation of the labour market, the developments in working life as well as the sectoral and economic conjuncture fluctuations.[221] To this end, every four weeks the Labor Institution of Turkey ('Türkiye İş Kurumu') prepares a report on 'professions which are not appropriate for foreigners to be employed' on a city to city basis and delivers it to the Ministry of Labour and Social Security.[222] Following this initial one-year work permit, the duration of the permit can be prolonged for up to three years to carry out work at the same workplace or undertaking, and in the same profession.[223] Furthermore, when this three-year work period ends, the permit can be extended for up to six years to allow the foreigner to work near any employer, however doing the same line of work.[224] The Ministry of Labour and Social Security is competent to broaden or tighten the area of geographic validity of such permits.[225]

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218 Application Directive of the Law on the Work Permits of Foreigners [Yabancıların Çalışma İzinleri Hakkında Kanunun Uygulama Yönetmeliği], published in the Official Gazette No.25214 dated 29.08.2003.

219 Directive on the Employment of Foreign Personnel in Direct Foreign Investments [Doğrudan Yabancı Yatırımlarda Yabancı Uyruklu Personel İstihdamı Hakkında Yönetmelik], published in the Official Gazette No.25214 dated 29.08.2003.

220 Circular No: 155 dated 02.10.2003.

221 Law on the Work Permits of Foreigners, Article 5(1).

222 Application Directive, Article 13(3).

223 Law on the Work Permits of Foreigners, Article 5(2).

224 *Ibid*., Article 5(3).

225 *Ibid*., Article 5(5).

Secondly, the Law on the Work Permits of Foreigners regulates the indefinite work permit in Article 6. According to this provision those who have lawfully and continuously resided in Turkey for at least eight years or who have worked lawfully for six years in total shall be given an indefinite work permit. The situation on the labour market, the developments in working life or the sectoral and economic conjuncture fluctuations shall not be taken into account while issuing the indefinite work permit. Moreover, again in contradiction to the rules governing work permits for a definite period, indefinite work permits are issued without being limited to a specific undertaking, profession, administrative or geographical area.[226]

The third type of residence permit introduced by the Law is the independent work permit. This permit is issued to those foreigners who shall work independently and who have lawfully and continuously resided in Turkey for at least five years.[227]

An interesting development presented by the Law is that according to Article 8, the work permits to be given to citizens of the European Union Member States and their third-country national spouses and children do not have to respect the statutory time periods which have been explained above. With this provision, the Law has given EU citizens and their third-country spouses and children the same status as those who are married to Turkish citizens and those who have lost Turkish citizenship.[228] This provision finds its reasoning in the direct applicability of Article 6(1) of Decision No. 1/80 of the EEC-Turkey Association Council. The mentioned provision upholds, in clear, precise and unconditional terms, the right of a Turkish worker, after a number of years' legal employment in a Member State, to enjoy free access to any paid employment of his choice.[229] Article 11 of the same decision states that nationals of the Member States, duly registered as belonging to the labour force in Turkey, shall enjoy the same rights and advantages that have been granted to Turkish nationals. The direct applicability of this provision made it necessary that the right to work for citizens of EU Member States is separated from the ordinary rules governing work permits. Article 6(1) of Decision No. 1/80 regulates employment rights in 1, 3 and 4-year periods. According to this provision a worker shall be entitled, after one year's legal employment, to the renewal of his permit to work for the same employer, if a job is available. If the legal employment has lasted for three years,

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226 *Ibid.*, Article 6.

227 *Ibid.*, Article 7.

228 *Ibid.*, Article 8(a) and (b).

229 Judgment of the European Court of Justice in Case C-192/89 (20/9/1990), Sevince, paragraph 17.

this shall give the worker the opportunity to respond to another offer of employment, with an employer of his choice in the same occupation, subject to the priority to be given to workers of Member States. After four years of legal employment, the worker shall enjoy free access to any paid employment of his choice.

Article 8 of the Law on the Work Permits of Foreigners is also significant because it puts an end to the difficult situation that foreign spouses of Turkish citizens had in terms of obtaining the right to work. The Law makes it possible for foreigners married to Turkish citizens to obtain a work permit, even if the marriage has ended, as long as the marriage has lasted for at least three years.[230] The work permit will lose its validity if the marriage ends before the completion of three years or if it is determined that the marriage in question is a marriage of convenience.[231]

An application for a work permit can be made abroad at Turkish Republic representations or, if the foreigner is already residing in Turkey, the application can be made directly to the Ministry of Labour and Social Security.[232] The foreigner must possess a valid residence permit issued for at least six months for it to be possible for the application to be made to the Ministry.[233] If the application is made to the representations of the Turkish Republic abroad, the representations shall transmit these applications directly to the Ministry, together with any comments they might have.[234] The Ministry communicates the application to the relevant authorities and obtains their opinion.[235] The relevant authorities differ on a case by case basis according to which profession the foreigner is planning to pursue. These authorities include official professional institutions which will advise the Ministry as to whether the foreigner possesses sufficient professional competence.[236] It must be mentioned that the opinion of such authorities is not requested concerning foreigners who will be working in direct foreign investments.[237] These authorities have to inform the Ministry about their opinion within thirty days. When necessary, the authorities may ask

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230 Law on the Work Permits of Foreigners, Article 8(a).

231 Application Directive, Article 44.

232 Law on the Work Permits of Foreigners, Article 12, Application Directive, Article 4.

233 Application Directive, Article 7.

234 *Ibid.*, Article 6. The application is also simultaneously transmitted to the Ministry of the Interior and the Undersecretariat of the National Intelligence Agency in accordance with Circular No.155 dated 02.10.2003 by the General Directorate of Security.

235 Application Directive, Article 10(1), Law on the Work Permits of Foreigners, Article 13.

236 Law on the Work Permits of Foreigners, Article 13.

237 Directive on the Employment of Foreign Personnel in Direct Foreign Investments, Article 14.

for a reasonable additional time to draft their opinion.[238] If the authorities have not answered the Ministry within thirty days or within the additional time which they have requested, their opinion shall be deemed to be positive.[239]

The Ministry will provide a decision concerning the application within ninety days.[240] For work permit applications subject to the Directive on the Employment of Foreign Personnel in Direct Foreign Investments, the Ministry should give its decision within fifteen days.[241] With reference to work permits issued for a definite period, the Ministry may limit the effect of the permit for the agricultural, industrial or service sectors, for a certain occupation or for an administrative and geographical area. This limitation can be made, subject to the principle of reciprocity and without prejudice to the rights provided in bilateral or multilateral treaties to which Turkey is a party, taking into account the situation of the labour market and the developments in working life, in cases where the sectoral and economic conjuncture conditions relating to employment make it necessary.[242]

The applications to extend the validity period of the work permit should be made within fifteen days following the expiry of the work permit. All applications made after this fifteen-day period shall be subject to the procedure applied to first-time applications.[243] One may also apply for an extension before his or her permit expires, subject to the condition that the application is made at most two months before the expiry of the work permit.[244]

An application for a work permit shall be rejected when one of the five conditions enumerated in Article 14 of the Law exists. These conditions are:

1. the situation of the labour market, the developments in working life, the sectoral and economic conjuncture fluctuations relating to employment not being suitable;
2. another person is found who can fulfil the function from within the country, within four weeks, having the same qualifications;[245]

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238 Application Directive, Article 10(2).

239 *Ibid.*, Article 10(4).

240 Law on the Work Permits of Foreigners, Article 12(4).

241 Directive on the Employment of Foreign Personnel in Direct Foreign Investments, Article 12(1).

242 Law on the Work Permits of Foreigners, Article 11.

243 Application Directive, Article 8(2).

244 *Ibid.*, Article 8(3).

245 This condition does not apply to work permit applications relating to direct foreign investments. Directive on the Employment of Foreign Personnel in Direct Foreign Investments, Article 13.

3. the foreigner does not have a valid residence permit;
4. the foreigner applies for a work permit within one year after being rejected for the first time, in case the application relates to the same workplace or undertaking or occupation;
5. the employment of the foreigner poses a threat to national security, public order, public morality and public health.

The Ministry's decision to reject the work permit application may be objected to within thirty days of the announcement. If the Ministry rejects the objection, the decision may be challenged in the Administrative Courts.[246] As has been indicated above, obtaining a work permit is a three-step procedure; and the work permit is only valid with the existence of a work visa and a residence permit.[247]

Foreigners who have obtained a work permit should apply for a visa within ninety days of obtaining the permit and they should apply for a residence permit within thirty days of entering the country.[248] In accordance with the chronology of procedures that needs to be followed, we shall first take a look at principles governing the acquisition of visas for the purpose of work and then at principles governing residence permits for work purposes.

The first significant issue to be mentioned regarding the work visa is that the Passport Law does not regulate a visa under this name. Until the Law on the Work Permits of Foreigners came into force, it was a debated issue whether foreigners needed to obtain a work visa before they could enter the country for work purposes.[249] The Law put an end to all discussions surrounding this issue. The Law on the Work Permits of Foreigners as well as the Application Directive and the Directive on the Employment of Foreign Personnel in Direct Foreign Investments explicitly talk about a work visa. As it has been mentioned above[250]some visas contain a clause as to the purpose of the stay; they are called '*meşruhatlı vize*' and the representation of the Turkish Republic abroad must refer the application to the relevant authorities in Turkey to be able to issue one. Thus,

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246 Law on the Work Permits of Foreigners, Article 17(2).

247 *Ibid*., Article 12(1).

248 *Ibid*., Article 12(1)

249 For arguments supporting the view that a 'work visa' is not a requirement see: B. Tiryakioğlu, 'Türk Hukukunda Yabancıların Oturma ve Çalışma Hakkı' [The Right of Foreigners to Reside and Work in Turkish Law] in *Vatandaşlık ve Yabancılar Hukuku Alanında Gelişmeler (Bilimsel Toplantı)* [Developments in the Area of Citizenship and Foreigners' Law (Scientific Meeting)] (Ankara Üniversitesi Hukuk Fakültesi 1998) p.166. For more information on the debate in legal doctrine see B. Çiçekli, *Yabancıların Çalışma İzinleri* [Work Permits for Foreigners] (Ankara, TISK 2004).

250 See *supra* 3.4.2.1.

a work visa is such a visa which contains the clause that it has been issued for work purposes.[251]

As a rule, work visa applications are made to the representations of the Turkish Republic; however, if the foreigner possesses a residence permit for at least six months, for purposes other than to study, which is still valid and if he or she has also acquired a work permit within this residence duration the foreigner can make his or her application directly to the Ministry of Labour and Social Security.[252] At this point an exception is made which fits in with Turkey's recent achievements concerning combating human trafficking.[253] If the foreigner is going to work in professions which can be subject to human trafficking, the foreigner must on each occasion apply for a work visa at Turkish foreign representations even if he or she possesses a valid six-month residence permit.[254] This provision relates especially to those foreigners who will work in the tourism sector[255] or in the fashion industry as models.[256] It should also be mentioned that some protective measures have also been put in place regarding the work permits of such foreigners. The labour contract should be drafted in both the Turkish and Russian languages. If the contract shall be drafted in the foreigner's mother tongue, then it is sufficient if it is in Turkish and in the mother tongue of the foreigner. The reason why the provision primarily mentions the Russian language can be explained by the 'country of origin' statistics relating to the victims of trafficking to Turkey. Most victims come from former Soviet Union

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251 B. Çiçekli, *Yabancıların Çalışma İzinleri* [Work Permits for Foreigners] (Ankara, TISK 2004).

252 Application Directive, Article 7(2).

253 Two major developments towards combating human trafficking should be mentioned. In the legislative sphere, Article 5 of the Turkish Citizenship Law No.403 was amended in 2003 so that marrying a Turkish citizen no longer makes one automatically a Turkish citizen. The acquisition of Turkish citizenship by way of marriage has been made conditional upon the marriage continuing for at least 3 years, the spouses living together and the marriage still continuing on the date of the application for citizenship. As the former Article 5 has been abused in order to traffic human beings, the recent amendment constitutes a major improvement. In the practical sphere the Turkish Authorities and the International Organization for Migration (IOM) carry out joint activities including awareness-raising campaigns and the establishment of the national toll-free telephone helpline (157) for emergency assistance and information, which is advertised on television channels in key source countries and in Turkey. For more information please refer to www.countertrafficking.org (last visited 21.01.2009).

254 Application Directive, Article 7(2).

255 B. Çiçekli *Yabancıların Çalışma İzinleri* [Work Permits for Foreigners] (Ankara, TISK 2004).

256 This example is given on the IOM Turkey website and relates to a group of Ukrainian girls aged between 15 and 21 trafficked to Turkey. For more information please refer to: www.countertrafficking.org/case_studies.html (last visited 21.01.2009).

countries and from countries in Eastern Europe where the Russian language is also spoken.[257] The work contract should include some measures such as a clause assuring that the return tickets for the return of the foreigner to his or her country following the expiry of the work contract shall be paid for by the employer company.[258]

The application will be transmitted to the Ministry of Labour and Social Security, the Ministry of the Interior and the Undersecretary of the National Intelligence Agency via the Ministry of Foreign Affairs as is the case with work permits.[259] In the case that the Ministry of the Interior does not reply within twenty days, its opinion shall be deemed to be positive.[260] Once the foreigner obtains a work visa and enters the country for purposes of working, he or she must apply for a residence permit within thirty days following the date of entry.[261] In any event, a residence permit should be acquired before the foreigner starts working.[262]

For the residence permit to be issued, the foreigner must have obtained a valid work permit from Turkish foreign representatives, must be staying in Turkey within the legal time periods, it must be understood that the foreigner shall work at the workplace specified, and there must be no drawbacks regarding administrative, legal or political aspects. The residence permit shall be issued without an instruction from the Ministry.[263]

Those who will work in professions which can only be performed by becoming a member of the professional chamber shall become members thereof within a month following their entry into the country.[264] In any case, such membership shall be sought during the residence permit procedures.[265]

Regarding work permits issued for a definite period of time, the duration of the residence permit shall be parallel to that of the work permit. The residence permit

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257 For detailed statistical data on the country of origin of victims of trafficking assisted by the IOM in Turkey between 2004 and 2009, see: http://www.countertrafficking.org/2009.html (last visited 14.04.2009).

258 Circular No.155 dated 02.10.2003 of the General Directorate of Security.

259 *Ibid.*

260 Circular No.155 dated 02.10.2003 of the General Directorate of Security amended by the Note of the Ministry of the Interior No. 38843-207492 dated 21.11.2003.

261 Law on the Work Permits of Foreigners, Article 12(1).

262 Law on the Residence and Travel of Foreigners in Turkey, Article 3(2).

263 Circular No.155 dated 02.10.2003 of the General Directorate of Security.

264 Application Directive, Article 62(1).

265 *Ibid.*, Article 62(3).

shall also be extended in parallel with the renewal of the work permit.[266] As for indefinite and independent work permits the residence permits shall be given for a duration of not more than five years, taking into consideration the request of the foreigner and the labour contract, if any. However, the duration of the residence permit cannot exceed the period of validity of the passport. If the relevant provincial authority finds that the extension of a foreigner's residence is not desirable for reasons relating to national security, public order, public health or public morality, the Ministry should thereby be informed and the provincial authority shall act according to the directives of the Ministry.[267] If the work permit is terminated by the institution which has issued it, the residence permit for the purposes of work shall also be terminated ex officio.[268]

At this point the special situation of foreigners of Turkish descent and the citizens of the Turkish Republic of Northern Cyprus (TRNC) should be mentioned. According to Law No. 2527,[269] foreigners of Turkish descent could be permitted by the Ministry of the Interior to take up professions allocated to Turkish nationals.[270] Article 30 of the Law on the Work Permits of Foreigners amended Law No. 2527 to render the Ministry of Labour and Social Security the competent authority to allow foreigners of Turkish descent to take up employment in professions allocated to Turkish citizens. According to the amended Article 3, the Ministry of Labour and Social Security shall give its decision after consulting the Ministry of the Interior, the Ministry of Foreign Affairs and other relevant Ministries and institutions, on condition that the foreigner possesses the qualifications required according to special laws. Those who have been permitted in accordance with the law shall be exempted, for the duration of the permit, from the obligation of being a Turkish citizen in order to enjoy certain rights regarding residence and work.[271]
Similarly, according to the Agreement Facilitation Agreement, citizens of the TRNC shall be subject to the same principles as Turkish citizens regarding work in the public sector.[272] The citizens of the TRNC have been excluded from the

266 Circular No.155 dated 02.10.2003 of the General Directorate of Security.

267 *Ibid.*

268 *Ibid.*

269 The law relating to the employment of foreigners of Turkish descent in public or private institutions and workplaces, and their right to carry out their jobs and crafts freely in Turkey [Türk Soylu Yabancıların Türkiye'de Meslek ve Sanatlarını Serbestçe Yapabilmelerine, Kamu, Özel Kuruluş veya İşyerlerinde Çalıştırılabilmelerine İlişkin Kanun], No.2527 dated 25.09.1981, published in the Official Gazette No.17473 dated 29.09.1981.

270 Law No.2527, Article 3.

271 *Ibid.*, Article 7.

272 International Agreement Between the Turkish Republic and the Turkish Republic of Northern Cyprus on the Initiation of Additional Facilities to the Citizens of the Two

scope of Law No. 2527 by the mentioned international agreement which aims to ensure that citizens of TRNC enjoy all economic and social rights provided for Turkish citizens.

ILLEGAL WORK

The policy which applies to illegal work among foreigners is also laid down in Law No. 4817. Accordingly, the system is based on administrative fines which shall be levied on the foreigner who works illegally or his or her employer. If the foreigner who has not obtained a work permit is working as an employee he or she will be fined 500 Turkish Liras;[273] if he or she is an independent worker the fine will be 2000 Liras.[274] The employer who hired a foreigner without a work permit shall be fined 5000 Liras for every illegal employee.[275] In the case of repetition the fines shall be doubled and if the work is performed at a workplace, this workplace shall be closed down.[276]

Working illegally constitutes a violation of Turkish laws, which in the case of a foreigner might result in deportation. According to the Law on the Residence and Travel of Foreigners in Turkey, the Ministry of the Interior decides which foreigners should be invited to leave the country.[277] It is for this reason that the Law on Work Permits for Foreigners stipulates that the names of the foreigners working without a work permit and their employers shall be communicated to the Ministry of the Interior.[278] It follows that expulsion is not an automatic result of working without a work permit, but that a Ministerial decision has to be taken to this effect. As a general rule the foreigner who is expelled has to pay for his own travel expenses; and if he or she should not be able to meet these travel expenses, the state shall transport him or her.[279] The Law on the Work Permits of Foreigners contains one exception to this general rule. Accordingly, should the Ministry of the Interior decide to expel the foreigner for working illegally, it will be the employer who pays for the accommodation and travel expenses that the foreigner and his family will have to meet in order to return to their country of origin.[280] Furthermore, if the foreigner and his family would have some medical expenses in the meantime, the employer shall meet those expenses as well.[281]

Countries ratified by Law No.4465 on 03.11.1999, Article 3.

273 Law on the Work Permits of Foreigners, Article 21(2).

274 *Ibid.*, Article 21(5).

275 *Ibid.*, Article 21(3).

276 *Ibid.*, Article 21(4) and (6).

277 Law No.5683, Article 21(1).

278 Law on the Work Permits of Foreigners, Article 21(7).

279 Law No.5683, Article 22(2).

280 Law on the Work Permits of Foreigners, Article 21(3).

281 *Ibid.*, Article 21(3).

This provision finds its reasoning in the high costs suffered by the state in connection with the expulsion of foreigners. With Law No. 4817 the state has endeavoured to lessen the financial costs by shifting some of the burden on the employers.[282]

CONCLUSION

The Law on the Work Permits of Foreigners was enacted for two pressing reasons: to prevent illegal employment and to contribute to the EU harmonization process.[283] If it is possible to lay down the regime regarding work permits in a systematic manner it is thanks to the enacting of this Law. The Law has aimed at making the Ministry of Labour and Social Security the main competent authority regarding the work permits of foreigners. Before the coming into force of the Law, the competence to issue work permits had been given to many different institutions resulting in delays and confusion in practice.[284] The Law on the Work Permits of Foreigners has aimed at overcoming such setbacks by authorizing the Ministry of Labour and Social Security as the main authority. However, the possibility for other Ministries and public institutions to issue work permits has been provided for in the Law itself.[285] Accordingly the Prime Ministry, the Ministry of Health, the Ministry of National Defence,[286] the Higher Education Institution and the Undersecretariat of Foreign Trade[287]continue to issue work permits. To illustrate how such procedures are designed it is useful to look at how Universities may employ foreign teaching staff. The rector of a university is empowered to appoint foreign teaching staff, upon a proposal by the relevant faculty and the approval of the university board.[288] The employment contract can be signed after the university notifies the Ministry of the Interior and the Ministry has given its affirmative

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282 A. Asar, *Türk Yabancılar Mevzuatında Yabancı ve Hakları* [Foreigner and Foreigner's Rights in the Turkish Foreigners' Legislation] (Ankara, Turhan Kitabevi Yayınları 2006) p.171.

283 M. Alp Yabancıların Çalışma İzinleri Hakkında Kanun [The Law on the Work Permits of Foreigners], *AÜHF Dergisi* [Journal of the Ankara University Faculty of Law], No.53, Vol.2 (2004) pp.33-59.

284 C. İki, 'Türkiye'deki Yabancıların Çalışma İzinleri Bakımından Güncel Sorunlar' [Current Problems Concerning the Work Permits of Foreigners in Turkey] in Vatandaşlık ve Yabancılar Hukuku Alanında Gelişmeler (Bilimsel Toplantı), Developments in the Area of Citizenship and Foreigners' Law (Scientific Meeting) (Ankara Üniversitesi Hukuk Fakültesi 1998) p.184.

285 Law on the Work Permits for Foreigners, Article 2(2).

286 B. Çiçekli, *Yabancıların Çalışma İzinleri* [Work Permits for Foreigners] (Ankara, TISK 2004).

287 Circular No. 155 dated 02.10.2003 of the General Directorate of Security.

288 Law on Higher Education [Yükseköğretim Kanunu], No.2547 dated 04.11.1981 published in the Official Gazette No.17506 dated 06.11.1981, Article 34(1).

opinion within two months.[289]

Although Law No. 2007 Concerning the Professions and Crafts Allocated to Turkish Citizens in Turkey has been annulled, there are still a number of professions which cannot be performed by foreigners. Consequently, each work permit application still requires a check as to whether the profession which the foreigner wants to pursue in Turkey is one that is allocated to Turkish citizens. Even though the Law on the Work Permits of Foreigners represents a very positive development in the context of foreigners' right to work, it is not possible to argue that it has been completely successful in broadening the working rights of foreigners.

3.4.2.3 Situation of Researchers

The situation of foreign researchers has not been very thoroughly regulated under Turkish law. The basic principles applying to those who would like to come to Turkey for purposes of conducting research are laid down in a Council of Ministers' Decision from 1988.[290]

This brief legal text basically obligates the researcher to apply for permission in order to conduct research. However, a differentiation is made between archeological and geological research and research relating to other disciplines.[291] Permission to conduct archeological research should be requested by applying to the Ministry of Foreign Affairs in Turkey via the embassy of the country of citizenship of the researcher or to the Turkish embassies abroad.[292] The applications shall be decided by the Foreign Ministry by taking into account the opinion of the relevant ministry.[293]

As for other types of research, a simplified procedure has been set. Accordingly, the application should be made to the local authorities of the place where the research is to be conducted.[294] Applications in this simplified procedure do not

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289 Law on Higher Education, Article 34(2).

290 The principles which apply to foreigners, their representatives and foreign journalists who wish to conduct scientific research and examination and to make films [Türkiye'de İlmi Araştırma, İnceleme Yapmak ve Film Çekmek İsteyen Yabancıları veya Yabancılar Adına Müracaat Edenler İle Yabancı Basın-Yayın Mensuplarının Tabi Olacakları Esaslar] Council of Ministers' Decision No.88/12839 dated 04.04.1988, published in the Official Gazette No.19799 dated 29.04.1988.

291 Council of Ministers Decision No.88/12839, Article 2(a) and (b).

292 *Ibid.*, Article 3(4).

293 *Ibid.*

294 *Ibid.*, Article 3(5).

have to be made personally, but can be made by mail, fax or email.[295] The local authorities are under an obligation to decide on the application within five days.[296]

The authorities shall not allow research which might have negative implications for National Security and National Interests.[297] If it is understood that research is being carried out outside the scope of the given permission, this permission shall be withdrawn.[298] While deciding whether or not to allow the research to be conducted, the Foreign Ministry shall take into consideration factors relating to the researcher such as whether or not he or she has previous publications in this field[299] as well as factors relating to the country of citizenship of the researcher in terms of the principles of reciprocity and Turkey's relations with the relevant country.[300]

During their stay in Turkey researchers are not under an obligation to obtain a residence certificate as long as their visas have not expired.[301] This is due to the fact that researchers do not fall within the scope of the Law on the Work Permits of Foreigners and the obligation to acquire a residence certificate before starting to work does not apply to researchers. Accordingly, the Law on the Residence and Travel of Foreigners in Turkey[302] contains a facilitating provision for those who come to attend a congress or a conference with a tourist visa. As maintained by this provision, whereas the rule dictates that foreigners should apply for a residence certificate within one month following their entry into the country, for the aforementioned persons this obligation has been lifted for four months.[303] Following the completion of the research, the researcher is under an obligation to submit a copy of his/her publication or film, which is the result of his or her research, to the authority which gave the permission.[304]

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295 *Ibid.*

296 *Ibid.*

297 *Ibid.*, Article 5.

298 *Ibid.*

299 *Ibid.*, Article 3(2).

300 *Ibid.*, Article 3(3).

301 A. Asar, *Türk Yabancılar Mevzuatında Yabancı ve Hakları* [Foreigner and Foreigner's Rights in the Turkish Foreigners Legislation] (Ankara, Turhan Kitabevi Yayınları 2006) p. 219.

302 The Law on the Residence and Travel of Foreigners in Turkey [Yabancıların Türkiye'de İkamet ve Seyahatleri Hakkında Kanun], No. 5683 dated 15.07.1950, published in the Official Gazette No.7564 dated 24.07.1950.

303 *Ibid.*, Article 5.

