EUROPEAN CONFERENCE

FROM TAMPERE 20
TO TAMPERE 2.0

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Background Note:
Legal Migration

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Pre-Conference Version

DISCLAIMER

The draft of this note has been prepared by Kees Groenendijk, Emeritus Professor, Radboud University. The present document is, however, the result of a process during which some changes have been made following a preparatory workshop and in liaison with the author. This means that the author might not agree with all of the suggestions proposed in this note. Final versions of all the background notes, which will take account of the input provided by the conference, will be published and widely disseminated. References to authors quoted have been reduced to a strict minimum contrary to academic rules due to a lack of space. More details will be provided in the published version of this note.

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Tampere Conclusions:

III. Fair treatment of third country nationals

20. The European Council acknowledges the need for approximation of national legislations on the conditions for admission and residence of third country nationals, based on a shared assessment of the economic and demographic developments within the Union, as well as the situation in the countries of origin. It requests to this end rapid decisions by the Council, on the basis of proposals by the Commission. These decisions should take into account not only the reception capacity of each Member State, but also their historical and cultural links with the countries of origin.
21. 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. The European Council endorses the objective that long-term legally resident third country nationals be offered the opportunity to obtain the nationality of the Member State in which they are resident.

I. ASSESSMENT OF THE CURRENT SITUATION:

A. The Legislative Landscape:

Since 2003 the Union legislator has adopted a series of directives in the field of legal migration of third-country nationals (TCN). Moreover, third-country nationals are covered and protected by the Racial Discrimination Directive 2000/43, adopted as a consequence of point 19 of the Tampere Conclusions and by other Union law instruments, such as the social policy directives. The EU Charter on Fundamental Right grants most fundamental rights to "everyone" irrespective of nationality or immigration status. The Employer Sanctions Directive 2009/52, finally, provides protection also to undocumented third-country workers.

Currently, seven directives on legal migration are in force. These include the Family Reunification Directive 2003/86, the Long-Term Residents (LTR) Directive 2003/109 and the Students and Researchers Directive 2016/801, in addition to four directives on admission and rights of workers: the Blue Card Directive 2009/50 on highly qualified workers, the Single Permit Directive 2011/98, the Seasonal Workers Directive 2014/36 (SPD) and the Directive 2014/66 on intra-company transferees (ICTs). Together those seven directives relate to the three main categories of immigrants who come to the EU for other purposes than asylum: family reunification, study and employment.[1] The main categories not yet covered, are on the one hand workers who are not highly skilled coming for (temporary) employment of more than nine months and on the other hand self-employed third-country nationals and investors.

[1] Fitness Check on EU Legislation on legal migration, SWD(2019)1055 Part 1/2, p. 22.

The early legal migration directives of 2003 and 2004 are still in force except for two major changes. First, in 2011 the personal scope of the LTR Directive was extended to refugees and beneficiaries of subsidiary protection. Second, the 2003 Researchers Directive and the 2004 Students directive were merged in 2016, introducing more room for intra-EU mobility and a right for students to look for employment in the Member State (MS) of graduation. The Commission's highly publicised 2016 proposal to recast the 2009 Blue Card Directive was so far unsuccessful due to disagreement between Member States, mainly about the possibility for MSs to keep national schemes for the admission of highly qualified workers in parallel to the European Blue Card scheme.

The three most recent legal migration directives adopted in 2014 (ICT and Seasonal Work) and the 2016 (Students and Researchers Directive) are far longer and more complex than the migration directives adopted in 2003/2004. The last directive is almost five times as long as the family reunification directive.[2] This complexity apparently is due, to begin with, to the increased need to find compromises between conflicting aims or interests of MSs. In addition, it also linked to MSs reticence against granting new competences to EU institutions in this field in order to keep room for national policies. These reasons also explain why the idea of a legally binding EU Immigration Code, tabled by the Commission in 2010[3] was dropped a few years later. It would have required very long and complex negotiations and, probably, a transfer of more competences from MSs to the EU. In the current political climate such negotiations would probably result in a reduction of migrants' rights.

