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Question of status in the European Union. The space between immigration and citizenship.

Relatore

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ABSTRACT

Plurality in Unity is a simple but effective formula to summarise the current situation of individual status in Europe. Multiple and variable over time are the status possessed, or that could be acquired, by persons, although, in this composite panorama, it is still nationality that appears to be the most valuable, privileged and secure status: the one capable to reduce to unity all the others. However, if this remains true in general terms, the continuous appearance of new status and the transformation of the European Union itself into a rights provider, has challenged not only the hegemony of nationality, as the sole meaningful status for mobile persons, but, inevitably, has also shaped and modified its content and symbolic meaning in accordance with the evolved context.

This thesis concentrates upon the relation between immigration and citizenship legislations at the supranational, national and sub-national level, since they are the basis and the determinants of individual status in relation to a certain territory. Firstly, it focuses on the relation between individual status in the EU legal order, i.e. on the status attributed by EU laws to third-country nationals labour migrants, and on the Union citizenship. In the second part, it investigates the range of status available to non-nationals within Belgium, paying particular attention to the sub-national level; Sweden, considering the influence of the Nordic cooperation; and, finally, Switzerland as regards, specifically, the role of sub-national units in citizenship acquisition procedures and influence on the government of immigration of the Swiss-EU relations as regards persons' freedom of movement.

This thesis concludes affirming that an increasing level of interaction, reciprocal influence and convergence are observable in the government of immigration and citizenship acquisition. The latter is increasingly used as a tool to better govern the former, by relying on the everlasting distinction between the citizens and *the others*, and regardless of the level of government considered.

PREFACE

Summary: 1. Research questions. - 2. The first part. - 3. The second part.

1. Research questions.

How are immigration and citizenship related? Is the acquisition of the latter by means of naturalisation instrumentally used to govern the former? If so, how does this relation differ if observed at the European Union level or at the state level? And finally: how does the establishment of the principle of free movement of persons within a certain area affect this relation? These are the leading questions to which this research has tried to provide an answer.

The study of how rules governing immigration relate to citizenship laws aims to analyse how the relation between an individual and the state or the supra-national organisation is regulated within a certain territory from the moment in which the person enters the national territory.

Citizenship is a legal status that entails specific rights and duties. Granted that, the determination of modes of acquisition of nationality has remained in the domain of states' sovereignty, what are the consequences for individuals when, on the contrary, the competence to determine conditions of entry and residence in a certain state territory is no longer an exclusive national competence? How is the immigration-citizenship relation is affected when the nation state becomes part of an area of free movement? These questions are relevant since immigration rules - conditions of entry and residence in a certain territory of non-citizens - if looked at from the «citizenship point of view» determine the composition of the group of potential would-be citizens.

So far, the sole national/supra-national dynamic has been considered. However, the immigration-citizenship relation is interesting to be observed also for how it develops at the sub-national/national level. In fact, in cases in which sub-national units are attributed competencies as regard immigration and citizenship attribution, this further interaction adds significant elements to the analysis.

As a primary general consideration it can be said that since immigration and citizenship laws regulate modes and conditions of acquisition of different legal status by non-nationals, the more subject are granted competences in these two matters - providing them the possibility to shape policies according to their own preferences within certain limits - the more individual status of diverse content will be acquirable by individuals

within a certain territory. Therefore, this research eventually analyses the modes of acquisition and the content of the multiplicity of status that individuals can acquire within determinate territories.

2. The first part.

The dissertation is divided in two parts. The first is dedicated to the analysis of individual status in the EU legal order, i.e. the status attributed by EU laws to third-country nationals who are legal migrants, and of Union citizenship. The analysis of the relevant legislation is preceded by an historical reconstruction of the development of the provisions on free movement of persons, on Union citizenship, and on the EU immigration policy.

In the last two decades the role of the European Union in the government of economic migration of third-country nationals to EU Member States has constantly grown in relevance. With the Treaty of Amsterdam which has conferred to the EEC the shared competence on migration a number of legislative and non-legislative acts were adopted in this field, and over time they have built the EU common immigration policy. The acts aiming at regulate migration at the EU level constitute the body of rules that determine the conditions of legal entry, residence and movement of third-country nationals within the EU, but taken together they also reveal what we can regard as the European Union approach towards migration and the objectives that the EU pursues in this field. Although there is very little which is intrinsically specific only of the EU approach, the nature of its view in structuring economic migration emerges from the mode in which EU laws dealing with labour migration are connected between them, and from how they relate and refer to the Union citizenship.

The second chapter explores the relation between migration and citizenship within the EU legal order by analysing, in its first part the EU legislative acts regulating labour migration of third-country nationals and Union citizens' rights. In particular, the directives adopted in the field of labour migration will be analysed in details, with a special focus on the rights that are conferred to the status' holders, the fields where equal treatment rights are granted and the level of protection against expulsion. Subsequently, the analysis will focus on the Union citizens' rights directive, with the aim to highlight the differences but above all the similarities with the statutes previously analysed.

The inner fragmentation into multiple status of the status provided to third-country nationals who are economically active is immediately perceivable by observing the EU laws on labour migration. However, in a similar but less obvious way, is also subdivided the Union citizen status. In the first place, as for third-country nationals who

are migrant workers, the Union citizen status is internally divided into multiple status. Secondly, the elements on which basis the status are internally distinguished are almost identical for both categories: that are the qualification, or more precisely, the activity that justify the entry and residence within the territory of an EU Member State, and the length of legal residence within the same territory. Moreover, these elements stay in an inverse proportional relation: with the increase of the length of residence, the relevance of the exercise of an economic activity formally decreases. It follows that all these status are connected, and on the basis of the similarities and differences between them, they are related in a such way as to be consequential one to the other, and may be ordered along a growing scale that starts with the less privileged and ends with the most privileged status. The position on the scale - i.e. how much «privileged» a status is considered - is assigned by considering what are the necessary conditions to acquire that status, what rights are attached to it, in what fields and with what extension their holders are entitled to equal treatment rights vis-à-vis nationals, and eventually what is the level of protection against expulsion. In other words, what is the security of residence in, the Member State in which the holders lawfully reside.

In addition to the shared structure between the just mentioned status and their connections, a second significant element emerges, which confirms the possibility to identify a specific EU dimension in the management of economic migration: this is the role that the citizen status plays and the relevance that it has within the EU labour migration policy. In fact, EU laws regarding third-country nationals status always refer to nationals treatment as a parameter on which equal treatment rights that are granted to non-EU citizens should be measured and approximated. Thus, the status provided to third-country nationals are connected and consequential also on the basis of the degree of approximation that the rights provided have with nationals' rights. Finally, all these status, altogether observed, draw a path to be followed by third-country nationals which goes from the acquisition of the less privileged status to the acquisition of the most privileged, the Union citizenship.

The unbalance of the status towards the citizen status, and the constant references to citizens' rights as a parameter on which the value of a status is measured, allow to suppose that the EU adopts in relation to its labour migration policy and, more generally, in framing the relation between migration and citizenship within the EU legal system a formal complementary approach, that is access to better rights through access to better status. Concerning this, firstly, we observe that citizenship is instrumentally used as a means of control and management of (regular) migration and migrants integration in host societies also by the EU, and, secondly, that the acquisition of more and more privileged status is seen as a sign and a consequence of a progressive integration and demonstrates the will to permanently settle in a determined territory.

However, is the complementary approach consistent with the EU legal system and with EU policies, and to the modes in which EU laws on labour migration of third-country nationals are structured, specially considered the relation between the status provided to third-country nationals and with the citizen status? What if the alternative approach is better considered the specificities of the EU legal system?

According to the alternative view, the multiple status attributed to third-country nationals who are economic migrants can be seen not as resulting from but as alternative one to the other. This means that a status attributed to a third-country national is privileged as much as it allows both their holders and the EU to fully take advantage from the exercise of that specific activity within the EU, and not, on the contrary, for its degree of proximity with the citizen status. So, status should be structured with the objective to maximise the benefits for that specific category of third-country national workers within the EU. This induces to focus and give priority to the elements that constitute the added value of having these status regulated and available at the EU level instead of twenty-eight different legal status for the same category of labour migrants. Furthermore, this approach seems to better incarnate the model of the "perfect" citizen that EU laws and policies regarding labour migration and free movement implicitly assume - i.e. of an economically active and mobile person – and could also be an explanation of the current proliferation of sectorial laws that provide a list of prêt-à-porter status for third-country nationals as well as the inner fragmentation of the Union citizen status. Finally, if status are alternative, and are framed in a way that effectively allow their holders to make the most of the rights attached to them and of the exercise of a particular activity in the EU, the decision to settle permanently in a certain Member State territory and start to accumulate a certain time of residence will reflect the will to «put down roots in the country» instead of being the only mode available to have access to more extended equal treatment rights and to a higher security of residence.

3. The second part.

The second part focuses on the immigration-citizenship relation in three selected European countries: Belgium, Sweden and Switzerland. These have been chosen since their immigration and citizenship legislation is affected, although in different degree and modes, by the principle of free movement of persons.

Belgium is a founding father of the European Union, thus the mode in which its national legal system is concerned by the just-mentioned principle is manifest, however it is interesting is to consider how its membership in the Benelux regional cooperation has influenced the current situation. Furthermore, Belgian federate units are granted

competences on immigration and integration of foreigners capable of affecting the outcome of the immigration-citizenship relation at the national level.

