

Directive 2003/109 or the Legal Exclusion of the Long-term Resident

‘Other’

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I. INTRODUCTION

Council Directive 2003/109/EC¹ concerning the status of third-country nationals who are long-term residents was adopted on 25 November 2003. While acknowledging its positive contributions in some aspects², some commentators described it as inadequate and unsatisfactory.³

The historical developments which led to the adoption of this Directive⁴ have two precise antecedents. The first one dates back to March 1996 when the Council

¹ Council Dir 2003/109/EC of 25 November 2003 [2004] OJ L 16/44. The United Kingdom, Ireland and Denmark did not participate in the adoption of the Dir and are not bound by it or subject to its application. See Preamble to the Dir, recitals 25 and 26. Nonetheless, for comparative purposes, these countries will be cited throughout the paper.

² For instance, before the adoption of the Dir, third-country nationals could only move to another EU country for three months. For a complete relate of the situation of third-country nationals before the adoption of the Dir see H Staples, *The Legal Status of Third-country Nationals Resident in the European Union* (The Hague, Kluwer Law International, 1999).

³ S Peers, ‘Implementing Equality? The Directive on Long-term Resident Third Country Nationals’ (2004) 29 *European Law Review* 437, at 437.

⁴ For a historical relate of the Council negotiations see N Rogers and S Peers (eds), *EU Immigration and Asylum Law: Text and Commentary* (Leiden/Boston, Martinus Nijhoff, 2004) 623-28.

adopted its resolution on the status of third-country nationals residing on a long-term basis in the territory of the Member States.⁵ Later, in 1997, the Commission presented a proposal for a Convention on the admission of third-country nationals.⁶ The invariable dichotomy in the approach to immigration management⁷ between the Commission, backed most of the time by the European Parliament⁸ that usually has a more liberal approach than the Commission itself⁹, and the Council was present in these two proposals. On the one hand, the Council's motivation for adopting some kind of measure was that the integration of long term residents provided with more security, stability and social peace, both in daily life and in work, in the different Member States.¹⁰ On the other hand, the Commission's position was that the integration of long-term resident third-country nationals was an imperative dictated by

⁵ Res of 4 March 1996 [1996] OJ C 80/2.

⁶ Proposal published on 30 July 1997 [1997] OJ C 337/9.

⁷ Several authors have pointed out the confronted positions in the management of migration between, on the one hand, the Commission and the European Parliament and, on the other hand, the Council and some Member States. The former have had a more open approach compared to the more restrictive one of the latter. See B Melis, *Negotiating Europe's Immigration Frontiers* (The Hague, Kluwer Law International, 2001); A Geddes, *Immigration and European Integration. Towards Fortress Europe?* (Manchester, Manchester University Press, 2000); E. Guild, *Immigration Law in the European Community* (The Hague, Kluwer Law International, 2001).

⁸ It is notable to cite that the European Parliament had already proposed in 1990 to extend the scope of application of Regulation 1612/68 on freedom of movement for workers within the Community ([1968] OJ L 257/2) to second-generation immigrants, refugees and states persons. K Hailbronner, 'Third-country Nationals and EC Law' in A Rosas and E Antola (eds), *A citizens' Europe. In Search of a New Order* (London/Thousand Oaks/New Delhi, Sage Publications, 1995) 182, at 196.

⁹ G Papagianni, *Institutional and Policy Dynamics of EU Migration Law* (Leiden/Boston, Martinus Nijhoff Publishers, 2006) 253.

¹⁰ Preamble of the Res of 4 March 1996, above n 5.

the democratic and humanitarian tradition of the Member States.¹¹ In line with this, whereas the Council Resolution stated that long-term residence status should be granted after a maximum of ten years, the Commission's proposal reduced that period to five years residence if a permit for a further five years had already been granted.

The whole setting changed with the adoption of the Amsterdam Treaty¹² and with the agreement of the Tampere European Council Conclusions, which advocated further integration of third-country nationals within the Union with rights and obligations comparable to those of EU citizens.¹³ It is with this scenario in mind that the adoption of this Directive can be understood.

Among the historical considerations, there was a further question about its appropriateness that needed to be answered. Was it really necessary to have such a

¹¹ For a complete historical account see D Kostakopoulou, "Integrating" Non-EU Migrants in the European Union: Ambivalent Legacies and Mutating Paradigms' (2002) 2 *Columbia Journal of European Law* 181, at 188-192.

¹² On 1 May 1999, the Amsterdam Treaty took effect, adding a new title IV "Visa, Asylum, Immigration and Other Policies Related to Free Movement of Persons" to the EC Treaty. The new Articles 61 to 69 of the EC Treaty are designed to progressively establish an area of freedom, security and justice.

¹³ Presidency Conclusions of the Tampere European Council 15 and 16 October 1999. Para 18 of the Conclusions stated that: 'the European Union must ensure fair treatment of third country nationals who reside legally on the territory of its Member States. A more vigorous integration policy should aim at granting them rights and obligations comparable to those of EU citizens.' Moreover, para 21 signalled that: 'the legal status of third country nationals should be approximated to that of Member States' nationals. A person, who has resided legally in a Member State for a period of time to be determined and who holds a long-term residence permit, should be granted in that Member State a set of uniform rights which are as near as possible to those enjoyed by EU citizens; e.g. the right to reside, receive education, and work as an employee or self-employed person, as well as the principle of non-discrimination vis-à-vis the citizens of the State of residence.'

Directive? Why was it important to have a new special EC residence status?¹⁴ According to some estimates in January 2006 the number of third-country nationals residing in the EU was 18.5 million, which constituted 3.8% of the total EU population of almost 493 million.¹⁵ Despite the fact that the Tampere Conclusions called upon Member States to facilitate the acquisition of their respective nationalities by long-term residents living in their territory¹⁶, at present this is far from being possible to achieve for some reasons: First, there are States which do not accept renunciation of citizenship. This, combined with the fact that some European states do not recognise multiple nationality¹⁷, deprives numerous citizens of the possibility to naturalise. For instance, someone born in Europe of Moroccan parents would find it very difficult to obtain Dutch nationality.¹⁸ Secondly, there has been a new trend in Europe of tightening naturalisation requirements. The Netherlands, with the 2003 change to the Act on the Dutch Nationality, that required applicants for naturalisation to pass a four hour written test on both language (speaking, reading and writing) and general knowledge of Dutch Society, is a good example of this. Following this

¹⁴ K Groenendijk, 'The Long-Term Residents Directive, Denizenship and Integration' in A Baldaccini, E Guild and H Toner (eds), *Whose Freedom, Security and Justice? EU Immigration and Asylum Law and Policy* (Oxford, Hart Publishing, 2007) 429.

¹⁵ Third Annual Report on Migration and Integration, COM (2007) 512 final, 11 September 2007, at 3.

¹⁶ Para 21, above n 13.

¹⁷ These are at least Austria, Denmark, Germany, Luxembourg and the Netherlands. H Waldrauch, 'Acquisition of Nationality' in R Bauböck, E Ersbøll, K Groenendijk and H Waldrauch (eds) *Acquisition and Loss of Nationality. Policies and Trends in 15 European Countries* (Amsterdam, Amsterdam University Press, 2006) extensive online version of chapter 3 (<http://www.imiscoe.org/natac/>) at 40-41.