B. Connections to the Tampere Agenda:

1. Fair Treatment and Human Rights:

The Tampere conclusions, in line with Article 79(1) TFEU, instructed the Union legislator to ensure "fair treatment" of third country nationals legally residing in Member States. It has been argued that "fair treatment" equals compliance with human rights. However, this interpretation would deprive the fair treatment clause in the TFEU of its *effet utile*. Human rights treaties and the Charter guarantee almost all human and fundamental rights to "everyone", including third-country nationals. Hence, "fair treatment" must imply protection above the minimum level of human rights.

The right to admission and the rights of admitted TCN immigrants granted by the legal migration directives clearly go far beyond the minimum level guaranteed by the ECHR and, since 2009, by the EU Charter. The directives grant a right to family reunification, to admission for study or employment for certain categories of workers, under conditions specified in the instruments and many other rights not guaranteed by current European or human rights standards.

The Tampere conclusions also stated that the EU legal migration instruments should take the reception capacity of Member States into account as well as their historical and cultural links with the countries of origin. This guideline is not explicitly reflected in any of the seven directives. The directives' frequent optional or may-clauses and exceptions nevertheless create room, to some extent, for MS to take those three factors into account when adopting national rules within the framework set out by the directives.

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[2] The Family Reunification Directive has 18 preambles and covers 7 pages in the OJ; the LTR directive has 26 preambles and covers 10 pages. The 2014 Seasonal Work Directive has 55 preambles and covers 16 pages, the 2014 ICT Directive has 48 preambles and covers 22 pages, and the 2016 Students & Researchers Directive has 68 preambles and covers 37 pages in the OJ.

[3] In the Commission's Action Plan on the implementation of the Stockholm Programme, COM(2010)171; see S. Peers, An EU Immigration Code: Towards a Common Immigration Policy, EJML (14) 2012, p 33-61.

2. Partial approximation:

Most legal migration directives did not introduce a new EU residence status, but laid down common rules on admission conditions, procedures or migrants' rights after admission. On the contrary, the LTR directive and the Blue Card directive did introduce a new residence status. Both types of directives undeniably contributed to the "approximation of national legislations on the conditions for admission and residence" intended by the Tampere conclusions. For the directives that instituted a new common EU residence status, this effect is - at least in part of the MS- clear (e.g. 3 million valid EU LTR residence permits in 2017). For the other directives, the approximation was more the result of amendments to national legislation to comply with the EU rules, to reduce the national rules to the prescribed level, or to introduce national rules on issues that had not been covered by such rules before. Moreover, the common rules created a minimum standard (far above the minimum of human rights instruments) which prohibited introduction of lower or more restrictive national rules. This effect is clearly visible when comparing, for instance, the family reunification directive with the national rules of two Member States, Denmark and the UK, which are not bound by that directive. The UK has introduced high fees and a very high income requirement. Denmark has introduced a 24 years minimum age level for spouses, a requirement of special ties with Denmark, a requirement that the application of reunification with children can only be lodged within two years after the sponsor acquired a permanent status, and privileged rules that apply only to spouses who have held Danish citizenship for at least 28 years. Such requirements would be clearly prohibited by the directive. Some of those Danish requirements are even incompatible with the ECHR or the EEC-Turkey association law.[4]

3. Acceptance and Implementation of Directives by Member States:

The Tampere Council's request for "rapid decisions" on the legal migration instruments proved to be too optimistic. Especially in the field of labour migration it proved to be difficult to reach agreement between member states. The first two directives (Blue Card and Single Permit) in that field were adopted only a decade after Tampere. Generally, implementation and correct application of the directives in MS took considerable time as well.

The central dilemma here is that in legal migration (as in asylum) the aims and political interests of MS vary considerably due to differences in their geographical location, economic situation, language and (colonial) history. On the other hand, however, common interests and aims can only be achieved through application of binding EU rules. Accordingly, MS remain reluctant as shown by the slow and difficult process of EU approximation of national rules in the area of labour migration since 1999 to give up room of manoeuvre and national policies (part of their "sovereignty") which is the inherent effect of adopting and effectively implementing common rules.