Sweden has joined the European Union in 1996, however this Nordic country has been part of the Nordic Passport Union and of the Nordic common labour market since the 1950s. Therefore, long before its EU membership its immigration and citizenship legislation have been affected by the principle of persons' free movement. In other words, this means that within the Swedish immigration and citizenship policy Nordic citizens are privilege migrants. Because all Nordic countries are Schengen members and the non-EU Nordic states are, however, EFTA members, thus part of the EEA area, the privileged treatment of Nordic citizens have been absorbed by the EU/EEA membership and rules. On the contrary, their status as Nordics is still valuable as regard citizenship acquisition in relation to both EU citizens and third-country nationals who wish to naturalise in Sweden, since naturalisation requirements are eased for those who hold a Nordic citizenship, provided that they are not naturalised Nordics.

Switzerland is the last nation state considered. This country is an interesting case study in the framework of this research since its immigration-citizenship relation may be significantly observed in relation to the effects that the persons' free movement principle has exercised on the national immigration policy since the signature of the bilateral agreement on the matter in 1998. Secondly, the just-mentioned relation assumes a unique character due to the three-level citizenship of the Swiss federation. Swiss citizens are always citizens, in turn, of the municipality where they reside, of the canton where that municipality is situated, and ultimately of the federation regardless of the mode in which they have become Swiss citizens. However, as regard acquisition by naturalisation, sub-national units are granted a high degree of autonomy, giving origin of many different paths of naturalisation at the sub-national level.

It goes without saying that the immigration-citizenship relation has its specificities within every single case study, nevertheless, some *fils rouge* are traceable among them. Firstly, their sovereignty is limited when it comes to immigration due to their EU membership or bilateral relation. Therefore, even if they have all recently amended their labour migration policies in order to better match the exigencies of national economies with the characteristics of labour migrants to whom entrance and residence in the national territory is allowed to in order to pursue an economic activity, these reforms have regarded and impacted on conditions of entry and residence - with the partial exception of Switzerland - only of third-country nationals.

Secondly, they share the complementary approach when it comes to the role of naturalisation and integration in relation to immigration: citizenship acquisition by naturalisation is seen as a means to grant more and better rights to foreigners. Recently, all three countries have amended their national regimes as regard both labour

immigration, integration and citizenship acquisition. In particular, integration in all three countries has been further specified or for the time defined in legislation. In the Belgian and Swiss case, it is a requirement that has to be fulfilled in order to naturalise. These means that integration in the host society has to be attained before the foreigner can demand to become a member of it. In the Swede case, on the contrary, citizenship is a stage of the integration path of the foreigner in the mainstream society, a path that will continue even after citizenship acquisition.

In conclusion, citizenship still matters and its importance is demonstrated by the relevance attributed to integration in these different national settings. Despite the higher mobility of individuals, the grant of rights of free movement to certain categories of foreigners, at the national as at the supranational level, with the necessary subtle distinction, citizenship remains the most valuable status for individuals.

FIRST CHAPTER
THE SPECTRUM OF STATUS BETWEEN IMMIGRATION AND CITIZENSHIP.
The European Union and Nation States compared: setting the scene.

Summary: 1. Introduction. - 2. The structure of the research. - 2.1. The role of Member States. - 3. The plurality of status within the EU: an attempt of a linear reconstruction. - 3.1. A further delimitation of the research ambit. - 4. Citizenship(s): member states' citizenships and the Union citizenship. - 4.1. The citizenship of the Union. - 4.2. The complementary versus alternative approach. - 5. Conclusions.

1. Introduction.

Plurality in Unity[1] could be chosen as a simple but effective formula to summarise in a few words the current situation experienced by individuals working and residing within the European Union (hereinafter EU). Multiple and variable over time are the status possessed or that can be acquired by persons in the EU, although, in this diverse panorama, it is still the citizenship status at the national level that appears to be the most valuable, privileged and secure: the one capable of reducing to unity all the others, once acquired or if already possessed[2]. However, if this remains true in general terms, the continuous appearance of new status, and the becoming of the EU itself a rights provider and, consequently, a provider of individual status to both Union citizens and third-country nationals challenge this state of affairs. Not only the hegemony of national citizenships as the unique meaningful status for mobile persons is cast into doubt, but it has also inevitably shaped and modified its content and symbolic meaning in accordance with the evolved context[3]. We should not forget, in fact, that citizenship as

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[1] This expression is used with the aim to recall the motto of the European Union «United in diversity». Cfr. Declaration by Member States on the symbols of the European Union,Treaty on European Union, OJ C 326, 26.12.2012.

[2] From the one side, in fact, we observe the adoption of national practises of «re-nationalisation of citizenship» through the introduction, for example, of citizenship tests or citizenship ceremonies, or of re-sacralisation of the State. On the other side, there was a general liberalisation of the access to citizenship, and a rise of a neoliberal conception of citizenship as the outcome of a rational choice of individuals detached from any symbolical meaning or identity aspect. See C. JOPPKE, *The Inevitable Lightening of Citizenship*, in *European Journal of Sociology*, 1, 2010, p. 13; P. J. SPIRO, *Beyond Citizenship*, Princeton, 2008, p. 91.

[3] «In the golden age of nationally closed welfare states that antedated the contemporary era of globalisation, citizenship was not visible as a nationally and territorially bounded construct. (…) Today, in the era of globalisation and blurring state boundaries, conflicts surrounding citizenship have taken on a different meaning, closer to the original meaning of citizenship as state membership: how can foreigners be citizens, and who are we, the Danes?», C. JOPPKE, *Transformation of Citizenship: Status, Rights, Identity,* in *Citizenship Studies*, 11, 2007, p. 38.

a means to regulate the relation between the individual and the state is an historical product, therefore its content and meaning is not given once and for all[4]. Consequently, the study of the plurality of status that are currently acquirable by individuals within the EU other than the national citizenship is, firstly, a way to reflect on the former within the evolved context. Therefore, it is necessary to clarify without further ado that this research does not aim to contest the significance of the national citizenship or of the citizen status in general. On the contrary, the object is to describe and reflect on the forms and contents of the other status that surround it and that are contributing to re-drawing and re-defining its forms and content[5].

Since the rise of nation states, the citizenship attributed at the state level was considered the most privileged status and the sole capable to *perfecta reductio ad unum* of the other status. However, especially in the last decades, this state of affairs has started to change due to the combined action of various elements. The question of the dominion of the national citizenship is connected with the emergence of individual human rights in the aftermath of the Second World War (WWII) - i.e. rights started to be attributed to the individual *per se* regardless of the status possessed[6] - and to the constant growing of immigration flows towards and within Europe since the fifties of the twentieth century[7]. Particularly, in relation to the EU, the integration process and the establishment of the common market - more precisely, free movement of workers, the following establishment of the Union citizenship, and, in the last decades, the constant increase of EU competencies in matters of borders control and immigration - are the elements that have contributed over time to foster the doubt over the lasting hegemony of citizenship.

Doubtless, the basic distinction seems to be still that between the national citizen and *the others*[8]. Nevertheless, the just mentioned elements have led not only to question

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[4] J. H. H. WEILER, *To be a European citizen. Eros and civilization*, in *Journal of European Public Policy*, 4, 1997, p. 507-508.

[5] We believed that it is possible to explore the changes under which have undergone the citizen status without having forcefully to choose between the nationals and post-nationals theories on citizenship, but that a «third way», the EU way, exist and can coherently and effectively combine element of both these views. A detailed explanation of the contents of the above mentioned theories on the evolution of citizenship can be found in Y. SOYSAL, *The Limits of Citizenship*, Chicago, 1994; R. BRUBAKER, *Citizenship and Nationhood in France and Germany*, Cambridge, 1992.

[6] B. NASCIMBENE, *L'individuo e la tutela internazionale dei diritti umani*, in S. M. CARBONE, R. LUZZATO, A. SANTA MARIA (EDS.), *Istituzioni di diritto internazionale*, Torino, 2006, 369 ff..

[7] S. CASTLES, *Immigration and Asylum: Challenges to European Identities and Citizenship*, in D. STONE, *The Oxford Handbook of Postwar European History*, Oxford, 2012, p. 145; A. SOLIMANO, *International migration in the age of crisis and globalization: historical and recent experiences,* Cambridge, 2010, P. 23-38.

[8] On the impossibility to find a unique and homogeneous definition of foreigner without considering the role of the European Union, of the International community or of sub-national units in the Italian legal system see M. CUNIBERTI, *La cittadinanza. Libertà dell'uomo e libertà del cittadino nella Costituzione italiana*, Padova, 1997, 193; E. GROSSO, *Straniero (status costituzionale dello)*, in *Digesto delle discipline pubblicistiche*, XV, Torino, 1999, p. 153.

the supremacy of the national citizenship but also, and more importantly, to an inner proliferation of individual status within the status of *the others* and of the citizen status as well. Hence, if the possession of a status for an individual means to hold a set of rights (and, but not always, duties)[9], the entrance of other subjects rather than the state into the arena of *providers* of rights and status[10] - as the EU and sub-national units - has inevitably led to their consequent multiplication, to the re-definition of the boundaries, meanings and contents, but also of hierarchies among the status themselves.