¹⁸ E Guild, *The Legal Elements of European Identity. EU Citizenship and Migration Law* (The Hague, Kluwer Law International, 2004) 77.

change, the number of applications for naturalisation reduced dramatically from around 200-300 each month to 40 in Rotterdam.¹⁹ Finally, there is also the fact that many third-country nationals may legitimately not be willing to lose their former nationality for numerous reasons like being willing to spend periods in the other country. In that sense, more bilateral agreements on double nationality are necessary.

Hence, a common framework for the regulation of the status of long-term resident third country nationals was needed. Directive 2003/109 was designed to fill this vacuum.

The subject matter of the Directive is twofold. First, it determines how a third-country national residing legally in the territory of a Member State can acquire long-term resident status. Secondly, it establishes the requirements to enjoy residence in a Member State other than the first one that has already granted the long-term residence status.

The objectives of the Directive are more complicated and can, in my opinion, be categorised in 3 groups.

1. **Integration of the third-country nationals:** The integration objective is mentioned consistently in the Commission proposal and in the preamble of the adopted Directive. Paragraph 4 of the preamble states that:

¹⁹ K Groenendijk, 'Legal Concepts of Integration in EU Migration Law' (2004) 2 *European Journal of Migration and Law* 111, at 112. The debate has also arisen in the United Kingdom with the publication of a green paper by the Home Office in which a new concept of probationary citizenship is introduced. See Home Office (Border & Immigration Agency), 'The Path to Citizenship: Next Steps in Reforming the Immigration System', February 2008.

The integration of third-country nationals who are long-term residents in the Member States is a key element in promoting economic and social cohesion, a fundamental objective of the Community stated in the Treaty.²⁰

Consequently, this is probably the most important objective of the Directive, at least as stated by the European Union.²¹

2. **Granting of rights and obligations comparable to those of EU citizens:** this aim is mentioned both in the Commission proposal and in the preamble as a prerequisite to the one before. In the preamble it is said that:

In order to constitute a genuine instrument for the integration of long-term residents into society in which they live, long-term residents should enjoy equality of treatment with citizens of the Member State in a wide range of economic and social matters, under the relevant conditions defined by this directive.²²

²⁰ Recital 4 of the preamble of Dir 2003/109/EC.

²¹ Former Commissioner Antonio Vitorino asserted its importance in the following terms: 'The integration of migrants is to my mind the greatest challenge of the common policy on migration. The success of the policy depends on it. Integrating migrants into society is both a matter of social cohesion and a pre-requisite for economic growth and greater competitiveness.' Final Address by Antonio Vitorino, former European Commissioner Responsible for Justice and Home Affairs in the Conference, jointly organized by the European Commission and the OECD: 'The Economic and Social Aspects of Migration', Brussels 21-22 January 2003. <http://www.oecd.org/dataoecd/16/20/15579858.pdf> (accessed 10 April 2008).

²² Recital 12 of Dir 2003/109/EC.

This is also in line with the Tampere conclusions mentioned previously.

- 3. The establishment of a common immigration policy.** This aspiration goes hand in hand with the establishment of an area of freedom, security and justice.²³ In order to assess the achievement of this objective, special attention should be paid to the level of policy convergence which has been attained with this Directive.²⁴

Other authors whose work will be acknowledged in the following pages have provided a more in depth portrayal of the Directive. Thus, with my analysis I intend to limit myself to show that these three objectives have not been achieved. Instead, this Directive represents a clear example of the construction of a new ‘Other’ at a European Law level. By the concept of a legal ‘Other’ I mean to say nationals of countries that are not part of the European Union, the European Economic Area (EEA)²⁵ or Switzerland.²⁶ Hence, the rest of the countries of the world are included in

²³ This also enhances the attainment of the internal market. Recital 18 of the Dir provides that: ‘Establishing the conditions subject to which the right to reside in another Member State may be acquired by third-country nationals who are long-term residents should contribute to the effective attainment of an internal market as an area in which the free movement of persons is ensured’.

²⁴ By policy convergence I refer ‘not only to the degree of harmonisation or level of “Europeanisation” based on the number of legal instruments that have been adopted at the EU level, but also to the discretion left to member states in the application of a wide range of provisions incorporated in the EU laws.’ T Balzacq and S Carrera, ‘Migration, Borders and Asylum. Trends and Vulnerabilities in EU Policy’ (Centre For European Policy Studies, Brussels, 2005) < www.ceps.be > accessed 10 April 2008, at 2.

²⁵ The European Economic Area comprises the EU27 and Liechtenstein, Norway and Iceland. The European Economic Area Agreement provides the citizens of these three states with basically the same rights as European Citizens with regards to free movement.

principle, although the situation is not static.²⁷ This concept of the construction of a new legal ‘Other’ can be assessed by following five different stages, all related to different articles in the Directive:

- a. First, with regard to **eligibility**, it will be seen that not all of the third-country nationals residing in Europe can submit an application for this status. On the contrary, many remain outside of the legal scope of the Directive with the aggravating circumstance of an unclear definition of the third-country national who can apply for this category.
- b. Secondly, with reference to **acquisition conditions**, it will be assessed that the attainment of this status by those who can

²⁶ Switzerland has signed an agreement with the European Union, which entered into force on 1 June 2002. As in the case with the citizens of the EEA, Swiss have free movement of workers and establishment as well as free movement for the economically inactive. See Decision of the Council, and of the Commission as regards the agreement on Scientific and Technological cooperation of April 4 2002 on the conclusion of seven agreements with the Swiss Confederation [2002] OJ L 114/1.

²⁷ It is important to note that there is a hierarchy both in the legal ‘Us’ and in the legal ‘Other’. Without entering into detail, as that is not the scope of this paper, it can be said that citizens of the new 12 Member States, with the exception of Malta and Cyprus, are still one step behind in the legal ‘Us’, as they don’t have freedom of movement of workers to all the other EU 15 Member States. Following the same line of reasoning, citizens of certain states, although still part of the legal ‘Other’, are in a better position. For instance, citizens of Turkey have a better situation with regards to employment in the EU than citizens of most African countries. Other nationals like Croatians will probably soon be citizens of the European Union. Other citizens, such as those from the US, Canada, Australia or New Zealand, have an easier access to work in some EU countries (notably Germany and the Netherlands). However, from a pure legal EU perspective they have to be considered part of the legal ‘Other’ although in a preferential position.

ask for it is not automatic. Not only is it not automatic, but it is also left to the discretion of Member States who can impose integration conditions that will vary from country to country.

- c. Thirdly, with respect to the **rights associated**, once the third-country national has secured this status, he²⁸ acquires rights that are not equal to those of a European citizen.
- d. Fourthly, in terms of the **security of the status**, there is not an absolute protection against expulsion for the long-term resident. Even in cases in which the third-country national has a strong link to the host country, he can be expelled.
- e. Finally, the possibility to **reside in other Member States** is contained within some important restrictions.

The Directive will be compared to the Commission proposal²⁹ where appropriate, as well as to other instruments such as 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.³⁰ Examples will be given about the different approaches to its implementation that the Member States are taking. This will show, among other things, how the desired policy convergence is not being achieved and how the integration objective is left aside, outshone by other considerations.

²⁸ He, him or his will be used to denote both the masculine and the feminine genre.

²⁹ COM (2001) 127 of 13 March 2001 [2001] OJ C 240E/79.

³⁰ Directive 2004/38/EC of the European Parliament and of the Council 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 [2004] OJ L158/77.