304 Council of Ministers' Decision No. 88/12839, Article 7.

3.4.2.4 Situation of Students

Article 42 of the Turkish Constitution ensures the right to education for everyone without differentiating between citizens and foreigners by stating that 'no one shall be deprived of the right of learning and education'. There is, however, a distinction to be made when it comes to compulsory primary education, as only Turkish citizens are under an obligation to attend primary education.[305] The right to education of foreigners is regulated by the Law on Foreign Students who are studying in Turkey[306] and the relevant by-law laying down the principles relating to the application of the Law on Foreign Students.[307]

Foreigners who wish to follow education in Turkey, be it primary, secondary education or at graduate or post-graduate level, would need to apply for a visa with a special clause or explanatory note indicating that it is issued for education purposes ('öğrenim meşruhatlı giriş vizesi')[308] before entering the country. Those foreigners have to apply for a residence certificate ('ikamet tezkeresi') within a month following their entry into the country.[309]

The By-law on foreign students lists the situations where foreigners do not need to be in possession of a student visa while entering the country.[310] Accordingly, a student visa is not required for those who have already completed their secondary or higher education in Turkey, and who want to continue with their post-graduate studies provided there is not a longer time gap between the two studies than one year; for foreigners who possess a residence or work permit of at least one year, and their spouse[311] and children; for those who will take the Foreign Student Examination ('Yabancı Öğrenci Sınavı' – YÖS)[312] in Turkey; and for

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305 Turkish Constitution, Article 42(5).

306 Law on Foreign Students who are studying in Turkey [Türkiye'de Öğrenim Gören Yabancı Uyruklu Öğrencilere İlişkin Kanun], No.2922 dated 14.10.1983, published in the Official Gazette No.18196 dated 19.10.1983.

307 By-law on Foreign Students Studying in Turkey [Türkiye'de Öğrenim Gören Yabancı Uyruklu Öğrencilere İlişkin Yönetmelik], No. 85/9380, published in the Official Gazette dated 30.04.1985 No.18740.

308 B. Çiçekli, *Yabancılar ve Polis: Polisin Görev ve Yetkileri Çerçevesinde Yabancıların Hukuki Durumu* [Foreigners and the Police: the Legal Position of Foreigners within the Framework of the Duties and Competences of the Police] (Ankara, Seçkin Yayıncılık 2003) p.81.

309 A reference to Circular 2002 of the General Directorate of Security is made in B. Çiçekli (2003) p.81. The Circular itself was not possible to obtain, despite various attempts, due to the fact that it was an internal document.

310 By-law on Foreign Students, Article 9.

311 General Directorate of Security, Circular No. 158.

312 The Foreign Student Examination is the centralized university entry exam which is exclusive to foreigners, meaning that Turkish citizens who have dual citizenship may also not take part in this exam.

those who will attend summer courses which will not take more than three months. Even if a foreigner who has not obtained a student visa does not belong to one of these categories, he or she may still enrol in an education institution by applying to the competent authorities to be granted a residence permit for educational purposes by explaining the reasons for the delay as long as he or she has entered the country legally.[313] In order to have their student residence permits extended, students shall submit a document proving that their registration with the educational institution has been renewed.[314]

There are some important limitations as to the right to education for foreigners in Turkey. The first limitation is to be found in the By-law on foreign students. Article 10 prohibits foreign students from being engaged in an economic activity during their studies. It must be noted that students at post-graduate level are excluded from this prohibition to the extent that they are allowed to work at the educational institutions where they are studying.[315] On the other hand, foreign students are under an obligation to provide proof that they have the necessary legal means to meet their expenses during their studies.[316] In the absence of a right to access the labour market, students usually provide proof that they are the recipients of a scholarship or that their families support them economically.[317]

The second limitation concerning foreigners' right to study is to be found in the Private Education Institutions Law.[318] According to Article 13(6), the number of foreign students in a preschool, or a primary and secondary education institution, cannot exceed 30% of the Turkish students in that institution. The percentage of foreign students allowed in an educational institution used to be 20% according to Article 28 of the repealed Law on Private Educational Institutions which was abolished in 2007.[319]

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313 B. Çiçekli, *Yabancılar ve Polis: Polisin Görev ve Yetkileri çerçevesinde Yabancıların Hukuki Durumu* [Foreigners and the Police: the Legal Position of Foreigners within the Framework of the Duties and Competences of the Police] (Ankara, Seçkin Yayıncılık 2003) p.81.

314 A. Asar, *Türk Yabancılar Mevzuatında Yabancı ve Hakları* [Foreigner and Foreigner's Rights in the Turkish Foreigners Legislation] (Ankara, Turhan Kitabevi Yayınları 2006) p.212.

315 B. Çiçekli, 'Yabancılar ve Polis Polisin Görev ve Yetkileri çerçevesinde Yabancıların Hukuki Durumu', (Seçkin Yayıncılık, 2003), p.84.

316 A reference to Circular 2002 of the General Directorate of Security is made in B. Çiçekli (2003) p.84.

317 A. Asar, *Türk Yabancılar Mevzuatında Yabancı ve Hakları* [Foreigner and Foreigner's Rights in the Turkish Foreigners' Legislation] (Ankara, Turhan Kitabevi Yayınları 2006) p.215.

318 Private Educational Institutions Law [Özel Öğretim Kurumları Kanunu], No. 5580 dated 08.02.2007, published in the Official Gazette No.26434 dated 14.02.2007.

319 Private Educational Institutions Law [Özel Öğretim Kurumları Kanunu], No. 625, dated 08.06.1965.

The final limitation which needs to be dealt with here derives from the structure of the Turkish education system. The Third Section of the Treaty of Lausanne[320] dealing with the protection of Turkish citizen minorities also ensures the right of non-Muslim minorities to an education in their own language in their own schools.[321] In such schools established by the Greek, Armenian and Jewish minorities, which are referred to as minority schools, only Turkish citizens may enroll and study.[322] This can be seen as a limitation on the right to study for foreigners as it limits the freedom of choice they have as to which school they would like to be enrolled in.[323]

The Turkish policy on foreign students favours the return of foreign students to their country of origin after completing their education in Turkey.[324] Leaving aside feasibility of maintaining such a policy, Turkish policy-makers should decide whether this is a policy which deserves to be upheld given the danger of foreigners who have completed their studies in Turkey resorting to illegal employment channels when the legal means of staying in Turkey in order to search for a job are closed. However, there is also a group of foreign students who, after graduating, do need to leave the country in any event. Those are students who have studied subjects such as law or medicine at Turkish universities. As foreigners are not allowed to work in Turkey as lawyers or doctors, these students have no other choice but to find a job in other countries, which creates new problems for them, such as having to deal with diploma recognition procedures and finding out what they can do with a Turkish law degree elsewhere.

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320 Treaty of Peace with Turkey signed at Lausanne on July 24, 1923 which took effect with Law No. 341, dated 23.08.1923.

321 Treaty of Lausanne, Articles 40 and 41.

322 Private Educational Institutions Law No. 5580, dated 08.02.2007, published in the Official Gazette No. 26434 dated 14.02.2007.

323 An amendment has been proposed to the draft Private Educational Institutions Law making it possible for foreign students who belong to the respective minority ethnically or religiously to attend minority schools. The reasoning behind this proposal was explained with the fact that the Treaty of Lausanne does not contain any provisions that may prevent students other those with Turkish citizenship from enrolling in minority schools. However, this argument cannot be accepted as the relevant articles of the Treaty of Lausanne regulate the rights of minorities. See: N. Ö. Hadimoğlu, 'Minority Schools, Foreign and International Schools in the New Law on Private Educational Institutions', *Ankara Law Review*, Vol.5, No.1 (Summer 2008) pp.53-100.

324 A. Asar, *Türk Yabancılar Mevzuatında Yabancı ve Hakları* [Foreigner and Foreigner's Rights in the Turkish Foreigners' Legislation] (Ankara, Turhan Kitabevi Yayınları 2006) p.215.

3.5 Conclusions

How the rights dealt with above have been regulated for foreigners living in Turkey provides valuable indications as to the mentality of the Turkish legislator. Numerous aspects of the legislation and practice regarding foreigners carry traces of the mindset which still bears vivid memories of the collapse of the Ottoman Empire and the young Turkish Republic struggling to survive according to its own resources.

It is true that neither generally accepted principles of international law nor the EU acquis require countries to treat third-country nationals in the same way as they treat their citizens. However, the EU acquis does determine the general framework for restrictions that are allowed. This chapter constitutes the basis of the assessment regarding how much in conformity the Turkish laws and practices are with the relevant EU acquis, in terms of both the minimum standards which Member States should maintain while regulating the rights of third-country nationals and the scope of liberty that is given to Member States for them to limit certain rights of foreigners.

Chapter Four

Turkish Immigration Law and Policy Put to the Test: Is Turkish Immigration Law and Policy Compatible with the EU Immigration Acquis?

4.1 Introduction

This Chapter contains the climax of the study where the two plots of the book meet, revealing the level of conformity of Turkish laws to the European Union acquis on immigration. The revelation is intertwined with propositions on how to bring Turkish laws into conformity with the EU acquis against which they are tested.

The comparison is conducted on two levels. First of all, there is a comparison at a more general level. This is done by means of taking the two legal systems as a whole, and evaluating the basic principles governing the two. Secondly, a more in-depth comparison is carried out by retracing the structure of Chapter two in terms of the order of EU acquis elements which are examined. Following the identical order, the specific aspects of the two legal systems are placed side by side in order to carry out a comparison which paves the way for an examination of how the Turkish legal system will need to change as a result of the obligation of compliance with the EU immigration acquis.

4.2 A General Comparison

This section is devoted to some rather general remarks concerning the entirety of the legal systems forming the subject-matter of comparison, namely the Turkish law and the EU acquis on immigration. These remarks relate to the general characteristics of the two legal systems, which are very telling as to their different starting points. This general comparison is followed by a more detailed comparative analysis of the Turkish law against the EU acquis, in order to determine the legal changes that will have to take place in Turkish legislation towards accession. It should be borne in mind that even though the relevant changes that will have to take place in the Turkish legislation towards accession are two-fold: those relating to EU citizens, and those relating to third-country nationals; this study is solely devoted to the legislation on third-country nationals.

When the areas of immigration law that are dealt with by the EU acquis and that are dealt with by Turkish law are put side by side, it can be seen that different subjects have been concentrated upon. For matters which have been thoroughly regulated in EU law, such as family reunification and the status of long-term residents, there is very little room in Turkish law, if any. At this point, it is important to remember that EU immigration law never digresses too far from the national legislation of Member States. In other words, due to the reluctance of Member States to harmonize the area of immigration expansively, meaning that Member States would be obliged to raise their standards, the successful harmonization at EU level of immigration policies is mostly possible when the national laws are taken as a basis.[1] Despite this reluctance, the evolution of EU immigration law represents a demonstration of the fact that the Member States have ended up raising their standards concerning immigration law. However, for a legal system such as the Turkish law on foreigners to comply with EU immigration law, more is needed than raising standards; a whole structure has to be put in place. This assertion sheds some light on an important fact, namely the existence of a difference in the basic traditional approach towards immigration by the Member States, as well as by the EU on the one side, and by Turkey on the other. For instance, the granting of a 'differentiated legal status to the various groups of immigrants according to the purpose of residence has deep roots in European history and is based on a broad political consensus'.[2] The Turkish legal system, however, does not contain the principle of giving a different legal status to those coming for different purposes of residence, nor does the legal status of a foreigner become more secure the longer he or she resides in Turkey. Consequently, in Turkish law we do not find a catalogue of comprehensive rules on the residence of foreigners as we do in the EU acquis which is based on the traditional aspects of immigration laws in old Member States. Those more systematic sets of rules on a certain aspect of the residence of foreigners which we do see in Turkish law are those enacted within the framework of EU accession.

The existence of detailed rules on the rights of third-country nationals concerning different aspects of residence in EU law, and the absence thereof in the Turkish law hints at yet another difference between the two legal systems. EU law is increasingly becoming a legal system centred around the concept of residence

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1 T. Givens and A. Luedtke, 'The Politics of European Union Immigration Policy: Institutions, Salience, and Harmonization', *The Policy Studies Journal*, Vol.32, No.1 (2004) pp.145-165.

2 T. Gross, 'Integration of Immigrants: The Perspective of European Community Law', *European Journal of Migration and Law*, Vol.7 (2005) pp.145-161.

which is based on participation in the community, rather than nationality.[3] On the contrary, the Turkish system is based on the traditional differentiation between a national and a foreigner.[4] A foreigner in Turkey, no matter how many years he or she has lived and worked in the country, will remain a non-national, which is the sole determinant of his or her legal status. It will indeed be a challenge for Turkey to shift the bedrock of the legal status awarded to individuals more than anything else. Thus, it is not so much adopting the rules themselves but changing the paradigm which is the demanding task. This would require a change in the minds of those who make the law and policy.

The Turkish law on foreigners does not constitute a comprehensive area of the law. It regulates basic aspects of the lives of foreigners in Turkey, but overlooks certain fundamental aspects thereof. The lack of a clear and institutionalized regime on family reunification and the integration of foreigners can be mentioned here as aspects of the lives of foreigners which are overlooked in Turkey. EU immigration law on the other hand, adopting mainly a minimum standards approach, has led the rules which apply to third-country nationals to be criticized as 'an underdeveloped legal regime' which in many instances does not even constitute a coherent regime.[5] It is very telling as to the regime applying to foreigners living in Turkey if the Turkish legislation on foreigners even falls short of measuring up to the 'underdeveloped' level of the EU immigration law. The reason for this scarcity of rules providing for a secure legal position for foreigners in Turkish legislation can be retraced in certain historical facts relating both to a period stretching from the mid-15th century to the end of the 17th century as well as the not very distant past, namely after the First World War. The triumphant Ottoman Empire was never concerned with who entered its territory. Throughout its existence[6] the Ottoman frontiers were permeable, and the Ottoman lands were relatively easily accessible to outsiders where they were allowed not only to come and go, but also to reside.[7] Furthermore, what is very

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3 G. Davies, "Any Place I Hang My Hat?' or: Residence is the New Nationality', *European Law Journal*, Vol.11, No.1 (January 2005) pp.43-56.

4 Under Turkish law, 'citizenship' and 'nationality' correspond to the same concept and can be used interchangeably.

5 R. Cholewinski, 'The Need for Effective Individual Legal Protection in Immigration Matters', *European Journal of Migration and Law*, Vol.7 (2005) pp.237-262.

6 The reason why in the previous sentence the period between the mid 15th century and the end of the 17th century is mentioned relates to the fact that this time frame corresponds to the apogee of the Ottoman Empire. The mentioning of this period excludes the mass influx of Ottoman subjects into areas which were still Ottoman territory starting with the decline of the Empire. For further information see *supra* 3.3.1.

7 S. Faroqhi, *The Ottoman Empire and the World Around It* (New York, Palgrave Macmillan 2006) p. 28, 213.

relevant for this study is that foreigners were not subject to many rules during their stay in the Ottoman territory; and even the existing rules, such as those prohibiting them from marrying local women or from acquiring real estate, were often ignored in practice.[8] This traditional approach towards (not) regulating the entry and residence of foreigners has not been abandoned in the Turkish Republic, constituting the primary reason for the scarcity of rules concerning the legal residence of foreigners. A second reason can be seen when focused on the more recent history. In contrast to the war-torn Europe of the post-Second World War, Turkey never experienced labour shortages.[9] This is why, while the European Union countries were busy with legislating on various aspects of having guest workers among the locals in society and thus sowing the seeds of future immigration law, Turkey, or rather the foreigners living in Turkey, had to subsist on the limited scope of legislation concerning them, which mostly dated back to the establishment of the Turkish Republic. Such legislation is obviously the product of different times and does not meet the needs of foreigners living in Turkey today. These restrictive sets of rules applying to the residence of foreigners in Turkey will have to be transformed into effective tools which are capable of meeting the needs of foreigners living in Turkey today. Here, the concept of a changing paradigm comes into play once more. The transformed legislation on foreigners should see the foreigner as a resident who participates in and contributes to Turkish society, and not as a security threat who will not be able to work, suppose, as an attorney, even if he or she has graduated from a law school in Turkey and has fulfilled the other conditions determined by the law in order to become an attorney, based on the simple fact that he or she is not a Turkish citizen.[10]

One facet of providing a secure legal position for foreigners in general is to create a neat legal regime which does not oblige the persons concerned to engage in a treasure hunt in order to determine what their rights and obligations exactly are, going from one piece of legislation to the other following references in one law, exceptions in the other. The clear-cut way of achieving such a neat legal regime is to adopt a Foreigners' Law which will contain all relevant rules governing various aspects of the entry and residence of foreigners. The Turkish legal system is lacking in structure when it comes to the rights and obligations of foreigners.

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8 *Ibid.,* p. 213.

9 A. Çelikel, 'Türk Yabancılar Hukukunun Genel İlkeleri' [General Principles of Turkish Foreigners' Law] in Vatandaşlık ve Yabancılar Hukuku Alanında Gelişmeler (Bilimsel Toplantı) [Developments in the Area of Citizenship and Foreigners' Law (Scientific Meeting)] (Ankara Üniversitesi Hukuk Fakültesi 1998) p.95.

10 Law on Attorneyship [Avukatlık Kanunu], No. 1136, dated: 19.03.1969, published in the Official Gazette No.13168 dated 07.04.1969, Article 3(a).

Rules on the entry and residence of foreigners can be found in various legal texts making it necessary to consult specialists if there is a legal issue.[11] Especially considering the need to make amendments in a broad range of areas in order to fully align Turkish foreigners' legislation with the EU acquis, it is efficient to combine efforts in alignment with drafting a Foreigners' Law which would bring order to the realm of foreigners' law in Turkey as well as achieving alignment in various aspects of EU immigration law.[12] The Foreigners' Law is due to be enacted in the period between 2009 and 2013.[13] This loosely set deadline fits the general trend in reluctant alignment efforts observed in the area of immigration. However, it is also a realistic target as the opening of negotiations on Chapter 24 would contribute to the drafting of a Foreigners' Law with the EU laying down its requirements in concrete terms once the negotiations on this Chapter begins.

If one were to classify the totality of immigration laws as 'liberal' or 'restrictive', and if based on such a classification a comparison were to be made between the EU and Turkish immigration policy, the contents of this research would have to be evaluated in two sections, namely 'visa' and 'residence' policies. Compared to the restrictive EU visa rules which inspire the description 'fortress Europe', the Turkish visa policy is a very liberal system. Taking its origins from the state tradition of the Ottoman Empire which considered neither installing stringent controls at entry points nor a closing of the borders[14] the Turkish visa policy is welcoming to those who appear at its borders. What compels such a classification is the entirety of the relevant rules and practices, such as how relatively easy it is to obtain a visa to enter Turkey, especially when visas issued at the borders are considered, or how local border traffic arrangements have been concluded with neighbouring countries. As the following section goes more into depth concerning the specific rules, the details are spared here. This liberal disposition of the Turkish visa system does not recur in matters relating to the residence of foreigners. The Turkish policy on the residence of foreigners can easily be labelled as 'restrictive' considering, inter alia, that numerous occupations are forbidden to foreigners; no additional rights are granted even after having spent years of having been completely integrated into society and a field of immigration law as important as family reunification is almost totally neglected by the legislator. When compared to the Turkish policy on the residence of foreigners, the EU acquis corresponds to a liberal regime. This contradiction is in fact the

11 N. Ekşi, *Yabancılar Hukukuna İlişkin Temel Konular* [Basic Concepts Regarding Foreigners' Law] (İstanbul, Beta 2006) p.5.

12 *Ibid.,* p.6.

13 Turkey's Programme for Alignment with the Acquis (2007-2013), April 2007.

14 S. Faroqhi, *The Ottoman Empire and the World Around It* (New York, Palgrave Macmillan 2006) pp. 212-214.

logical outcome of the characteristics of the relevant visa policies. The gap between the rights of foreigners and citizens will be greater in legal regimes where the visa policy is very liberal, thus participation in society as a resident foreigner is easy. Consequently, if the legal regime affords resident foreigners a status closer to the benefits enjoyed by citizens, the visa policies will be tighter.[15] Therefore, it is natural that the liberal visa policy of Turkey has contributed to the restrictive nature of the residence policies, whereas the widening level of rights afforded to legally resident third-country nationals under EU law has contributed to the restrictive nature of EU visa policies. It is remarkable that the EU residence acquis portrays a liberal nature even with the fact that Member State legislations are mostly harmonized at the level of minimum standards and the acquis allows for derogations sometimes even without standstill clauses. From an optimistic point of view, the EU law on immigration could not have any prospects of becoming a fully-fledged legal system ensuring a high level of protection for third-country nationals if these first steps in the form of minimum standards have not been taken at this stage. The policy documents signalling development in the coming years in various areas of immigration policy such as circular migration or integration are evidence of the immature state of EU immigration policy which will develop into a field of law which not only covers diverse policy areas but also concentrates more on the immigrants themselves rather than immigration as an international phenomenon.[16]

Accordingly, the alignment efforts of Turkey to the EU immigration acquis will represent two types of challenges. First of all, the adoption of more restrictive rules on visa policy will constitute an economic challenge for Turkey, as well as affecting its relationships with neighbouring regions. Secondly, bringing its foreigners' legislation into a more liberal line will be a challenge both for the legislature and the policy makers as well as the executive authorities in ensuring that those who implement the foreigeners' law which is aligned to the EU acquis do not hinder the liberal approach with their acts.

One final remark which should be included in this general comparison relates to a terminology problem which might lead to misinterpretations and confusion when Turkey becomes a Member State of the EU. As is discussed above in detail, the meaning given in Turkish legislation to the concept of 'immigrant' ('*göçmen*') differs from the customary usage thereof internationally and especially in EU law. In policy documents at the EU level, the term 'immigrant' is used interchangeably

[15] R.C.A. White, 'Conflicting Competences: Free Movement Rules and Immigration Laws', *European Law Review*, Vol. 29 (2004) pp.385-396.

[16] A. Geddes, 'International Migration and State Sovereignty in an Integrating Europe', *International Migration*, Vol.39, No.6 (2001) pp.21-42.

with the term 'third-country national'.[17] However, in Turkish law the term 'immigrant' as described by the Law on Settlement refers to "individuals and groups of Turkish descent who are committed to the Turkish culture, who come to Turkey for settling purposes and who have been accepted in accordance with the Law on Settlement".[18] The regime governing third-country nationals living in Turkey is in very broad lines divided into two: the one concerning immigrants as described in the Law on Settlement, and the one concerning other foreigners living in Turkey. The former are regarded as 'citizens to be' rather than foreigners while the latter are subject to a much more restrictive regime. Following accession, as well as in preparation thereof, Turkey will need to work with the EU documents referring to 'immigrants'. It can be expected that certain terminology problems will be experienced as a result of the very peculiar description of an immigrant under Turkish law and the remarkable regime to which those who are accepted as 'immigrants' are subjected. For this reason, Turkey may have to resort to some legislative amendments introducing linguistic adjustments. Such an amendment would also be beneficial from a different point of view, one that accepts the assumption that 'terminology influences the way in which immigration policy is conceived and understood in each country and the terms, initially instruments of description, become fixed concepts limiting flexibility and creativity.'[19] The outcome of applying this assumption to the terminology confusion in the Turkish legislation would be that only those foreigners of Turkish descent who are committed to the Turkish culture are seen as part of the Turkish society as they are named 'immigrants', whereas any other foreigner is seen as merely a 'foreigner' even if he or she has spent most of his/her life living and working in Turkey. Within the comprehensive approach towards immigration, this result would hamper integration efforts, as already indicated above, because integration is a two-way process involving not only the immigrants but also the residents of the host country.[20]

Having started this general comparison as to the more general aspects of the two legal systems by noting that the areas which have traditionally received attention from the law-makers in Turkey and in EU, as well as its Member States, have

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17 For some examples please refer to the Policy Plan on Legal Migration, COM(2005) 669 final; Commission Communication Towards a Common Immigration Policy, COM(2007) 780 final.

18 Law on Settlement [İskan Kanunu], No. 5543 dated 19.09.2006 published in the Official Gazette No.26301 dated 26.09.2006, Article 3(1)(d).

19 J. Apap, *The Rights of Immigrant Workers in the European Union: an evaluation of the EU public policy process and the legal status of labour immigrants from the Maghreb countries and the new receiving states,* (The Hague, Kluwer Law International 2002) p.4.

20 See *supra* 2.4.5.

been different, the focus has then been shifted to laying down the different starting points of the EU and Turkish immigration laws, being residence and nationality respectively. After this, the historical reasons for such differences were pointed out. This was followed by a look at the organization of the Turkish immigration policy which, in fact, lacks structure, something which will have to change during the accession preparations. Then, as a first step to the content-wise comparison, which is the main undertaking of the following section, an assessment of the general character of both systems has been made. This is a ballpark assessment looking at the totality of rules concerning immigration in the compared legal systems laying down the challenges awaiting Turkey in aligning its foreigners' law to the EU immigration acquis. Finally, notice has been taken of the terminological confusion which may occur with the accession of Turkey into the EU resulting from the unique meaning given by Turkish law to the term 'immigrant. This general comparison lays the necessary ground in order to begin with a detailed evaluation of the Turkish foreigners' law against the EU immigration acquis in order to determine to what extent the Turkish legal system will be influenced by the alignment to the EU acquis. In the section below, this comparative assessment is intertwined with the concluding findings.

4.3. Admission

The Schengen acquis, which consists of the Schengen Agreement, the Schengen Implementation Convention and all the rules adopted in accordance with these two legal texts, is the backbone of the European visa policy.[21] It is stated in Article 8 of the Schengen Protocol integrating the Schengen acquis into the framework of the EU that the Schengen acquis must be accepted in full by all candidate countries for admission. The realization of this principle is first observed by the 2003 Act of Accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic.[22] It follows from the Act concerning the conditions of accession of the ten new Member States that the provisions of the Schengen acquis are binding on the new Member States from the date of accession.[23] However, the acquis will not be automatically applicable in a new Member State upon accession. A unanimous Council decision is needed for the Schengen acquis to apply in the new Member States.[24] In this respect, it is

21 See *supra* 2.3.1.1.
22 O.J. L 236, 23.09.2003, pp.33-49.
23 2003 Act of Accession, Article 3(1).
24 *Ibid.*, Article 3(2) and (3).

evidently crucial that the Turkish visa policy is in line with the Schengen acquis. This section of the Chapter is therefore devoted to analyzing the relevant Turkish policy based on the EU visa regime.