Both the citizenship and the alien status have always been internally composite. That is to clarify that the plurality of individual status *per se* is not a novelty. Nevertheless, the newness can be found, firstly, in the appearance of a plurality within a (thought to be) homogeneous status, namely citizenship, secondly, in the concurrent role played by institutional subjects other than the nation state as potential *providers of status*. Hence, although the existence of a plurality of status for individuals is something that can be found already previously and within other legal systems, the current plurality of status in the EU present some specificities not observable elsewhere.

This EU distinctive character consists, firstly, in the genesis and development of the Union citizenship[11]. Born to provide a comprehensive status for EU mobile workers, students and pensioners and to «remedy [the] sector-by-sector, piecemeal approach to the right of free movement and residence and facilitate the exercise of this right», it was not (yet) capable of overcoming its inner fragmentation, and of completely detaching the status from the paradigm of the market citizen on which it was originally built upon[12]. In fact, as happens at the state level, also the EU citizenship was constructed having in mind a «perfect (EU) citizen». Therefore, despite having the label of «citizenship», we are far from seeing reproduced at the EU level the same (formal) equalising effect between citizens regardless their personal characteristics that we usually attach to national citizenships.

The second ambit where a specific EU plurality can be observed is the EU common policy on immigration, more precisely, with reference to EU laws regulating

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[9] Despite the mention by the Treaty on the European Union of the duties that are attached to the Union citizenship, scholar have questioned their real existence see M. CONDINANZI, A. LANG, B. NASCIMBENE (eds.), *Citizenship of the Union and Free Movement of Persons*, Leiden, 2008, p. 18-19; R. BELLAMY, *The Liberty of the Post-Moderns? Market and Civic Freedom within the EU*, LESQ Paper No. 01/2009, 14, 2009, p. 26-27.

[10] With the expression «provider of rights» we identify the subjects which hold the necessary competencies and resources to guarantee the effective exercise of the rights concerned.

[11] Cfr. art. 8, Treaty on the European Union, OJ C 191, 29 July 1992; Cfr. also art. 9, Treaty on European Union (consolidated version) and art. 20, Treaty on the functioning of the European Union, OJ 326, 26.10.2012 (hereinafter TFEU).

[12] Despite the fact that for some scholars we cannot speak of a true citizenship when referring to the Union citizenship. See M. CONDINANZI, A. LANG, B. NASCIMBENE (ED.), cit., p. 5-6. For the adverse effects that this development of the Union citizen status can have on the function and content of national citizenships see R. BELLAMY, *The Liberty of the Post-Moderns? Market and Civic Freedom within the EU*, cit., p. 18.

legal labour migration of third-country nationals[13]. Moreover, since citizenship and immigration are deeply connected fields, we observe that, as nation states usually do[14], they have been used as instruments to control and shape one another also at the EU level. From the moment in which the EU has had its immigration legislation and policies, it has started to use the status of both ambits - free movement and immigration - in a functional and instrumental manner. Therefore, apart from considering the development of these two ambits in the EU legal order, it is even more relevant to investigate the relations between these two fields, and the use that the EU has made of instruments and notions which were previously related to the sole nation state, namely citizenship, foreigners, borders, integration and so on.

One of the effects of the process of the EU integration process has been the question of the notion of borders which was at the basis of the modern conception of the nation state[15], by progressively depriving the latter of the monopoly of their control, and, in relation to persons, of the control on the entry to, and exit from, the state territory[16]. Moreover, with the introduction of the Union citizenship in the early nineties[17], the - before unquestioned - sequence: national citizenship - national rights - national identity - nation state started to be challenged. It follows that the national citizenship is not anymore the unique relevant status within the European Union both for EU citizens and non EU citizens[18]. Nonetheless, a description limited to the membership of the individual to the non-EU citizen category nowadays tells very little about the content of its legal status. The reasons why this description has become insufficient is based, as above-mentioned, on the increasing acquisition of competencies in immigration by the EU in

[13] The embryonic form of the EU competencies in the immigration matter developed for the major part around the control and security aspect, namely the control of external borders, the fight against irregular immigration, a common visa policy and rules and, eventually, data exchange, finding its first institutional form in the Schengen agreements of 1985. It has been necessary to wait until the Treaty of Maastricht in 1993 and, then, Amsterdam in 1999, to find a first definition of the EU policies in relation to legal immigration and movement of third-country national within the EU. The historical development of the EU common policy on immigration will be the object of the second chapter. See Y. PASCOUAU, *La politique migratoire de l'Union européenne: de Schengen à Lisbonne*, Paris, 2011.

[14] C. JOPPKE, *The Inevitable Lightening of Citizenship,* cit., p. 11-12; Ib., *Transformation of Citizenship: Status, Rights, Identity,* cit., p. 7.

[15] See P. J. SPIRO, *Beyond Citizenship*, cit., 4. P. COSTA, *Cittadinanza sociale e diritto del lavoro nell'Italia repubblicana*, in *Lavoro e Diritto*, 1, 2009, p. 60.

[16] Even if EU member states have maintained an exclusive competence in the immigration field for all that situations «with regard to the maintenance of law and order and the safeguarding of internal security.». Cfr. art. 72 TFEU. R. ZAIOTTI, *Cultures of border control*, Chicago, 2011.

[17] *Supra* note 15; N. REICH, *Union Citizenship - Metaphor or Source of Rights?*, in *European Law Journal*, 7, 2001, p. 5.

[18] R. HANSEN, *The poverty of postnationalism: citizenship, immigration, and the new Europe*, in *Theory and Society,* 38, 2009, p. 1. Moreover, that there have been a significant change in the view in which national citizenship is perceived is a statement that stays above the choice between the post-nationalist or «naturalisationists» position. See for an overview of the current state of the debate, T. HUDDLESTON, M. P. VINK, *Membership and/or rights? Analysing the link between naturalisation and integration policies for immigrants in Europe,* RCSA Policy Paper 2013/15, p. 1-4.

these last two decades, in the progressively enriching content of the status as an EU citizen, and on the complex relations between the EU and other sub- and supra- national sources of personal status.

As above said, the Union citizenship and EU norms and policies on immigration of third country nationals have partially moved the sources of the plurality of status from the national to the EU level. Nevertheless, if we extend our view beyond the sole EU, we note that other sources of plural individual status were already present in EU member states or European states diversely connected with the EU. Moreover, their content and importance is changed over time as a consequence of the changes of the their relation with the EU.

This phenomenon is particularly observable within that national legal systems where, firstly, sub-national units have relevant competencies in matters which are strongly related with corollary ambits of migration management and citizenship acquisition, e.g. integration of third-country nationals, education or access to the labour market. Secondly, it is similarly noticeable where other forms of supra-national cooperation in cross border movement are present other than established at the EU level. Therefore, a significant proliferation of individual status cannot be observed with the same degree in all EU member and European states. It is, in fact, particularly relevant only within specific national legal systems that for their constitutional features or membership in supra-national organisations other that the EU present multilayered immigration, integration and citizenship policies.

The reference is made to, on the one hand, federal states whose federate units are characterised by a high degree of autonomy and strong sub-national identities[19], possessing exclusive (yet attributed) competencies in matters that directly or indirectly concern rights of non-nationals. On the other hand, a source of multiple status other than those deriving from the EU legal order, could derive from membership in supra-national organisations other that the EU. We are referring to specific forms of regional cooperation between EU member states and non-EU member states which are, however, part of the Schengen area, and to other agreements that concern movement of persons, cooperation in this regard, residence and citizenship acquisition. After saying this, the interest lies in studying the genesis, the development over time and, finally, on the current relations between these multiple sources of individual status present in immigration and citizenship regimes of nation states and of the EU.

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[19] Which is an aspect that influence citizenship and immigration policies, as they are both linked to the construction and to the self-determination of the national and sub-national identity and narrative. M. HELBLING, *Practising Citizenship and Heterogeneous Nationhood. Naturalization in Swiss Municipalities*, Amsterdam, 2008, p. 32.

Considered that movement of persons, immigration and citizenship at the national, sub-national and EU level have become fields which cannot be anymore thought or studied separately, an explanatory image that can help describe the relations between these multiple sources of status is composed of a series of circles which, partially, overlap and, in some cases, are comprised one into another. To every circle is associated a specific portion of territory within which are in force specific norms regulating movement of persons, immigration and citizenship acquisition, thus to every circle we can associate specific status.

2. The structure of the research.

The arguments and reasonings briefly exposed above constitute the basis of the research. Nevertheless, a more detailed definition of the scope of the analysis is needed. Within this research, we consider the content of a «personal status» to be the conditions under which a person can enter and reside within a certain territory, and the rights of which it can benefit from as its holder. Whenever conditions and rights differ, we have, in turn, a diverse personal status. Therefore, to explore the status of persons moving across borders, residing within a certain territory and therein benefitting from a certain range of rights, we have to refer, firstly, to the legislation that regulate movement and immigration within that specific portion of territory, and, subsequently to the citizenship regime.

The *fil rouge* that keeps together and crosses the whole analysis is the concept of movement. In the present work, it develops in the observation of the impact that immigration and citizenship regimes have on the status acquirable by individuals that moves across European borders over time. Therefore, with the aim to explore the different ways in which movement of individuals is regulated within different legal systems in Europe, the research is divided in two main parts.