II. ELIGIBILITY OR THE ‘OTHER’ WHO CAN BE ADMITTED

The scope of the Directive is stated in Article 3 as applying to ‘third-country nationals residing legally in the territory of a Member State’. Article 3(2) defines the third-country nationals to whom this Directive does not apply. When the Commission first proposed the Directive, refugees and doctoral students were included. The Council rejected both. Therefore, the list of third-country nationals who can not apply for a long-term resident permit was completed as follows:

- a. Those who reside in order to pursue studies or vocational training;
- b. Those who are authorised to reside in a Member State on the basis of temporary protection;
- c. Those who are authorised to reside in a Member State on the basis of a subsidiary form of protection;
- d. Those who are refugees or have applied for recognition as refugees;
- e. Those who reside solely on temporary grounds such as au pair or seasonal worker, or as workers posted by a service provider for the purposes of cross-border provision of services, or as cross-border providers of services;
- f. Those whose residence permit has been formally limited.³¹

Hence, the final Directive adopted included two important modifications to the one originally proposed: the exclusion mentioned above of the doctoral students and the inclusion of a clause regarding those whose residence permit had been formally

³¹ Art 3.2 also establishes that diplomats cannot apply for a long-term residence permit. They are not included in the enumeration as they are not relevant to the discussion followed here.

limited. The importance of this clause rests on the fact that not a single Member State in the European Union grants third-country nationals an unlimited residence permit. On the contrary, they are usually limited by the economic activity, time, or both.³² Apparently, this sentence was added on a proposal 'from Belgium without any clarifying explanation.'³³ This is lamentable as it could exclude many third-country nationals from the scope of the directive, which would make 'a mockery of the Tampere Council Meeting's statement of intention.'³⁴ According to Peers, the definition of 'limited' will be an issue of Community Law and not of national law. Moreover:

In light of the purpose of the Directive, the exception can only apply to persons whose residence permit cannot in principle be extended under the relevant applicable rules at all, or for more than a certain period (totalling less than five years).³⁵

It is, in any case, regrettable that such an ambiguity was inserted in the Directive.³⁶ It will be the national courts and the ECJ who will have the last word.³⁷

³² C Adam and A Devillard, *Comparative Study of the Laws in the 27 EU Member States for Legal Migration* (Brussels, IOM, 2008) at 76-77.

³³ L Halleskov, 'The Long-term Residents Directive: A Fulfilment of the Tampere Objective of Near Equality?' (2005) 7 *European Journal of Migration and Law* 181, at 184-85

³⁴ E Guild, above n 18, at 225.

³⁵ S Peers, above n 3, at 448-49.

³⁶ Ireland, who is not obliged by this Dir, seems to have followed this line of thought in his new 2008 Immigration, Residence and Protection Bill. In fact, if adopted, s 36 (5) (f) states that a period of residence which 'consists of a period where the foreign national's residence permission was non-renewable or otherwise formally limited' shall not be reckonable for the acquisition of a long-term residence permit.

On this issue, the Cyprus Supreme Court has already made a decision, stating that a migrant was not eligible for this permit, regardless of the fact that she had been legally and continuously living for five years, as her residence permit had been formally and temporary limited in time.³⁸ The importance of the validity or not of this interpretation is enormous as many third-country nationals could see the door to the long-term permit closed.

III. THE SECOND STEP OR THE LONG JOURNEY OF THE ‘CHOSEN ONES’

When the Commission proposed the Directive it established some clear objective requirements to obtain the long-term residence permit. Among them, were the prerequisite of a five-year legal and continuous residence, stable resources and sickness insurance. Member States could refuse to grant the status on grounds of public policy or public security. Periods of absence from the territory of the Member State did not interrupt the five years period when they were no longer than six consecutive months. The Council added to the final Directive that the total period of absence during those five years can not exceed ten months although Member States may accept a longer period of absence.³⁹ It is probable that the Commission will propose an extension of this period to two or three years.⁴⁰

³⁷ E Guild, above n 18, at 225.

³⁸ For more information see the website of KISA <<http://www.kisa.org.cy/EN/news/561.html>> accessed 10 April 2008.

³⁹ This is desirable in light of the current debates about circular migration and its benefits. See for instance, A Portes, ‘Migration and Development: A conceptual review of the Evidence’ (2006) The Centre for Migration and Development, Princeton University, CMD Working Paper # 06-07; F

However, what is more relevant to this debate is the addition by the Council of Article 5(2): ‘Member States may require third-country nationals to comply with integration conditions, in accordance with national law.’

This was added mainly on the initiative of Austria, Germany and the Netherlands and is considered by many commentators to be the ‘real Achilles heel of the Directive.’ This is because there are no stated limits on the significance of the integration conditions and there is no standstill provision, as is the case with article 14(4) for instance.⁴¹

As Groenendijk points out, the wording ‘to comply with integration measures’ was replaced by the wording ‘to comply with integration conditions’. In that way, Member States are authorised to ask the immigrants ‘to pay, either fully or partially, the costs of the integration measures’.⁴²

The integration condition is worrying. Some Member States are not hesitating to implement such a condition in their national legislations. In 1999, only Germany

Docquier, ‘Brain Drain and Inequality Across Nations’ (2006) FNRS, IRES, Université Catholique de Louvain and IZA Bonn, Discussion Paper No. 2440; LT Katseli, REB Lucas and T Xenogiani, ‘Effects of Migration on Sending Countries: What do We Know?’ (2006) OECD Development Centre, Working Paper No. 250.

⁴⁰ Commission (EC) ‘On Circular Migration and Mobility Partnerships between the European Union and Third Countries’ (Communication) COM (2007) 248, 16 May 2007, at 10.

⁴¹ S Boelaert-Suominen, ‘Non-EU Nationals and the Council Directive 2003/109/EC on the Status of Third-country Nationals who are Long-term Residents: Five Pace Forward and Possibly Three Paces Back’ (2005) 42 *CML Rev* 1011, at 1023.

⁴² K Groenendijk, above n 19, at 122.

required knowledge of the language to obtain a permanent residence permit.⁴³ Today, 14 Member States are applying some kind of integration conditions. These conditions vary from country to country and they can be divided between language requirements and civic knowledge requirements.⁴⁴ Depending on the existence of conditions and on when these conditions are imposed, countries can be divided in three groups:

a. Those which require integration before the third-country national is willing to acquire the long-term residence permit, usually by signing an integration agreement: The case of the Netherlands is very relevant. In 1998, a first law was passed named 'Act on the Integration of New Immigrants.'⁴⁵ The act provided for an integration programme of 600 hours comprising of language courses and courses on Dutch society. There was an administrative fine for those who did not participate in the programme.⁴⁶ However, since 1 January 2007, the 'Civic Integration Act'⁴⁷ replaced the 1998 Act. The new act has the same objective of providing courses on Dutch language and society to the newcomers. Nonetheless, it has three important

⁴³ K Groenendijk, E. Guild and R. Barzilay, *The Legal Status of Third-Country Nationals who are Long-Term Residents in a Member State of the European Union* (Nijmegen/Brussels, Office for Official Publications of the European Commission, 2000/2001) 43.

⁴⁴ C Adam and A Devillard, above n 32, at 52-53.

⁴⁵ Wet inburgering nieuwkomers (Act on the Integration of New Immigrants). It entered into force in 30 September 1998 but it has now been repealed by the new Civic Integration Act.