The visa regime can be analyzed from several different aspects. The analysis here concentrates on the negative and positive visa lists, the types of visas, the procedures relating to the issuing of visas and technical aspects of the visa policy. This section on the visa regime is concluded with a discussion on the relevant aspects of border management.

4.3.1 Alignment to the negative and positive visa lists

At the beginning of the discussion on the Turkish and EU visa regimes, the question of 'who is subject to these visa regimes' deserves some attention. The EU system determining who shall be required to possess a visa is very straightforward: those who are nationals of the third countries which are listed in Annex I of Council Regulation 539/2001 are obliged to obtain a visa in order to be accepted into the Schengen territory. Those who are citizens of the third countries listed in Annex II thereof shall be exempt from the visa requirement for stays up to three months.[25] The alignment of the Turkish legislation to the negative and positive visa lists can be examined from two aspects. Firstly, the negative and positive lists can be placed next to the corresponding Turkish lists revealing towards which third counties Turkey still needs to change its visa policy. Secondly, the duration of the visa-free regime applying to the citizens of third countries belonging to the positive visa list can be scrutinized.

Following the aforesaid order, the first aspect to be examined here is to what extent Turkish visa policy is in line with Annex I and Annex II of Council Regulation 539/2001. Turkey's Programme for Alignment with the Acquis envisages the alignment to the negative and positive visa lists should take place in the period between 2010 and 2013.[26] Turkish efforts in aligning to the positive and negative visa lists are not steady enough to predict whether this deadline will be met. While in 2005, the discrepancy between the visa obligation lists concerned six countries,[27] in 2007 with the lifting of visa obligations for Azerbaijan, Mongolia, Uzbekistan, Tajikistan and Turkmenistan contrary to the acquis, the discrepancies have grown.[28] In fact, it was the introduction of visa obligations for citizens of Azerbaijan in November 2003 which reduced the

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25 See *supra* 2.3.1.2.

26 Turkey's Programme for Alignment with the Acquis (2007-2013), April 2007.

27 Turkey 2005 Progress Report, SEC(2005) 1426, p.111.

28 Council of Ministers' Decision No.2007/12441, dated 19.07.2007, published in the Official Gazette No.26597, dated 29.07.2007.

discrepancy between Annex I and the Turkish visa policy to six countries. This move celebrated by the EU in the 2004 Regular Report has been undone in 2007 within the scope of improving relations with Central Asian countries. In fact, in the first National Programme for Alignment with the Acquis, the deadline for adopting the negative and positive visa lists of the EU was set at 2004.[29] The primary reason why the 2007 National Programme is delaying the alignment lies in a mere realization by Turkish officials, upon being reminded by European Commission officials, that alignment did not need to be immediate and that it could be spread out until closer to the accession date.[30]

The issue of alignment with the EU negative list is a delicate issue as Turkey itself is on that list. Turkey demands to be included in the visa-free travel regime applying to other candidate countries.[31] However, the EU considers the signing of a readmission agreement with Turkey to be a precondition for agreeing to adopt visa facilitation towards Turkey.[32] On the other hand, the EU's reluctance concerning sharing the burden which Turkey will face once a readmission agreement is signed with the EU is resulting in Turkey abandoning positive efforts in adopting the acquis. Turkey does not want to become a 'buffer zone' for the EU,[33] as it has been argued that 'Fortress Europe is only possible by forming a buffer zone around the EU.'[34] It is precisely the fear of becoming the EU's buffer zone that makes Turkish officials approach the issue of signing readmission agreements with EU countries very reluctantly.[35] Consequently, Turkey distances itself from the frustrating efforts of aligning its visa policy to the EU negative visa list and focuses on building better relations with the Central Asian countries. This in turn gives the EU cold feet in considering a visa facilitation agreement with Turkey. Keeping in mind Turkey's commitment to align its laws

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29 Table 24.3.1.

30 K. Kirişçi, 'Border Management and EU-Turkish Relations: Convergence or Deadlock', European University Institute, Robert Schuman Centre for Advanced Studies, Research Reports 2007/03, p.38.

31 The ECJ Judgment of 19.02.2009 in the Case C-228/06, *Soysal and Savatlı* [2009], preventing Member States from maintaining visa requirements for Turkish citizens who are providing services on behalf of undertakings established in Turkey has partially made the 'visa facilitation agreement' debate redundant. See *supra* 2.3.2.5.

32 'No partial visa facilitation, Ankara reacts to EU's Rehn' Article published in the Turkish Daily News dated 06.09.2008.

33 K. Kirişçi, 'Informal 'Circular Migration' into Turkey: the Bureaucratic and Political Context', CARIM Analytic and Synthetic Notes 2008/21, Robert Schuman Centre for Advanced Studies, European University Institute (2008).

34 S. Laçiner, M. Özcan, İ. Bal, *European Union with Turkey: the Possible Impact of Turkey's Membership of the European Union* (Ankara, Publication of USAK 2005) p.95.

35 *Ibid.,* p.126.

so as to comply fully with the EU positive and negative visa lists in a period which extends from 2010 to 2013, there has so far been no breach of any commitments on the side of Turkey. Moreover, the EU requires adherence to the Schengen acquis on the date of accession and not before that. Thus, Turkey is still on track even though an immediate alignment to the EU negative and positive visa lists would be a noble display of commitment towards not only being removed from the negative visa list but also to the ultimate goal of becoming a Member State by showing a desire and capability in taking on the acquis and thereby possibly speeding up the negotiations process. However, what must not be underestimated is the clear declaration in the National Programme as to the compliance with the negative and positive visa lists. Notwithstanding the obvious necessity to adapt the visa regime to these lists, the National Programme fails to address a number of legislative amendments which Turkey would have to realize, especially in such clear wording. From this aspect, as long as Turkey ultimately complies with the deadlines it sets for itself, it is understandable that Turkey wants to retain its more liberal visa arrangement, since such arrangements are not only crucial for Turkey in social, political and economic areas but they are also indispensible for certain countries such as Iran whose citizens 'enjoy informal protection in Turkey by the mere fact that they can enter, exit and re-enter the country unhindered'.[36]

The second aspect of Turkish alignment to the negative and positive visa lists relates to what these lists should actually mean. The EU acquis very clearly allows for a visa-free stay of three months for citizens of countries belonging to Annex II of Council Regulation 539/2001.[37] However, the Turkish visa regime is rather complicated regarding the period of the visit allowed to the citizens of the countries for which there is no visa obligation. Whereas the citizens of some countries subject to a visa-free regime do indeed enjoy a right to stay up to three months in Turkey,[38] for some this period is two months[39] and for others it is

[36] K. Kirişçi, 'A Friendlier Schengen Visa System as a Tool of "Soft Power": the Experience of Turkey', *European Journal of Migration and Law*, Vol.7 (2005) pp.343-367.

[37] Council Regulation 539/2001, Article 1(2).

[38] The countries whose citizens enjoy a visa-free stay for up to three months are: Argentina, Andorra, Bolivia, Brazil, Bulgaria, Chile, Czech Republic, Denmark, Ecuador, El Salvador, Finland, France, Germany, Greece, Guatemala, Honduras, Hong Kong, Iceland, Iran, Israel, Japan, Liechtenstein, Luxembourg, Malaysia, Monaco, Morocco, New Zealand, Nicaragua, San Marino, Montenegro, Paraguay, Singapore, South Korea, Sweden, Switzerland, Trinidad and Tobago, Tunisia, Turkish Republic of Northern Cyprus, Uruguay, Vatican City and Venezuela.

[39] The countries whose citizens enjoy a visa-free stay for up to two months are: Bosnia-Herzegovina, Croatia and Macedonia.

one.[40] Accordingly, the positive list does not create a homogenous system applying to all visa-free regimes. In order to fully comply with the Schengen acquis, Turkey not only needs to make sure that the countries in the negative and positive visa lists match with the EU acquis, but also to make sure that its visa-free regime means the same thing for all countries subject to a visa exemption.

4.3.2 Types of visas

As it stands today, the uniform visa consists of four types: the airport transit visas, transit visas, short-term or travel visas and group visas.[41] With the entry into force of the Community Code on Visas, group visas will no longer be part of the Schengen visa regime as separate visa application forms for individuals will then become the norm.[42] Under Turkish law, entry and transit visas are regulated.[43] This means that the inconsistency in the types of visa under Turkish law in comparison to the Schengen system shows itself in the lack of airport transit visas in the former system. As a rule, transit airway passengers are not subject to visa requirements provided that they do not leave Turkish airports. However, transit passengers without a visa may also be allowed to tour the city where the airport is located for the period between their arrival and the first flight to their destination.[44] This practice is obviously contrary to the EU acquis on the subject.[45] The legislative alignment which was planned for the 2007-2008 legislative period has not yet been realized.[46] The Passport Law will have to be amended in order to include the airport transit visa as one of the types of visa. The introduction of the airport transit visa also requires the restructuring of airports in order to establish the transit zone at the airports. The EU has already started to warn Turkey of steps to be taken to introduce airport transit visas.[47]

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40 The countries whose citizens enjoy a visa-free stay for up to one month are: Azerbaijan, Costa Rica, Kazakhstan, Kyrgyzstan, Macao Special Administration Region, Mongolia, Tajikistan, Turkmenistan and Uzbekistan.

41 As described in the Common Consular Instructions, Sections 2.1.1., 2.1.2., 2.1.3. and 2.1.4. See *supra* 2.3.1.3.

42 Draft proposal for a Regulation establishing a Community Code on Visas, COM(2006)403 final, dated 19.07.2006.

43 Passport Law, Articles 28 and 29. See *supra* 3.4.1.1.

44 Turkish National Action Plan for the Adoption of the EU Acquis in the Field of Asylum and Migration, (March 2005).

45 Joint Action of 4 March 1996 on airport transit arrangements, O.J. L 63, 13.3.1996, pp.8-9.

46 Turkey's Programme for Alignment with the Acquis (2007-2013), April 2007.

47 Turkey 2007 Progress Report, 06.11.2007, SEC (2007) 1436, p.64.

4.3.3 Procedural Matters

4.3.3.1 Visas at borders

Passing to the procedure administering the visa regime but staying with the subject of types of visas, one practice in relation to entry visas constantly criticized by the EU is the issuing of visas at borders. The Schengen rule on issuing visas allows the Member States only to issue visas at their diplomatic and consular authorities.[48] Despite diplomatic and consular authorities being the primary authorities to issue visas,[49] the Turkish law also allows for the issuing of visas at the borders.[50]

Even though the EU does regulate the issuing of visas at borders, [51] it allows it only in exceptional situations where the third-country national could not have applied for a visa in advance due to unforeseeable and imperative reasons.[52] Even when all the requirements have been observed, the visa issued can still not exceed fifteen days.[53] The Turkish practice of issuing visas at the borders is far from being an exceptional case. In 2006 and 2007 the Progress Reports point out that the citizens of 35 countries, including 17 Member States, can apply for a visa at the Turkish borders and assert that this practice has to be abolished and be progressively replaced by the standard issuing of visas by diplomatic and consular missions.

Currently the citizens of 51 countries enjoy access into Turkey by applying for a visa at the border gates for fees determined on a country by country basis, ranging from 10 to 45 Euros.[54] The visa applicant is always checked in the system whether he or she is on a blacklist before the visa is issued at the border.[55] The issuing of visas at the border constitutes an important practice for Turkey for many reasons. First of all, it is a compromise between applying the reciprocity principle, which is one of the basic principles of Turkish foreigners' law, and economic concerns. With the introduction of the *bandrol* (or sticker) visas issued at the borders in the early 1990s, Turkey did not have to decide between

48 Schengen Implementation Convention, Article 12(1).

49 Passport Law, Article 24.

50 See *supra* 3.4.1.1.

51 Council Regulation 415/2003 of 27 February 2003 on the issue of visas at the border, including the issue of such visas to seamen in transit, O.J. L 64, 07.03.2003, pp.1-8.

52 Council Regulation 415/2003, Article 1(1). See *supra* 2.3.1.4.

53 *Ibid*., Article 1(2).

54 For a detailed list of visa fees see: http://www.mfa.gov.tr/visa-fees-at-border-gates-for-2008.en.mfa (last visited 21.01.2009).

55 Twinning Project for Visa Policy and Visa Practice, Standard Summary Project Fiche, 2003, Section 3.1.

reciprocity and not allowing the tourism income to decrease. It simply imposed an obligation on the citizens of some countries to obtain a visa at the borders. This practice also applied to several EU Member States as Turkey is on the negative visa list: however, the citizens of some EU Member States could still enjoy visa-free travel to Turkey. However, these visa exemptions do not relate to economic concerns but rather to the facilitation of travel for Turkish people who are citizens of countries such as Germany, France and Switzerland.[56] Furthermore, the practice is important insofar as it promotes the 'suitcase trade'. The suitcase trade not only provides a boost to the economy but also contributes to the stability of the region as explained above.[57]

Issuing visas at borders is probably the most typical appearance of a liberal visa regime. Thus the importance which the specific practice of the *bandrol* visa carries for Turkey corresponds to the advantages of having a liberal visa policy in general. Self-evidently the regime also has certain risks. These risks relate especially to illegal immigration and security. Furthermore, it facilitates extending the period of legal stay without applying for a residence permit and may encourage illegal work among these 'semi-illegal'[58] foreigners. The system represents a choice made by the Turkish Republic: to endure the risks inherent in a liberal visa policy such as illegal immigration and security threats and by doing so profiting from the stimulating economic and social effects of the system. This choice does not correspond to the choices made by the EU, which means Turkey will need to put an end to practices making its visa policy a liberal one. Issuing visas at border gates is one of these practices. Accordingly, Turkey is planning to terminate the practice of issuing visas at borders somewhere between 2010 and 2013.[59] Like in the case of alignment with the positive and negative visa lists, Turkey intends to take its time in completing alignment in this matter as the abolition of the *bandrol* visa practice will affect tourism and trade immensely. However, the Turkish experience concerning the issuing of visas at borders show that many Russian Federation citizens who enter Turkey continue to frequently visit Turkey, making it to their interest not to violate Turkish laws in order to ensure unhindered entries in the future.[60] It could be debated whether a

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56 J. Apap, S. Carrera, K. Kirişçi, 'Turkey in the European Area of Freedom, Security and Justice', Centre for European Policy Studies, EU-Turkey Working Papers No. 3 (August 2004) p.26.

57 See *supra* 3.4.1.1.

58 K. Kirişçi, 'Informal 'Circular Migration' into Turkey: the Bureaucratic and Political Context', CARIM Analytic and Synthetic Notes 2008/21, Robert Schuman Centre for Advanced Studies, European University Institute (2008) p.1.

59 Turkey's Programme for Alignment with the Acquis (2007-2013), April 2007, Section 24.4.

60 K. Kirişçi, 'A Friendlier Schengen Visa System as a Tool of "Soft Power": the Experience of

combination of reliable statistics and a well functioning, sound visa information system, which Turkey aims to establish,[61] could allow for the continuation of the system with certain countries. Taking this idea one step further, it can be discussed whether such arrangements could be introduced at EU level, especially at this stage of development of EU immigration law when circular migration as a form of flexibility is high on the agenda.[62]

Introducing the practice of issuing visas at borders could be worth a thought, confined to certain territories within the EU, in relation to countries which have a statistical record of its citizens choosing not to overstay their visas and preferring short-term and repeated stays. They may have a situation comparable to Russian Federation citizens who, mostly for suitcase trade-related motives, make multiple visits to Turkey and do not wish to endanger their future entries by violating the laws. This might in fact also be more beneficial than allowing a Member State to maintain a visa waiver agreement with certain third countries. An example of such practice can be given regarding the maintenance of the visa waiver agreement between Portugal and Brazil with a declaration attached to the Portuguese Accession Treaty. According to this declaration, the government of the Portuguese Republic undertook to readmit to its territory Brazilian nationals who, having entered the EU via Portugal under the visa waiver agreement between Portugal and Brazil, have been intercepted in the territories of the Member States.[63] The introduction of issuing visas at borders might in fact deliver more control over entries in comparison to a visa exemption agreement as the personal data of third-country nationals who would benefit from the system would be put into the visa information system to be cleared.

Such a debate should not obstruct the alignment efforts of Turkey to the Schengen acquis in every aspect. However, parallel to the Turkish alignment efforts yet detached from it, the EU might seek to benefit from the Turkish experience in maintaining a liberal visa policy within the scope of the current debate on possible new approaches towards immigration such as circular migration.

4.3.3.2 Visa Applications and Their Assessment

The Turkish Visa Application Form[64] is in conformity with the harmonized

Turkey', *European Journal of Migration and Law*, Vol.7 (2005) pp.343-367.

61 Turkey's Programme for Alignment with the Acquis (2007-2013), April 2007.

62 This discussion is elaborated below in Section 4.5.2.

63 Agreement on the Accession of the Portuguese Republic to the Convention implementing the Schengen Agreement, O.J. L 239 , 22.09.2000, pp.76-82.

64 Which can be downloaded from the web pages of Turkish consular missions abroad or

uniform visa application form.[65] This means that Turkish authorities are accustomed to working with the information provided by those applying for a visa, which will make the Turkish adaptation to working with the Schengen visa applications easier. Concerning the period of time it takes for a visa application to be processed, the Turkish legislation does not specify a maximum time. Nevertheless, Turkish missions usually deal with visa applications within 3 working days.[66] This period for processing visa applications is in line with the Community Code on Visas, which, when adopted, will bring a new obligation for Member States to process visa applications within 10 working days with a possibility of an extension of 30 days.[67] The compliance is impeded when the Turkish embassies and consulates are under the obligation to ask for permission from the central authorities in Turkey.[68] In those situations the approval of the visa takes usually from six to eight weeks.[69] It follows that the procedure involving the central authorities must be accelerated in order to catch up with the 30-day deadline. In any event, the practice should be reflected in law and clear deadlines for how long a visa application can be processed should be made part of the legislation on visas.

The Turkish practice concerning visa applications which has so far been mentioned displays encouraging features of Turkish visa policy towards accession. However, the picture is not so positive when the topic is the notification of refusals of visa applications. In the EU, the procedure for refusing entry used to be left to the national laws of the Member States until the adoption of the Schengen Borders Code in 2006. The adoption of the Borders Code brought with it an obligation on the side of the Member States to notify the third-country national of the refusal by a substantiated decision stating the precise reasons for the refusal.[70] The matter has also been dealt with by the Community Code on Visas with the adoption of a Standard Form for Notifying and

directly from the web page of the Turkish Foreign Ministry under 'consular info': http://www.mfa.gov.tr/default.en.mfa (last visited 21.01.2009).

65 Common Consular Instructions, Annex 16: Specimen harmonized uniform visa application form, introduced by the Council Decision of 25 April 2002 on the adaptation of Part III of, and the creation of an Annex 16 to the Common Consular Instructions, O.J. L 123, 09.05.2002, pp.50-52.

66 Information gathered from the websites of various Consular Missions of Turkey as confirmed in the Replies to Issues and Questions Posed to the Turkish Authorities by the European Commission as part of the Bilateral Screening with Turkey (13-15 February 2006).

67 COM(2006) 403 final, Article 20(1).

68 Such as in situations regulated in Article 26 of the Passport Law.

69 Information gathered from the websites of various Consular Missions of Turkey.

70 Schengen Borders Code, Article 13(2).

Motivating the Refusal of a Visa.[71] The Turkish practice on the refusal of a visa does not comply with the obligation to notify the visa applicant by a substantiated decision stating the precise reasons for the refusal; the visa applicant whose visa request has been turned down is informed verbally. A written confirmation of the refusal might be given if the refused applicant so requests.[72] Clearly, this approach by the Turkish authorities cannot be permitted under EU law and should be adjusted to the EU acquis on refusal. Nonetheless, not all the Turkish legislation concerning the refusal of a visa is contrary to EU law. The right to appeal for the third-country national against a decision to refuse his or her visa application is guaranteed under Turkish law as well as in the EU law. While this guarantee derives in EU law from the Schengen Borders Code Article 13(3), it is the Constitution that ensures the right to appeal in Turkish law. Article 125 of the Turkish Constitution guarantees, for everyone, recourse to judicial review against all actions and acts of administration. Accordingly, at this point Turkey does not need to introduce any additional legal adjustment as the Constitution itself warrants the right to appeal against all administrative actions and acts of which the refusal of a visa is a part. However, the concrete value of the guarantee provided in Article 125 of the Constitution is questionable as long as giving written notification of reasons for refusal is not made an obligation for the Turkish authorities. It must be mentioned that the Asylum and Immigration Action Plan[73] has proposed setting up a specialized two-instance administrative structure when dealing with immigration-related cases.

4.3.4 Uniform Format for Visas

For the time being, the Turkish visa complies with neither the technical standards of the Schengen uniform visa format nor the required information which should be contained in the Schengen visas.[74] The Programme for Alignment with the Acquis had set 2007 as the deadline for alignment;[75] however, this target has not been reached. A protocol was signed between the Ministry of Foreign Affairs, the Ministry of the Interior and the Ministry of Finance on 29 August 2006 on the alignment of the Turkish visa sticker with that of the EU. Subsequently, the

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71 COM(2006) 403 final, Annex IX.

72 Replies to Issues and Questions Posed to the Turkish Authorities by the European Commission as part of the Bilateral Screening with Turkey (13-15 February 2006).

73 Turkish National Action Plan for the Adoption of the EU Acquis in the Field of Asylum and Migration, Section 4.7.6.

74 Council Regulation 1683/95 of 29 May 1995 laying down a uniform format for visas, O.J. L 164, 14.07.1995, pp.1-4, and Council Regulation 334/2002 of 18 February 2002 amending Regulation 1683/95 laying down a uniform format for visas, O.J. L 53, 23.02.2002, pp.7-8. See *supra* 2.3.1.3.

75 Turkey's Programme for Alignment with the Acquis (2007-2013), April 2007, Section 24.1.

Turkish Central Bank has been mandated by the Ministry of Finance for the printing process. Currently, the technical design efforts are continuing.[76] Transforming the Turkish visa stamp into a secure sticker-type document involving essential information on the issuing of the visa, as well as an integrated photograph of the visa holder will be a major challenge the result of which shall be seen shortly.[77]

4.3.5 Local Border Traffic

The passport-free travel regime which the Turkish Republic has with Iran and Syria[78] (by using *Pasavans* and Administrative Letters as travel documents) resembles to a great extent the Local Border Traffic regime introduced by Regulation 1931/2006.[79] In this newly established EU Local Border Traffic system border residents lawfully resident in the border area for at least one year are issued with a local border traffic permit allowing visa-free travel to the border area of the EU Member State. The bilateral agreements which Turkey has with Iran and Syria aim at facilitating the border crossing of border residents for short visits up to, respectively, ten and seven days.

The passport-free travel arrangements which Turkey has with Iran and Syria, which would under normal circumstances have to be annulled before EU membership, could alternatively be transformed into Local Border Traffic arrangements with some adjustments as explained below.

The criteria established by the EU on Local Border Traffic are partially already required by Turkey in order to allow citizens of Iran and Syria living in the border areas to travel into its territory without a visa. First of all, those benefiting from the regime have to be border residents in both legal systems. However, there is a possible disparity as to what constitutes a border area. Under Turkish law the border area consists of the area 50 km from the border, while in EU law it is the area no more than 30 km from the border. The reason why this issue is a possible disparity lies in the leeway presented in Article 3(2) of Regulation 1931/2006 stating that, under certain circumstances, the border area might stretch to 50 km. Whether the Turkish arrangements on accepting the 50 km area from the border

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76 Ministry of the Interior Activity Report, July 2008, p.44.

77 Ministry of the Interior Activity Report of July 2008 announced that the new visa sticker complying with the Schengen visa format will start being utilized in 2009.

78 See *supra* 3.4.1.

79 Regulation 1931/2006 of the European Parliament and of the Council of 20 December 2006 laying down rules on local border traffic at the external land borders of the Member States and amending the provisions of the Schengen Convention, O.J. L 405, 30.12.2006. See *supra* 2.3.1.3.

as the border area can be maintained depends on the observation of the criterion in Article 1(2) which is part of the local administrative district, considered as the border area, lying between 30 and 50 km from the border line.

Furthermore, the Regulation requires the persons benefiting from the regime to be lawfully residing in a border area for at least one year[80] and be in possession of a valid travel document.[81] The Turkish system does not contain a condition as to the duration of the residence in the border area. The adjustment of the Turkish regime to the former requirement entails minor adaptations to the bilateral agreements concerning the obtaining of domicile documents from the local authorities. However, the entry of Turkey into the EU might increase the number of Iranian and Syrian citizens residing in the border area expecting to obtain a local border traffic permit after one year of legal residence. There might be an increasing number of people who see this as an opportunity to move towards other Member States. This potential problem can be overcome by the stringent enforcement of the local border traffic rules, making sure the permit is used for solely the purposes and the territory for which it is intended. On the other hand, the latter requirement relates to the very foundation of the system. The passport-free travel arrangement should be transformed into a visa-free travel arrangement for border residents. Thus, border residents should be obliged to obtain a passport, but with the issue of their local border traffic permits they will be exempt from the visa requirement.[82]

The other requirements of issuing a local border traffic permit[83] necessitate rather secondary and axiomatic changes to the bilateral agreements. For example, the obligation for the third-country national to produce documents proving the existence of legitimate reasons for frequently crossing the border[84] may be put into practice by documenting, for instance, family relations with people on the other side of the border. Furthermore, a check which should be carried out before issuing the local border traffic permit will reveal if an alert has been issued in the SIS for the applicant[85] or if the person is considered to be a threat to public

80 Regulation 1931/2006, Article 3(6).

81 *Ibid.*, Article 9(1)(a).

82 In the case of Iran the visa-free travel character of the local border traffic permit will be of relevance after the full adoption of the EU negative visa list.

83 Laid down in Article 9 of Regulation 1931/2006 as not being among the persons for whom an alert has been issued in the SIS and not being a threat to public policy, internal security, public health or the international relations of any of the Member States, and in particular not having an alert issued in Member States' national databases for the purposes of refusing entry on the same grounds.

84 Regulation 1931/2006, Article 9(1)(b).

85 *Ibid.*, Article 9(1)(c).

policy, internal security, public health or the international relations of any of the Member States.[86] Finally, a readmission clause should be added to the bilateral agreements establishing the local border traffic regime with Iran and Syria as stipulated in Article 13(3).