The first part is focused on personal status that are attributed to individuals by EU laws. Therefore, firstly, the focus will be on the EU common immigration policy, and precisely, on EU laws governing migration of third-country nationals. Subsequently, the status as an EU citizen will be considered, since it is the status of mobile individuals who hold the national citizenship of an EU member state.

The second part is devoted to explore the same spectrum of status within states which are EU members, or, despite being non-EU members, are related to the EU as regards matters that impact on the way in which movement is regulated within their specific legal systems. The aim is, in the first place, descriptive: to analyse other sources of personal status in Europe other that the ones provided by EU laws. This means to explore other forms in which movement of persons across borders has been regulated in

the past or is regulated at present, and their impact on national, supra-national and sub-national immigration and citizenship regimes. Secondly, the scope is to outline the characteristics of the relation between these other systems of rules governing movement and the EU.

In order to study how personal status is regulated in the European Union legal system, therefore, how movement of individuals is regulated and how rules concerning immigration and citizenship interplay, a hierarchical approach has been chosen. Personal status acquirable by individuals entering, residing and moving in the EU are ordered and studied assuming that they could be hierarchically ordered. The spectrum of EU personal status goes from the most general status, that offer less secure rights to non-EU citizens, to the status that guarantee the most wide and secure set of rights to EU citizens.

The EU common immigration policy is analysed assuming that the status that can be acquired by a third-country national from the moment in which the person legally enters for the first time in one of the EU Member States' territory are thought to be consequential one to the other. More precisely, the thesis at the basis of the first part of this work consists in considering the legal status regulated by the EU common labour immigration policy to be designed as natural and logical stages in the process of progressive settlement of a third-country national into EU Member States. The analysis will show that over time, according to EU secondary law, third-country nationals can acquired status to which are attached more rights, on which basis they can benefit of equal treatment in a broader list of fields, and, finally, of a greater security of residence. This consequentiality in the acquisition of better legal status, besides being deducible from the analysis of legal provisions, is also clearly expressed by multiple cross-references between directives and other legal acts regulating these status[20]. Moreover, in all these legal acts Union citizenship is presented as the most privileged status, where rights, equal treatment and security of residence find their maximum extension.

The first status that will be taken into account is the one acquired by the third-country national who is a single permit holder[21], a status regulated by one of the more recent directives adopted by the EU aiming at disciplining immigration of third-country nationals for work purposes. It is the best example of the attempt of the EU to provide a common status to third-country nationals workers without considering the specificities of their labour activity. Actually, the single permit is released for work and residence[22].

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[20] Ib.

[21] Directive 2011/98/EU of the European Parliament and of the Council of 13 December 2011 on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State, OJ L 343, 23.12.2011.

[22] Cfr. art. 1, lett. a, Directive 2011/98/EU, cit..

Over time the strict relation between this dual concept becomes more and more clear within EU immigration policies, and it is not by chance that this directive expressly refers to the long-term resident directive as a more privileged status, which is mostly focus on residence and that is a permit which release is not necessarily linked, as is the former, with a work activity.

For our intent, also the entry and stay as a researcher[23] or as a high-qualified worker[24] will be considered in order to highlight the main differences among the status and the rights attached. Considering that all these status can be reconnected to the broad «worker category», the extension of the analysis also to these more specific groups of workers or professions is done in order to comprehend what kind of workers are privileged within the EU. Subsequently, the following status which will come under consideration will be the long-term resident status that can be acquired after five years of legal residence on one of the EU Member States' territory[25], and which the single permit directive expressly defined as a «more privileged status»[26] confronted with the previous one.

In the first part of the research the assumption concerning the unifying effect of national and EU citizenship, and its role as the most privileged status (in absolute terms) will be challenged by analysing the plurality of status within the citizenship of the Union. Furthermore, also the presumption that naturalisation is a natural and undisputed stage for a third-country national residing permanently in a EU Member State, that is the formal complementary approach adopted by the EU as it emerges from EU legal acts regulating (labour) immigration will be questioned. Nevertheless, precisely because there is a lack of coordination among EU member states in the field of citizenship acquisition, and the EU does not have competencies in the matter of modes of acquisition of member states' citizenships, the status that are presented as intermediate and temporary - stages in the path towards becoming an EU and a national citizen - can be, on the contrary, considered as potentially permanent, becoming the basis of a *de facto* alternative approach.

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[23] Council Directive 2005/71/EC of 12 October 2005 on a specific procedure for admitting third-country nationals for the purposes of scientific research, OJ L 289, 3.11.2005. See also the Proposal for a Directive of the European Parliament and of the Council on the conditions of entry and residence of third-country nationals for the purposes of research, studies, pupil exchange, remunerated and unremunerated training, voluntary service and au pairing, 25.3.2013 COM(2013) 151 final 2013/0081 (COD).

[24] So called «Blue card Directive», cfr. Council Directive 2009/50/EC of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment, OJ L 155, 18.6.2009.

[25] It should be underlined that the United Kingdom, Ireland and Denmark have opted out from both Directives. Cfr. recitals 33 and 34, Directive 2011/98/EU cit.; recitals 25 and 26, Council Directive 2003/86/EC cit.

[26] Cfr. e.g. recital 8, Directive 2011/98/EU cit.

Fundamental, and nowadays contested, deeply related fields will not be considered. We are mainly referring to asylum and, specifically, to the Common European Asylum System (CEAS)[27], and, secondly, to the legal instruments regarding irregular migration, which consist in the legal acts through which the EU aims to fight against human trafficking and irregular immigration, i.e. the return and readmission procedures[28]. At least on paper, the EU provisions regarding asylum are focused on the granting of the fundamental right of asylum or other forms of temporary protection[29]. On the other hand, the instruments to fight against human trafficking[30] and irregular migration are seen as parts of the EU immigration policy but as a phenomenon that need to be prevented and effectively managed in order to have a credible immigration policy in relation to those who have a «legitimate interest» to enter into the EU territory. These parts of the external dimension of the EU common immigration policy are more concerned with the fight against the exploitation of migrants as irregular labour force, but above all with the security dimension of the EU policy. Therefore a great attention is paid to the aspect of the surveillance of EU external borders through specialised agencies[31], and the improvement of the exchange of data and information between

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[27] The legal acts that compose the Common European Asylum System are: Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person, OJ L 180, 29/06/2013; Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers, OJ L 31/18, 6.2.2003 which will be valid until 21 July 2015 when the Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection OJ L 180, 29.06.2013 will enter into force; Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, OJ L 326, 13.12.2005; which will be valid until 21 July 2015 when the Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection OJ L 180, 29.6.2013 will enter into force.

[28] Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, OJ L 348, 24.12.2008.

[29] Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted, OJ L 337, 20.12.2011; Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof, OJ L 212, 7.8.2001.

[30] Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA, OJ L 101, 15.4.2011; Communication from the Commission to the European Parliament, the Council, The European Economic and Social Committee and the Committee of the Regions, The EU Strategy towards the Eradication of Trafficking in Human Beings 2012–2016, COM(2012) 286 final, 19.6.2012.

[31] Council Regulation (EC) No 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, OJ L 349, 25.11.2004. And 2nd December 2013 have become operational the European Border Surveillance System. Cfr. Regulation (EU) No 1052/2013 of the European Parliament and of the Council of 22 October 2013 establishing the European Border Surveillance System (Eurosur), OJ L 295, 6.11.2013.

member states and the EU. Although, in quantitative and qualitative terms the above-mentioned ways of entering in the EU Members States territories are quite relevant, and the EU legislation and harmonisation among Member States have importantly progressed in these fields in recent times, these subjects involve a different set of reflections and objectives both for EU institutions and Member States.

Finally, another source of plurality of status is excluded from the research, i.e. the different legal status within the EU common immigration policy, other that the ones regulated by the above-mentioned directives, that are established by the numerous bilateral agreements that the EU have signed with non-EU Member States. These agreements attribute to selected non-EU citizens a privileged status within the EU in relation to other third-country nationals which cannot benefit from such preferential treatment. One of the best examples, also in relation to the current state of relations among the EU and this non-EU Member States, is the bilateral agreement between the EU and Turkey signed in 1963[32].

One of the objectives of the present research is to understand and underline the aspects in which the progressive acquisition of these status differs from one EU Member State to the other, and how specific constitutional features shape and influence this EU route for third-country nationals. Therefore, we cannot avoid to consider how Member States have transposed the sub-mentioned directives regulating the EU status for third-country nationals, how they have exercised their discretion where the directives leave such possibility[33], and how these EU legal acts have changed national immigration laws and systems. As it might be expected, due to the derivative nature of the EU citizenship, if in the first part of the research we consider the acquisition of the Union citizenship as the natural conclusion of this route of progressive acquisition of better status, we cannot avoid either to take into consideration how this acquisition takes place. By consequence, EU Member States' laws dealing with naturalisation of foreigners have to be considered as the only means through which a third-country national can acquire EU citizenship. Although the general trends among EU Member States concerning naturalisation of foreigners will be taken into account, as the situation in this respect is extremely

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[32] Agreement of 12 September 1963 establishing an Association between the European Economic Community and Turkey, Council Decision of 23 December 1963, 64/732/EEC, OJ 217, 29/12/1964. See P. BOELES, M. DEN HEIJER, G. LODDER, K. WOUTERS, *Residence rights of Turkish nationals under the association agreement*, in *European Migration Law*, Antwerp, 2009, p. 91 ff.