The Family Reunification Directive (FRD) was adopted in 2003. It had to be implemented in 2005. The first reference by a national court to the Court of Justice (CJEU) in the case *Chakroun* was made in 2008 and the Court's judgment came in 2010. It took another five to seven years before immigration officials, lawyers and judges in the MS from which the reference was made began to take all elements of that judgment seriously in practice. References from other MSs asking for interpretation of the directive were made only as from 2013 onwards.

The 2003 LTR Directive had to be implemented in 2006. According to Eurostat data, two years later a total of 1.2 million EU LTR permits had been issued by MS. In 2017, the total number had increased to over 3 million. The first CJEU judgment on this directive came in 2012.

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[4] ECtHR (Grand Chamber) 13 June 2016, application no. 38590/10, *Biao v Denmark*, CJEU (Grand Chamber) 12 April 2016, C-561/14 (*Caner Genc*) and CJEU (Grand Chamber) 10 July 2019, C-89/18 (*A*).

A reference to the CJEU is an indication that the EU instrument and its implementation raise issues. Apparently, it is important to grant MSs and their institutions, courts and lawyers time to get used to EU rules, if one wants them to be taken seriously. Absence of references is no guarantee that the national practice is in compliance with a directive.

In addition, the actual acceptance and application of legal migration directives varies considerably between MSs. This is clearly visible in relation to directives that introduced a new EU residence status but allowed for parallel national status, the LTR Directive and the Blue Card Directive. In Germany, France, Sweden, Portugal and Belgium less than 1-3% of the LTR third-country nationals have the EU LTR permit, whilst in Austria, Italy, CZ, Romania, Estonia and Finland 50-100% of the LTRs acquired the EU status. In Germany and Austria Turkish nationals are the largest TCN group. In both countries the integration requirement is at the same level. Nevertheless, according to Eurostat data in 2017 in Germany less than 1% of LTRs had the EU status and in Austria 94%. Political choices, administrative instructions or practices and the incorrect idea that the national status is better than EU status most probably explain the difference between those two MS. Generally, the EU status is more favourable because the national permits do not provide for mobility within the EU.

In 2019, only 27% of the highly skilled third country workers admitted in MSs received the EU Blue Card. In Germany and the Czech Republic almost all highly skilled workers received the EU permit. In Finland and the Netherlands, however, less than 5% received the EU permit. Instead, almost all highly skilled workers admitted in those two MSs received the national permit.[5]

4. Nationality law:

One issue mentioned in the Tampere conclusions - *"the objective that long-term legally resident third country nationals be offered the opportunity to obtain the nationality of the Member State in which they are resident"* – was not touched on by the Union legislator in the past two decades mainly due to lack of competence. The CJEU judgments in *Rottmann* and *Tjebbes* confirmed that it is generally up to each MS, having due regard to international law, to lay down the conditions for acquisition and loss of nationality. However, the judgments also highlighted that EU rules on free movement and Union citizenship do restrict, to a certain extent, this freedom when it comes to national rules relating to the loss of nationality. Moreover, the debate on the EU-wide consequences of certain MS granting their nationality to third country investors illustrates that legislation and practice of nationality law will increasingly become an issue for consultation and discussion between MS and for action by the Commission. The Commission has held discussions with the Maltese and Cypriot authorities on the inclusion of an effective residence criterion in their investor citizenship scheme legislation which resulted in amendments of the legislation in both MSs[6]. This could also apply to the intra-EU mobility and labour market consequences that result from the acquisition of the Union citizenship by other third country nationals residing in a MS.[7] The relationship between the integration and labour market position of immigrants on the one hand, and their acquisition of the nationality of their country of residence on the other is well established.[8]

The EU has developed several other instruments to reach approximation of national rules other than through binding legislation that could already be used to address the above issues. These include discussions in expert committees, working groups of national civil servants convened by the

[5] Fitness Check on EU Legislation on legal migration, SWD(2019)1055, Part 2/2, p. 283 and Annex 9.

[6] COM(2019)12 at p. 6 and S. Carrera, How much does EU citizenship cost? The Maltese citizenship-for-sale affair: A breakthrough for sincere cooperation in citizenship in the union? Brussels, 2016, CEPS.