⁴⁶ L Besselink, 'Unequal Citizenship: Integration Measures and Equality' in S Carrera (ed) *The Nexus between Integration, Immigration and Citizenship in the EU* (Brussels, Collective Conference Volume, Challenge Liberty & Security, CEPS April 2006) 14, at 15.

⁴⁷ Wet inburgering, Wi (Civic Integration Act).

differences. First, the Act also applies to some old-comers.⁴⁸ Secondly, the person involved has to pass an exam and not merely follow a course. The penalty for not passing the exam adds, to the administrative pecuniary sanction, a more severe one, such as the impossibility of acquiring the long-term resident status. Thirdly, it is the third-country national who has to pay for the exam and the course and not the government as it was before.⁴⁹ Those who think that they possess enough knowledge of Dutch and the Netherlands can take a test without attending the course. The period within which the candidates have to pass the exam varies from three and half years, if the candidate has already passed a basic exam abroad, to five years in other cases. Interestingly enough, as of 15 March 2008 it has become more difficult to pass the Spoken Dutch Test as candidates are required to answer more questions correctly in order to pass.

In Austria third-country nationals who have an initial settlement permit or who apply for an additional settlement permit have to comply with the integration agreement,⁵⁰ although some exceptions may apply to certain third-country nationals.⁵¹ The integration agreement consists of two modules: one on the acquisition of the ability to read and write for those who need it and another one on knowledge of

⁴⁸ In effect, the Act provides that the old-comers who do not have a Dutch passport, are between 16 and 65 years old, already lived in the Netherlands before 1 January 2007, lived in the Netherlands for fewer than eight years when they were of school age and have no diplomas to prove that they have an appropriate knowledge of Dutch and the Netherlands, must also undergo integration.

⁴⁹ The Act provides that some municipalities will issue a so-called 'integration grant' paying for the preparation course to those without enough resources. Basically, the Act defines them as those on social benefits, those who have no income or those who have a religious function.

⁵⁰ 2006 Austrian Settlement and Residence Act, Art 14 (3).

⁵¹ *Ibid.*, Art 14 (4).

German and acquisition of the capacity to participate in the social economic and cultural life in Austria.⁵² It is interesting to mention that the language requirements are higher and more difficult to attain than in the past.⁵³ In order to obtain a long-term residence permit the third-country national has to have complied with the integration agreement.⁵⁴ In case of non compliance with the integration requirement expulsion is contemplated in the law as a means of last resort.⁵⁵

In Denmark, which is not obliged by the Directive, a third-country national has to sign an integration contract when he is granted a residence permit. In that contract, signed with the local council, it is decided the degree and content of the programme. In order to obtain a permanent residence permit,⁵⁶ a third-country national must have completed this introduction programme and passed a test in Danish language.⁵⁷

France is also relevant to highlight the pattern of tightening requirements over a period of time. A permanent residence status had been in place since the immigration law of 1984. This law was quite liberal and provided many possibilities for third country nationals to acquire this status. There was no integration condition.⁵⁸

⁵² *Ibid.*, Art 14 (2).

⁵³ An A2 level of German knowledge instead of an A1 is now required to be allowed to stay in the country. K König and B Perchinig, 'Austria', in J Niessen, Y Schibel and C Thompson (eds) *Current Immigration Debates in Europe* (Brussels, Migration Policy Group, 2005) <http://www.migpolgroup.com/multiattachments/2956/DocumentName/EMD_Austria_2005.pdf> accessed 10 May 2008, at 11.

⁵⁴ Above n 50, Art 45.

⁵⁵ Austrian Alien Police Act, Art 54(4)

⁵⁶ This is usually granted only after seven years, although there are some exceptions. See Art 11 (3) AA Danish 2006 Aliens Act.

⁵⁷ C Adam and A Devillard, above n 32, at 197-98.

⁵⁸ D Lochak, 'L'Intégration Alibi de la Précarisation', *Plein Droit* 59-60 : 3-6.

However, the requirements to acquire this status changed in November 2003 when the Loi Sarkozy⁵⁹ entered into force. This Loi Sarkozy amended the Ordonnance of 1945 which had been in place with regards to immigration. This Ordonnance was replaced by the new Code de l'entrée et du séjour des étrangers et du droit d'asile (CESEDA)⁶⁰, which entered into force on 1 March 2005. The Loi Sarkozy made it more difficult to acquire the long-term residence status.⁶¹ The Code had already been modified in 2006⁶² to introduce an integration contract requiring the third-country nationals to attend a civic formation course, and a linguistic one if needed. The signature of this contract has been compulsory since 1 January 2007. Although it is true that the courses are free of charge, and that there are some exceptions to the obligation to have to sign the contract (when the foreigner has attended a French school for three years among others), it should be noted that on the first renewal of the residence permit and in order to acquire the long-term resident status the administrative authorities will take into consideration the non respect of the integration contract.⁶³

⁵⁹ Act no. 2003-1119 of 26 November 2003, JORF no. 274 of 27 November 2003, p. 20136.

⁶⁰ JORF 25 November 2004.

⁶¹ K Groenendijk, 'The Legal Integration of Potential Citizens: Denizens in the EU in the Final Years before the Implementation of the 2003 Directive on Long-term Resident Third Country Nationals' in R Bauböck et al, above n 17, extensive online version of chapter 10, at 18.

⁶² It was modified by Loi number 2006-911 du 24 juillet 2006 relative à l'immigration et à l'intégration. The latest version is the one modified by Loi number 2007-1631 du 20 novembre 2007, JORF 21 novembre 2007.

⁶³ Article L311-9 reads as follows: 'L'étranger admis pour la première fois au séjour en France ou qui entre régulièrement en France entre l'âge de seize ans et l'âge de dix-huit ans, et qui souhaite s'y maintenir durablement, prépare son intégration républicaine dans la société française. A cette fin, il

Finally, in Germany an integration course has to be successfully completed to show adequate knowledge of the German language and basic knowledge of the legal and social system and the way of life. This course is compulsory for some third-country nationals (notably those who do not speak German, receive benefits or have special integration needs).⁶⁴

b. Those which only impose an integration condition when the third-country national is willing to apply for a long-term residence permit: In Estonia there is a simple language test to prove that the third-country national can speak Estonian at

conclut avec l'Etat un contrat d'accueil et d'intégration, traduit dans une langue qu'il comprend, par lequel il s'oblige à suivre une formation civique et, lorsque le besoin en est établi, linguistique ... La formation civique comporte une présentation des institutions françaises et des valeurs de la République, notamment l'égalité entre les hommes et les femmes et la laïcité. La formation linguistique est sanctionnée par un titre ou un diplôme reconnu par l'Etat. L'étranger bénéficie d'une session d'information sur la vie en France et d'un bilan de compétences professionnelles. Toutes ces formations et prestations sont dispensées gratuitement. Lorsque l'étranger est âgé de seize à dix-huit ans, le contrat d'accueil et d'intégration doit être cosigné par son représentant légal régulièrement admis au séjour en France. Lors du premier renouvellement de la carte de séjour, l'autorité administrative tient compte du non-respect, manifesté par une volonté caractérisée, par l'étranger, des stipulations du contrat d'accueil et d'intégration. L'étranger ayant effectué sa scolarité dans un établissement d'enseignement secondaire français à l'étranger pendant au moins trois ans est dispensé de la signature de ce contrat. Il en va de même pour l'étranger âgé de seize à dix-huit ans révolus pouvant prétendre à un titre de séjour et relevant des dispositions prévues à l'article L. 314-12. Il en est de même de l'étranger titulaire de la carte de séjour mentionnée au 5° de l'article L. 313-10 ou à l'article L. 315-1, de son conjoint et de ses enfants âgés de plus de seize ans ...'.