[33] We are referring to, for example, the possibility of Member States to require third-country nationals to comply with integration conditions, in addition to the five years of legal residence, the possession of stable and regular resources and of a sickness insurance to acquire the long-term resident status. Both Belgium and Sweden do not required the compliance with this further integration requirement, on the other hand, countries as Italy or the Netherlands require third-country nationals to demonstrate a sufficient integration in the national society and the knowledge of the national language. Cfr. art. 5, para. 1 and 5, Council Directive 2009/109/EC cit.; art. 9, para 2 bis, D. Lgs. 8 gennaio 2007, n. 3.

diversified throughout the EU, only the Belgian law and the Swedish law on naturalisation will be studied in details.

As it will be explained later on, the choice of these two EU Member States as case studies is based on the assumption that for their specific constitutional features they add to this already stratified and composite picture further elements of complexity[34]. Therefore, particular attention will be payed to the different ways chosen to arrive at the same final point: i.e. national differences regarding naturalisation and conceptions of citizenship between Member States, but also within the same Member State, that impose different time frames and conditions for the acquisition of the national and the EU citizenships. Furthermore, it is worth to reflecting on the recent amendments to the citizenship laws of these two EU Member States and on what circumstances have influenced the reform process. Finally, if and how EU laws regarding immigration and EU citizenship have in some way influenced these reforms.

At the very end, with the purpose to analyse the principles and mechanisms applied in a legal system where multiple status are attached and attributed by different territorial units, the three-level Swiss citizenship and naturalisation procedure will be studied.

2.1. The Role of member states.

The objective of the EU common immigration policy is to approximate rules and standards on the entry for, in broad terms, purposes of work and residence of third-country nationals in EU member states' territories. This is the reason why, as previously explained, the research firstly considers the EU legal acts which compose the EU common immigration policy, how they are connected and how is their role in the overall EU strategy towards legal labour immigration of non-EU citizens. Nevertheless, as we will try to explain in due corse, the role of member states, and their immigration and citizenship policies in particular, has to be considered since they are themselves *status producers* other than the EU.

Firstly, it should be considered that EU competencies falling under the area of Freedom, Security and Justice (hereinafter AFSJ) are shared competencies[35]. This means that in establishing the EU common immigration policy - i.e. an efficient management of migration flows and fair treatment of third-country nationals residing legally in Member States[36] - EU institutions and Member States may legislate and adopt acts, even though

[34] Cfr. Chapters III and IV of the present work.

[35] Cfr. arts. 2.2, 4.2, lett. j, and Protocol no. 25 on the exercise of shared competence, Treaty on the functioning of the European Union, (TFEU, consolidated version), OJ C 326, 26.10.2012.

[36] Cfr. art. 79. 1, and 2, letts. a and b, TFEU.

the competence of the latter is residual and exercisable where the EU has not exercised it or ceased it exercised[37]. Consequently, national legislation on immigration and on rights of third-country nationals residing in EU Member States, as the modes in which EU legal acts are transposed within national legal systems and concretely operates cannot but be included in the study[38].

Another aspect in which the EU has not competence, but, nevertheless, it is exercising a mouldering function is integration of third-country nationals. The process of appropriation by the EU of a concept which was, until recent times, deeply connected with, and a mirror of, only national sovereignty and conceptions of belonging and citizenship[39], has extended also to the EU level the debate about what is and when there is integration[40]. However, this is an ambit that remains almost totally left to member states to concretely define and make effective as it is strictly linked with national identity and values[41]. Therefore, it should be considered how this new-born integration concept at the EU level influence its immigration policy and, in turn, potentially affects member states' modes of integration.

The second significant reason for which an analysis of the EU immigration policy and citizenship cannot avoid to consider how the same concretely operate within member states' legal systems are the two processes of, from one side, decoupling of citizenship from nationhood, and, from the other, of increasing relevance of (the length of) residence over citizenship as the main criterion for rights to be granted to foreigners[42]. These phenomena are deeply connected both to the inner characteristics of the Union citizenship[43], and to some extent to what is happening at the sub-national levels within certain member states, where third-country nationals are now seen as

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[37] Cfr. art. 2.2, TFEU.

[38] N. WALKER (ED.), *Europe's Area of Freedom, Security and Justice,* Oxford, 2004, p. 32-33.

[39] It is not by chance that it is expressly said that in this ambit harmonisation of member states laws and regulations through EU legal acts is excluded. Cfr. art. 79, para. 4, TFEU (consolidated version), OJ C 326, 26.10.2012.

[40] For a brief overview on the diverse theories which try to describe integration see H. KOFF, *Fortress Europe of a Europe of Fortresses? The integration of Migrants in Western Europe*, Brussels, 2008, p. 71-88.

[41] D. MILLER, *Citizenship and National Identity*, Cambridge, 2000, p. 41-42.

[42] G. T. DAVIES, *'Any Place I Hang My Hat?' or: Residence is the New Nationality*, in *ELJ*, 11, 2005, p. 55-56.

[43] D. KOSTAKOPOULOU, *Ideas, Norms and European Citizenship: Explaining Institutional Change*, in *Modern Law Review*, 68, 2005, p. 242-243.

potential new citizens, but above all as «supporters» of the sub-national identities and projects to gain greater autonomy when not independence[44].

Thirdly, the multiplication of status of non-EU citizens is a phenomenon that is not only due to the decoupling process described above, but that was also provoked by the attribution to certain sub-national units of competencies in fields which are connected with the management of immigration, and which attribute them the power to decide on procedures and requirements to acquire the (national and Union) citizenship. Independently of the degree of decentralisation and of the number of competencies given to sub-national units within nation states even in fundamental fields, matters as immigration - intended as the power to control and establish the conditions under which individuals can enter and exit from the national territory - and citizenship - on what basis grant or withdrawal national citizenship - are never attributed to sub-national units, except for very specific and isolated cases[45]. Nevertheless, competencies passible to deeply influence immigration and citizenship policies and how these two fields relate to each other can be attributed to sub-national units. We refer to matters as integration of foreigners and other competencies which, even though they regard all individuals residing in a specific portion of the national territory and are not meant to be directed only to foreigners, touch ambits that are particularly relevant most of the times mainly for non citizens, e.g. housing, access to the labour market, education and social welfare among others.

In order to explore in details the sub-mentioned dynamics the Kingdom of Belgium has been chosen as a case study. Being a federation only since 1993, it has experienced a long series of institutional reforms, particularly from 1950s, in order to accommodate within a proper institutional architecture the diversity of the different (linguistic) communities of which it is composed[46]. Divided in regions and communities,

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[44] This phenomenon is quite clear if we look at Catalonia and Scotland, and - even if independence has not been made as a request (still), although is constantly refer to as a possible outcome, Belgian regions. See M. CHAMON, G. VAN DER LOO, *The Temporal Paradox of Regions in the EU Seeking Independence: Contraction and Fragmentation versus Widening and Deepening?,* in *ELJ*, 2013; See also J.-T. ARRIGHI DE CASANOVA, *Those Who Came and Those Who Left: The territorial politics of migration in Scotland and Catalonia,* EUI PhD thesis; Department of Political and Social Sciences, 2012; specifically on Scotland, see J. SHAW, *EU citizenship and the edges of Europe*, CITSEE Working Papers Series 2012/19, p. 7-9, at http://www2.law.ed.ac.uk/file_download/series/372_eucitizenshipandtheedgesofeurope.pdf.

[45] We can account for two cases in which sub-national units, despite that they do not have any kind of competence in the field of immigration strictly intended, they have their one sub-national citizenship(s) and the correspondent power to grant or withdrawal the same. The first case is Switzerland, which Nationality Law is going to be extensively analysed later on, and the second case, and last to our knowledge, are the Åland Islands. Cfr. Arts. 9-11, Act on the Autonomy of Åland, 1991/1144, and arts. 12, 13, Nationality Act, n. 359/2003 and following amendments (cfr. law n. 974 of 2007). The regional citizenship can be withdrawal in case of residence outside the islands' territory for more than five years. Cfr. arts. 6 e 7, Act on the Autonomy of Åland, 1991/1144. Cfr. Arts. 59 a, 59 b, Act on the Autonomy of Åland, 1991/1144 (as amended in 2004, Law n. 68, 30 January 2004).

[46] The last and sixth reform of the State is going to enter into force in July 2014. Cfr. art. 59, Proposition de loi spéciale relative à la Sixième Réforme de l'État, 25 juillet 2013; Cfr. A. MASTROMARINO, *Belgio,* Bologna, 2012, p. 23-28.

the Belgian federation is characterised by the principles, among others, of the exclusivity of competencies and the absence of hierarchy between the federation and federal entities.