The bilateral arrangements of *Pasavans* and Administrative Letters have already been functioning for many years without problems. There exists a tradition of crossing the border for reasons such as family visits or looking for lost or stolen cattle or to be present at a court hearing and so forth. Implementing Regulation 1931/2006 will alter the ad hoc character of the Turkish regime according to which every time a situation enumerated in the agreements occurs, border residents have to obtain a new pass allowing them to travel to the other side of the border for a set number of days. The new regime would allow Syrian and Iranian border residents to obtain a permit which is valid between one to five years[87] allowing up to three months of uninterrupted stay on the other side of the border.[88] The parties may also choose to maintain the seven and ten-day periods which are allowed for every visit. The adaptation of the passport-free travel regimes which Turkey has with Iran and Syria into the Local Border Traffic regime as introduced by the EU would serve the underlying aim of Regulation 1931/2006 of preventing the EU borders for becoming a barrier to social and cultural interchange between Member States and neighbouring third countries.

4.3.6 Entry conditions

The entry conditions for third-country nationals are laid down in the Schengen Borders Code.[89] In the Turkish legislation, one needs to look at the Passport Law in order to find the equivalent provisions.[90] Conditions for entry into Turkey correspond with the EU acquis insofar as the obligation to hold a valid travel document,[91] a valid visa,[92] not being a threat to public policy, security and public health are concerned.[93] However, the specifications of some aspects of these entry conditions are dubious. Article 8 of the Passport Law has listed seven categories of persons who shall not be allowed into the country. The police are to establish whether the person at the border is among those listed in Article 8. In practice, persons at the border are checked against a list confirmed by the

86 *Ibid.*, Article 9(1)(d).
87 *Ibid.*, Article 10.
88 *Ibid.*, Article 5.
89 Schengen Borders Code, Article 5. See *supra* 2.3.1.3.
90 Passport Law, Articles 1, 2, 5 and 8.
91 *Ibid.*, Article 2.
92 *Ibid.*, Article 5.
93 *Ibid.*, Article 8. See *supra* 3.4.1.

Ministry of the Interior. However, this list is not much help concerning the determination of those who are a threat to public health. It is clear that Turkey should clarify the conditions regarding who constitutes a threat.

As for having sufficient means of subsistence, both for the duration of the intended stay and for the return, or being in a position to acquire such means lawfully,[94] the Turkish legislation is partially in compliance. Article 8 of the Passport Law states that those who do not seem to have sufficient means to finance their stay in Turkey and who cannot prove that they have someone in Turkey who could look after them or that they will be engaged in financial activity not forbidden to foreigners will be refused entry.[95] It can be seen that the provision of the Passport Law corresponds in essence to the Schengen entry condition. However, Turkish legislation lacks clarity as to which documents could be used to support the existence of entry conditions such as those listed in Annex I to the Border Code.[96] The legislation should also be amended so as to require the visa applicant to justify the purpose of his or her visit in accordance with the Schengen acquis.[97] Finally, with the full adoption of the Schengen acquis, the fact that an alert has not been issued in the SIS for the person applying for a visa will become one of the conditions of entry into Turkey.

4.3.7 No visa extension

One procedural aspect of Schengen visas which have to be introduced in the Turkish visa system is that relating to the extension of visas. The Executive Committee, upon the mandate given to it by the Schengen Implementation Convention,[98] has laid down the conditions for extending the uniform visa.[99] Accordingly, if new facts have arisen since the visa has been issued the validity of the visa may be extended without resulting in the duration of stay exceeding 90 days. An application to extend the validity of a visa may not result in the purpose of the visa being changed. The Community Code on Visas has preserved the principles applying to the extension of the uniform visa.[100]

The Turkish visa system does not contain a similar provision of extending visas. Consequently, under Turkish law, when the validity of a visa expires, the

94 Schengen Borders Code, Article 5(1)(c).

95 Passport Law, Article 8(7).

96 ANNEX I of the Schengen Borders Code: Supporting documents to verify the fulfilment of entry conditions.

97 Schengen Borders Code, Article 5(1)(c).

98 Schengen Implementation Convention, Article 17(3)(e).

99 Decision of the Executive Committee of 14 December 1993 extending the uniform visa.

100 Community Code on Visas, Article 28.

foreigner should obtain a residence permit. Turkey should make necessary alterations in the visa regime to make it possible for the visa to be extended under the conditions specified in the Schengen acquis.

The discussion on visa policy comes to an end at this point where visa policy comes close to the subjects dealt with in the following section on residence. However, before passing to the subject of residence the issue of border control deserves some attention.

4.3.8 Border management

The management of borders is an issue which is very closely connected to that of visa policy. However, border management is a broader concept which encompasses a variety of concerns, making it difficult for simplified solutions to be viable at all times.

The EU policy on border management is continuously evolving, especially following the introduction of an operational cooperation mechanism with the establishment of FRONTEX.[101] Nevertheless, the fundamental principles prevailing in the border management policy have been upheld from the earliest attempts to create a common policy on the management of external borders. Accordingly, the persons performing border police duties should be specialized, trained professionals; border checks and surveillance should be performed by the same administration organizing border management and this border management organization should be in the form of a non-military authority under a single national ministry providing centralized supervision.

Alignment with the EU acquis on border management constitutes one of the priorities of the Accession Partnership with Turkey.[102] It follows that in the short term, within one or two years, the EU anticipates efforts from Turkey towards establishing a new border law enforcement authority. In the medium term, on the other hand, the EU expects to see within three or four years the acceleration of efforts to set up an integrated border management system in line with the acquis. This system should be based on close interagency coordination and the professionalism of staff. The Turkish efforts towards establishing an integrated border management is organized around the National Action Plan Towards the Implementation of Turkey's Integrated Border Management Strategy adopted on

[101] For a detailed account of the EU's integrated border management policy see *supra* 2.3.1.8.

[102] Council Decision of 18 February 2008 on the principles, priorities and conditions contained in the Accession Partnership with the Republic of Turkey and repealing Decision 2006/35/EC, O.J. 51, 26.02.2008, pp.4-18.

March 27, 2006.[103] The Action Plan addresses the mostly criticized aspects of the Turkish border management structure. These are the untidy structure of border controls with an early stage of inter-agency cooperation and a low level of information exchange between the various authorities; the training and professionalism of border staff, especially concerning the deployment of conscripts; and the risk analysis capacity.[104] With the adoption of the Action Plan, these shortcomings have started being addressed immediately. Already a year after the Action Plan was adopted steps had been taken towards eliminating shortcomings by organizing inter-agency cooperation meetings at political level, the sharing of databases between the Ministry of Foreign Affairs, the Ministry of the Interior and the Customs Administration for the screening of persons crossing the borders and the establishment of a risk analysis unit within the Customs Administration.[105] However, the establishment of a risk analysis unit within the police and, more importantly, the new border law enforcement authority are still to be realized.[106] Furthermore, the issue of the training and professionalism of border staff has not yet been dealt with.[107]

The National Action Plan does intend to achieve complete alignment with the EU acquis on border management and does recognize the need to take the necessary steps in legislation, capacity building, and technical standardization in the short and medium term, which according to the Action Plan will occur in the period up to 2014.[108] Following the completion of the legal and technical infrastructures in the short and medium term, the duties and competences of the Turkish Armed Forces in the area of the control and surveillance of Turkish borders shall be entirely transferred to the Border Security Unit, which shall be established in the long term as a civil and professional institution established under the Ministry of the Interior as a Directorate General responsible for border controls and surveillance.[109]

The reason why the Action Plan has postponed the establishment of the Border Security Unit until an indefinite future date relates to the nature of Turkish borders which do not bear much resemblance to the characteristics of EU external borders in general. Some 65% of the 2,949 km land border of Turkey

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[103] For information on the border management structure of Turkey see supra 3.4.1.2.

[104] Turkey 2006 Progress Report, 08.11.2006, SEC(2006) 1390, Section 4.24.

[105] Turkey 2007 Progress Report, 06.11.2007, SEC(2007) 1436, Section 4.24.

[106] Turkey 2007 Progress Report, 06.11.2007, SEC(2007) 1436, Section 4.24.

[107] *Ibid.*

[108] National Action Plan Towards the Implementation of Turkey's Integrated Border Management Strategy, Section 5.2.

[109] *Ibid.*, Section 5.3.

comprises mountainous areas. The eastern and south-eastern border line of Turkey mostly follows the summits of the high mountain range where winter lasts longer then eight months with temperatures below zero prevailing in the daytime, even during the summer months.[110] The rough climate and physical conditions of the eastern border of Turkey creates additional obstacles to border control efforts unlike some EU external border lines where the nature actually contributes to the efficiency of the border management staff.[111] Combined with the existence of underdeveloped neighbouring countries such as Iraq suffering from internal conflict, security at the border areas is an important and challenging threat.

For the above-mentioned reasons, 390 border stations are situated right next to the border every 5-10 km of the 2,949 km land border line with 34,000 military personnel deployed in border units.[112] However, the physical characteristics of the border areas make the use of satellite systems necessary for the surveillance and control of border crossings. Turkey does not have the financial means to build the necessary technical equipment on the borders in the short and medium term. Therefore, the National Action Plan contains a Financing Plan as an annex setting forth the technical assistance, supply contracts and framework contracts which have to be arranged in order to meet the technical and structural standards set by the EU. In the meantime, Turkish borders remain vulnerable to attack due to the current lack of technical equipment and the lack of bilateral cooperation with neighbouring countries. In October 2008, a terrorist attack organized by the PKK[113] devastated a border station on the Iraq border[114] underlining the crucial importance of bilateral cooperation in addition to setting up adequate technical systems for border surveillance. The consequent action taken by Turkey, Iraq and the United States towards the establishment of a tripartite structure for security

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110 *Ibid.*, Section 2.2.

111 The 1999 Estonia Progress Report explains how the eastern border of Estonia consisting of water, marshland and dense forest renders the border management relatively efficient despite the staff shortages in the Border Guards.

112 National Action Plan Towards the Implementation of Turkey's Integrated Border Management Strategy, Section 3.5.3.

113 See Council Common Position 2008/586/CFSP of 15 July 2008 updating Common Position 2001/931/CFSP on the application of specific measures to combat terrorism and repealing Common Position 2007/871/CFSP, O.J. L 188, 16.07.2008, pp.71-76.

114 On October 4, 2008, the Aktütün border station on the Iraq border was attacked by the PKK which used artillery located in northern Iraq, killing 17 conscripts undergoing their compulsory military service. See the Press Release by the Turkish General Staff dated 04.10.2008, available at: http://www.tsk.mil.tr/10_ARSIV/10_1_Basin_Yayin_Faaliyetleri/10_1_Basin_Aciklamalari/2008/BA_42.html (last visited 21.01.2009).

on the Iraqi border[115] demonstrates that the exceptional circumstances taking place in Iraq as a neighbouring state does not allow for a civil surveillance and management of the border. The control of the eastern borders is crucial for the security of Turkey not only in terms of the prevention of illegal immigration and the entry through legal channels of third-country nationals who might be a security threat, but also in terms of direct terrorist attacks. As the example illustrates the full demilitarization of border units is an issue which Turkey cannot attempt to realize in the short term, especially because in addition to unilateral efforts by Turkey such demilitarization is also related to the stabilization of neighbouring Iraq as a sovereign state able to control terrorist movements in its border areas.

Nevertheless, the National Action Plan demonstrates a genuine will on the side of Turkey in alignment to the EU acquis by undertaking to demilitarize the management of the western border in the short and medium term by transferring duties and competences from the Armed Forces to the Ministry of the Interior.[116] The choice for starting the demilitarization of border management from the western border is due to a compilation of reasons such as the relatively trouble-free character of border crossing from the western borders in terms of security and the natural features of these borders making them much easier to control compared to the eastern border.[117] The demilitarization of the management of the Greek and Bulgarian borders will allow the Turkish authorities to gather experience which will be very useful when demilitarizing the entire border management organization with the eventual transfer of duties and competences from the Armed Forces to the Border Security Unit functioning under the Ministry of the Interior.

The legal infrastructure which is needed to restructure the border management

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115 Following the attacks on the border station , Turkey sent a diplomatic note to the Iraqi government as well as a communication to the American authorities as the leaders of the coalition forces urging for better control of the Iraqi external borders (News item available at: http://www.cnnturk.com/HaberDetay/turkiye/2/siniriniza_sahip_cikin_mesaji/495558/0, last visited 21.01.2009) leading to the first steps towards establishing a tripartite structure consisting of Turkey, Iraq and the United States against terrorist activities by way of information exchange and the coordination of military actions (News item available at: http://www.cnnturk.com/HaberDetay/Turkiye/2/terorle_mucadelede_uclu_yapi_kuruluyor/497528/0, last visited: 21.01.2009).

116 National Action Plan Towards the Implementation of Turkey's Integrated Border Management Strategy, Section 5.2.

117 *Ibid.*, Section 5.1.

organization of Turkey is intended to be put in place by the end of 2009.[118] These legislative amendments should be in the form of allowing the transfer of duties and competences to the civil authority and to ensure the adequate training of border guards including their training concerning visa procedures. In this respect, the establishment of the Faculty of Border Security within the Police Academy shall be the principal development towards ensuring the professional character of the border guards providing specialized education to those who shall become the professional civil corps responsible for border controls.[119] The legislation which should be enacted in order to enable the establishment of the Faculty of Border Security is listed in Turkey's Programme for Alignment with the Acquis.

4.4 Residence

4.4.1 Introduction

The alignment of Turkish legislation to the EU acquis on asylum and immigration will be a heavy burden for Turkey.[120] However, within the entire spectrum of areas which are in one way or another included in the asylum and immigration policy such as visas, readmission, return or border controls, the adoption of EU 'residence' standards is the most troublesome. This is because in the other areas the Turkish reluctance in alignment derives mostly from burden sharing,[121] economic concerns,[122] or further comparable reasons which have an innate potential to be resolved during the negotiations either by striking deals with the EU on burden sharing or visa facilitation arrangements. In the area of 'residence' the hardship of aligning the Turkish regime to the EU acquis is the outcome of peculiarities inherent to the Turkish state in its approach towards foreigners. As

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118 *Ibid*., Section 5.5.

119 Turkey's Programme for Alignment with the Acquis (2007-2013), April 2007.

120 M. Özcan, 'Turkey's Possible Influences on the Internal Security of the European Union: The Issue of Illegal Migration, in S. Laçiner, M. Özcan and İ. Bal, *European Union with Turkey: the Possible Impact of Turkey's Membership on the European Union* (Ankara, Publication of USAK 2005) p. 126.

121 Burden-sharing concerns are most strongly felt in the signing of a readmission agreement and the lifting of the geographical limitation to the Geneva Convention. See M. Özcan, 'Turkey's Possible Influences on the Internal Security of the European Union: The Issue of Illegal Migration, in S. Laçiner, M. Özcan and İ. Bal, *European Union with Turkey: the Possible Impact of Turkey's Membership on the European Union* (Ankara, Publication of USAK 2005) p. 129.

122 Even though economic concerns are also the basis of burden-sharing concerns, what is meant here is the more directly financially-related trepidations making it very undesirable for Turkey to align its visa policy in full with the EU acquis concerning the issuing of visas at borders. For more detail on the financial aspects of the visas issued at the borders see *supra* 3.4.1.1.

this section unfolds, it will become clearer what is meant by 'peculiarities in the approach towards foreigners'. However, at this very point it is useful to give some examples of what such peculiarities lead to. The scarcity of data on migration into Turkey, as well as the unreliable nature of the existing data has been pointed out over the years by international organizations.[123] This scarcity and unreliability is partly due to the attitude of the authorities towards the importance of collecting data, but partly due to the simple fact that illegality reaches high levels. According to official records kept by the Turkish authorities, the number of foreigners residing in Turkey was 202,085 in the year 2008.[124] However, according to empirical studies, just the number of legally residing foreigners who are originally from a European country is between 150,000 and 200,000.[125] A further example can be given concerning one group within this total number of Europeans living in Turkey, namely UK citizens, in order to illustrate the reliability of the Turkish records. The number of UK citizens legally residing in Turkey is 7,940 persons according to official Turkish records.[126] According to UK records, though, it would be more realistic to set this number above 40,000.[127] Furthermore, the number of illegally working foreign nationals in Turkey is estimated to be around one million.[128] Despite the fact that this number also includes illegal immigrants, a portion thereof comprises foreigners residing legally in the country without possessing a work permit.

Thus the Turkish legislation on the residence of foreigners appears as a regime which compels the majority of foreigners to find alternative ways of residing legally in Turkey rather than applying for a residence permit, and to choose to work illegally, rather than applying for a work permit. The present section sheds some light on the particularities which render the Turkish regime on residence as foreigner-unfriendly so as to drive the majority of foreigners into illegality. It can already be said that these particularities can boil down to the restrictive character of the Turkish legislation, which was introduced above.[129] What further

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123 A. İçduygu, 'Turkey and International Migration, 2005', SOPEMI Report for Turkey, 2005/06, p.4; 'International Migration Outlook: SOPEMI', OECD, 2008 Edition, p.284.

124 Yerleşik Yabancıların Türk Toplumuna Entegrasyonu [The integration of settled foreigners into Turkish society], Report prepared by the International Strategic Research Organization (USAK) (September 2008) p.23.

125 *Ibid.,* p.24.

126 *Ibid.,* p.23.

127 *Ibid.*

128 M. Özcan, 'Turkey's Possible Influences on the Internal Security of the European Union: The Issue of Illegal Migration, in S. Laçiner, M. Özcan and İ. Bal, *European Union with Turkey: the Possible Impact of Turkey's Membership on the European Union* (Ankara, Publication of USAK) p. 129.

129 See *supra* 4.2.

aggravates the difficulty of alignment with the EU acquis in the area of residence is that not all the foreigner-unfriendliness of the system is an outcome of inadequate legislation. Some legislation dealt with below is in accordance with EU standards, but it is the practice which creates problems for foreigners. Such foreigner-unfriendly practice should be regarded as evidence of the change that is needed in the minds of those who make the law on policy which is a point made earlier in this chapter, while discussing the general characteristics of the two systems.[130]

Before analyzing each aspect of residence separately there is another point to be made which holds true for all of these aspects. Within the Turkish accession efforts relating to the immigration acquis not much has been planned in a concrete manner in rearranging legislation and the practice on residence. The National Action Plan on Asylum and Immigration, which is the most extensive document laying down the programme within which Turkey will align its immigration policy with the EU acquis contains next to nothing on residence. The 2005 Progress Report also calls for the clarification of the provisions in the Action Plan concerning family reunification, long-term residence and the residence of students.[131] Thus, for the time being, there are not many indicators hinting at how Turkey is planning to tackle the alignment to the acquis of its legislation on the residence of foreigners.

4.4.2 Uniform Format for Residence Permits

Foreigners who shall stay in Turkey for longer than one month[132] are issued with a residence certificate ('ikamet tezkeresi').[133] This certificate is in the form of a booklet, containing the photograph, the name and nationality of the foreigner as well as his or her place and date of birth, his or her father's and mother's name, and his or her profession and marital status. The presence of a photograph of the certificate holder as well as the specification of the period of validity of the permit are in line with the relevant acquis.[134] The certificate includes an indication of the issuing authority, the date and the reason for issuing it, the begin date of the legal residency of the foreigner concerned and the period of time he or she has spent in Turkey until the date the on which the residence permit was issued. Furthermore,

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130 See *supra* 4.2.

131 Turkey 2005 Progress Report, 09.11.2005, SEC(2005)1426.

132 If the visa exemption period or the visa which the foreigner possesses is adequate, this one-month period shall be applied as 90 days.

133 Law on the Residence and Travel of Foreigners in Turkey, No.5683, dated 15.07.1950, published in the Official Gazette No.7564, dated 24.07.1950, Article 3.

134 Council Regulation 1030/2002 of 13 June 2002 laying down a uniform format for residence permits for third-country nationals, O.J. L 157, 15.06.2002, pp.1-7.

the home and business addresses of the foreigner are also part of the information contained in the residence certificate. Neither the National Action Plan on Asylum and Immigration, nor the National Programme for Alignment with the Acquis contain any indication as to the time frame to adopt the uniform format for residence permits or as to what precisely needs to be done to bring the format of the residence permits into line with the uniform format.[135]

The issuing of residence certificates is not regulated by strict rules under Turkish law, which allows certain arbitrary practices on the side of the responsible authorities in rejecting applications,[136] provoking foreigners to make short-term trips abroad and by doing so prolonging their tourist status instead of obtaining a residence certificate.[137] This is one of the reasons for the above-mentioned incoherence of the Turkish official figures of foreigners living in Turkey. It is an alarming situation as it may lead to illegal employment and the exploitation of foreigners. The foreigner should be encouraged to apply for a residence certificate by eliminating arbitrariness in the decision-making procedure as well as by setting up a legal regime for those legally resident in Turkey in such a way as to render it much more beneficial to acquire a residence certificate. The adoption of the EU acquis on legally resident third-country nationals would act as an element making it more beneficial to be a resident instead of a tourist because the relevant rules increase legal security for third-country nationals living in the Member States. If Turkey were to make the changes discussed below, it would not only increase the legal security of the foreigners currently holding a residence certificate but it would also bring many foreigners to the legally resident status from the tourist status which they assume in order to circumvent the hassle with the authorities with not much to gain from it.

4.4.3 Family Reunification

The right to family reunification of foreigners residing in Turkey is not regulated systematically under Turkish Law. One can find traces in the current legislation which suggest the existence of practices allowing the spouse and children of the foreigner to reside with him or her. However, there are no clear-cut rules forming an institutionalized family reunification regime offering legal certainty to foreigners. On the other hand, there are also no restrictions as to the exercise of the right to family reunification such as age limits for dependent children, integration conditions or rules on the minimum length of stay in Turkey before

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135 For an in-depth explanation of the uniform format for residence permits see *supra* 2.3.2.2.

136 'Yerleşik Yabancıların Türk Toplumuna Entegrasyonu: Sorunlar ve Fırsatlar' [Integration of Settled Foreigners in Turkish Society: Issues and Opportunities], Report prepared by the International Strategic Research Organization (USAK) (September 2008) p.53.

137 *Ibid.,* p.54.

being able to apply for family reunification. It follows that foreigners who come to Turkey in order to be reunited with their family members should follow the regular procedure to obtain a residence certificate, i.e. to fill in an application form for a residence certificate and to state the purpose of the stay.[138] Provided that the foreign family member fulfils the entry conditions, he or she will be given a residence certificate so that the family can reside together in Turkey. The Screening Report on Turkey explains that children and spouses have a right to benefit from family reunification; other relatives might be allowed to join the family on special occasions or for medical rehabilitation.[139] It is not clear what the 'special occasions' are. This approach to regulating family reunification is far from ideal as it does not offer any legal certainty for the foreigner. The disadvantages of the lack of legal certainty override the advantages of having a relatively more flexible situation, as the lack of clear-cut rules may also be construed restrictively in the case of huge masses of people applying for family reunification.

Turning to the traces mentioned above, in the legal system suggesting the existence of family reunification practices, some examples can be given, which all relate to different aspects of the reunification of the spouse and the children. First of all, the Law on the Residence and Travel of Foreigners in Turkey[140] states that, despite the general rule compelling residence certificates to be issued individually to each legally resident foreigner, it is also possible to issue a joint residence certificate for the spouses and their minor children.[141] Secondly, in the Law on the Work Permits of Foreigners[142] the spouse and dependent children are given a possibility to be granted a work permit provided they have resided legally and continuously with the foreigner for at least five years.[143] Furthermore, a Circular issued by the General Directorate of Security[144] establishes that the duration of the residence certificate of the foreign spouse and the minor children of the legally resident foreigner shall be parallel to his or her residence certificate irrespective of whether the foreigner has married before starting to reside in

138 Application forms for a residence certificate can be found on the websites of the General Directorates of Security of every city in Turkey. For an illustration see: http://yabancilar.iem.gov.tr/form%20pdf.pdf of the Istanbul General Directorate of Security (last visited 21.01.2009).

139 Screening Report Turkey, Chapter 24 – Justice, Freedom and Security, 06.06.2006.

140 Law No.5683 dated 15.07.1950, published in the official Gazette No.7564 dated 24.07.1950

141 *Ibid*., Article 9(3).

142 Law No.4817 dated 27.02.2003 published in the Official Gazette No. 25040, dated 06.03.2003.

143 Law No.4817, Article 5(4).

144 Circular No.63 dated 02.04.2004.

Turkey or afterwards.[145] This last point is in conformity with the acquis by not attaching consequences to when the family relationship arose,[146] yet this does not mean much as an entire regime which should have contained this principle is lacking. One final aspect of Turkish law which might be approached as an indication of the state policy towards family reunification can be found in relation to the Law on Settlement, which is a legal text governing the admission and residence of 'immigrants' in the traditional sense, meaning 'people of Turkish descent'.[147] For the purposes of the Law on Settlement, a family unit consists of the spouses, the children under the age of 18, and the dependent parents and these family members of the immigrant may travel to and settle in Turkey.[148] This clear provision cannot be utilized in the case of foreigners, as it only applies to the family members of those who have settled in Turkey based on the Law on Settlement and have subsequently acquired Turkish nationality.

When discussing the alignment of Turkish legislation on family reunification with that of the EU,[149] the question does not relate to what amendment needs to be inserted in which legal text, but to how to set up a family reunification regime from scratch. The National Programme for Alignment with the Acquis does not contain any provisions concerning family reunification. The Asylum and Immigration Action Plan, on the other hand, devotes some attention to the issue by announcing that the Draft Law on Foreigners shall incorporate rules on family reunification in line with the EU acquis. In explaining what this incorporation shall entail, the Action Plan explicates that persons applying for family reunification shall be asked to fulfil conditions such as adequate financial resources.[150]

The Turkish approach towards family reunification lacks transparency, which is precisely what has to be addressed by the Turkish legislator during the alignment efforts. The Law on Foreigners should contain clear rules as to who are the family members who can benefit from the family reunification regime and what the conditions are for being allowed to reside with one's family. Concerning the latter point, Turkey should determine whether, in order to allow family members to join, a minimum residence duration, not exceeding two years, shall be required

145 B. Çiçekli, *Yabancılar Hukuku* [Foreigners' Law] (Ankara, Seçkin Yayıncılık 2007) p.105.

146 Directive 2003/86 on family reunification, Article 2(d).

147 See *supra* 3.3.2.

148 Council of Ministers Decision No.98/11863 of 18.10.1998, published in the Official Gazette No.23512 dated 03.11.1998.