⁶⁴ See s 9 and 43-45 of the 2004 Residence Act (last amended by the Act Amending the Residence Act and other acts of 14 March 2005).

least at a basic level.⁶⁵ **Portugal** requires a basic knowledge as well.⁶⁶ The same occurs in **Latvia** which requires a sufficient knowledge of the Latvian language in order to grant the long-term resident status.⁶⁷ Similar to this is the case in **Romania** with a satisfactory level required.⁶⁸ In **Greece**, before applying, immigrants must pass an integration test, which they may sit only after attending 125 hours of special lessons (language proficiency and knowledge of the culture) offered by the education ministry's institute for life-long education (IDEKE). This course is free but there are a maximum number of persons who can attend this course. Immigrants who have completed secondary school or its equivalent in Greece are exempt from this requirement. This Greek EU-wide long-term resident status costs 900 euros which is a too high fee considering that is roughly equivalent to two months minimum salary.⁶⁹ **Cyprus** has followed the Greek example and requires knowledge of Greek and of Cypriot History and Civilization which will be certified by the Ministry of Education and Culture.⁷⁰ **Lithuania** is comparable to Greece and Cyprus in the sense that a

⁶⁵ This situation follows on from the 2006 amendment to the Aliens Act. The language requirement has been in place since 1 June 2007. For more information see the Estonian Citizenship and Migration Board <www.mig.ee> accessed 10 April 2008.

⁶⁶ Portuguese Immigration Law, Act 23/2007, Art 126(1)(e).

⁶⁷ Art 3 of the Law 'Long-term resident status of the European Community in Latvia'.

⁶⁸ Romanian Emergency Ordinance 194/2002, Art 71(d).

⁶⁹ See Law 3386/2005 entitled 'Entry, residence and social inclusion of third country nationals in Greek territory'. Retrieved at <http://www.imepo.gr/documents/Nomos3386_en.pdf> accessed 10 April 2008. Articles 67-69.

⁷⁰ See KISA, 'Analysis and Positions on the Policy and Proposed Bill of the Cyprus Government for the Transposition of Directive 2003/109/EC (long-term residents), Directive 2003/86/EC (family reunification) and Directive 2002/90/EC (facilitation of unauthorised entry)' (Memo 13 April 2006)<http://www.kisa.org.cy/EN/resources/position_papers/579.html> accessed 20 May 2008, at 10.

civic knowledge is required in addition to the language one.⁷¹ In **Slovakia**, the level of the third-country national's integration in the Slovak society is taken into account when granting this permit. This notion of integration is vague as the law does not detail it.⁷² In **Ireland**, which is not obliged by this Directive, according to a new bill not yet enacted, a third-country national has to demonstrate a reasonable competence to communicate in English or Irish and has to show that he has made reasonable efforts to integrate into the Irish society.⁷³ In the **United Kingdom**, which is not obliged by the Directive either, in order to obtain a settlement permit (long-term residence) the third-country national has to pass a language and knowledge of life in the UK test. This requirement has been in place since 2 April 2007.⁷⁴

c. Those who might offer language courses or other integration courses (mostly free) without imposing the passing of an exam to obtain a long-term residence permit: Bulgaria, Czech Republic, Finland, Hungary, Italy, Malta,⁷⁵ Poland,

⁷¹ Article 53(6) of the Law on the Legal Status of Aliens of 29 April 2004 No. IX-2206 as amended by 28 November 2006 No X- 924, provides that in order to acquire the long-term residence status, a third-country national 'has passed the examination in state language and in the fundamentals of the Constitution of the Republic of Lithuania'. See the law at <http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=307827> accessed 10 April 2008.

⁷² C Adam and A Devillar, above n 32, at 410.

⁷³ See S 36 (4) (c) (ii) and (iii), above n 36.

⁷⁴ C Adam and A Devillard, above n 32, at 458.

⁷⁵ It is interesting to note that Malta does not impose any integration condition in order to acquire the long-term resident permit. Nevertheless, it may require long-term residents from other EU Members coming to Malta to attend and successfully complete a Maltese language course. Information retrieved from the Maltese Ministry for Justice and Home Affairs <http://www.mjha.gov.mt/departments/citizen/urp_3cn.pdf.pdf> accessed 10 May 2008.

Slovenia, Spain and Sweden. With regards to Luxembourg, the Government is in the process of changing its 1972 immigration law. Hitherto, it is not clear whether an integration requirement will be introduced or not. Finally, with reference to Belgium, it is interesting to note that there is no integration requirement in order to acquire the long-term resident permit. However, the Flemish Community has since 2003 imposed a policy called 'civic integration'. By virtue of this, the third-country national who registers for the first time in the Commune has to follow a 60 hours course on the duties and values of the Flemish society and a 120 hours Dutch language course. In case of non compliance with this requirement, an administrative fine can be imposed which ranges from 50 to 5000 euros.⁷⁶

As Besselink points out all of these developments show that the 'discourse about integration has become discourse about admission and residence, and is now even extended to be a discourse about expulsion'.⁷⁷ In that sense, Member States use integration to avoid giving a more secure status to citizens who have been established for a long time in their territories.

By bringing these developments to the fore it can be seen how there is a new trend for emphasising integration conditions even for persons who:

- a. have been residing legally for the precedent five years (therefore they have been admitted before into that country);
- b. have a residence permit that has not been formally limited,

⁷⁶ C Adam and A Devillard, above n 32, at 148.

⁷⁷ L Besselink, 'Expulsion and Integration: Erecting Internal Borders within the Kingdom of the Netherlands', (Challenge Liberty and Security, September 2006) <<http://www.libertysecurity.org/article1096.html>> accessed 10 April 2008, at 5.

- c. have stable and regular resources as well as sickness insurance⁷⁸ and
- d. do not constitute any threat in terms of public policy or public security.

This is very unfortunate and represents a line of thought that believes in the purity of the nation:

Concern for the cultural, linguistic and ethnic integration of aliens may send a signal which accentuates both the otherness of the alien and an intolerance of the dominant culture towards such otherness.⁷⁹

Hence, before the immigrant is allowed entrance into a more secure status 'he or she must abandon attributes of being a third country national.'⁸⁰ Moreover, this concept of compulsory integration does not appear in Directive 2004/38, thus making a significant departure from European citizens in terms of mobility between Member States.

Those Member States, which were never happy with the idea of a Common European Immigration Policy, have found in this concept their new safeguard clause to continue applying their internal laws. Language requirements should not be used to debilitate the position of legitimate workers by not granting them a more secure status. It is presumable that the European Court of Justice will also opine on this in the next few years.

⁷⁸ In the Commission proposal, this requisite did not apply to third-country nationals born in the territory of a Member State.

⁷⁹ JHH Weiler, 'Thou Shalt not Oppress the Stranger: On the Judicial Protection of the Human Rights of Non-EC Nationals' (1992) 3 *European Journal of International Law* 67.

⁸⁰ E Guild, above n 18, at 234.