For what concerns competencies as immigration and citizenship, it is significant that Communities are exclusively competent in cultural and personal matters[47]. More specifically, in the matter of integration of foreigners and for relevant social services as housing and access to the labour market. Therefore, different paths are provided in every region for the integration of third-country nationals, and the requirements that have to be fulfilled in order to benefit from the above mentioned rights may differ in relation to the region where the third-country national resides. Furthermore, we should not forget to mention the strong role played by language within the Belgian state, considering that it is the first vehicle for the transmission of culture and (sub-national) identity. In this sense it is significant that the competencies concerning education are an exclusive community competence.

In particular, language and integration have acquired a fundamental importance within the last amendment of the modes of acquisition of the Belgian citizenship[48]. The Code of Nationality of 1984[49] has been amended extensively in the last decades, but only with the last reform of 2012, which has entered into force in 2013[50], a general reflection on the overall structure and its inner coherence has been done[51]. It is quite interesting to note that even the title of the law highlights the influence of the immigration matter over the developments of the citizenship regulation. In fact, it clearly states that this last reform has been done in order to make citizenship acquisition neutral from the point of view of immigration[52]. The new modes of acquisition of the Belgian citizenship will be analysed in details later on, nevertheless, it is significant that with the 2012 reform has been reintroduced the «integration» requirement. This, which was present in the first version of the Code of Nationality of 1984, was seen, at that time, as something which had to precede citizenship acquisition, i.e a *de facto* integration would be followed by a

[47] Cfr. arts. 127 and 128, Constitution belge.

[48] Despite the fact that in Belgian legal acts regarding citizenship is commonly used the term «nationality» as «citizenship» implies a reference to voting rights, for reasons of homogeneity we will use only «citizenship». The difference is quite visible in the use of these two terms in the third paragraph of article 8 of the Belgian constitution modified in order to provide a legal basis for the voting rights of EU citizens which were not Belgian nationals: «*Par dérogation à l'alinéa 2, la loi peut organiser le droit de vote des citoyens de l'Union européenne n'ayant pas la nationalité belge, conformément aux obligations internationales et supranationales de la Belgique*». Cfr. art. 8, para. 3, Constitution belge.

[49] Which is the source of civil law mentioned by the Constitution when reserving to the Federal legislator - the representative Chamber - the power to decide on the modes of acquisition, loss and recover of the Belgian citizenship, and naturalisation. Cfr. arts. 8 and 9, Constitution belge.

[50] Loi du 4 décembre 2012 modifiant le Code de la nationalité belge afin de rendre l'acquisition de la nationalité belge neutre du point de vue de l'immigration, M.B., 14 décembre 2012, 2e éd., p. 79998.

[51] D. DE JONGHE, M. DOUTREPONT, *Le Code de la nationalité belge, version 2013. De «Sois Belge et intègre-toi» à «Intègre-toi et sois Belge»*, in *Journal des Tribunaux*, 2013, p. 313.

[52] Cfr. *supra* note 84.

legal integration[53]. Repealed by the 2000 amendment, it has been reintroduced by the 2012 reform of the Nationality Code and, although a legal definition is still missing, the federal legislator has strictly defined how foreigners have to prove its fulfilment. Thus, citizenship is seen as a consequence of integration and not as an instrument to attain it. Furthermore, a supplementary element of complexity is represented by the divergence between the views between two French speaking and Flemish communities[54] of what integration means and on the role that citizenship plays in the integration process. These different conceptions have had an important influence in the reform process. In fact, this has taken ten years to be completed because of the difficulties to find a common view on these issues that could satisfy both communities. In the end, it has resulted in the provision of different paths of integration[55] for foreigners.

Finally, it should be mentioned that Belgium is part, with the Netherlands and Luxembourg, of Benelux since 1958[56]. The cooperation between these neighbouring countries pursues three main objectives: a common market and economic union, an agreed durable development, justice and home affairs. Although nowadays its influence is not comparable to the past, it has played a significant role in setting the scene for the EU integration process in ambits, between others, as free movement of persons. Keeping this in mind, not unexpectedly Benelux countries were part of the founding fathers of the European Economic Community in 1957, and three of the first five original members of the Schengen agreement in 1985. Much said, it is of some interest to study the history of the rules aiming at regulating the movement of persons in Belgium over time also considering the membership and its participation in the construction of the EU.

As previously said, the sub-national level, when looking at further sources of personal status within states, is not the sole level on which this phenomenon can be observed. Despite the fact that when speaking about a supranational level the immediate association with the sole EU level is almost automatic, another source of plurality of status at the supranational level exists between a group of EU member states and non-EU

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[53] D. DE JONGHE, M. DOUTREPONT, *cit.*, 316.

[54] Different paths are provided in every region for the integration of foreigners, from which clearly emerges the influence of neighbouring countries in defining the approach and ideology which inform the visions of what should be the contents and aims of integration. The French assimilationist model is the reference point in the Walloon region; on the contrary, the Dutch multicultural model - although it has been modified in recent times, also due to the - supposed - failure of the multicultural model in Netherlands - in the Flemish region.

[55] The language requirement is quite important because to all the five categories of foreigners that now can ask for the Belgian citizenship is required to demonstrate the knowledge of one of the three national languages, and to posses an educational qualification or to have followed an integration course. Cfr. arts. 12 bis, 14, 16, 17, Loi du 4 décembre 2012.

[56] The treaty which established the Union Benelux in 1958 was revised in 2008, renewed for an indefinite period of time, and has entered into force in 2012. Cfr. Traite portant revision du Traite instituant l'Union economique Benelux signe le 3 Fevrier 1958, at http://www.benelux.int/files/3313/9230/2800/TraiteBenelux_2008.pdf.

member states. We are referring to multilateral agreements signed between certain European countries, involving matters as movement of persons across their national borders and the acquisition of the national citizenship which provide a different status and additional rights to national citizens coming from the signatory parties. We can speak then of a supranational level that partially overlaps with the EU supranational level. For individuals who are citizens of the states which are parties of these agreements, they represent a potential source of further status that are additional to those provided by the EU and at the national level. Therefore, one of the legal systems where status deriving from overlapping supranational levels are present is the Kingdom of Sweden, the second case study of this research.

Sweden, with Norway, Finland, Iceland, and Denmark, has signed in 1962 the Helsinki Treaty which poses the basis for co-operation between Nordic countries in «the legal, cultural, social and economic fields, as well as in those of transport and communications and environmental protection»[57]. This agreement was amended several times since 1962, and the last two amendments of 1993 and 1995 were done in order to enhance the «participation by the Nordic countries in the process of European co-operation»[58].

Within the Nordic co-operation framework specific treaties have been signed in the fields of culture, industry and trade, defence, labour market, education and research, taxation, social and health care, language and legislation. For our purposes those establishing the common Nordic labour market as well as those on passport issues, citizenship and national registration are particularly relevant. Signed in 1957 between Sweden, Norway, Finland, and Denmark, and joined by Iceland in 1965, the Passport Control Convention is applicable to both Nordic and non-Nordic citizens, and aims at establishing a common visa policy and to waive passport controls at intra-Nordic borders. In 2000 the convention was amended to regulate the application of the same in accordance to the Protocol annexed to the Treaty of Amsterdam, which integrates the Schengen *acquis* within the framework of the European Union[59]. In fact, even if not all Nordic countries are EU member states, they are all parties of the Schengen agreement[60]. In addiction, Nordic citizens after 1954 - and, from 1966, also citizens of the Faroe Islands - are exempted from the obligation to hold a passport or another travel document

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[57] Cfr. Preamble to the Helsinki Treaty of 23 March 1962, at http://www.norden.org/en/about-nordic-co-operation/agreements/treaties-and-agreements/basic-agreement

[58] Cfr. art. 1, Helsinki Treaty. as amended in 1974 and 1993.

[59] Cfr. Council Decision 2000/777/EC of 1 December 2000 on the application of the Schengen *acquis* in Denmark, Finland and Sweden, and in Iceland and Norway - Declarations, OJ L 309, 09/12/2000.

[60] Cfr. Council Decision 1999/439/EC of 17 May 1999 on the conclusion of the Agreement with the Republic of Iceland and the Kingdom of Norway concerning the latters' association with the implementation, application and development of the Schengen *acquis*, OJ L 176, 10/07/1999.

when travelling through Nordic countries, or a residence permit when residing in another Nordic country other than their own[61].

The second relevant agreement signed in the framework of the Nordic cooperation for the aims of the research is the 2002 agreement between Denmark, Finland, Iceland, Norway and Sweden on the implementation of certain provisions concerning nationality[62]. Differently from the previous agreement, this has been signed in order to implement national provisions of nationality acts of the signatory parties. In brief, it provides an easier track for Nordic citizens whom fulfil certain requirements to naturalise in another Nordic country. It is interesting to underline that under a certain age the years of residence in one Nordic country can be counted in the procedure for naturalisation in another Nordic country. Moreover, the, so called, «double naturalisation» is not allowed: i.e. in order to profit from this fast track the applicant may not have acquired its previous «Nordic citizenship» through naturalisation[63]. Thus, a certain group of first generation third-country nationals are, by definition, excluded from the beneficiaries of the agreement.