[7] M. de Hoon, M. Vink & H. Schmeets, A ticket to mobility? Naturalisation and subsequent migration of refugees after obtaining asylum in the Netherlands, JEMS 2019.

[8] OECD, Naturalisation: A Passport for the Better Integration of Immigrants, Paris 2011, OECD Publishing.

Commission, the development of legally not binding guidelines and the so-called open method of coordination.

II. IDEAS AND SUGGESTIONS FOR THE FUTURE:

A. General Considerations:

All legal migration directives are based on the principles that also guided the gradual development of the rules on free movement since 1961: equal treatment including access to employment and education, family reunification and a secure residence right to enhance the integration of the migrant in the host society. The Tampere conclusions explicitly referred to "rights and obligations comparable to those of EU citizens" and for LTR to "rights which are as near as possible to those enjoyed by EU citizens". Comparable rights, evidently, does not mean the same rights. 'Rights which are as near as possible' do not imply equal rights.

Academic and political debates, as well as judicial disputes on this issue tend to focus on the differences between the rights of EU citizens under directive 2004/38 and the rights granted to third country nationals in the legal migration directives. Undeniably, those latter directives do not grant the same, but less rights to third country nationals. It should not be forgotten, however, that the principles and rules on free movement of Union citizens acted as a model. During the drafting, in the negotiations on these directives and in the (early) interpretation of the directives by the Court, those principles were taken into account. In the years to come, the EU should continue to stick to them.

B. Existing Acquis and How to Take It Forward:

1. In its recent reports on three legal migration directives (Family Reunification, LTR and Single Permit) the Commission rightly decided not to propose legislative amendments but to monitor and support the instruments' correct implementation by MSs.[9] Until 2019 the Commission stimulated the correct implementation mainly with the so-called Pilot procedures. In the past decades, only one infringement case on the incorrect application of a legal migration directive reached the Court, (Commission/Netherlands, C-508/10) on the level of fees for residences permits. The judgment in that case resulted in better implementation of legal migration directives in several other MSs.

Recently, in July 2019 the Commission decided to start formal infringement procedures against seven MSs with regard to the incorrect implementation or application of six out of the seven legal migration directives. **In some of the three recent reports, the Commission explicitly mentions MSs which do not correctly implement the directive(s) by name. This more active and more public monitoring is the right way forward.**

In addition, the Commission could consider publicly announcing the beginning, the end and possible results of Pilot procedures in this field. Such publicity and the explicit mention of the names of non-compliant MSs in reports will support immigrants, their organisations, and lawyers in their political or legal actions aimed at ensuring correct implementation practices. It will also increase the chances that these directives are taken seriously by national courts.

2. The Students and Researchers Directive 2016/801 had to be implemented by 2018. The Commission's report on the implementation in MS is set for 2023. **No legislative changes should be considered before a serious evaluation of practices and experiences in MS. This also applies to the two directives adopted in 2014, the Seasonal Work Directive and the ICT-Directive.**

[9] COM(2019) nos. 160-162 of 29 March 2019.

A better coordination between policies concerning migration with those on education, research and foreign affairs at EU as well as at national level could lead to the admission of more students and researchers in the EU, in particular by promoting the innovative mechanism of admission of researchers.

C. Labour Migration:

Considering the large differences in labour market needs and MSs' opposition to the 2016 proposal for a new Blue Card directive, a common policy on admission of highly skilled workers or on the temporary admission of workers without high skills appears to be unrealistic. As long as employers, workers and national authorities prefer the flexibility of the national admission schemes and consider the EU directives in this field as too complex, MSs will prefer to issue residence permits under their national schemes. The complexity of the recent labour migration directives is at least partly due to the predominance of Home Affairs Ministries over the Ministries of Economic Affairs and of Social Affairs in the legislative process. Prior to 2001, it was these latter ministries that played a predominant role in the legislative and policy debates both at the EU and national level.

3. EU policy documents should not mention 'circular migration' or 'opening up channels for legal migration for employment', when MSs are not prepared to offer serious and concrete opportunities for third-country nationals without higher education. Creating false expectations outside the EU risks backfiring and should be avoided.