149 See *supra* 2.3.2.3.

150 The Turkish National Action Plan for the Adoption of the EU Acquis in the Field of Asylum and Migration, Section 4.7.1.

from the foreigner as permitted by Article 8(1) of the family reunification directive. Similarly, Turkey should also determine if additional conditions will be requested from the foreigner in order to decide affirmatively on the family reunification application as allowed in Article 7 (1) of the Directive, such as evidence of accommodation suitable for the family, health insurance, and stable and regular resources. Furthermore, the Law on Foreigners should also include provisions as to the rights which the family members shall enjoy once admitted to the country. The Family Reunification Directive instructs the Member States to allow access to education, to employment and self-employment, and to vocational guidance to family members in the same way as the foreigner who has applied to be reunified with his or her family.[151] The Turkish legislator should secure these rights for the family members. Currently, the right of the spouse and dependent children to be granted a work permit is conditional upon their legal and continuous residence together with the foreigner for at least five years.[152] If Turkey wants to maintain this restriction or put in place some other restrictions concerning the access of family members to employment and to self-employed activity, the national legislation should not violate the limitations determined in the Directive for Member State leeway.[153] The present Turkish rule on allowing family member to have access to the labour market only after five years of legal residence in Turkey is not in compliance with Article 14(2) of the Family Reunification Directive, as it limits access to employment and to self-employed activity for family members for five years, whereas the leeway allowed to Member States for restricting access to the labour market cannot exceed 12 months.

Remaining within the sphere of the leeway given to Member States in regulating family reunification, one other choice allowed to Member States should be discussed here. Article 16(2)(b) states that Member States may reject family reunification where it is shown that the marriage was contracted for the sole purpose of enabling the person concerned to enter or reside in a Member State. Within Turkey's general approach towards marriages of convenience it can easily be deduced that the Turkish legislation to be adopted on family reunification would make use of the opportunity provided in Article 16(2)(b). An example of the Turkish approach towards marriages of convenience can be found in the Law on Turkish Citizenship.[154] With an amendment introduced in 2003[155] to the Law

[151] Directive 2003/86, Article 14(1).

[152] Law No. 4817, Article 5(4).

[153] Directive 2003/86, Article 14(2).

[154] Law on Turkish Citizenship, No.403 dated 11.02.1964, published in the Official Gazette No.11638 dated 22.02.1964.

[155] Amending Law No.4866 dated 04.06.2003, Article 1.

on Turkish Citizenship, marriages of convenience were precluded from enjoying benefits in citizenship law granted to genuine marriages. Accordingly, contrary to the old version of the provision, a marriage no longer automatically confers Turkish citizenship.[156] The acquisition of Turkish citizenship has been tied to three conditions: being married for at least three years, living together physically and that the marriage is continuing at the time of application.[157] It is stated very clearly in the reasoning for the amendment that by proposing this new version of the provision, the executive aimed to protect the institution of marriage from degeneration into the hands of people who want to exploit it for achieving their underlying aims.[158] Preventing the exploitation of marriage in the form of foreign nationals wishing to reside in Turkey misusing the institution of marriage fits within this general approach as evidenced by the new provision of the Citizenship Law. For this reason, it should be expected that the Turkish legislator will adopt a similar provision within the framework of setting up a family reunification regime for foreigners.

Currently the grounds for the refusal of a family reunification application, such as in the case of a marriage of convenience, are not laid down in law; neither are the conditions of reunification for family members other than the spouse and dependent children, whom the Screening Report suggests can be reunited with their family members in Turkey on 'special occasions'. This situation creates a lacuna in legal certainty. In fact, the lack of legal certainty is the general theme of the Turkish practice relating to the reunification of families. The Circular drafted for the internal operation of the General Directorate of Security[159] seems to be the only document which determines who shall be allowed to be reunited with foreign family members in Turkey and the conditions for such a reunification. However, it is not possible to discover what the contents of this Circular are. Despite countless personal attempts as an academic carrying out research on the topic followed by resorting to legal channels made available for obtaining documents and information[160] it was not possible to obtain this Circular even after objecting to the original decision and requesting a re-examination of the request for information. This secrecy surrounding the only rules which guide the

156 Law on Turkish Citizenship, Article 5(1).

157 *Ibid.*

158 Annex 2 to the letter from the Prime Minister to Parliament introducing the proposal for amendment to the Law on Turkish Citizenship, No.1087 dated 01.03.2002.

159 Circular No.63 dated 02.04.2004.

160 The Law on the Right to Acquire Information [Bilgi Edinme Hakkı Kanunu], No.4982 dated 09.10.2003, published in the Official Gazette No.25269 dated 24.10.2003. Article 4 of the Law on the Right to Acquire Information states that 'everyone has the right to acquire information. Foreigners residing in Turkey can make use of this Law based on reciprocity as long as the information requested relates to them'.

authorities in allowing or not allowing family reunification is troubling from a legal certainty point of view. The adoption of a family reunification scheme in compliance with the EU acquis will bring with it the necessary transparency to the conditions of family reunification and to the decision-making process of authorities, contributing immensely to the level of legal certainty experienced by foreigners living in Turkey. The establishment of the family reunification system in Turkey shall involve, next to a significant legislative undertaking, extensive capacity building in determining whether the person applying fulfils relevant criteria[161] which shall be laid down in the negotiation process.

4.4.4 Long-Term Residents

The shared European principle, on which the Long-Term Residents Directive[162] is based, concerning the granting of differentiated legal status to various groups of immigrants according to the purpose of their residence[163] does not have the same tradition in Turkey. No matter how long a foreigner has lived in Turkey, he or she is subject to the same regime as any other foreigner.

There are indications that the Turkish tradition of placing the resident foreigner and the tourist in the same category of 'foreigners' is slowly changing. This change is not yet taking place directly due to efforts to comply with the long-term residents directive, but nevertheless as a result of the alignment efforts. What is referred to here is the term 'resident foreigner' used in the Law on the Work Permits of Foreigners[164] which is a legal act prepared within the framework of EU alignment.[165] The Law puts foreigners who have been married to Turkish citizens for at least three years in a privileged position concerning work permits, even if the marriage no longer continues, provided they are settled in Turkey.[166] Even though this provision is far from being a revolutionary step within the legal system, it is still a move in the right direction, by recognizing that there is a category of foreigners who have settled in Turkey and that they should be subject to a more advantageous position compared to tourists. However, no explanation is made as to who will be deemed to be a settled foreigner.

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161 The Turkish National Action Plan for the Adoption of the EU Acquis in the Field of Asylum and Migration, Section 4.7.1.

162 Council Directive 2003/109 of 25 November 2003 concerning the status of third-country nationals who are long-term residents, O.J. L 16, 23.01.2004, pp.44-53. See *supra* 2.3.2.4.

163 T. Gross, 'Integration of Immigrants: the Perspective of European Community Law', *European Journal of Migration and Law*, Vol.7 (2005) pp.145-161.

164 Law No. 4817 dated 27.02.2003 published in the Official Gazette No.25040, dated 06.03.2003.

165 A. Çelikel, *Yabancılar Hukuku* [Foreigners' Law] (İstanbul, Beta 2007) p.133.

166 Law No.4817, Article 8(a).

The issue of whom the Turkish authorities see as a settled foreigner can be found in the practice relating to the issue of residence certificates. Residence certificates are issued for five years; however, this period may also be determined to be longer or shorter than five years.[167] In practice one of the factors in determining the duration of the residence certificate is the time spent residing in Turkey. Those who have legally resided in Turkey for many years and have made Turkey the centre of their lives in terms of their economic and social activities can be given residence certificates which are valid for longer than the residence certificates for other foreigners.[168] However, apart from not constituting a long-term resident foreigner regime, this practice also does not generate any level of legal certainty for the foreigner as there are no rules ensuring this preferential treatment. Such steps should be approached with reserved appreciation; reserved because they do not constitute a facilitated regime for long-term residents, appreciation because they are a step towards recognizing the special situation that long-term residents should enjoy in the general foreigners' law of the country, albeit not a great one.

In order to adapt to the sophisticated regime applying to long-term residents in the EU, Turkey will need to legislate extensively as well as to alter the mentality of those who will apply the aligned rules. Concerning the legislation aspect, the National Action Plan for the adoption of the EU acquis in the field of asylum and migration stipulates the incorporation of the relevant articles of the Long-Term Residents Directive into the Draft Proposal for the Foreigners' Law in the mid-term.[169] This means the adoption of rules relating not only to the conditions of acquiring a long- term resident status, and ensuring equal treatment in certain areas, but also to the rights to be enjoyed by those who have acquired a long-term resident status in another Member State and who then move to Turkey.[170]

Concerning the mentality aspect, Turkey will need to ensure that settled foreigners or long-term residents are not treated as tourists as the legal tradition has been nurturing this mindset for a very long time.[171] This will be a difficult

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[167] Law on the Residence and Travel of Foreigners in Turkey, No.5683, dated 15.07.1950, published in the Official Gazette No.7564, dated 24.07.1950, Article 9(1).

[168] A. Asar, *Türk Yabancılar Mevzuatında Yabancı ve Hakları* [Foreigner and Foreigner's Rights in the Turkish Foreigners' Legislation] (Ankara, Turhan Kitabevi Yayınları 2006) p.107.

[169] Turkish National Action Plan for the Adoption of the EU Acquis in the Field of Asylum and Migration, (March 2005), Section 4.7.5.

[170] For explanations regarding the relevant rules in the long-term residents directive see above Section 2.3.2.4.

[171] 'Yerleşik Yabancıların Türk Toplumuna Entegrasyonu: Sorunlar ve Fırsatlar' [Integration of Settled Foreigners in Turkish Society: Issues and Opportunities], Report prepared by the International Strategic Research Organization (USAK) (September 2008) p.57.

issue for Turkey to overcome as studies show that foreigners settled in Turkey are conceived as missionaries, separatists and spies.[172] The lack of integration efforts by Turkish policy makers compel foreigners to live in neighborhoods where they will be close to each other and away from Turkish people,[173] which is counterproductive in helping to correct the misconceptions on the Turkish side and in achieving some level of integration in society. The fact that state organs do not recognize and grasp the concept of 'settled foreigner' leads to there being no systematic arrangements for foreigners living in Turkey at the level of government institutions, which renders the communication between foreigners and the state very weak.[174] A result of this weak communication is even less legal security as the state institutions are not aware of the problems faced by foreigners. The examples illustrate the necessity of educating society and the authorities on the existence of legally resident foreign nationals who as a result of alignment to the EU acquis will acquire the right to equal treatment in areas such as access to employment, education, social security, recognition of diplomas, freedom of association and taxation.[175]

4.4.5. Economic Migration

The Turkish approach towards economic migration can be characterized as a *de facto* sectoral one.[176] This approach has been shaped by many factors such as the need to attract direct foreign investment to Turkey and the influence of major companies and sports clubs on bureaucracy. Foreign workers who fall within the scope of the Direct Foreign Investments Law[177] are subject to a facilitated procedure exempt from the condition of no one having the same qualifications being found from within the country to do the job, within four weeks;[178] and the condition of obtaining the opinion of professional institutions on whether the foreigner possesses sufficient professional competence[179] before granting them a work permit.[180] In cases where the Direct Foreign Investments Law does not

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172 *Ibid.,* p.34.

173 *Ibid.*

174 *Ibid.,* p.35.

175 Council Directive 2003/109, Article 11(1).

176 For a detailed description of the Turkish regime on access to the labour market for foreigners see *supra* 3.4.2.2.

177 Law No.4875 dated 05.06.2003, published in the Official Gazette No.25141 dated 17.06.2003.

178 Such foreigners are exempt by Article 13 of the Direct Foreign Investments Law from fulfilling the obligation in Article 14(b) of the Law on the Work Permits of Foreigners.

179 Law on the Work Permits of Foreigners, Article 13.

180 Directive on the Employment of Foreign Personnel in Direct Foreign Investments, Article 14.

apply, the general provisions of the Law on the Work Permits of Foreigners[181] shall apply. Even though the passing of this Law has been an invaluable contribution to legal clarity in the area of foreigners' law by tidying up the disarray created by 71 laws and 10 Directives, the practice does not have the same eminence. The 'default preference' of authorities competent to decide on work permit applications has been summarized as 'non-deliverance of the permit' not necessarily due to a direct rejection but also due to behaviour which encourages the foreigner to give up.[182] As a result, 'only a very small proportion of foreign nationals working in Turkey have a work permit'.[183] Those who have no problems obtaining a work permit are highly qualified foreign nationals who are working for prominent Turkish companies, universities or sports clubs.[184] For this practice combined with the preferential treatment of foreigners who fall under the scope of the Direct Foreign Investments Law it can be said that this *de facto* sectoral practice favours highly qualified migrants. However, neither the practice of major companies having such an influence on the authorities on immigration issues, nor the reluctance in issuing work permits to foreigners can be accepted.

Furthermore, even though the Law on the Work Permits of Foreigners has repealed Law No. 2007 concerning the Professions and Crafts Allocated to Turkish Citizens in Turkey,[185] many occupations remain prohibited for foreigners. Doctors,[186] dentists,[187] nurses,[188] nursing aids,[189] midwives,[190] pharmacists,[191] opticians,[192] veterinarians,[193] judges,[194] public prosecutors,[195]

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181 Law No. 4817 dated 27.02.2003, published in the Official Gazette No.25040 dated 06.03.2003.

182 K. Kirişçi, 'Informal 'Circular Migration' into Turkey: the Bureaucratic and Political Context', CARIM Analytic and Synthetic Notes 2008/21, Robert Schuman Centre for Advanced Studies, European University Institute, 2008, p.7.

183 *Ibid.*

184 *Ibid.*

185 Law No.2007 dated 11.06.1932, published in the Official Gazette No.2126 dated 16.06.1932.

186 Law No.1219 of 11.04.1928, Article 1.

187 *Ibid.*, Article 30.

188 Law No.6283 of 25.02.1954, published in the Official Gazette No.8647, dated 02.03.1954, Article 3.

189 Law No.1219 of 11.04.1928, Article 63.

190 *Ibid.*, Article 47.

191 Law No.6197 of 18.12.1953, published in the Official Gazette No.8591, dated 24.12.1953, Article 2.

192 Law No.3958 of 30.11.1940, Article 1.

193 Law No.6343 of 09.03.1954, published in the Official Gazette No. 8661, dated 18.03.1954, Article 2.

lawyers,[196] notaries[197] and various other professions have been allocated to Turkish citizens in the special laws regulating these professions. The relevant professional associations and chambers react very strongly to government efforts to open their occupations to foreign nationals.[198] This pressure might delay the amendment of the relevant professional laws which prohibit foreigners from accessing the related labour market until the date of accession when Turkey will need to open up its markets to EU citizens. Even after that date, the professional associations argue that the job markets which are currently closed to foreigners should be opened only for EU citizens and not third-country nationals.[199] Obviously, even concerning EU citizens certain exceptions can be placed based on Article 39(4) of the EC Treaty concerning employment in the public service. However, maintaining restrictions as to nationality for third-country nationals who wish to work as doctors and midwives is more problematic.

Clearly, the Turkish legislator will need to restructure the legislation on economic migration in Turkey before accession, in accordance with the EU acquis which will be in place at the date of accession. The relevant area of the acquis will include the adopted versions of the Proposal for a General Framework Directive[200] and the Proposal for Highly Qualified Migrants.[201] Both Proposals contain equal

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194 Law No.2802 of 24.02.1983, published in the Official Gazette No.17971, dated 24.02.1983, Article 8.

195 *Ibid.*

196 Law No.1136 of 19.03.1969, published in the Official Gazette No.13168, dated 07.04.1969, Article 3.

197 Law No.1512 of 18.01.1972, published in the Official Gazette No.14090, dated 05.02.1972, Article 7.

198 The Union of Chambers of Turkish Engineers and Architects (TMMOB) and the Turkish Medical Association (TTB) have organized press conferences to voice their opposition against the plans of the government to open up their professions to a foreign work force by accusing the government of 'not trusting their own citizens and own doctors' and claiming that the proposed system would 'mean that Turkish engineers and architects are in fact placed as foreigners in their own country which discriminates against them'. The related press releases can be found on the websites of the organizations: http://www.tmmob.org.tr/modules.php?op=modload&name=News&file=article&sid=1311&mode=thread, http://www.ttb.org.tr/index.php/haberler/150-baanl/79-qbaan-ginde-r-etmesinq (last visited on 21.01.2009).

199 Press release on the Turkish Medical Association website: http://www.ttb.org.tr/index.php/haberler/118-kadaae/78-qyabancrmayeq-i-qyabanckimq (last visited on 21.01.2009).

200 Proposal for a Council Directive on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State, COM(2007) 638 final, 23.10.2007.

201 Proposal for a Directive on the conditions and residence of third-country nationals for the

treatment provisions for those who fall under their scopes, the latter also including certain facilities for the migrant in a second Member State.[202] However, what has to be drastically changed is the practice which, despite clearly drafted legislation regulating the area,[203] places obstacles for foreigners to live and work in Turkey. This situation goes to show that subjects which have not been regulated under Turkish law but which somehow are being exercised, such as family reunification, cannot be expected to transform into areas of law which bestow legal security on foreigners living in Turkey merely because they are codified. As long as the practice remains foreigner-unfriendly and non-transparent, legislation in itself is not sufficient to elevate the level of legal security enjoyed by foreigners.

Such practices in the area of access to the labour market push foreigners into working illegally in Turkey, precluding any legal security which they would enjoy had they been working legally. Those who opt for working illegally and become 'invisible workers'[204] while their residence status is legal, or rather 'semi-illegal', form a large group in Turkey as they prefer to move back and forth between Turkey and their country of origin.[205] As was already discussed above,[206] preventing illegal employment is a matter of reducing incentives for resorting to illegal work. For foreigners, this means creating possibilities for legal employment. As long as the general idea about the Turkish work permits system can be summarized as the 'non-deliverance of the permit', foreigners cannot be expected to go down that road knowing that their application will be rejected. Furthermore, the integration policy should be supporting the chances of a foreigner to find work. For employers, reducing incentives means introducing sanctions for illegally employing foreigners. It must be said that in this respect, Turkish legislation[207] is in line with the recommendations of the Council adopted in 1996.[208] Accordingly, employers are made subject to an administrative fine for

purposes of highly qualified employment, COM(2007) 637 final, 23.10.2007.

202 See *supra* 2.3.2.5.

203 Law on the Work Permits of Foreigners and the Application Directive on the Work Permits of Foreigners.

204 A. Gençler, 'Yabancı Kaçak İşçilik Gerçeği ve Türkiye Örneği' [The Reality of Foreign Illegal Workers and the Turkish Example], *TÜHİS İş Hukuku ve İktisat Dergisi* [TÜHİS Labour Law and Economics Journal], Vol.17 No.3 (February 2002) p.28-47.

205 K. Kirişçi, 'Informal 'Circular Migration' into Turkey: the Bureaucratic and Political Context', CARIM Analytic and Synthetic Notes 2008/21, Robert Schuman Centre for Advanced Studies, European University Institute (2008) p.1.

206 See *supra* 2.3.2.5.

207 For a detailed explanation of the Turkish legislation on illegal employment see *supra* 3.4.2.2.

208 Council Recommendation of 27 September 1996 on combating the illegal employment of third-country nationals, O.J. C 204, 14.10.1996, pp.1-2.

every illegal employee.[209] Furthermore, his or her workplace is closed down in case of repetition.[210] Additionally, the employer pays for the accommodation, travel and medical expenses of the foreigner working illegally and his or her family until they return to their country of origin should they be expelled from the country.[211]

According to the Policy Plan on Legal Migration,[212] the EU acquis on economic migration will consist of measures on the entry and residence of highly skilled workers, seasonal workers, remunerated trainees and Intra-Corporate Transferees, besides the general framework Directive. So far, the Proposals for the conditions of entry and residence of highly skilled workers and the general framework directive are in the process of being adopted.[213] The alignment of Turkish legislation to the EU acquis on economic migration is an issue which requires further examination as the EU economic migration acquis develops into a more concrete regime. However, what can already be said is that Turkey should adopt a new approach towards third-country nationals when it comes to access to the labor market. The current default practice in the area of issuing (or rather 'not' issuing) work permits for foreigners constitutes a discrepancy with, if nothing else, the Tampere conclusions which call for the fair treatment of third-country nationals, granting them rights and obligations comparable to those of EU citizens.[214]

4.4.6 Researchers

The EU acquis on the conditions of entry and residence of researchers[215] is built

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209 Law on the Work Permits of Foreigners, Article 21(3).

210 *Ibid.*, Article 21(5).

211 *Ibid.*, Article 21(3).

212 Policy Plan on Legal Migration, COM(2005) 669 final.

213 On 20 November 2008 the European Parliament adopted the Reports on the two Proposals. Concerning the Proposal for a Council Directive on highly qualified workers; most importantly the report proposes certain amendments to the original proposal in terms of eligibility as a highly qualified worker. See Report A6-0432/2008 of 10.11.2008. Concerning the Proposal on the single application procedure the Parliament agreed that the text could have been more ambitious. See the Explanatory Statement of the Report A6-0431/2008 of 07.11.2008.

214 Presidency Conclusions of the Tampere European Council of 15-16 October 1999, Section III, point 18.

215 Consisting of Directive 2005/71 on a specific procedure for admitting third-country nationals for the purposes of scientific research (O.J. L 289, 03.11.2005, PP.15-22), Council Recommendation of 12 October 2005 to facilitate the admission of third-country nationals to carry out scientific research in the European Community (2005/762/EC O.J. L 289, 03.11.2005, pp.26-28) and Recommendation of the European Parliament and of the Council of 28 September 2005 to facilitate the issue by the Member States of uniform

upon the superior aim of establishing the European Research Area. The relevant acquis is the means to achieve one of the aspects of this European Research Area, namely 'making Europe attractive to researchers from the rest of the world'.[216] This is done by the introduction of a facilitated admission and residence procedure for researchers, by granting researchers equal treatment rights with nationals in certain areas and by facilitating the conducting of research in a Member State other than the one of first admission.[217]

The Turkish approach towards regulating the entry and residence of foreigners is not motivated by similar concerns aimed at attracting researchers from all around the world. Turkish concerns are centred on matters of national security and national interests.[218] Even though some procedural differentiation exists according to the type of research to be conducted, in essence researchers are subject to an authorization system in order to be able to carry out research in Turkey.[219] Yet, some level of facilitation has been provided concerning the residence of researchers such as exempting them from the obligation to apply for a residence certificate within one month following their entry into Turkey. Instead, those who come to Turkey in order to attend a congress or a conference do not have to make such an application for four months following their entry.[220] Furthermore, those researchers who fall under the scope of the Council of Ministers' Decision No.88/12839[221] are not under the obligation to obtain a residence certificate for the duration of their visa as their activities are outside the scope of the Law on the Work Permits of Foreigners which obliges foreigners to obtain a residence certificate before starting to work.[222]

Despite the Turkish system on foreign researchers being a regime based on permissions with a view to safeguarding national security and national interests, some developments have been witnessed in recent years. Concerning the differentiation mentioned above regarding procedures for applying for

short-stay visas for researchers from third countries travelling within the Community for the purpose of carrying out scientific research (2005/761/ec, O.J. L 289, 03.11.2005, pp.23-25).

216 Towards a European Research Area, COM(2000) 6 final, 18.01.2000, Section 6.3.

217 See *supra* 2.3.2.6.

218 Council of Ministers' Decision No.:8/12839, Article 5.

219 See *supra* 3.4.5.

220 The Law on the Residence and Travel of Foreigners, Article 5.

221 Council of Ministers' Decision on the principles which apply to foreigners, their representatives and foreign journalists who wish to conduct scientific research and examination and to make films, No.88/12839 dated 04.04.1988, published in the Official Gazette No. 19799 dated 29.04.1988.

222 Law on the Work Permits of Foreigners, Article 12.

permission for different types of research, a simplified procedure is stipulated by an amendment made to the Council of Ministers' Decision No.88/12839 in 2003 for all types of research other than archeological research.[223] Accordingly, researchers are under the obligation to obtain permission from the local authorities[224] while those conducting archeological research have to apply to the Ministry of Foreign Affairs.[225] This change in the authorization system might be interpreted as loosening up the regime to which foreign researchers are subject. Nonetheless, this 'loosening up' does not match the developments witnessed at EU level on researchers' mobility.

In order to align its legislation on foreign researchers with that of the EU, Turkey should set up a system which confers some of its exclusive competence in determining who shall be allowed to conduct which research, to the research institutes. For instance, with the setting up of such a system, the competence which the Ministry of Foreign Affairs has in determining whether the research should be conducted will be considerably affected. Currently, the Ministry of Foreign Affairs carries out an assessment based on certain factors relating to the researcher such as whether or not the researcher has previous publications in the relevant area.[226] In the EU regime on third-country national researchers, it is up to the research institute to decide whether a researcher is competent in the area.[227] Should the research institute decide to that effect, a hosting agreement is to be concluded between the research organization and the researcher, which gives certain rights and obligations to both parties. In this way, in the regime which has to be set up, the competence of the Ministry of Foreign Affairs will be shared with the research institutions. Accordingly, Turkey should, primarily, embark upon evaluating and consequently approving its research institutions which will share part of the competence in admitting a foreign researcher.[228]

Relevant Turkish authorities will be included in the admission process of a foreign researcher only after a hosting agreement has been concluded and the parties make an application. Upon application the Turkish authorities will still have a say in admitting the researcher, but only within the scope of Article 7 of Directive 2005/71 which enumerates the items which a Member State may check before allowing the residence of the researcher concerned.

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223 The amended texts have been published in the Official Gazette No.25285, dated 10.11.2003.

224 Council of Ministers' Decision No.88/12839, Article 3(5).

225 *Ibid.*, Article 3(4).

226 *Ibid.*, Article 3(2).

227 Directive 2005/71, Article 6(2)(a)(ii).

228 *Ibid.*, Article 5(1).

Once the foreigner has been admitted in order to conduct research, he or she shall enjoy equal treatment with nationals in certain areas.[229] At this point the same concerns come to mind as the 'foreigner-unfriendly' character of the practice previously referred to. It is of the utmost importance that Turkey ensures not only the enactment of the legislation which sets up the above-described system including the equal treatment principle, but also that this principle of equal treatment is observed in practice. Otherwise Turkey will amount to a weak chain in the European Research Area jeopardizing the mobility of researchers which contributes to attracting researchers from the rest of the world and thus the intention of the Lisbon Strategy to make the Union the most competitive and dynamic knowledge-based economy in the world.