As it emerges, this supranational form of co-operation between EU and non-EU member states in ambits like citizenship acquisition and movement of persons across national (Nordic) borders, from the one hand, has to take into account EU laws in the same fields. At the same time, this cannot but influence the modes in which the same legal acts are transposed and operate within national legal systems of EU and non-EU member states. Furthermore - and despite a common citizenship status at the Nordic cooperation level does not exist - the circumstance for which certain Nordic citizens can easily naturalise in another Nordic country, makes Nordic citizens holder of a privileged status in relation to third-country nationals and EU citizens coming from non-Nordic countries. Therefore, it is worth to analyse how these two supranational levels relate both in the field of national and supranational citizenship acquisition, and for what concern the movement of nordic citizens who are EU citizens, nordic citizens who are not EU citizens and third-country nationals across their national borders.

Finally, the very last part of the research will be dedicated to the study of the Swiss legal system and, in particular, of its legislation on citizenship acquisition and immigration. Even though it is not an EU member state, since 2008, Switzerland is a

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[61] Protocol concerning the exemption of nationals of the Nordic countries from the obligation to have a passport or residence permit while resident in a Nordic country other than their own, Copenhagen 22 May 1954.

[62] Agreement Between Denmark, Finland, Iceland, Norway and Sweden on the Implementation of Certain Provisions Concerning Nationality, signed at Copenhagen 14 January 2002, entered into force October 18, 2003.

[63] Cfr. art. 4, *supra* note.

signatory of the Schengen agreement, thus, part of the Schengen area. It is an interesting legal system to look at when reflecting on the relation between citizenship and immigration at the EU level due to its three-level citizenship and its apparent similarities with the EU citizenship[64]. Every Swiss citizen has, by definition a triple citizenship: the municipal, the cantonal and the federal citizenship[65]. Thus, the possession of a municipal citizenship is needed to obtain the cantonal citizenship - i.e. the latter is derived from the former - and both are indispensable in order to acquire the federal citizenship, as it is clearly stated at art. 37, para. 1 of the Swiss Federal Constitution: «Any person who is a citizen of a commune and of the Canton to which that commune belongs is a Swiss citizen».

The evolution of the Swiss Citizenship law, especially its provisions concerning the requirements and the procedure for foreigners naturalisation is a quite interesting example of how different levels of government can intervene and manage immigration and the acquisition of a unique citizenship by naturalisation. Since the very beginning of the federation, the legal acts regulating the modes of acquisition and loss of Swiss citizenship have gone through numerous changes with a gradual shift of the competencies in this field in favour of the federal level. On the contrary, for what concern naturalisation of foreigners, the high degree of autonomy in determining their own naturalisation criteria has remained a distinctive character of this mode of acquisition of the Swiss citizenship[66].

Swiss municipalities and cantons have always strongly defended their competencies in the matter of citizenship acquisition against the efforts of federal authorities to increase the harmonisation at the federal level of naturalisation requirements and procedures. A certain degree of harmonisation is necessary, in the view of the federal authorities, to better address the need of integration within the Swiss society of the high percentage of foreigners living in the country[67]. Therefore, the multilevel procedure for acquire the Swiss citizenship by naturalisation reflects this division of competencies between different levels of government, and not only leads to a differentiation of naturalisation requirements and procedures across cantons and municipalities, but has also the effect to multiply the conceptions of membership and nationhood across the country, influencing, or localising, the construction of the Swiss

[64] The similarity stays in the derivative nature of the European citizenship from member states national citizenships. Once acquired the latter the former is automatically attributed. Cfr. art. 20, para. 1, TFEU, OJ C 326/56, 26.10.2012.

[65] J. HAINMUELLER, D. HANGARTNER, *Who Gets a Swiss Passport? A Natural Experiment in Immigrant Discrimination*, in *American Political Science Review*, 1, 2013, p. 168; M. HELBLING, cit., p. 12.

[66] A. AUER, G. MALINVERNI, M. HOTTELIER, *Droit constitutionnel suisse, Volume I, L'Etat,* Berne, 2013, p. 119.

[67] O. ZIMMER, *Coping with deviance: Swiss nationhood in the long nineteenth century,* in *Nations and Nationalism*, 17, 2011, p. 763.

national and sub-national identities[68]. Nevertheless, since a number of requirements are set at the federal level, at least a minimum level of harmonisation between sub-national units in this matter, and a minimum of control by federal authorities is present[69] in order to prevent abuses at the local level[70], and to guarantee, for example, the respect of the principles of non-discrimination, justiciability[71] and reasonableness[72].

The analysis will be focused on the modes in which these multiple citizenships - federal, cantonal and municipal - coexist within a unique legal system. Far from being perfect, the Swiss model can be a significant case study also for the deficiencies that its naturalisation procedure has, if we consider it as an opportunity to understand what is the other side of the coin when multiple actors influence and differently regulate relevant aspects of a matter as citizenship is, in accordance with its own views.

3. The plurality of status within the EU: attempting a linear reconstruction.

The plurality of personal legal status within the EU can be analysed from a double point of view: territorial - i.e. in what modes a specific legal system contributed in augmenting the stratification of personal status - and individual - how and what personal characteristics are significant in determining the status that may be acquired over time. The former is adopted in the second part of the research, the latter guides the analysis of the EU immigration policy and EU citizenship.

The study of the plurality of status will be led by the assumption that citizenship, both at the national and at the European Union level, is the most privileged and paramount status, i.e. the status capable to unify all the status previously acquired in terms of access to rights, of the number of fields in which equal treatment is guaranteed and in relation to which the security of residence or, more precisely, protection against expulsion at its maximum level. Therefore, the aim will be to explore the, supposed,

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[68] A. WIMMER, *A Swiss anomaly? A relational account of national boundary-making*, in *Nations and Nationalism*, 17, 2011, p. 719.

[69] A. ACHERMANN (ET AL.), *Country report: Switzerland,* EUDO Citizenship Observatory, 19, at http://eudo-citizenship.eu/admin/?p=file&appl=countryProfiles&f=2013-23-Switzerland.pdf.

[70] The risk of abuses that may derive from the discretion left to member states to decide the modes of acquisition of their own national citizenships and, consequently, of the EU citizenship is exemplify by the recent episodes of «sell of the EU citizenship». Cfr. *Malta free to sell EU citizenship, commission says*, EUobserver, 14.11.2013, at http://euobserver.com/justice/122101; *Investors may buy Maltese citizenship,* Times of Malta, October 8, 2013, at http://www.timesofmalta.com/articles/view/20131008/local/individual-investor-programme-enables-foreigners-to-buy-maltese-citizenship.489537#.UoZdxpGlJrO

[71] Cfr. art 50.1, 141.0, Loi fédérale du 29 septembre 1952 sur l'acquisition et la perte de la nationalité suisse (Loi sur la nationalité, LN): «Les cantons instituent des autorités judiciaires qui connaissent des recours contre les refus de naturalisation ordinaire en qualité d'autorités cantonales de dernière instance.», at http://www.admin.ch/opc/fr/classified-compilation/19520208/index.html

[72] J. HAINMUELLER, D. HANGARTNER, cit., p. 4-5, 11. Cfr. judgements 9 July 2003, 123 I 232 and 129 I 217.

linear progression between status within the EU, i.e. to look at the role that citizenship plays within immigration policies both at the EU level and of selected member and non-member states. Differently said, we will look at the functional role of citizenship in shaping and guiding the changes and evolution of immigration government.

As it will be latter explained, it is assumed that the citizen status is used by the EU within its immigration policy in a not dissimilar way from the mode in which states have used it when dealing with the necessity to adopt measures to govern immigration in the last sixty years. This said, the implicit assumption is that citizenship and immigration are engaged in a constant relation, and are reciprocally useful one to the other to control and delineate policies in both ambits[73]; moreover, as this is true for nation states[74], it was from the very beginning a fundamental relation also for the EU[75], initially only regarding EU citizens[76], but from the late nineties, with the growing gaining of competencies in the field of immigration, also in relation to non EU-citizens. The interesting aspect is that the progressive development of the EU integration and, more recently, of its gain of competencies in immigration of third-country nationals, has created new categories of foreigners and has partially deprived member states of the advantages attached to this instrumental use of citizenship.

The aim is, firstly, to explore how the EU has used its own citizenship instrumentally within its own immigration policy. Secondly, considered that it is a derivative status, and that EU competencies on immigration are shared with member states, we cannot avoid to consider how these legal acts and policies are transposed and implemented within member states and their sub-nationals units legal systems. Therefore, the analysis will concentrated on a series of determined status that a third-

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[73] In recent times, ever more this relation is being used by member states as an instrumental relation, and, more precisely, as a partial solution to solve their public deficit problems. The reference is obviously to the national operations of sell of Union citizenship. The Maltese case of «Individual Investors program», promptly stooped by the European Commission, is the latter in time and the one that provokes more reactions at the EU level, notwithstanding that similar types of programs were in place in United Kingdom (as a form of premier residence), Austria and Montenegro. See J. DZANKIC, *The Pros and Cons of Ius Pecuniae: Investor citizenship in comparative perspective,* EUI Working Paper RSCAS 2012/14, p. 11-14, at http://cadmus.eui.eu/bitstream/handle/1814/21476/RSCAS_2012_14.pdf?sequence=1; See also *Should be citizenship be for sale?*, Citizenship Forum, EUDO Observatory on Citizenship, RSCAD, EUI, at http://eudo-citizenship.eu/commentaries/citizenship-forum/990-should-citizenship-be-for-sale

[74] Especially due to the increasing flows of migrants in the aftermath of World War II and to the establishment and of national welfare state. See A. J. MENÉNDEZ, *European Citizenship after Martínez Sala and Baumbast. Has European law become more human but less social?*, ARENA Working Paper, 11, June 2009, at http://www.arena.uio.no; C. JOPPKE, *Transformation of Citizenship: Status, Rights, Identity,* cit, p. 38.