4. The EU and MSs have an interest in creating visible and viable alternatives for irregular labour migration. Hence, the Commission could:

(a) **conduct a systematic evaluation of experiences in MSs which introduced liberal rules on admission for employment** (e.g. Sweden, Spain and in Germany the *Fachkräfteeinwanderunggesetz*) in recent years;
(b) **check which MSs would be interested in participating on an optional basis in an EU job seekers visa scheme for third country nationals with or without a certified job offer in a MS;**
(**c) check which MSs would be interested in participating on an optional basis in the supply driven Expression of Interest model (creating a pool of pre-screened highly skilled candidates which could serve national or EU schemes) developed by the OECD**. It should also check the possible advantages of this model compared with the current EU Skills Profile Tool, and whether the high investment in such a model would be justified by the interest among member states;
(d) develop an EU scheme to improve understanding among employers and authorities in MSs about educational and professional qualifications acquired outside the EU.

5. The EU institutions should clarify whether their understanding of the notion of "common policy" in Article 79 TFEU with regard to labour migration is that an EU policy should only be *complementary* to MS' policies. It should also clarify whether it considers that future labour market and demographic needs are better addressed at national rather than at EU level. What role would the Council and the Parliament play in such an interpretation of the Treaty? How would such an interpretation fit with the aim of making the EU more attractive for highly skilled workers from outside the EU and with the idea of one EU labour market?

6. The Commission's Fitness Check on EU legislation on legal migration observed that the current directives do not cover two main categories: (a) admission for temporary migration (more than the maximum nine months per year covered by the SWD), and (b) admission of third country national entrepreneurs for establishment, self-employment or investment (who are currently excluded from

the Single Permit Directive). The increased flexibility on the labour market (e.g., as jobs previously performed by employees are increasingly performed by real or quasi-self-employed persons) could be a reason to consider the latter issue.

Considering the reaction of the MSs to the 2016 proposal for the Blue Card Directive recast, a **proposal for a directive on admission of third country national entrepreneurs for establishment, self-employment or investmen**t should not set common admission conditions. However, the proposal could cover the admission procedure and equal treatment by proposing rules similar to those in the SPD but adapted to the circumstances of self-employment. **Furthermore, the directive should provide for intra-EU mobility on a similar basis as the ICT-Directive and the new Students and Researchers Directive**, and for a standstill clause. The personal scope could also cover truck drivers, airline pilots and inland shipping crews. In case the EU would wish to set limits to the GIG economy, a minimum investment in the MS of residence could be required. Moreover, the EU should start implementing the right of establishment provided in the Agreements with the Western Balkan, Russia and other third countries.

D. Long-term residence status and intra-EU mobility for third country nationals:

7. EU legislator should refrain from introducing administrative sanctions that create new barriers for the acquisition of the EU LTR status, such as in Article 44 of the 2016 proposal for a Qualification Regulation (COM(2016)466). Such administrative sanctions requiring reliable information on possible irregular residence in another MS, will be hard to apply correctly and fairly. They will be counterproductive to the integration of TCNs and create a barrier to intra-EU mobility.

8. For seasonal workers or other third country workers with periods of lawful employment of more than five consecutive years in a member state, the periods of lawful employment in that MS should count for the five years of lawful residence required for the EU LTR status in order to avoid their permanent exclusion from that status even after being lawfully employed for eight or ten years. This would require a minor change to the Seasonal Work Directive.

9. Stimulate intra-EU mobility of lawfully resident third country nationals with two years of lawful residence in one MS and a confirmed job offer in another MS. Intra-EU mobility should not be limited to highly skilled workers. Several MS have urgent demand for medium or low skilled workers. Why admit workers from outside the EU to meet that demand rather than workers already lawfully present in the EU? This could reduce irregular employment, since the workers would no longer be 'locked' in one MS and would also be a way to implement the principle of EU priority.

10. The experience with the more flexible and practical rules of the 2014 ICT directive (as a new model based on mutual recognition) and those on intra-EU mobility in the 2016 Students & Researchers Directive should be systematically evaluated as a basis for proposals for opening up intra-EU mobility for lawfully resident third country workers more generally.