4.4.7. Students

The Turkish legislation on foreign students studying in Turkey is a very brief one consisting of a Law[230] made up of 9 articles, and a By-law[231] of 13 articles.[232] Possibly due to this concise character of the relevant laws a flexible environment was created for moving towards a more decentralized system. The general system of Turkish higher education is characterized as a 'highly centralized system'.[233] A nationwide, single-stage university entrance examination is organized annually and the Student Selection and Placement Centre (ÖSYM) determines in which institution the applicant will study, based on the list of institutions the applicant has handed in, and calculating the grade scored by the applicant as a result of the university entrance exam as well as the high school grade-point average.[234] This centralized system of the Turkish higher education system has been criticized by the Commission due to the fact that the centralized structure does not allow the education system to respond to local needs.[235] A similar centralized examination is also organized for foreigners who wish to study in Turkey, namely the Foreign Student Examination (Yabancı Öğrenci Sınavı – YÖS).[236] Until the academic

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229 *Ibid*., Article 12.

230 The Law on Foreign Students who are studying in Turkey No.2922, dated 14.10.1883, published in the Official Gazette No. 18196, dated 19.10.1983.

231 The By-law on Foreign Students Studying in Turkey, published in the Official Gazette dated 30.04.1985 No.18740.

232 See *supra* 3.4.2.4.

233 Turkey 2005 Progress Report, 09.11.2005, SEC(2005) 1426, Chapter 26: Education and Culture.

234 See 'The Turkish Higher Education System – Part 3: Current Status' available at: http://www.yok.gov.tr/english/index_en.htm (last visited 21.01.2009).

235 Turkey 2005 Progress Report, SEC(2005) 1426, 09.11.2005, Chapter 26: Education and Culture.

236 The 2008 Examination Guide for Foreign Students for the Higher Education Programmes in Turkey, published by the ÖSYM lists the centres where the YÖS will be held as: Ankara

year 2004-2005, foreign students who had passed the YÖS were also placed in higher education institutions by the ÖSYM. However, since this academic year, foreign students apply not to the centralized authority but to the higher education institutions of their choice.[237] The universities are given the competence to decide whether or not the foreign student who has passed the YÖS shall be admitted. For this reason, universities have made public the requirements from foreign students in order to be admitted for studies at their faculties.[238] As a result, the issue of foreign students corresponds to one of the rare areas of Turkish higher education regulation which has achieved a certain level of decentralization in compliance with the recommendations of the European Commission.

Turkey replicates the positive developments in the area of admission to higher education institutions for foreign students in the area of Community Programmes on Education such as Socrates, Leonardo da Vinci and Youth.[239] This encouraging Turkish alignment in education-related matters extends to the Turkish position in terms of Directive 2004/114 on the admission for the purposes of studies, pupil exchange, unremunerated training or voluntary service.[240] The Turkish legislation on foreign students obliges the prospective students to complete the general entry and residence procedures, with the specification that the visa is requested for educational purposes.[241] With the enhancement of Turkish alignment to the EU acquis in terms of general admittance conditions, this provision will automatically cover elements of the conditions for being admitted as a student as laid down in Directive 2004/114, such as presenting a valid travel document, having health insurance and not being a threat to public policy.[242] Some of the conditions which can be found in

(Turkey) and also at Kabul (Afghanistan), Mezar-ı Serif (Afghanistan), Tirana (Albania), Baku (Azerbaijan), Dacca (Bangladesh), Cairo (Egypt), Jakarta (Indonesia), Amman (Jordan), Almaty (Kazakhstan), Nairobi (Kenya), Bishkek (Kyrgyzstan), Beirut (Lebanon), Skopje (Macedonia), Kuala Lumpur (Malaysia), Ulanbator (Mongolia), Abuja (Nigeria), Islamabad (Pakistan), Pretoria (Republic of South Africa), Kazan (Russian Federation), Dakar (Senegal), Damascus (Syria), Dushanbe (Tajikistan), Bangkok (Thailand) and Tashkent (Uzbekistan). In all these centres the examination is held on the same day, at the same local time.

237 See the web page of the Higher Education Council for the relevant announcement: http://www.yok.gov.tr/english/higher_edu.htm (last visited 21.01.2009).

238 The requirements of individual universities can be found in the following link: http://www.yok.gov.tr/english/higher_edu.htm (last visited 21.01.2009).

239 Turkey 2005 Progress Report, SEC(2005) 1426, 09.11.2005, Chapter 26: Education and Culture.

240 Council Directive 2004/114 of 13 December 2004, O.J. L 375, 23.12.2004, pp.12-18. See *supra* 2.3.2.7.

241 The By-law on Foreign Students Studying in Turkey, Article 6.

242 Council Directive 2004/114, Article 6.

Directive 2004/114 are already being implemented under Turkish law such as the requirement of Directive 2004/114 that in order to be admitted as a student, the prospective student should have been accepted by an establishment of higher education to follow a course of study.[243] A provision to the same effect can be found in the By-law on Foreign Students Studying in Turkey.[244] Furthermore, in order to have the education-based residence certificate extended, the renewal of registration with the education institution has to be documented.[245]

One aspect of the Turkish legislation which needs to be adjusted in order to be in compliance with the acquis is the issue of employment among students. Under EU law, students are entitled to be employed for at least 10 hours per week, albeit with restrictions in access to the labour market being allowed during the first year of residence.[246] Under Turkish law, however, students are prohibited from working throughout their studies.[247] The only exception to this rule is the situation of post-graduate students, who are only allowed to work in the higher education institution in which they study.[248] The prohibition on working may force students who are not recipients of scholarships or who are not being supported by their families to work illegally. Such an undesirable result will have negative repercussions similar to any form of illegal work, but in an elevated social dimension due to the fact that the persons in question are students. All in all, the Turkish legislation on foreign students is not too much in conflict with the relevant acquis. This is dus to the fact that Turkey has become a 'student country' with 130 universities, attracting students from neighbouring regions.[249] Combined with the celebrated success of the implementation of Community Programmes in the recent years, it can be said that Turkey has developed an understanding as to how to manage foreign students residing in its territory. This is evidenced by the relaxation of the centralized admission procedure for foreign students in comparison with Turkish students. The mentioned example goes to show that the Turkish authorities are enjoying an increasing level of confidence when it comes to the management of foreign students which is promising for the future alignment efforts concerning the EU acquis.

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243 *Ibid.*, Article 7(1)(a).

244 The By-law on Foreign Students Studying in Turkey, Article 6(B)(4).

245 A. Asar, 'Türk Yabancılar Mevzuatında Yabancı ve Hakları [Foreigner and Foreigner's Rights in the Turkish Foreigners' Legislation] (Ankara, Turhan Kitabevi Yayınları 2006) p.212.

246 Council Directive 2004/114, Article 17.

247 The By-law on Foreign Students studying in Turkey, Article 10.

248 *Ibid.*

249 For a list of Turkish universities see the web-site of the Higher Education Council: http://www.yok.gov.tr/universiteler/uni_web.htm (last visited 21.01.2009).

4.5 Immigration Policy

4.5.1 Introduction

The European policy on immigration as is dealt with in this book consists of the aspects of the global approach to migration relating to legal immigration except the traditional elements forming part of the core European immigration law such as rules on visas and residence. Matters which have been examined under the heading of European immigration policy consist mostly of policy documents such as communications. However, some of these aspects of European immigration policy, such as the fair treatment of third-country nationals, are partly secured by secondary legislation, while others will turn into actual secondary legislation once it is indisputably determined by the EU what their scope and characteristics will be, such as in the case of circular migration. Other policy aspects, like integration, function through Member State actions which are built around the framework set up by the European Union. In whichever way they may have been put together by the EU, the fact remains that all of these aspects represent the true agenda of the EU when it comes to dealing with migration issues, confirmed time and again by the EU institutions and Member States. In this regard it is crucial that Turkish immigration policy does measure up to these aspects of European immigration policy. Turkey will, in one way or another, depending on the specific policy area, have to apply or take part in these manifestations of the future of EU law as envisaged by the Union, if most will not have already become hard law by the time Turkish accession becomes a reality. It is with this consideration in mind that the comparison below is made between the European immigration policy and the Turkish legislation.

4.5.2 Development and Migration

Among the topics which have been discussed in Chapter two concerning the relationship between development and migration, what is most interesting from the Turkish point of view is the circular migration issue.[250] Circular migration, as the 'form of migration that is managed in a way allowing some degree of legal mobility back and forth between two countries',[251] aims at ensuring that the receiving country, the migrant and the sending country benefit from the migration. The prevention of illegal immigration contributes to the development of the sending country by a transfer of skills and know-how as well as by increasing remittances sent home.[252] The essence of circular migration is to

[250] See *supra* 2.4.2.2.

[251] Commission Communication on Circular Migration and Mobility Partnerships Between the European Union and Third Countries, COM(2007) 248 final, 16.05.2007.

[252] For an extended discussion of the benefits expected from circular migration see supra 2.4.2.2.

reassure the immigrant that by leaving the host country, he or she will not lose his or her position in that country. Various schemes have been proposed to achieve this end from issuing long-term multi-entry visas for returning migrants, to giving former migrants priority when further temporary employment is granted to workers who have already worked under such schemes and have returned in a timely manner.

Turkey might provide a valuable input to the discussion on circular migration in the future due to the experience it has gained as a result of practising a liberal visa policy. The Turkish visa policy is not approached here from a technical point of view, but rather as a tool to enable a very particular form of movement of persons, characterized by a mobility back and forth between Turkey and the home country, the so-called 'suitcase trade'. It is not only this back and forth 'circular' movement which constitutes the nexus between the Turkish experience and the proposed circular migration schemes, but also the results achieved by the Turkish model. The question of whether the benefits expected from circular migration could be imitated by simply loosening the visa regime with certain countries, while adopting stricter measures against illegal employment, deserves some attention. Such benefits could especially show themselves in reducing illegal immigration as aimed at by circular migration schemes; and in ensuring the migrant's contribution to the development of his or her host country. The effects of a liberal visa policy on preventing illegal immigration can be illustrated by the fact that Russian Federation citizens who frequently visit Turkey do not overstay their visa so as not to hinder their future visits.[253] The latter effect of a liberal visa policy has been discussed above in relation to the 'suitcase trade' which constitutes an important source of exports for Turkey and a means of livelihood for many families in the third countries whose citizens have been engaged in the suitcase trade such as Russia, the Ukraine, Georgia, Azerbaijan, Romania, Moldova and the Central Asian Republics.[254] As it has been argued in section 4.3.3.1., in order for such a relaxation of the visa system to lead to the expected results, reliable statistics must be gathered on the citizens of which countries prefer short-term and repeated stays for purposes of engaging in economic activity such as the 'suitcase trade'. As for the concerns which the EU has regarding relaxing its visa regime, it must be highlighted that the correlation between internal security and strict visa policies is controversial.[255] Furthermore,

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253 K. Kirişçi, 'A Friendlier Schengen Visa System as a Tool of "Soft Power": the Experience of Turkey', *European Journal of Migration and Law*, Vol.7 (2005) pp.343-367.

254 See *supra* 3.4.1.1.

255 For an argument defining the opinion that efficient border control mechanisms can ensure internal security as an 'illusion' see C. Phuong, 'Enlarging 'Fortress Europe': EU Accession, Asylum, and Immigration in Candidate Countries', *International and Comparative Law*

what is proposed here is the relaxation of the visa regime, under certain conditions, for certain groups of third-country nationals and possibly for confined territories of the EU. If this proposal were to be adapted to the case of the Turkish visa policy towards the citizens of the Russian Federation, as described above, the existence of a certain culture of moving back and forth would be advantageous in obtaining the desired results relating to co-development.

Concerning the discussion on mobility partnerships[256] based on the principle that the supply of labour in countries of origin should complement the demand for labour, Turkey will need to make certain adjustments in order to contribute to and make use of the system. First of all, in providing all the necessary information on legal possibilities for admission, which is the most basic way in which mobility partnerships will contribute to co-development efforts, Turkey would need to catalogue its legal immigration possibilities in order to be used in mobility partnership models. Given the current state of legislation on the entry and residence of foreigners in Turkey, the Turkish contribution to the system of mobility partnerships would not be an extensive one as the conditions of entry and residence are not very clear and transparent. Nevertheless, the adoption of a foreigners' law which will lay down the rules for entry and residence in an open and systematic way will allow for the proper participation of Turkey in mobility partnerships. Secondly, in benefiting from the partnership programmes as the receiving country by fulfilling the labour needs of the Turkish markets, Turkey should firstly determine its realistic labour needs. In fact, the Labour Institution of Turkey (Türkiye İş Kurumu) does prepare annual reports on the labour market situation in Turkey, publicizing data such as the occupations in which there is a labour need, occupations in which there is a labour surplus and occupations for which it is very difficult to find suitable employees.[257] However, the reliability of such reports is doubtful. Above all, there are high numbers of persons working undocumented amongst both Turkish citizens and foreigners. The Turkish Statistical Institute TurkStat has announced that in 2007 some 9,920,000 undocumented workers were actively engaged in the Turkish labour market, which led the Ministry of Labour and Social Security to launch a set of reforms including a toll-free number for reporting undocumented work.[258] As a result of

Quarterly, Vol.52 (July 2003) pp.641-664.

256 See *supra* 2.4.2.3.

257 These reports (İşgücü Piyasası Araştırması Sonuç Raporları) can be accessed from the web-site of the Labour Institution of Turkey: http://www.iskur.gov.tr/LoadExternalPage.aspx?uicode=statikraporindex (last visited 21.01.2009).

258 For a brief account of recent reforms in this field see the website of the Ministry of Labour

such reforms, it is anticipated that the monitoring of the labour market will also convey more realistic results which can be relied upon for purposes of utilizing the mobility partnership schemes. However, an optimum result is only possible if an accurate number of foreign workers already active in the labour market is known. As already explained above, the official figures concerning the number of foreigners living in Turkey are not very reliable[259] and neither are the figures relating to how many of these foreigners are actually working and in which sectors.[260] Accordingly, in order for Turkey to be able to plan which sectors could use additional foreign labour, and subsequently to make use of mobility partnerships, much work needs to be done in encouraging persons to choose documented residence and documented work.

4.5.3 External Relations

Turkey's accession to the EU will be a valuable asset for the Union from an external relations point of view. Turkey's existing political and economic ties with its neighbours will increase the expectations from EU policies towards these regions following Turkish accession to the EU.[261] The Turkish foreign policy is in broad alignment with the common foreign and security policy (CFSP).[262] In Addition, Turkey has much closer relations with regions that are important for the EU. Turkey has close ties with the Balkan countries such as Albania, Bosnia-Herzegovina, Kosovo and Macedonia; with the Black Sea countries within the framework of the Black Sea Economic Cooperation Organization (BSEC) which was established in the early 1990s at Turkey's initiative; with the Caucasus, especially in relation to Azerbaijan and Georgia with which Turkey shares the Baku-Tbilisi-Ceyhan pipeline and together with which it is constructing the Baku-Akhalkalaki-Kars railway; with Central Asia, not only regarding the oil and natural gas-rich six Central Asian Republics, most of which are Turkic countries, but also regarding Afghanistan and Pakistan to the south due to the "Ankara Declaration" providing for a trilateral platform to bring the countries closer; with the entire Middle East which led Turkey to broker the indirect talks between Syria and Israel.[263]

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and Social Security: http://www.csgb.gov.tr/article.php?article_id=515 (last visited 21.01.2009).

259 See *supra* 4.4.1.

260 See *supra* 4.4.5.

261 Issues Arising From Turkey's Membership Perspective, SEC(2004) 1202, 06.10.2004.

262 Turkey 2008 Progress Report, 05.11.2008, SEC(2008)2699 final, Section 4.30.

263 S. Laçiner, 'Possible Impacts of Turkey's Full Membership to EU's Foreign Policy', in S. Laçiner, M. Özcan, İ. Bal, '*European Union with Turkey: the Possible Impact of Turkey's Membership on the European Union* (Ankara, Publication of USAK 2005) pp.15-86; Turkey 2008 Progress Report, 05.11.2008, SEC(2008)2699 final, Section 4.30.

With the accession of Turkey to the European Union, the bilateral agreements, the European Neighbourhood Policy Action Plans and the Regional Cooperation Programmes of the EU will increasingly start dealing with the areas which Turkey has influence on. Turkey's existing ties, knowledge and experience concerning the relevant regions will play an indispensible role in ascertaining which EU tools will be the more appropriate to utilize and in which way. Whichever EU tool is decided upon, it will contain aspects of immigration policy in accordance with the EU policy of integrating migration issues into the EU external relations.[264] Addressing the root causes of migration by way of, for instance, development programmes, institution and capacity building and conflict prevention fit within the traditional relationship that Turkey has with its neighbouring regions. It might even be said that these traditional ties already work towards addressing the root causes of migration. With accession, once Turkey would have to take part in the systematic inclusion of migration policy matters into the relations with third countries, the positive outcomes of the Turkish influence in the neighbouring regions in addressing the root causes of migration will be more planned and efficient, instead of unintentional and collateral.

4.5.4. Fair Treatment of Third-Country Nationals

Even though at the EU level most of the efforts concerning the fair treatment of third-country nationals take place within the realm of integration policies, the anti-discrimination Directives play a central role in enhancing the provision of legal protection against discrimination in Member States.[265] The Directive combating discrimination on the grounds of racial or ethnic origin[266] and the Directive establishing a general framework for equal treatment in employment and occupation[267],[268] work towards achieving the non-discrimination and anti-racism goals set by the Tampere European Council in order to achieve the fair treatment of third- country nationals.[269]

Turkey has not yet transposed the above-mentioned two Directives. Furthermore, discrimination, be it direct or indirect, has not been defined under

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264 See *supra* 2.4.3.

265 M. Bell, I. Chopin and F. Palmer, *Developing Anti-Discrimination Law in Europe: the 25 EU Member States Compared* (Brussels, European Communities 2007) p.80.

266 Council Directive 2000/43 of 29.06.2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, O.J. L 180, 19.07.2000, pp.22-26.

267 Council Directive 2000/78 of 27.11.2000 establishing a general framework for equal treatment in employment and occupation, O.J. L 303, 02.12.2000, pp.16-22.

268 See *supra* 2.4.4.

269 Presidency Conclusions of the Tampere European Council of 15-16 October 1999, paragraph 18.

Turkish law[270] except for what can be deduced from the Constitutional provisions on equality before the law. It must be stressed that the relevant Article of the Turkish Constitution (Article 10(1), which is described below) is not sufficient to omit transposing the Directives. This is because, among other reasons, the Constitutional provision does not contain an adequate level of detail, and it does not contain the most important enforcement provision that the burden of proof is borne by the respondent in proving that there has been no breach of the principle of equal treatment as has been provided in Article 8(1) of Directive 2000/43 and Article 10(1) of Directive 2000/78. However, it should not be deduced that Turkey is completely motionless in joining EU efforts towards combating discrimination or that the Turkish legislation does not encompass any instruments which can be used for combating discrimination. Turkey has participated in the EU action programme aimed at promoting measures to combat discrimination based on racial or ethnic origin, religion or belief, disability, age or sexual orientation.[271] Turkey's participation to the action programme was based on an agreement concluded between Turkey and the EC on October 31, 2002 with a view to strengthening fundamental rights and equality in the candidate country before accession.[272] The cooperation included a € 30,000 annual Turkish contribution to the EU budget and followed by the general principles laid down in the framework agreement between Turkey and the EC for the participation of the Republic of Turkey in Community Programmes.[273]

As for legal instruments which may be used to combat discrimination, a general provision of the Turkish Constitution ensures equality before law for everyone irrespective of language, race, colour, sex, political opinion, philosophical belief, religion and sect or any such considerations.[274] Moreover, Turkey has also ratified the Convention on the elimination of all forms of racial discrimination on September 16, 2002, 30 years after signing the Treaty.[275] Additionally, as one of

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270 Turkey 2008 Progress Report, 05.11.2008, SEC(2008)2699 final, Section 4.19.

271 Council Decision 2000/750 of 27.11.2000 establishing a Community action programme to combat discrimination (2001 to 2006), O.J. L 303, 02.12.2000, pp.23-28.

272 The Agreement between the European Communities and Turkey concerning the participation of Turkey in the Community Action Programme to Combat Discrimination (2001-2006), Ankara, 31 October 2002, as approved by the Council of Ministers by Decision No.2003/5224, dated 03.02.2003, published in the Official Gazette No.25027, dated 21.02.2003.

273 Framework Agreement between the European Community and the Republic of Turkey on the general principles for the participation of the Republic of Turkey in Community Programmes, O.J. L 61, 02.03.2002, pp.29-31.

274 Turkish Constitution, Article 10(1).

275 The International Convention on the Elimination of All Forms of Racial Discrimination of

the High Contracting Parties to the European Convention on Human Rights, Turkey is under an obligation to ensure that the rights and freedoms set forth in the Convention are enjoyed without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.[276]

The Directive combating discrimination on the grounds of racial or ethnic origin also stipulates the designation of a body by each Member State to deal with discrimination matters.[277] In the Turkish system, as the Turkish Ombudsman Institution has still not been established, the Human Rights Investigation Committee and the Petition Committee of the Turkish Grand National Assembly are the most important bodies where claims of discrimination can be voiced. The Turkish Constitution grants the right to petition not only to citizens but also to resident foreigners subject to the principle of reciprocity.[278] It must be mentioned that until the year 2001, the right to petition was exclusively granted to Turkish citizens. Within the framework of aligning Turkish legislation with the EU acquis, an amendment was made to the relevant provision of the Constitution by Law No 4709,[279] thereby widening the scope of the right to petition.[280] The Law on the Right to Petition was, consequently, amended in 2003[281] in accordance with the constitutional amendment of 2001. Following the 2003 amendment, the relevant provision of the Law on the Right to Petition states that foreigners living in Turkey can make use of the right to petition as long as the principle of reciprocity is respected and the petition is written in Turkish.[282] Foreigners living in Turkey may report the discriminatory treatment they have experienced either to the Petition Commission or to the Human Rights Investigation Commission which has the special mandate to examine such claims

07 March 1966, which entered into force on 04.01.1969, was signed by Turkey on 13.10.1972.

276 Convention for the Protection of Human Rights and Fundamental Freedoms, Article 14.

277 Council Directive 2000/43, Article 13.

278 Turkish Constitution, Article 74(1).

279 Law concerning the amendment of certain provisions of the Constitution of the Turkish Republic [Türkiye Cumhuriyeti Anayasası'nın Bazı Maddelerinin Değiştirilmesi Hakkında Kanun], No. 4709, dated 03.10.2001, published in the Official Gazette No.24556-bis, dated 17.10.2001.

280 Y. Çalışkan, 'Yabancıların Bilgi Edinme Hakkı' [The Right of Foreigners to Acquire Information] in 'Prof. Dr. İrfan Baştuğ Anısına Armağan', (2005), pp.473-492.

281 Law concerning the amendment of various laws [Çeşitli Kanunlarda Değişiklik Yapılmasına İlişkin Kanun], No.4778, dated 02.01.2003, published in the Official Gazette No.24990, dated 11.01.2003.

282 Law on the Right to Petition [Dilekçe Hakkının Kullanılmasına Dair Kanun] Law No.3071, dated 01.11.1984, published in the Official Gazette No.18571, dated 10.11.1984, Article 3(2).

next to the general mandate of investigating the compliance of Turkish human rights practices with the international conventions to which Turkey is a party and with the Constitution and the pertinent laws.[283]

The above-mentioned Commissions of the Turkish Grand National Assembly are, arguably, not the appropriate bodies to be the main responsible organs in investigating discrimination claims. This can be concluded from the European Commission's Progress Report on Turkey calling for the establishment of an effective and independent 'Equality Body' to promote non-discrimination and equal treatment.[284] As the members of both Commissions of the Turkish Grand National Assembly are Members of Parliament, the political influence on the decisions is unavoidable, which can hardly be combined with the requirement of independence. As for their 'effectiveness', the non-binding character of the decisions does not ensure such effectiveness either. Furthermore, the current legal framework is not adequate to eradicate discrimination. Turkey needs to enact legislation which addresses the specific case of combating discrimination on the grounds of racial or ethnic origin in employment. Such legislation should, most importantly, introduce the principle of the burden of proof being borne by the respondent as long as the facts from which discrimination can be presumed are established.[285] Accordingly, the Programme for the Alignment with the Acquis envisages that Directives 2000/43 and 2000/78 are to be transposed before 2013.[286]

4.5.5 Integration

The integration of foreigners into Turkish society is an unfamiliar concept for Turkish policy makers. The lack of interest in integration matters is not unique for Turkey, but it is a more general standpoint among countries which have not experienced large-scale immigration such as in the case of guest worker schemes. Accordingly, the integration of foreigners was likewise a 'radically new challenge' for most of the new Member States.[287] In Turkey, the only integration activities which are being practised concern asylum seekers and refugees.[288] In any event, it is not possible to talk about a Turkish integration policy. The Asylum and

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283 The Human Rights Investigation Commission Law [İnsan Haklarını İnceleme Komisyonu Kanunu], No.3686, dated 05.12.1990, published in the Official Gazette No. 20719, dated 08.12.1990, Article 4.

284 Turkey 2008 Progress Report, 05.11.2008, SEC(2008)2699 final, Section 4.19.

285 Council Directive 2000/43, Article 8(1) and Council Directive 2000/78, Article 10(1).

286 Turkey's Programme for the Alignment with the Acquis (2007-2013), Section 19.3.

287 Second Annual Report on Migration and Integration, SEC (2006) 892, 30.06.2006, Section 4.

288 Turkish National Action Plan for the Adoption of the EU Acquis in the Field of Asylum and Migration, (March 2005), section 4.9.1.