IV. ONCE YOU HAVE BEEN ADMITTED YOU DO NOT HAVE EQUAL RIGHTS

It has been remarked before that one of the main objectives of the directive was to give rights and obligations comparable to those of the EU citizens and equality of treatment with citizens of the Member State in a wide range of economic and social matters. It has been seen how not every third-country national is eligible for the acquisition of the long-term resident status and how even those who are eligible have to fulfil different requirements. It could be thought that these 'chosen' third-country nationals would benefit from equality in rights that, if not complete, would be extremely close to the one that the European citizens enjoy. Article 11 deals with the rights in which long-term residents enjoy equal treatment with nationals. However, this equal treatment is not completely achieved as there are different justifications by which this equality may be limited by a Member State:

- a. Access to employment or self-employed activities is limited as such activities cannot 'entail even occasional involvement in the exercise of public authority' according to Article 11. This limitation⁸¹ differs from the one imposed in Article 39(4)⁸² which has been narrowly interpreted by the European Court of Justice.⁸³

⁸¹ There is a second limitation in Art 11(3) (a) where the positions are reserved for nationals of the state, EU citizens and European Economic Area nationals by existing national or Community legislation. This limitation was not in the Commission proposal and its meaning is ambiguous.

⁸² Art 39(4) of the EC Treaty reads as follows: 'The provisions of this Article shall not apply to employment in the public service.' However, for the self-employed, it is almost the same clause which appears for EU citizens in Art 45 of the EC Treaty, although the terms slightly change from 'public' to

b. Education⁸⁴, which includes study grants⁸⁵ and vocational training, is limited as Member States may require proof of appropriate language proficiency⁸⁶ for its access, and admission to university may be subject to the fulfilment of specific education prerequisites (Art. 11(3)(b)). Once more, this limitation was not in the Commission proposal and its vague terms confer a ‘significant amount of discretion to the Member States’.⁸⁷ These rights are more limited compared to the ones EU citizens enjoy by Regulation 1612/68, Article 7 (2) and (3).⁸⁸

‘official’ authority. The first term seems wider in scope. Art 45 reads as follows: ‘The provisions of this Chapter shall not apply, so far as any given Member State is concerned, to activities which in that State are connected, even occasionally, with the exercise of official authority.’ There is some case law on the subject interpreting narrowly this exception: Case 2/74 *Reyners v. Belgium* [1974] ECR 631; Case C-42/92 *Thijssen v. Controledienst voor de Verzekeringen* [1993] ECR I-4047. See comments by P Craig and G de Búrca, *EU Law: Text, Cases and Materials* (Oxford, Oxford University Press, 2008, 4th), at 795-96.

⁸³ The Court of Justice has taken a functional view of the meaning of public service in which the key requirement is the exercise of official authority on a regular basis. See cases 66/85 *Lawrie-Blum v Land Baden Württemberg* [1986] ECR 2121; Case 307/84 *Commission v France* [1986] ECR 1725.

⁸⁴ Recital 14 makes clear that: ‘The Member States should remain subject to the obligation to afford access for minors to the educational system under conditions similar to those laid down for their nationals’.

⁸⁵ This provision is to be applied in accordance with national law. Recital 15 of the Dir provides that: ‘The notion of study grants in the field of vocational training does not cover measures which are financed under social assistance schemes’.

⁸⁶ This should always carry a certain proportionality test. L Halleskov, above n 33, at 194.

⁸⁷ L Halleskov, *Ibid.*, at 195.

⁸⁸ Regulation (EEC) No 1612/68, above n 8. See L Halleskov, *Ibid.*, at 194-97.

- c. There is a territorial limitation with regards to the rights described in Article 11(b), (d), (e), (f) and (g),⁸⁹

‘where the registered or usual place of residence of the long-term resident, or that of family members for whom he or she claims benefits, lies within the territory of the member state concerned’ (Article 11(2)).

This provision concerns a long-term resident who is exercising his right of movement to another Member State and who has not yet acquired the long-term resident status in that second Member State.

- d. Equal treatment in respect of social assistance and social protection may be limited to core benefits.⁹⁰ This was not in the Commission proposal. Moreover, the proposal stated the right to equal treatment in social benefits, which has been erased from the final Directive. EU citizens have a much better treatment by Regulation 1408/71⁹¹ complemented by Article 7 (2) of Regulation 1612/68.⁹²

⁸⁹ (b) education and vocational training, including study grants; (d) social security, social assistance and social protection; (e) tax benefits; (f) access to goods and services and the supply of goods and services made available to the public and to procedures for obtaining housing ; (g) freedom of association and affiliation and membership of an organisation representing workers or employers.

⁹⁰ ‘With regard to social assistance...core benefits...covers at least minimum income support, assistance in case of illness, pregnancy, parental assistance and long-term care.’ Recital 13, preamble.

⁹¹ Council Reg (EEC) No. 1408/71 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community. [1971] OJ L 149.

⁹² L Halleskov, above n 33, at 197-99.

Considering the points above, one can agree with Halleskov that this directive ‘accords long term residents an absolute right of equal treatment with nationals in very few areas of life’.⁹³ The status of long-term resident provides comparable rights to those of a European citizen, however there are many grounds on which Member States can restrict them.⁹⁴ Pressure should be put on Member States to make use of the possibilities opened up by Article 11(5), by which they can grant access to additional benefits or grant equal treatment with regard to other areas.⁹⁵

V. LIMITED SECURITY AGAINST EXPULSION

⁹³ L Halleskov, *Ibid.*, at 200.

⁹⁴ S Carrera, “‘Integration’ as a Process of Inclusion for Migrants? The Case of Long-Term Residents in the EU”, (Brussels, CEPS Working Document No. 219/March 2005) <www.ceps.be> at 16.

⁹⁵ Interestingly enough, this Art does not make any mention to voting rights. However, the European Parliament, in its opinion to the Dir, amended this Art by adding that they may also extend these benefits to ‘participation in political life, including voting rights at local and European level’. See [2002] OJ C 284 E, at 94. Regarding this, there is the Council of Europe Convention on the participation of Foreigners in Public Life at Local Level adopted on 5 February 1992. By April 2008, the only EU countries which have ratified it were Denmark, Finland, Italy, the Netherlands and Sweden. The United Kingdom, Cyprus and the Czech Republic have signed it but not ratified it. From outside the EU Norway, Iceland and Albania have also ratified it. The Convention provides also that the Parties may undertake to grant to every foreign resident the right to vote in local elections, after five years of lawful and habitual residence in the host country, and to stand for election. Some countries provide resident third-country nationals with voting rights in municipal elections like Denmark, Finland, Ireland, the Netherlands, Sweden, Estonia, Hungary, Lithuania, the Slovak Republic and Slovenia. See H Waldrauch, ‘Electoral Rights for Foreign Nationals: A Comparative Overview of Regulations in 36 Countries’, National Europe Centre Paper No. 73, 2003, <www.anu.edu.au/NEC/Archive/waldrauch_paper.pdf> accessed 10 April 2008, at 24-25. By contrary, this is a right for any European citizen by virtue of article 19 EC Treaty.