Immigration Action Plan does deal with the issue of integration and proposes the establishment of an institution which would coordinate the activities of other institutions and agencies including local governments, employers and NGOs. Integration activities will be delegated to this institution while the general regulatory and supervisory responsibility for integration shall remain with the state. It is important that the Turkish integration system which is to be set up is compatible to the Common Basic Principles for Immigrant Integration Policy laid down by the JHA Council in November 2004.[289] These Common Basic Principles guide the integration efforts both at EU and national levels.[290]

Access to the labour market constitutes a key part of the integration process as has been pointed out in Common Basic Principle 3. Furthermore, employment is central to the contributions which immigrants make to the host society. In this respect, allowing foreigners to work in occupations in which they have been trained would allow for an optimum contribution to society as those foreigners will be practising what they know best. It follows that the professions which are forbidden for foreigners under Turkish law should be reconsidered in the light of integration concerns. Allowing the foreigner to work in the profession in which he or she has been educated, ensuring optimum contribution to society, will also make the existence of the foreigner in the host country more acceptable in the eyes of the local population thereby acknowledging the fact that foreigners are part of society and combating negative opinions among Turkish citizens towards resident foreigners that they are engaged in either missionary activities, separatism or espionage.[291] The Asylum and Immigration Action Plan recognizes this crucial role which access to the labour market plays in a functioning integration policy. Foreigners who have settled in Turkey with long-term residence permits, family members arriving in Turkey within the scope of family reunification, together with asylum seekers, refugees and those enjoying subsidiary protection will have access to vocational courses organized by local governments or provincial organizations such as hairdressing, sewing or embroidery courses.[292] The Action Plan also mentions the possibility of creating employment opportunities according to the skills and knowledge of the

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289 2618th Council Meeting Justice and Home Affairs, 19 November 2004, 14615/04, Annex 'Common Basic Principles for Immigrant Integration Policy in the EU'. See *supra* 2.4.5.

290 Third Annual Report on Migration and Integration, COM (2007) 512 final, 11.09.2007, section 3.1.

291 Yerleşik Yabancıların Türk Toplumuna Entegrasyonu [The integration of settled foreigners into Turkish society], Report prepared by the International Strategic Research Organization (USAK) (September 2008) p.34.

292 Turkish National Action Plan for the Adoption of the EU Acquis in the Field of Asylum and Migration, (March 2005), section 4.9.6.

foreigner; however, it does not specify what 'creating employment opportunities' might entail. Otherwise, foreigners should be directed towards the Turkish Labour Institution (Türkiye İş Kurumu), private employment offices and vocational courses.[293]

The Asylum and Immigration Action Plan also touches upon the issue of language courses for foreigners as endorsed by Common Basic Principle 4. Knowledge of the Turkish language among foreigners living in Turkey is at worryingly low levels adding to the obstacles which foreigners experience in the country in terms of becoming part of society. Research shows that more than 95% of foreigners who have settled in Turkey cannot speak the Turkish language.[294] The Action Plan advocates organizing language courses with the support of universities and NGOs in which foreigners should be encouraged to take part.[295] Furthermore, it suggests the selection of pilot schools in some provinces for the education of foreign children at the age of mandatory education where supportive education in the Turkish language will be provided by the Ministry of National Education.[296] Moreover, in compliance with Common Basic Principle 5, the Action Plan recognizes the importance of education in participating in society. In this respect, priority has been given to foreign children at the age of mandatory education.[297] Accordingly, it should be the duty of the Ministry of National Education to take necessary measures to ensure that foreign children participate in mandatory primary school education.[298]

Even though no concrete steps have been taken to date towards realizing the integration goals of the Asylum and Immigration Action Plan, the proposals which are pointed out above are relatively positive in terms of adopting measures in compliance with the Common Basic Principles. However, the same cannot be said for all of the proposals of the Action Plan. For instance, contrary to the spirit of Common Basic Principle 9, and of the opinion of the Commission,[299] the Asylum and Immigration Action Plan explicitly states that foreigners shall not

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293 *Ibid.*

294 Yerleşik Yabancıların Türk Toplumuna Entegrasyonu [The integration of settled foreigners into Turkish society], Report prepared by the International Strategic Research Organization (USAK) (September 2008) p.36.

295 Turkish National Action Plan for the Adoption of the EU Acquis in the Field of Asylum and Migration, (March 2005), section 4.9.2.

296 *Ibid.*

297 *Ibid.*

298 *Ibid.*

299 Commission Communication on a common agenda for integration: Framework for the integration of Third-Country Nationals in the European Union, COM(2005) 389 final, 01.09.2005.

enjoy the right to vote and be elected.[300] The Turkish Constitution only grants the right to vote and to be elected to Turkish citizens.[301]

In order to make a fully-fledged assessment of the Turkish integration policy, one must be patient until the vague proposals put forward by the Asylum and Immigration Action Plan are transformed into more concrete legislative proposals. However, integration is more than a detached policy area. It is a concept which should be mainstreamed in all relevant policy portfolios and levels of government according to Common Basic Principle 10. Accordingly all relevant policies should be shaped having the integration of immigrants in mind. In this respect, it should not be forgotten that ensuring a secure legal status for foreigners is one of the fundamental characteristics which any integration policy must possess.[302] Therefore, it is still possible to make an assessment concerning the entirety of the Turkish law and policy concerning foreigners from an integration point of view.

It would not be possible to say that foreigners in Turkey enjoy a secure legal status. The non-existence of a long-term resident status in Turkish law, the lack of transparency surrounding the family reunification policy, the arbitrary decisions on (not) issuing work permits are indications as to the lack of security foreigners have when living in Turkey. By bringing Turkish laws into line with the relevant acquis a part of this 'insecurity' will automatically be addressed. However, as is indicated above, the other part of this 'insecurity' derives from the mindset of not only the legislator but also the competent authorities in practice.[303] To turn this foreigner-unfriendly environment around, this particular mindset should be addressed in a systematic and drastic manner. This could be done by way of training programmes for the police and others who occupy decision-making positions concerning foreigners. Furthermore, in accordance with Common Basic Principle 7, forums could be set up which will ensure intercultural dialogue and education projects could be organized for Turkish citizens on a general level about immigrants. Local governments, especially those with a relatively larger number of foreign residents, could organize activities which would enhance interaction between Turkish citizens and foreigners. It will be the migration and asylum specialization unit to be established under the Ministry of the Interior that

300 Turkish National Action Plan for the Adoption of the EU Acquis in the Field of Asylum and Migration, (March 2005), section 4.9.7.

301 Turkish Constitution, Article 67(1) and (3).

302 J. Niessen, 'Immigration, Citizenship and the Benchmarking of Integration in the EU', in S. Carrera, ed., *'The Nexus Between Immigration, Integration and Citizenship in the EU'*, Collection of Papers presented at the CHALLENGE seminar of 25.01.2006.

303 See *supra* 4.4.4. and 4.4.5.

coordinates and shapes these integration efforts.[304] This specialized unit will additionally be responsible for evaluating and deciding on applications by migrants willing to come to Turkey by legal means in order to work, study or join resident family members; for compiling and evaluating data on migration; and drafting and guiding migration policies. The fact that the Asylum and Immigration Action Plan has set 2012[305] as the estimated deadline for establishing this unit can be seen as a discouraging indication that not much is to be expected in the area of integration policy until this date.

4.6 Conclusions

This chapter provides a comparison between the EU acquis on immigration and the relevant Turkish legislation. However, Turkish legislation, as examined in Chapter three, is not included in the comparison on its own, but is supplemented by state practice in the relevant areas of the law. The result demonstrates that in the Turkish legal system, examining the existing legislation may be deceiving, as practice may be very different. In this respect, the chapter illustrates how certain pieces of Turkish legislation may seemingly be in accordance with the EU acquis, whereas the practice is far from being so.

It must be said that not all aspects of the EU immigration acquis which are dealt with in Chapter two are compared with the Turkish legislation and practice. Given the primal situation of the Turkish foreigners' law, such an effort would have been redundant. For instance, discussing some points of criticism that were voiced concerning the EU immigration law from a Turkish point of view, such as the situation of same-sex couples under the family reunification and long-term resident directives, seemed irrelevant and almost a luxury given that a system of long-term residents and family reunification does not even exist under Turkish law.

This comparison of the EU acquis, on the one side, and the Turkish law and practice on the other, provides the answer to the question of 'to what extent are Turkish laws and practices in compliance with the European Union immigration acquis'. In order to answer the second question, 'what the consequences of alignment will be on the Turkish legal system' an additional tool has been used, namely the alignment agenda put forward by the Turkish Republic. It is also evident that the alignment agenda in the case of immigration law is not an

[304] Turkish National Action Plan for the Adoption of the EU Acquis in the Field of Asylum and Migration, (March 2005), Section 4.1.

[305] *Ibid.*

enthusiastic one, lacking clarity as to what will exactly be done with no definite deadlines. Nevertheless, as far as these alignment programmes have been studied, they are made use of. For the remainder, several recommendations have been made.

Chapter Five

Concluding Remarks

The aim of this book is to answer the question of 'to what extent are Turkish laws and practices in compliance with the European Union immigration acquis and what the consequences of alignment thereto will be on the Turkish legal system.' In order to reach a point where such an evaluation could be made, first of all the two compared systems, namely the EU immigration law and policy and the Turkish law on foreigners, have been introduced in separate chapters. Even though the introduction of these two systems serves the ultimate aim of laying the foundations for the final analysis, the two chapters offer more than enough material to conduct the main analysis. It follows that both chapters are also functional, detached from serving the aim of answering the main question.

5.1 The European Immigration Law and Policy

In order to form the first leg of the comparative analysis which is the main concern of this study, Chapter two described the European immigration law and policy and answered the question 'whether and to what extent the legislators and policy makers of the candidate country are bound by the EU acquis.' The principal task of the relevant chapter, namely to describe the current state of European immigration law and policy, in itself can be a challenge.

We are experiencing exciting times as the European immigration policy is being shaped before our very eyes with an exhilarating speed. An area characterized by its proximity to the core of state sovereignty, and thus an area which stimulates states to guard their legislative competence with vigour against intrusion, is increasingly becoming subject to European-level regulation. This constantly evolving area of the EU acquis requires the interested parties to be continuously brought up to date with the most recent discussions as to future aspirations. This book has taken account of the Europeanization process of the immigration law and policy and captured the current state of development of the EU acquis on immigration as it stood in Spring 2009. However, while doing so it has attempted to draw attention mainly to developments which constitute the latest episodes in the enduring debates, not to bestow too much magnitude to transitory discussions, albeit there is always the difficulty of determining what can be deemed an 'enduring debate' in such a quickly evolving area of law and policy.

The European acquis on immigration as analyzed in this study consists of two elements, namely law and policy. European immigration 'law' was taken to comprise two general titles, being 'admission' and 'residence'. On the other hand, the complex structure of European immigration 'policy' has been examined by breaking it down into the subcategories of 'development and migration', 'external relations', 'fair treatment' and 'integration' even though each subcategory is highly intertwined. What becomes apparent from examining the developments in all the abovementioned aspects of the EU immigration acquis is that next to becoming more stringent in certain aspects of immigration law, it also grows and matures by taking on new paradigms of approaching the immigration phenomenon. Indeed, the introduction of biometric features into the uniform format for visas and residence permits, the leeway allowed to Member States concerning family reunification and the long-term residents Directives lacking a general standstill clause are examples of the EU immigration acquis displaying a stringent face, or in the last-mentioned example allowing for Member States to practice their stringent policies. However, in other areas the EU immigration acquis is stepping back from being a compilation of rigid ideas and rules. Instead, a renewed approach to immigration is being shaped at the EU level with developments such as the local border traffic permit which has been developed in order not to hinder the historic links which the new Member States of 2004 have with their neighbours; the facilitated admission regimes envisaged for researchers, Blue Card holders and young professionals in order to meet the goals of the Lisbon Strategy; the Circular Migration patterns, which are in the process of being shaped in order to reap optimum benefits from the (co)development-migration nexus; and the related policy areas concerning mobility partnerships and remittances.

Within the framework of this Global Approach to migration, the EU is becoming more flexible in producing policies to meet the latest challenges of migration. However, this flexibility aspect does not necessarily find its reflection in how candidate countries are approached during membership negotiations. The law and policy of Turkey concerning immigration will be rigorously brought into line with the EU acquis once the relevant Chapter 24 on Justice, Freedom and Security opens for negotiations.

5.2 The Turkish Legislation on Foreigners

The assessment of the Turkish legislation on admission and residence corresponds to the second leg of the comparative analysis comprising the core of this study. However, Chapter three on Turkish foreigners' legislation meets an

important need in isolation from the fact that it is an indispensable element of the final analysis. It is a comprehensive account of the Turkish foreigners' law, laying down not only the legislation, but also the background and mentality behind it in the English language contributing to future research which shall be conducted on similar issues.

Carrying out research on the rules on the admission and residence of foreigners under Turkish law and the historical derivations of these rules, one cannot help but notice certain choices which the Turkish Republic has made in abiding by practices of the Ottoman Empire in the realm of foreigners' law. On the one hand, the admission law and policy of Turkey is very reminiscent of the Ottoman tradition of having open borders for anyone who wanted to enter. This liberal policy has been observed throughout the existence of the Ottoman Empire, distinguishing the Ottomans from other vast empires of the time, such as Russia. Today the Turkish visa policy which allows the citizens of 51 countries to be issued entry visas at the border gates with not many questions asked, looks like the descendant of the Ottoman visa policy. On the other hand, however, the rules on the residence of foreigners bear the symptoms of another era of Turkish history, one that corresponds to the final days of the Ottoman Empire and the foundation of the new Turkish Republic. Nation building and foreigners' policies belonging to the early years of the Turkish Republic shaped the Turkish legislation on foreigners until the 2000s. These policies, which were designed to reunite the Muslim subjects of the Ottoman Empire within the territory of the newly founded Turkish Republic, bore signs of the fear of separatist movements inherited from the Ottoman experiences with nationalist uprisings in the Balkans. As a consequence, the legislation on the residence of foreigners and the associated practice, which are based on such policies, approach foreigners with distrust and caution. This restrictive nature of the legislation on the residence of foreigners contains an exception relating to those of Turkic origin, which, again, is reminiscent of the former policies aimed at uniting the Muslim Ottoman subjects under the rule of the Turkish Republic. It is due to the EU membership bid that since the beginning of the 2000s a move away from such legislation has begun. The adoption, within the framework of the EU alignment programme, of the Law on the Work Permits of Foreigners in 2003 is the most representative example of this move. This Law is representative in two ways: first of all, by being one of the first legal texts in the area of immigration law to be enacted with the purpose of alignment to the EU acquis. It is with this Law that for the first time the concept of a 'foreigner' is defined in the Turkish legal system and access to the labour market for foreigners is regulated. In this respect, the Law on the Work Permits of Foreigners is a clear example of how the EU accession process influences the Turkish legal system. However, this Law is also representative of

the EU-related legal change that is taking place in the area of immigration law in another way. This second aspect concerns the practice which accompanies the Law. The practice of the Turkish authorities which almost by default rejects every work permit application is virtually the embodiment of the fear that EU-influenced legislation is destined to stay on paper as long as the mentality of the authorities is still shaped by the distrust and caution towards foreigners who wish to form a part of society. The example of the Law on the Work Permits of Foreigners represents the two challenges awaiting Turkey in its endeavour to align its immigration legislation to the relevant EU acquis: first of all, changing the legislation itself; secondly, changing the mentality of the authorities which does not uphold the legislative amendments.

5.3 Compliance of Turkish Laws and Practices with the EU Immigration Acquis

It is worthwhile to start the general conclusions with a finding on the EU immigration law and policy, even if this would result in an unorthodox approach as the subject of analysis is mainly the Turkish immigration law and not the EU acquis. However, this finding is very telling as to the fundamental characteristics of the relevant area of Turkish law and also hints at in which direction Turkish immigration law should be developed. Despite all the criticism voiced in this book against certain aspects of it, EU law and policy on immigration emerge from the assessment of the comparative Chapter four as an all in all successful regime. The success of the EU immigration acquis within the context of this study is connected to the influence it has and will continue to have on the Turkish foreigners' law. Providing, at the end of the alignment process, that Turkish foreigners' law develops into a legal system which encompasses all the legislative adjustments laid down in Chapter four, the EU acquis will have contributed immensely to the advancement of the legal status of foreigners living in Turkey, thereby increasing the legal certainty and transparency of the regime regulating their entry and residence in the country and widening the scope of the rights that they enjoy.

This book highlights the fact that the Turkish legislation on foreigners has certain ambiguities where practice exists without regulation. Family reunification and the status of long-term residents are two examples of such areas of the law. The first challenge Turkey faces is to set up appropriate policies in these areas, which will not only comply with EU law, but also correspond to the specific characteristics of immigration into Turkey. Yet, Turkey has demonstrated, on various occasions throughout the accession process so far, that it is capable of putting legislation in

place following a speedy legislative process in order to comply with EU demands. The major challenge is not to enact laws which are in compliance with the EU acquis, but to uphold the principles contained in these laws in practice. Thus, the real problem is the lack of legal certainty and the lack of transparency, the inconsistent, arbitrary application of the existing rules, with no obligation for the state to state reasons for a certain decision. This 'tradition' both creates and is created by a certain mentality towards foreigners. Adopting the EU acquis on immigration will compel Turkey to change this mentality or else none of the legislative amendments put forward in Chapter four will have any true significance in practice. Following the argument voiced in this study that the terminology shapes the way immigration policy is conceived, one important characteristic of the Turkish foreigners' legislation cannot be overlooked in the context of the 'mentality' discussion, namely the Turkish definition of immigrants being *'individuals and groups of Turkish descent who are committed to the Turkish culture, who come to Turkey for settling purposes and who have been accepted in accordance with the Law on Settlement.'* This definition creates the impression that the foreigners who do not fall within this definition shall not be seen as persons who have settled in Turkey. The outcome of such an approach is that while 'immigrants', who are seen as having settled in Turkey, are treated very favourably to ensure their smooth integration into Turkish society, 'foreigners', who are seen as persons who happen to be in Turkey in passing, face a far less constructive approach as they are denied access to the rules that govern them and are not even presented with reasoned decisions relating to them. The fact that they are not seen as settled persons prevents them from being seen as a part of society entitled to a set of basic rights similar to those of citizens and even 'immigrants'.

This study also makes clear that, despite the caution in granting rights to foreigners, Turkey has never been a country where foreigners are not welcome. The liberal visa policy as opposed to the stringent residence rules indicates that foreigners are desirable and very welcome in Turkey as long as they come as tourists. The visa policy making it possible for the citizens of certain countries to easily obtain visas at the borders is a clear illustration of this fact. However, this hospitable attitude is not maintained if the foreigner wishes to stay in Turkey as a constituent of society having a right to a secure legal system endorsing and guaranteeing his or her activities as a resident of the Turkish Republic, at least knowing what the rules are that apply to him or her and how they are applied.

By looking at the regime applying to foreigners other than tourists, this book demonstrates that the distinction between a citizen and a foreigner is very sharp in Turkish law, practice and mentality. The outcome of this situation is in

complete contrast to the principles laid down in the Tampere European Council on approximating the legal status of third-country nationals to that of Member States' nationals and ensuring the fair treatment of third-country nationals supplemented by a vigorous integration policy which aims to grant them rights and obligations comparable to those of EU citizens. The discrepancy between the Turkish regime concerning foreigners and the Tampere principles has deep roots as foreigners living in Turkey are not even fully aware of the regime applying to them. This is due to a combination of many factors such as the untidy structure of Turkish foreigners' law making it difficult to find which rules apply to the specific situation which the foreigner is facing, or simply the lack of regulation in the relevant area, which does not mean that authorities do not deal with such areas. This last point adds to the setbacks that foreigners face in Turkey, as the authorities do deal with areas which are not regulated by law, such as family reunification applications; however, it is not known to the foreigner on what criteria the authorities base their decisions, creating an obscure situation. All these factors contribute to making the Turkish regime on foreigners a non-transparent, arbitrary and, as has been described in this study, a foreigner-unfriendly system.

5.4. Future Steps

What needs to be done by Turkey is, first of all, to catalogue the existing rules on foreigners, including those which are currently not disclosed to the public. This should be done in the form of a foreigners' law which includes all the relevant rules for the admission and residence of foreigners, thereby addressing the problem of the untidy structure making it difficult to find the relevant law and the problem of the non-transparency of the regime caused by regulating crucial aspects for the residence of foreigners in Circulars which are not disclosed to the foreigner. The European common immigration policy and national laws on third-country nationals shall consist of clear, transparent and fair rules; and Turkey, which shall become a part of this framework upon accession, should adopt the same approach.

A part of adopting a European approach in immigration matters is to take into consideration the time spent as a legal resident in the country in determining the rights which the foreigner shall possess. It is not only secondary EU legislation that dictates the granting of rights more similar to those of citizens as the time residing in the country increases, but it is the legal tradition in the EU Member States which encompasses the strengthening of the legal position in the country as the connection with the country becomes stronger. Turkey should make a

distinction between tourists and legally resident foreigners who have lived in the country for many years, and should set five years for complying with the EU long-term residents legislation, subjecting the latter to more favourable treatment which comes as close as possible to the legal status of citizens. Furthermore, various other secondary pieces of legislation at the EU level grant the holders of the specific status a right to equal treatment in areas such as working conditions, the recognition of diplomas and social assistance. Such equal treatment provisions concerning researchers and Blue Card holders should be swiftly transposed into Turkish legislation with a view to aligning Turkish laws with the EU acquis, while at the same time diminishing the sharp contrast in legal regimes applying to Turkish citizens and foreigners of Turkish descent and to other foreigners.

Turkish legislation on entering the country for purposes of family reunification, work, conducting research or studying also needs to be adapted to the relevant acquis as is described in Chapter four. Accordingly, a comprehensive regime for family reunification should be set up, responsibility for admitting researchers should be shared with research institutions, and the issue of prohibiting foreign students from accessing the labour market should be addressed. By aligning the Turkish law and practice with EU standards, the arbitrary character of the current regime will simultaneously be addressed. The elimination of this arbitrary disposition of the regime will contribute to diminishing illegality among foreigners living in Turkey.

It is of imperative importance that Turkey realizes that being part of the European Union means sharing the objectives of the Union and putting these objectives alongside traditional concerns such as national security, national interests etc. This means, for example, that in admitting foreign researchers the aims of the Lisbon Strategy and the European Research Area should be considered as much as National Interests.

Next to enacting the necessary legislation for alignment with the EU acquis and transforming the foreigner-unfriendly mentality of the authorities, Turkish alignment to the EU acquis will be a thorny issue in many other respects. The adoption of European standards in border management is an area where the difficulty does not only emanate from the attitude of the Turkish state but from external factors such as the unstable situation in neighbouring countries, such as Iraq, making safety at the borders more important for Turkey than any other concern relating to adopting EU standards. Nevertheless, Turkey has shown its willingness to adopt EU standards in border management by planning the alignment to start from the western land borders of Turkey. The management of

the remainder of the borders shall be dependent partly on how the situation in neighbouring Iraq unfolds.

Accession entails the acceptance of the EU acquis as it stands at the time of accession. By the time Turkish membership comes near, the immigration acquis will not only be a compilation of internal rules relating to third-country nationals. Instead, it will be an integral part of a broader, global approach encompassing policy areas such as external relations and development policies. A glimpse of this future form of EU immigration acquis offered in this study, under the title 'Immigration Policy', which encompasses the evolution of the development and migration nexus, the place of immigration within the EU's external relations, the issue of fair treatment of Third-Country Nationals in the EU and their integration within the framework of the EU acquis, demonstrates that these areas will be challenging for Turkey to align to. On the other hand, Turkey does have certain expertise to offer the EU for it to advance its policies in the relevant areas of immigration policy, such as in the area of immigration policy within the external relations of the EU. Nevertheless, these contributions, even if they materialize, are not a product of a systematic policy, but rather the natural consequences of the geographic and historical position of Turkey. Turkey will learn to work with immigration policies infiltrated into its relations with third countries, in accordance with the EU concerns in external relations. Similarly, in other areas of immigration policy, such as integration and fair treatment, Turkey should establish a systematic approach, as opposed to an accidental one, as is currently the case. Relevant independent and effective bodies should be set up to ensure the integration and fair treatment of foreigners in Turkey, and the necessary legislation to be observed by these established institutions should be adopted.

For Turkey to establish and develop a comprehensive, coherent, transparent and realistic immigration law and policy, which will also comply with the EU acquis, the first concrete step to be taken should be the collection of data on immigration into Turkey. Currently, as the actual numbers of foreigners residing in Turkey and contributing to the economy are not known, adequate integration policies cannot be designed and labour policies cannot be adapted to the actual situation. A detailed and reliable set of data on foreigners living in Turkey would contribute immensely to the establishment of an immigration policy which could diverge according to the specific characteristics of the foreign presence in the different regions of the country as well as in different sectors of the economy. This would also allow Turkey to already have an impression as to how it could make use of some of the new ideas which the EU is shaping at present such as mobility partnerships and circular migration. The prompt establishment of the migration and asylum specialization unit, one of the tasks of which will be the compilation

and evaluation of data on migration, is therefore crucial.

5.5. Giving the EU Food for Thought

So, in terms of aligning to the EU acquis on immigration, the Turkish journey towards accession will be a substantial challenge for the country; but not necessarily one which Turkey will not offer any models for the EU. After having highlighted the shortcomings of the Turkish regime on the residence of foreigners, it must be added that there are also areas where the Turkish law and practice can be an enrichment for the development of the EU immigration policy. Such a contribution can materialize especially within the ambit of visa policy. It is true that Turkey has to align itself with the negative and positive visa lists of the EU. However, Turkey also has expertise in certain areas of visa policy from which the EU can profit. The liberal character of the Turkish visa policy is a valuable example for the EU in demonstrating what the benefits of having a liberal approach in admission policies can be for the country itself as well as the neighbouring regions and whether the feared drawbacks of such policies are realistic. Within the context of the unfolding discussion at the EU level on circular migration, the Turkish experience with the 'suitcase trade' can set as an example of how such movements can be managed. At this point, it might, for example, be proposed that certain groups of third-country nationals could be granted EU visas at the borders. It would be an opportunity for the EU to demonstrate that it is genuinely committed to its 'migration and development' agenda, and that the 'Fortress Europe' image, which has been created over the years, can be put aside when weighed against the benefits to be expected from concentrating on the 'migration and development' nexus.

Remaining within the realm of visa policy, the passport-free travel arrangements between Turkey and Syria and Iran can be transformed into a system which is acceptable to the EU without necessarily having to end these historical arrangements. Accordingly, these passport-free travel arrangements, which apply to the citizens of the relevant countries living in the border areas, can be adjusted to the local border traffic regime as established by the EU. In this way the historical, social and cultural links between Turkey and Syria and Iran can be maintained while at the same time EU law is complied with, carrying these relationships under the EU framework from which the EU will benefit immensely in the external relations sphere.