The security of residence is one of the most important aspects of the Directive and of the integration of third-country nationals. In the absence of that kind of security there is ‘no incentive for the society to invest in the individual or for the individual to seek to become part of the society’.⁹⁶ If the immigrant fears that he could be expelled, ‘that fear will reinforce the orientation towards the country of origin’.⁹⁷ The relevance of a secured status is hence evident. Once again in this matter, the Commission proposal, in its Article 13, was far more generous than the final Directive adopted.⁹⁸ Several key features were omitted from the final version:

- a. First, in the proposal Member States could only take a decision to expel a long-term resident based on his ‘personal conduct’, when the threat affected a ‘fundamental interest of society.’ These two requirements are present for EU citizens in Article 27(2) of Directive 2004/38. There is some case law on their exact meaning. The first requirement (personal conduct) was defined in *Bonsignore v Köln*.⁹⁹ In this case, an Italian national was facing deportation as a measure of a general preventative nature.¹⁰⁰ The Court said that:

⁹⁶ E Guild, ‘Citizens, Immigrants, Terrorists and Others’ in A Ward and S Peers (eds) *The European Charter of Fundamental Rights* (Oxford, Hart, 2004) 231, at 236.

⁹⁷ K Groenendijk, ‘Long-Term Immigrants and the Council of Europe’ in E Guild and P Minderhoud (Eds) *Security of Residence and Expulsion. Protection of Aliens in Europe*, (The Hague/London, Kluwer Law International, 2000)7, at 8.

⁹⁸ Rogers and Peers, above n 4, at 622.

⁹⁹ Case 67/74 *Bosignore* [1975] ECR 297.

¹⁰⁰ N Foster, *Foster on EU Law*, (Oxford, Oxford University Press, 2006) 371.

Measures adopted on grounds of public policy and for the maintenance of public security against the nationals of member states of the Community cannot be justified on grounds extraneous to the individual case... (and) only the personal conduct of those affected by the measures is to be regarded as determinative.¹⁰¹

With reference to the second, it was mentioned in *R v Bouchereau*¹⁰² A French citizen had been convicted several times in the UK for drug possession.¹⁰³ The Court decided that:

In so far as it may justify certain restrictions on the free movement of persons subject to Community Law, recourse by a national authority to the concept of public policy presupposes, in any event, the existence ... of a genuine and sufficiently serious threat affecting one of the fundamental interests of society.¹⁰⁴

The consequences of the omission of these two requirements from the Directive remain to be seen.

¹⁰¹ Para 6, above n 99.

¹⁰² Case 30/77 *Bouchereau* [1977] ECR 1999.

¹⁰³ N Foster, above n 100, at 371.

¹⁰⁴ Para 35, above n 102.

- b. Secondly, according to the Commission's proposal, personal conduct was not considered a sufficiently serious threat when Member States did not 'take severe enforcement measures against its own nationals who commit the same type of offence'. Like before this was omitted from the final version. Again, the consequence of this omission is not clear. However, it is important to mention that this applies to EU citizens as it has been upheld by the ECJ on several occasions. In *Adoui and Cornaille*,¹⁰⁵ which concerned two French prostitutes in Belgium, the Court decided that:

Conduct may not be considered as being of a sufficiently serious nature to justify restrictions on the admission to or residence within the territory of a Member State of a national of another Member State in a case where the former Member State does not adopt, with respect to the same conduct on the part of its own nationals repressive measures or other genuine and effective measures intended to combat such conduct.¹⁰⁶

It remains to be seen whether the ECJ would take the same line of reasoning in cases involving third-country nationals.

- c. Finally, criminal convictions could not automatically 'warrant an expulsion decision'. Moreover, the challenges to

¹⁰⁵ Cases 115, 116/81 *Adoui and Cornuaille* [1982] ECR 1665.

¹⁰⁶ *Ibid.*, para 8.

expulsion decisions should have a suspensory effect and emergency expulsion proceedings were forbidden against long-term residents.¹⁰⁷

As has been noted, these guarantees were not finally accommodated in the definitive version of the Directive. Article 9 enumerates the cases in which a long-term resident can lose his or her status: detection of fraudulent acquisition, absence from the territory of the Community for a period of 12 consecutive months¹⁰⁸ (although derogation is possible for Member States) and adoption of an expulsion measure under the conditions provided for in Article 12. Article 12 provides that an expulsion decision will be valid if the long-term resident constitutes an actual and sufficient serious threat to public policy or public security. That decision cannot be founded on economic considerations. According to the same Article, Member States shall consider some circumstances before taking the decision. These circumstances are based on the decisions of the European Court of Human Rights relating to Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.¹⁰⁹ These factors are also set out in Article 28 of Directive 2004/38. In that

¹⁰⁷ It is interesting to note that collective expulsions of foreigners are forbidden by Art 4 of Protocol 4 to the European Convention for the Protection of Human Rights and Fundamental Freedoms. This Protocol has not been signed by Greece and it has not been ratified by Spain and the United Kingdom. The rest of the EU members have ratified it.

¹⁰⁸ There were two years in the original Commission Proposal, Art 10 (1) (a). See above n 39 and 40.

¹⁰⁹ For a concise account of the case law regarding Art 8 on the right to respect for private and family life, but also on Art 3 on the prohibition on torture, see P van Dijk, 'Protection of "Integrated" Aliens Against Expulsion under the European Convention on Human Rights' (1999) 1 *European Journal of Migration and Law* 293. See also N Blake QC and R Husain, *Immigration, Asylum and Human Rights* (Oxford, OUP, 2003) at 165-198. See also Case C-60/00 *Carpenter* [2002] ECR I-6279.

Directive, an extra protection is granted to those who have the right of permanent residence¹¹⁰ and to those who have resided in the host Member State for the previous ten years or who are minor. This last group can only be expelled on imperative grounds of public security.¹¹¹ This differs from the long-term residence directive.

The first factor that has to be taken into account is the duration of the residence of the long-term resident in their territory. However, in many EU countries, a third-country national with a long-term residence status can be expelled even after many years of residence in that country, in some cases even more than 20 years.¹¹²

Secondly, the age of the person concerned. Nevertheless, as in the case before, in many EU countries, minors can be the object of an expulsion measure.¹¹³

Thirdly, the consequences for the person concerned and family members must be considered. There is extensive jurisprudence from the European Court of Human Rights on this.¹¹⁴

Finally, the links with the country of residence or the absence of links with the country of origin have to be taken into account. One would think that a clear link

¹¹⁰ These persons can only be expelled on serious grounds of public policy or public security. See Art 28 (2).

¹¹¹ See Art 28(3) (a) and (b)

¹¹² A long-term resident could be expelled after many years of residence, among others, in the following countries: France, Austria, Finland, Slovenia, Estonia, Greece etc... (the list is not exhaustive). It would also be possible in the three countries which do not apply the Directive: United Kingdom, Ireland and Denmark. See J Niessen, T Huddleston and L Citron in cooperation with A Geddes and D Jacobs, *Migrant Integration Policy Index* (Brussels, British Council and Migration Policy Group, 2007).

¹¹³ Among them Austria, Italy, Slovenia, Finland etc... (the list is not exhaustive). Once again, this also applies to the United Kingdom, Denmark and Ireland. *Ibid.*

¹¹⁴ See E Guild, above n 18, at 137-146.

with the country of residence is to have been born there. Yet, many European countries allow for the expulsion of long-term residents born in their territory.¹¹⁵

Considering the last comments, it could be argued, as Peers does, that ‘the Tampere principles have been further disregarded as regards protection against expulsion’.¹¹⁶

¹¹⁵ This list includes Italy, Finland, France, Slovakia, Greece or Estonia among others. This applies to Ireland and Denmark as well. See J Niessen et al, above n 112.

¹¹⁶ S Peers, above n 3, at 452.