5.6 Final Observation

The accession process consists of legal, political and economic dimensions. The legal dimension relates to the acquis and whether the candidate country aligns its laws thereto. From an immigration law point of view, this study demonstrates that there is a considerable gap between the Turkish legislation and practice, on the one hand, and the relevant acquis and the philosophy behind it, on the other. Looking at the level and pace of the integration achieved on the Turkish side concerning the EU acquis on immigration, a combination of two factors seems to be playing an important role in keeping Turkey from wholeheartedly taking on the alignment objective. First of all, the 'immigration-sovereignty' nexus, which has been presented in the introductory chapter of this book, inevitably influences the willingness of Turkey to reduce the power and control it has over foreign nationals by establishing a more transparent, fairer and clearer regime concerning foreigners. From this aspect, Turkey will have to come to terms with the situation at hand, just like all of the Member States have done before Turkey, and not allow the sovereignty-related concerns to disrupt the pace of alignment to the EU acquis. After all, this study portrays the EU immigration acquis within its historical development, making it clear that Member States have eventually accepted the creation of EU immigration law even though it has been equally difficult for them to conciliate the need for Europeanization with sovereignty concerns. The second factor slowing down the accession process is the lack of membership guarantees given by the EU. As long as the EU refrains from explicitly stating the end result of the negotiations, there is no incentive for Turkey to abandon its current arrangements which do not necessarily comply with the EU acquis, but are economically beneficial, contribute to strengthening Turkey's regional importance and maintaining social and cultural ties with regions surrounding Turkey. Concerning this second aspect, the EU should make an announcement on which Turkey can sufficiently rely so as to base its entire policies on a definite destination for Turkey. Such a clear assertion of the final result of the negotiations seems to be the responsible step to take before the EU can expect a country with a population of over 70,000,000 to reroute its traditional policies.

All in all, Turkey will need to change not only a considerable amount of legislation, but also deep-rooted perceptions, such as what is understood by the concept of 'foreigner', in order to be ready for accession to the EU in respect of immigration law and policy. The diminishing enthusiasm on the side of Turkey concerning adopting the necessary reforms does not help, especially concerning the wide-ranging changes which have to be observed in the areas of immigration. However, with the right type of approach from the EU, giving Turkey a genuine

membership perspective, Turkey will regain the momentum which it has lost due to ambiguous statements by the EU. Regaining such drive will allow Turkey to undertake all the challenges it is facing in respect of aligning immigration law and policy with the EU acquis.

Samenvatting

Dit onderzoek heeft tot doel aan te tonen in hoeverre het Turkse recht en beleid overeenstemmen met het 'acquis' van de Europese Unie op het terrein van immigratie, en wat de consequenties zijn voor het Turkse juridische systeem om het daarmee in lijn te brengen. Om deze vragen te beantwoorden, worden beide systemen, het acquis van de Europese Unie en het Turkse vreemdelingenrecht, in twee aparte hoofdstukken beschreven.

Het immigratierecht- en beleid van de Europese Unie
Na het eerste inleidende hoofdstuk geeft hoofdstuk twee een compleet beeld van het Europese immigratie acquis met als doel een raamwerk te schetsen waarmee het Turkse immigratierecht kan worden vergeleken. In dit onderzoek wordt het Europese immigratie acquis uiteen gezet in twee elementen: recht en beleid. Het Europese immigratierecht wordt beschreven aan de hand van twee onderwerpen: 'toelating' en 'verblijf'. Het complexe systeem van het Europese immigratiebeleid wordt gevormd door de subcategorieën 'ontwikkeling en migratie', 'externe relaties', 'eerlijke behandeling' en 'integratie', hoewel deze subcategorieën over en weer met elkaar zijn vervlochten.

Hetgeen duidelijk wordt bij het onderzoeken van bovenstaande aspecten van het Europese immigratierecht, is dat dit recht continu in ontwikkeling is. Naast het strenger worden van diverse aspecten van dit immigratierecht, ziet men dat het recht op dit terrein ook groeit en volwassen wordt doordat nieuwe ideeën worden ontwikkeld voor het fenomeen immigratie. De strenge kant van het Europese immigratierecht wordt onder meer bepaald door de introductie van biometrische identificatiemethoden in visa en verblijfsvergunningen en de ruimte die wordt gelaten aan lidstaten voor (strenger) beleid omtrent gezinshereniging en langdurig ingezetenen. Op andere terreinen van het Europese immigratie acquis is juist een ommekeer te zien van een opstapeling van stringente regels en ideeën. Een nieuwe richting wordt bewandeld op het Europese niveau door ontwikkelingen als de lokale grensverkeervergunning om historische banden die de in 2004 toegetreden lidstaten hebben met buurlanden te eerbiedigen; versoepelde toegangseisen voor wetenschappelijk onderzoekers, houders van een Blue Card en jonge professionals om de doelen van de Lissabon Strategy te bereiken; de circulaire migratie patronen die momenteel worden ontwikkeld om optimaal te profiteren van de voordelen van de relatie tussen ontwikkeling en migratie; en de gerelateerde beleidsterreinen met betrekking tot mobiliteits-pakketten en geldstromen naar landen van oorsprong.

Binnen het raamwerk van de algehele aanpak van migratie wordt de Europese

Unie steeds meer flexibel in haar beleid om de meeste recente uitdagingen van migratie het hoofd te bieden. Deze flexibiliteit vindt echter niet direct zijn weerslag in de onderhandelingen met kandidaatlidstaten. Zodra de onderhandelingen over hoofdstuk 24, dat justitie, vrijheid en veiligheid betreft, worden geopend, zal blijken dat het immigratierecht- en beleid van Turkije rigoureus moeten worden aangepast om het in lijn te brengen met het EU acquis.

Het Turkse vreemdelingenrecht

Hoofdstuk drie schetst de huidige stand van het Turkse immigratierecht. Daartoe worden eerst de algemene principes van het vreemdelingenrecht geïntroduceerd. Vervolgens wordt het recht zelf onderzocht. Nadat is beschreven wie als immigrant volgens het Turkse recht kan worden betiteld, wordt een zelfde benadering gehanteerd als in hoofdstuk twee. Hierdoor worden eerst de regels omtrent toelating onderzocht en daarna de regels omtrent verblijf. Net als in hoofdstuk twee wordt eerst het visabeleid en het grensbeleid onderzocht onder de titel 'toelating', en vervolgens het verblijfsrecht, toegang tot de arbeidsmarkt en de regels voor wetenschappelijk onderzoekers en studenten onder de titel 'verblijf'. Een beschrijving van immigratie in de praktijk, de uitvoering daarvan door de Turkse autoriteiten alsmede het overeenstemmen van het Turkse recht met het Europese acquis, wordt met name in hoofdstuk vier besproken in plaats van hoofdstuk drie. De reden hiervoor ligt in de relevantie van deze elementen voor de vergelijking.

Met het doen van onderzoek naar de regels van toelating en verblijf van vreemdelingen in het Turkse recht ziet men de verschillende keuzes die de Turkse Republiek heeft gemaakt om de praktijk van het vreemdelingenrecht van het Ottomaanse Rijk te eerbiedigen. Aan de ene kant herinnert het toelatingsbeleid aan de Ottomaanse traditie om haar grenzen te openen voor een ieder die toegang verlangde. Dit liberale beleid was zichtbaar gedurende het gehele Ottomaanse Rijk, dat zich daardoor onderscheidde van gelijktijdige staten als het Russische Rijk. Het huidige Turkse visabeleid dat toegang verleent aan burgers van 51 landen door middel van een visum dat zonder veel moeite aan de grens kan worden verkregen, oogt als een bestendiging van het Ottomaanse visabeleid. Aan de andere kant dragen de huidige regels voor verblijf de symptomen van een andere fase in de Turkse geschiedenis, namelijk de laatste jaren van het Ottomaanse Rijk, en de beginjaren van de Turkse Republiek. Het vormen van beleid voor vreemdelingen in de beginjaren van de republiek hebben het vreemdelingenrecht bepaald tot het begin van de 21ste eeuw. Dit beleid, dat was ontworpen om de moslims van het Ottomaanse Rijk te herenigen binnen het territorium van de nieuwe republiek, droeg signalen in zich waaruit de angst naar voren kwam voor afscheidingsbewegingen afkomstig van Ottomaanse ervarin-

gen met opstand in de Balkan. Als gevolg hiervan werd het vreemdelingenrecht en de bijbehorende praktijk dat op dergelijke angst was gebaseerd, door vreemdelingen met wantrouwen en voorzichtigheid benaderd. Dit restrictieve aspect van het verblijfsrecht voor vreemdelingen bevat een uitzondering voor vreemdelingen van Turkse origine, dat ook hier afkomstig is van het vroegere beleid gericht op het herenigen van de moslimbevolking van het Ottomaanse Rijk in de Turkse Republiek.

Het is dankzij de beweging lid te worden van de Europese Unie en het aanpassen aan het raamwerk van het Europese recht, dat een ommekeer in het beleid zichtbaar is. De implementatie van de Wet op de werkvergunning voor vreemdelingen van 2003 is het duidelijkste voorbeeld van hoe de procedure voor het lidmaatschap van de EU de Turkse wetgeving beïnvloedt. Allereerst is het een van de eerste teksten op het terrein van het immigratierecht dat is aangenomen met als doel aan te sluiten bij het EU acquis. Voor het eerst in het Turkse recht is in deze wet bijvoorbeeld een definitie opgenomen van het begrip vreemdeling en is toegang van vreemdelingen tot de arbeidsmarkt gereguleerd. De wet is daarnaast een voorbeeld van de invloed van de EU op het juridische systeem van het vreemdelingenrecht op een andere manier, namelijk de uitwerking van het recht in de praktijk.
De praktijk van de Turkse autoriteiten, die bijna standaard iedere aanvraag voor een werkvergunning afwijzen, is echter de belichaming van de angst dat EU-gerelateerde wetgeving gedoemd is om een papieren werkelijkheid te blijven zolang als de mentaliteit van de autoriteiten gevormd wordt door het wantrouwen en voorzichtigheid jegens de vreemdelingen die deel willen uitmaken van de Turkse samenleving. Het voorbeeld van de Wet op de werkvergunning voor vreemdelingen van 2003 vertegenwoordigt de twee uitdagingen die Turkije wacht in haar poging om het Turkse recht in lijn te krijgen met het relevante Europese acquis: ten eerste het wijzigen van het recht zelf en ten tweede het wijzigen van de mentaliteit van de autoriteiten omdat de praktijk nog niet voldoet aan de gewijzigde wetgeving.

Overeenstemming van de Turkse wetten en praktijk met het Europese acquis.
Dit boek belicht het feit dat binnen de Turkse regelgeving ten aanzien van vreemdelingen vaagheid bestaat doordat de praktijk en de wetgeving elkaar niet volledig overlappen. De praktijk rond familiehereniging en de status van langdurig ingezetenen zijn twee voorbeelden van een dergelijke discrepantie. Een belangrijke taak voor Turkije is het opzetten van behoorlijk beleid op deze terreinen, dat niet alleen in lijn is met het Europese recht, maar ook correspondeert met de specifieke karakteristieken van immigratie naar Turkije. De

grote uitdaging is niet het instellen van een wet die in lijn is met het Europese recht maar het inbedden van de principes van het beleid in de praktijk. Het grote probleem is gelegen in het ontbreken van juridische zekerheid, het ontbreken van transparantie en de inconsistente arbitraire implementatie van bestaande regels, zonder een verplichting voor de staat om redenen te geven voor bepaalde keuzes. Deze 'traditie' creëert en wordt gecreëerd door een zekere mentaliteit ten opzichte van vreemdelingen. Implementatie van het EU vreemdelingenacquis zal Turkije dwingen om deze mentaliteit te veranderen.

De wijze waarop het nieuwe beleid zal worden ontvangen wordt voor een belangrijk deel bepaald door de gebruikte terminologie. De Turkse definitie van een immigrant luidt als volgt: een individu of deel uitmakend van een groep van Turkse origine die is gecommitteerd aan de Turkse cultuur, die naar Turkije komt om zich te vestigen en die is toegelaten volgens het vestigingsrecht. Deze definitie wekt de indruk dat vreemdelingen die niet vallen binnen deze definitie niet zullen worden gezien als personen die zich in Turkije hebben gevestigd. De uitkomst van een dergelijke benadering is dat 'immigranten', gunstiger worden behandeld om de gemakkelijkere integratie in de Turkse samenleving te garanderen. 'Vreemdelingen', worden gezien als tijdelijke passanten die toevallig in Turkije zijn, en worden minder gunstig benaderd doordat het vestigingsrecht niet op hen van toepassing is, en beslissingen omtrent hun situatie niet worden gemotiveerd. Het feit dat zij niet worden behandeld als gevestigde personen voorkomt dat zij worden gezien als een onderdeel van de samenleving dat recht heeft op een set van basisrechten die burgers en zelfs 'immigranten' wel hebben.

Dit onderzoek maakt tevens duidelijk dat, ondanks de voorzichtigheid in het verlenen van rechten aan vreemdelingen, Turkije nooit een land is geweest waar vreemdelingen niet welkom waren. Het visabeleid dat het voor burgers van bepaalde landen mogelijk maakt om gemakkelijk een visum te verkrijgen aan de grens, is hiervan een duidelijk voorbeeld. Het liberale visabeleid in tegenstelling tot de stringente verblijfsregels maakt duidelijk dat vreemdelingen meer dan welkom en gewenst zijn zolang zij als toeristen komen. Desalniettemin wordt deze gastvrije benadering niet gehandhaafd indien de vreemdeling in Turkije wenst te blijven, om onderdeel uitmakend van de samenleving, gebruik te maken van een juridisch systeem die vestiging in de Turkse Republiek mogelijk maakt, en het voor de gevestigde duidelijk is welke regels van toepassing zijn en hoe deze worden toegepast.

Kijkend naar het regime dat van toepassing is op vreemdelingen die geen toerist zijn, geeft dit boek aan dat er in het Turkse recht, de Turkse praktijk en de Turkse mentaliteit een scherp verschil bestaat tussen een burger en een vreemdeling. Het

resultaat van dit verschil is een compleet contrast met de principes die zijn neergelegd tijdens de Europese Raad van Tampere. Deze principes zijn juist gericht om de juridische status van derdelanders meer in overeenstemming te brengen met de juridische status van burgers van EU-lidstaten en om het verzekeren van een eerlijke behandeling van derdelanders in combinatie met een krachtig integratiebeleid dat erop toeziet hen de zelfde rechten en plichten te verschaffen als EU burgers.

De discrepantie tussen het Turkse recht betreffende vreemdelingen en de Tampere principes heeft diepe wortels aangezien de vreemdelingen die in Turkije woonachtig zijn, niet volledig bewust zijn van de regels die op hen van toepassing zijn. Dit komt door een combinatie van vele factoren zoals de onoverzichtelijke structuur van het Turkse vreemdelingenrecht en het gebrek aan regulering in een bepaalde situatie, hetgeen niet betekend dat de autoriteiten zulke situaties niet behandelen. Dit laatste punt draagt bij aan de tegenslagen die vreemdelingen in Turkije ondervinden, wanneer de autoriteiten situaties die niet gereguleerd zijn, zoals bijvoorbeeld aanvragen voor gezinshereniging, wel behandelen. Voor de vreemdeling is het niet duidelijk op basis van welke criteria de autoriteiten haar beslissingen baseert, waardoor een obscure situatie ontstaat. Al deze factoren dragen bij dat het Turkse regime een niet transparant, arbitrair en zoals in dit boek beschreven een vreemdeling-onvriendelijk systeem is.

Toekomstige stappen

Wat er moet gebeuren in Turkije is het catalogiseren van alle bestaande regels met betrekking tot vreemdelingen, waaronder die regels die voor vreemdelingen niet bekend zijn. Dit zou moeten gebeuren in de vorm van een vreemdelingenwet die alle relevante regels bevat voor toegang en verblijf door vreemdelingen. Hierdoor wordt het geconstateerde probleem van de onoverzichtelijke structuur aangepakt, alsmede het probleem van het niet transparante regime dat wordt veroorzaakt doordat circulaires met daarin cruciale aspecten voor het verblijf van vreemdelingen, niet bekend zijn bij de vreemdeling. Het Europese immigratiebeleid en wetgeving voor onderdanen van derde landen moet bestaan uit heldere, transparante en eerlijke regels; en Turkije, dat onderdeel wil worden van dit raamwerk, moet dezelfde aanpak aannemen. Turkije zou een onderscheid moeten maken tussen toeristen en legaal verblijvende vreemdelingen die al vele jaren in het land wonen. Voor deze laatste groep vreemdelingen zou een termijn van 5 jaar moeten worden vastgesteld, zodat zij voldoen aan de EU langdurig-ingezetenen-regelgeving waardoor ze een betere juridische status krijgen dat meer overeenkomt met de status van burgers.

Verschillende andere secundaire wetgevingsinstrumenten op EU niveau garan-

deren de houders van een specifieke status het recht op gelijke behandeling op terreinen als arbeidsvoorwaarden, erkenning van diploma's en sociale voorzieningen. Dergelijke gelijke behandeling voor wetenschappers en houders van een Blue Card zou versneld moeten worden geïmplementeerd in de Turkse wetgeving zodat het Turkse recht op dit punt in lijn wordt gebracht met het Europese recht, terwijl op hetzelfde moment het scherpe contrast tussen de regelgeving voor Turkse burgers, de regelgeving voor vreemdelingen van Turkse origine en de regelgeving voor vreemdelingen wordt verminderd.

Turkse wetgeving dat van toepassing is op vreemdelingen die het land binnen komen voor reden als gezinshereniging, het verrichten van arbeid, het doen van onderzoek of het volgen van een studie moet ook worden aangepast aan het relevante acquis als beschreven in hoofdstuk vier. Dienovereenkomstig moet een allesomvattend regime voor gezinshereniging worden opgezet. De verantwoordelijkheid voor de toelating van onderzoekers moet worden gedeeld met de betrokken onderzoeksinstituten en het verbod voor het toelaten van studenten op de arbeidsmarkt moet worden herzien. Door het in lijn brengen van het Turkse recht en de Turkse praktijk met EU standaarden zal het arbitraire karakter van het huidige systeem tegelijkertijd worden aangepakt. Het elimineren van deze arbitraire opstelling van het regime zal bijdragen aan de vermindering van het aantal illegale vreemdelingen die in Turkije leven.
Het is van belang dat Turkije zich realiseert dat onderdeel uitmaken van de Europese Unie betekent het delen van de doelen van de Unie en dat deze doelen moeten bestaan naast de traditionele overwegingen als de nationale veiligheid, nationale belangen etc. Dit houdt in dat bijvoorbeeld in het toelaten van wetenschappelijke onderzoekers, de doelen van de Lissabon Strategie en het Europese onderzoeksgebied, in dezelfde mate in overweging moeten worden genomen als nationale belangen.

Naast het opstellen van de nodige wetgeving om het recht in lijn te brengen met het Europese acquis en het transformeren van de vreemdeling-onvriendeijke mentaliteit van de autoriteiten, is het komen tot een Turkse overeenstemming met het EU acquis een lastig proces in vele opzichten. Het overnemen van Europese maatstaven in grensbeheer is een terrein waar de moeilijkheid niet alleen ziet op de houding van de Turkse staat, maar ook ziet op externe factoren zoals de onstabiele situatie in buurlanden. Irak is hiervan een goed voorbeeld omdat daar de veiligheid aan de grens veel belangrijker is voor Turkije dan ieder ander belang gerelateerd aan het overnemen van de Europese standaarden. Desalniettemin heeft Turkije aangetoond dat het bereid is om de Europese standaarden in grensbeheer over te nemen. Het in lijn brengen begint dan ook bij de grenzen in het westen, terwijl verdere aanpassingen omtrent grensbeheer aan

de overige grenzen zullen afhangen van de ontwikkelingen in buurland Irak.

Toetreding tot de Europese Unie betekent de acceptatie van het Europese acquis zoals dat geldt op het moment van toetreding. Op het moment dat een Turks lidmaatschap dichterbij komt, zal het immigratie-acquis niet alleen een compilatie zijn van interne regels met betrekking tot ingezetenen van derde landen. Het zal een integraal onderdeel zijn van een bredere, algehele benadering die verschillende beleidsterreinen omvat als externe relaties en ontwikkelingsbeleid. Aan de andere kant heeft Turkije de EU zekere expertise te bieden om het beleid in relevante terreinen van immigratie te verbeteren zoals op het gebied van immigratiebeleid binnen de externe relaties van de EU.

Desalniettemin zijn deze potentiële bijdragen niet een product van systematisch beleid, maar een natuurlijke consequentie van de geografische en historische positie van Turkije. Turkije zal leren om met immigratiebeleid te werken in de relaties met derde landen, overeenkomstig de EU belangen in externe relaties. In andere terreinen van immigratiebeleid, zoals integratie en fairtrade, zal Turkije op de zelfde manier een systematische benadering moeten kiezen in tegenstelling tot een toevallige benadering zoals dat nu het geval is. Relevante onafhankelijke en effectieve organen moeten worden opgezet om integratie en een eerlijke behandeling van vreemdelingen in Turkije te verzekeren, en de nodige wetgeving waar deze organen op moeten toezien zal moeten worden ontwikkeld.

Voor Turkije zal voor het creëren en ontwikkelen van een allesomvattend, coherent, transparant en realistisch immigratierecht- en beleid, dat overeenkomt met het EU acquis, een eerste concrete stap moeten zijn het verzamelen van alle informatie betreffende immigratie naar Turkije. Momenteel is het aantal vreemdelingen dat in Turkije verblijft en een bijdrage levert aan de economie niet bekend. Derhalve is het ontwerpen van een adequate integratie beleid niet mogelijk en kan het arbeidsbeleid niet worden geïmplementeerd op de huidige situatie. Een gedetailleerd en betrouwbaar beeld van vreemdelingen woonachtig in Turkije kan enorm bijdragen aan de ontwikkeling van een immigratiebeleid, dat kan uiteenlopen volgens de specifieke karakteristieken van de buitenlandse aanwezigheid in de verschillende regio´s van het land, als ook in de verschillende sectoren van de economie. Dit stelt Turkije ook in staat een idee te hebben hoe het gebruik kan maken van nieuwe ideeën die de EU momenteel aan het vormen is zoals mobiliteitspakketten en circulaire migratie. De snelle vestiging van de migratie en asiel gespecialiseerde overheidsinstantie, waarvan één van de taken het verzamelen en evalueren van informatie van migratie zal zijn, is daarom cruciaal.

Het geven van stof tot nadenken aan de EU

Nadat de tekortkomingen van het Turkse regime ten aanzien van het verblijf van vreemdelingen uiteengezet worden, wordt tevens aangegeven dat er terreinen zijn waar het Turkse recht- en beleid een verrijking kan zijn voor de ontwikkeling van het immigratiebeleid van de Europese Unie. Het is waar dat Turkije zichzelf in lijn moet brengen met de negatieve en positieve visa lijsten van de EU, maar Turkije heeft ook de expertise op verschillende gebieden van visabeleid waar de Europese Unie juist van kan profiteren. Het liberale karakter van het Turkse visabeleid is een waardevol voorbeeld voor de EU in het aantonen wat de voordelen van een liberale benadering in toelatingsbeleid kan zijn voor het land zelf, als ook voor de regio´s in buurlanden en of de nadelen van zulk beleid realistisch zijn. Binnen de context van de discussie op EU niveau met betrekking tot circulaire migratie, kunnen de Turkse ervaringen met de 'suitcase trade' eveneens als voorbeeld dienen hoe met zulke bewegingen kan worden omgegaan. Op dit punt kan als voorbeeld worden voorgesteld dat verschillende groepen van ingezetenen van derde landen EU visa kunnen verkrijgen bij de grens. Het zou een mogelijkheid voor de Europese Unie kunnen zijn om aan te tonen dat het daadwerkelijk gecommitteerd is aan haar migratie- en ontwikkelingsagenda, en dat het Fort Europa-beeld, dat door de jaren heen is gecreëerd, terzijde kan worden geschoven.

De paspoortvrije reisafspraken tussen Turkije, Syrie en Iran kunnen worden getransformeerd in een systeem dat acceptabel is voor de EU zonder dat er noodzakelijkerwijs een eind hoeft te worden gemaakt aan deze historische afspraken. Deze paspoortvrije reisafspraken, die van toepassing zijn op de burgers die in de grensstreken wonen, kunnen worden aangepast aan het lokale grensverkeerregime zoals dat door de EU is opgesteld. Op deze wijze kunnen de historische, sociale en culturele banden tussen Turkije, Syrie en Iran worden gehandhaafd, én tegelijkertijd voldoen aan het Europese recht, waardoor deze afspraken binnen het raamwerk van de EU worden gebracht, en de Europese Unie enorm kan profiteren in de sfeer van de externe relaties.

Laatste observatie

Al met al, zal Turkije niet alleen een aanmerkelijke hoeveelheid wetgeving moeten veranderen, maar ook diep gewortelde opvattingen moeten herzien zoals wat moet worden begrepen onder het concept vreemdeling, om op het terrein van het immigratierecht- en beleid klaar te zijn voor toetreding tot de Europese Unie. Het verminderen van het enthousiasme aan de kant van Turkije om de noodzakelijke hervormingen door te voeren helpt niet, zeker gezien de wijdverbreide veranderingen die op het terrein van immigratie moeten plaatsvinden. Echter, met de juiste benadering van de Europese Unie, dat Turkije een oprecht

lidmaatschapsperspectief geeft, zal Turkije de motivatie terug kunnen krijgen die het is verloren door de onduidelijke verklaringen van de zijde van de EU. Het terugkrijgen van die motivatie zal er voor kunnen zorgen dat Turkije de uitdagingen aangaat die het tegenkomt om het eigen vreemdelingenrecht- en beleid in lijn te brengen met het Europese acquis.

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Türkan Ertuna Lagrand was born in Ankara, Turkey on January 1, 1980. After graduating from the T.E.D. Ankara Koleji in 1996, she studied law at the Law Faculty of Ankara University, where she obtained her law degree in 2000. The same year, as the recipient of the Jean Monnet Scholarship of the EU Commission, she started her LL.M. study at the Erasmus University Rotterdam on Business and Trade Law. Upon obtaining her LL.M. degree in the following year, she moved back to Ankara in order to complete her lawyer's traineeship. During her traineeship she worked as a full-time legal trainee at the White & Case LLP in Ankara. She was also a member of the Foreign Relations and European Union Commission of the Turkish Bar Association. Having registered in the Ankara Bar as an attorney, in September 2004 she moved to the Netherlands to write her Ph.D. thesis at the European Law Department of the Erasmus School of Law. While writing her thesis she has also taught in the courses Introduction to EU Law and the Law of the European Union Advanced.