VI. THE 'OTHER' AND HIS FREE MOVEMENT POSSIBILITIES

A final important point to be made is regarding the ability of the long-term resident to move to another country. Chapter III of the Directive is entitled 'Residence in the other Member States'. Freedom of movement and residence is clearly one of the most important features of European citizenship.¹¹⁷ EU citizens can, in principle, move freely and reside in any other EU country subject to certain limitations. However, the limitations that have been imposed on long-term residents are greater and difficult to justify. I will examine some of them with regards to work, integration conditions and withdrawal of the residence permit.

A long-term resident may reside in another Member State on the following grounds: Exercise of an economic activity in an employed or self-employed capacity, pursuit of studies or vocational training or other purposes.¹¹⁸ While this is similar to Directive 2004/38 for EU citizens,¹¹⁹ there are some important limitations. First, when a long-term resident is moving to another Member State to exercise an economic activity,¹²⁰ Member States 'may examine their labour market' and 'may give preference to Union citizens'.¹²¹ Moreover, there are two further restrictions in Article 21. The first one concerns those who exercise an economic activity and provides that Member States for a maximum period of 12 months may deny them access to employment activities which are different to those for which they were

¹¹⁷ Art 18(1) of the EC Treaty.

¹¹⁸ Art 14 (2) of the Long-term Residence Dir.

¹¹⁹ Art 7 of Dir 2004/38.

¹²⁰ Whether in an employed or self-employed capacity.

¹²¹ Art 14 (3).

granted their residence permit. The second one concerns students and long-term residents who move for other purposes. For them, Member States decide if they have access to an employed or self-employed activity or not.¹²² None of these limits appeared in the Commission proposal.¹²³

When a long-term resident moves to another Member State he also has to comply with some additional conditions. One condition, which was not in the Commission proposal, was added in Article 15(3). In this case, when a long-term resident is exercising the right of residence in a second Member State he may be required to comply with integration measures, unless he has already complied with integration conditions in order to acquire the long-term residence status. However, these long-term residents may always be asked to attend language courses in the second Member State. This is obviously not applicable to any European citizen.

Finally, with regards to the withdrawal of the residence permit, two new grounds have been included: the first one is, ‘where the conditions provided from Articles 14, 15 and 16 are no longer met.’ The second is ‘where the third-country national is not lawfully residing in the Member State concerned’.¹²⁴ This second condition did not appear in the Commission proposal. Moreover, in the Commission proposal there was an important Article that was completely left out of the final Directive. Article 16 (2) of the Commission’s proposal provided that long-term residents would retain their status as workers in some cases: when they were incapacitated for work as a result of illness or accident, when they were unemployed but entitled to unemployment benefits (as long as such entitlement subsisted) or when

¹²² Art 21 (2).

¹²³ See Arts 15-21 of the proposal.

¹²⁴ Art 22 (1) (b) and (c).

they embarked on vocational training related to their previous occupational activity (unless they were in a state of involuntary unemployment). These grounds were, although reduced, very similar to the ones for European Citizens in Directive 2004/38.¹²⁵

Moreover, it seems that long-term residents do not have the possibility of having a period in which to seek a job, other than the three months that they can be in another Member State without applying for residence.¹²⁶ This is completely different to the situation for European citizens¹²⁷ whose status is contained in Article 14(4)(b) of Directive 2004/38. It is stated that they cannot be expelled if they ‘can provide evidence that they are continuing to seek employment and that they have a genuine chance of being engaged’. This comes as a result of the ECJ jurisprudence in the matter, which grants a minimum period of six months as a job seeker.¹²⁸

All this considered it is clear that it is much more difficult for a long-term resident to move to reside in another country than for a European citizen.

¹²⁵ Art 7 (3) of Dir 2004/38.

¹²⁶ See Art 14(1) of the long-term residence Dir.

¹²⁷ It is interesting to note that Art 7 of the Commission Proposal for a Dir on Migration for Highly Qualified Employment of 23 October 2007, (COM (2007) 637) grants to highly skilled workers the right to look for a job for a period of three months in the event of unemployment. This will give this group of people a better chance. However it is, in any case, a very limited right and probably not sufficient to find another equivalent job, even for a highly skilled worker. See E Guild, ‘EU Policy on Labour Migration. A First look at the Commission’s Blue Card Initiative’, (Brussels, CEPS, November 2007)<www.ceps.be> accessed 10 April 2008, at 6.

¹²⁸ Case C-292/89 *R. v. Immigration Appeal Tribunal ex p. Antonissen* [1991] ECR I-745. See P Craig and G de Búrca, above n 82, at 772-73. See also Art 7 (3) (c) of Dir 2004/38.

VII. CONCLUSION

The analysis of Directive 2003/109, concerning the status of third-country nationals who are long-term residents, has shown how a legal ‘Other’ is being constructed at a European legal level. Third-country nationals are viewed with suspicion¹²⁹ even when they have lived legally in Europe for more than five years, many more in most of the cases. This suspicion is also present in other Directives like the one on family reunification.¹³⁰

The three objectives mentioned at the beginning are not being attained. By comparing the final Directive with the Commission proposal, it is clear that the integration aim was much better achieved in the latter. Likewise, a parallel revision of this Directive with the one for European citizens illustrates that the Tampere goal of granting comparable rights to those of EU citizens has not been realised. Finally, by seeing the different implementation in the Member States, it is proven how the third ambition of a common immigration policy is far from a reality in many aspects. A third-country national can have a completely different legal path towards the long-term resident status depending on the Member State in which he resides. Moreover,

¹²⁹ E Guild, above n 18, at 233-34.

¹³⁰ Dir 2003/86 of 22 September 2003 on the right to family reunification which entered into force on 3 October 2003. See, among others, on the Dir: K Groenendijk ‘Family Reunification as a Right under Community Law’ (2006) 8 *European Journal of Migration and Law* 215; S Peers, ‘Family Reunion and Community Law’ in N Walker (ed), *Europe’s Area of Freedom, Security and Justice* (Oxford, OUP, 2004) 143; CA Groenendijk, R Fernhout, DPLM van Dam & R van Oers, *The Family Reunification Directive in EU Member States. The First Year of Implementation* (Nijmegen, Wolf Legal Publishers, 2007).

the lack of standstill clauses in many Articles signifies a future downgrading of the long-term resident status as has been seen.

Despite all of the foregoing, there are some positive elements.¹³¹ The situation of long-term residents has improved in some EU Member States as a consequence of this Directive.¹³² However, future involvement of the national legislators, the European Commission, NGOs and migrants will be extremely important for making use of the positive opportunities that the Directive creates.¹³³ The role of the European Parliament will be important as well. In fact, pressure should be put on the Member States to adopt more positive options as provided for in many Articles in the Directive.

Finally, and perhaps most importantly, the future involvement of the ECJ will be essential in the interpretation of the terms of the Directive. It is desirable and necessary, in that sense, that it will follow its rights based approach that it has so far adopted towards European citizens.

¹³¹ S Boelaert-Suominen, above n 41, at 1049. He mentions the strengthening of third-country nationals' legal position and the possibility to have a certain degree of internal mobility.

¹³² For example, in some Member States, a long-term residence status was only granted after many years, like in Greece (10 years) or Portugal (eight years). K Groenendijk, above n 61, at 22 and 28. This has also happened in the Czech Republic which required 10 years before. See s 83 of Act No. 326/1999 on the Residence of Aliens in the territory of the Czech Republic as amended by Act No. 161/2006.

¹³³ K Groenendijk, above n 14, at 448-49.