[75] C. JOPPKE, *The Inevitable Lightening of Citizenship,* cit., p. 19; *c*fr. Opinion of the European Economic and Social Committee on 'A more inclusive citizenship open to immigrants' (own-initiative opinion), OJ C 67, 6.3.2014.

[76] In this respect are relevant all the legal acts and case-law concerning non discrimination on the basis of nationality, and even more equal treatment of EU citizens vis-à-vis nationals, which was the leading force of the early developments of the Union citizenship.

country national can acquire within the EU. These are considered to be the stages of the path of linear approximation to the most privileged status, i.e. the citizen status. Coherently, the study does not aim at giving an overall and detailed overview of every status that is acquirable, but rather it is focused on the elements of selected status from which it appears evident the progression in comparison with the previous status possessed by the individual.

This approach allows to follow the construction over time of the above-mentioned linear progression, for example, by concentrating on the modulation of the degree of strictness of certain fundamental requirements. In this respect, in fact, we notice that the fulfilment of certain requirements are equally asked to third-country national as well as to Union citizens, but the difference stays in their grade of strictness[77]. As it will be largely explained further on, two are the most relevant elements in all the status concerned: time (of legal residence on the territory), and, respectively, the qualification as a worker or the possession of financial resources and of a health insurance.

Despite not being immediately evident, there is at least a further couple of reasons for which the requisite of «adequate resources» should be considered as a significant element. The first reason is that its fulfilment is asked to EU citizens as to third-country nationals. However, precisely the difference in the degree of strictness and of the consequences of its failed accomplishment between the two categories enlightens the aspects in which the status differ[78], and make evident in relation to what rights and fields the acquisition of the EU citizenship is a more privileged status. Secondly, the reference to the national social system and the set of elements that can be taken into account in order to evaluate the «sufficiency» of the resources[79] are further elements of a potential *nationalisation* of these status and of differentiation across EU Member States of the same requirements.

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[77] Cfr. art. 5.1, lett. a, Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents, OJ L 16, 23.1.2004, and art. 7.2, Directive 2004/58/EC, cit.. In the first to third-country nationals who wish to acquire the long-term resident status are required to possess «stable and regular resources which are sufficient to maintain himself/herself and the members of his/her family, without recourse to the social assistance system of the Member State concerned». On the other hand, to Union citizens are required to possess «sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and have comprehensive sickness insurance cover in the host Member State». On the fulfilment of the same for both categories depend the security of their right to residence in the territory of a member state of which they are not nationals.

[78] Even if to «(…) 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 citizens of the European Union». Cfr. recital 2, Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents.

[79] «Member States shall evaluate these resources by reference to their nature and regularity and may take into account the level of minimum wages and pensions», Cfr. art. 5, para. 1, lett. a, *supra* note.

Besides the interests regarding the specific features of every status, it could be significant to explore the progression from one status to the other over time to comprehend if a conception of citizen or of mobile foreigner common to all the status and capable to connect them exists. Secondly, the aim is also to study the understandings that different institutional subjects have of notions such as foreigner, migrant, citizen, integration, how these conceptions have been transposed and are reflected in the legislation regulating the acquisition of legal status. At last, it will be possible to observe how these notions have evolved over time, and what have been the causes, if any, of this evolution[80].

3.1. A further delimitation of the research ambit.

After this general introduction on what is the meaning attributed to plurality in the context of this research, a further delimitation of the research ambit cannot be postponed further: i.e. what are the specific aspects of immigration and citizenship which are going to be considered. The legal acts and policies which are going to be studied regard only voluntary and legal immigration towards the EU for economic reasons. In other words, the prototype of non-citizens that are going to be considered are workers, would-be workers such as students and assimilable categories - at least under this light they are considered by EU policies - and their family members. The choice to limit the analysis to these categories, instead of considering the overall EU common immigration policy, is based on the inner connection that both intra and extra EU immigration have with what is the core of the EU integration process, i.e. the creation, before, and now the enhancement, of the common market. More precisely, we believe that a similar mind frame and principles can be found within EU policies aiming at regulate intra-EU mobility of workers who are EU citizens, and now the entry, stay and contribution of non-EU citizens workers to the enhancement of the EU integration project. And precisely on the basis of these similarities that exist between these interrelated policies, the linear progression through status has been, at least formally, designed, as we should try to demonstrate (infra).

In order to determine the initial status of an individual a double series of elements have to be considered. The first can be labelled as «individual elements» and grouped in three categories: citizenship status, time of residence, and justification for the entry and stay in the territory. More specifically, these are the questions to which it is necessary to give an answer in order to have the full picture on the type and content of

[80] M. FIORAVANTI, cit., p. 429-430.

the status possessed by the individual: is the person an EU or a non-EU citizen? If he/she is an EU-citizen, is he/she residing in an EU member state of which he/she is also a national citizen? If not, how long he/she has been residing there? And for what reasons he/she has exercised his/her right of free movement and residence within the EU? On the contrary, if the person is a non-EU citizen, for what reasons he/she has entered and was allowed to reside in an EU member state territory? From what third-country he/she comes from? How long he/she has being residing in that EU member state?

The second group of features that are considered in order to determine the legal status of an individual, and to fully comprehend its content and consequences in relation to a specific territory can be labelled as «territorial elements». These include the supra-national, national and sub-national features of the territory in which the third-country national is residing for a determined period of time. In particular, we consider if and how EU legal acts regulating entry and residence of non EU-citizens have been transposed and implemented by the EU member state or by a state otherwise related to the EU, and how EU competencies in the field of immigration have modified the national regime[81]. Secondly, we take into consideration the specific constitutional features of the state in which the person resides: its federal or unitary form of state, the division of competencies between the central level and sub-national units, especially in matters which are particularly relevant in shaping foreigners' rights as integration, education, access to the labour market and social rights. Finally, the possible membership of the member state to forms of regional cooperation which involve fields as citizenship acquisition and movement of persons across national borders has to be consider. In relation to this last element, the focus is on how this membership - and the additional status created by it - shapes and influences personal status, and the rights attached to them, of citizens and foreigners residing in the country.

[81] The necessity to first consider if and how EU legal acts on immigration have been transposed by the member state derives from the circumstance that the EU common immigration policy, from the very beginning - and not by chance considered that it was preceded by the establishment of the Schengen area and agreements - has developed following the principle of differentiated integration or of «variable geometry». The United Kingdom, Ireland and Denmark, through Protocols n° 19, 21 and 22 of the Lisbon Treaty, have designed their participation to the Schengen *acquis* and to certain aspects of the EU immigration policy through a series of made-to-measure articles which allow them both to opt-in or opt-out in relation to the adoption of determined acts concerning the sub-mentioned areas. It has to be added that the United Kingdom and Ireland are not part of the Schengen area, while Denmark is but in the Protocol dedicated to its position it is expressly stated, in relation to the acts adopted by the Council in order to build up the Schengen *acquis*- as it was from the moment in which it was communitarised through the Amsterdam Treaty in 1999 - that «[I]f it decides to do so, this measure will create an obligation under international law between Denmark and the other Member States bound by the measure.»; Cfr. art. 4, Protocol No. 22 on the position of Denmark; See C. MATERA, *Much ado about opt-outs? The impact of variable geometry in AFSJ on the EU as a global security actor*, in S. BLOCKMANS (ED.), *Differentiated integration in the EU from the inside looking out*, Centre for European Policies Studies (CEPS), Brussels, 2014, p. 75-102.

As previously said, the relevant elements that can potentially determine the status of an individual within the EU and its content are multiples. In the following paragraph the attempt will be to expose the approach chosen in order to account for this plurality.

From the above exposed point of view, the challenges and changes that the citizen status, and the Union citizen status in particular, have provoked to the prototype of mobile economically active migrant is particularly visible. Nevertheless, despite the progressive decrease of relevance of the pursue of an economic activity for Union citizens, an overall look at EU norms on economic migration of third-country nationals confirms that is the category of economically active individuals, seen as a factor of production, the favoured by EU policies. Moreover, the preference towards workers is once again confirmed by the last acts adopted by the EU Commission, the EU institution which is responsible for the adoption of a global and, possibly, coherent approach towards immigration. Actually, the latter EU acts focused on circular migration[82], consent to say that a further idea is taking place within the EU labour immigration policy which competes with, and could potentially challenge, the «linear progression between status» thesis.

Actually, it seems that the attention is shifting from the third-country national worker as a potential EU citizen, to the third-country national mobile worker *per se,* to whom the EU seeks to at guarantee a status and mobility rights in order for the third-country national to better contribute to the EU integration project. If this is really the new direction that the global EU immigration policy are going to follow, this passage is quite significant. It may be expected that the attention and the efforts to improve intra-mobility rights of third-country nationals, i.e. to grant them with a greater extent the right which is the cornerstones of the Union citizenship: the right to move within the Union territory, *in primis,* for the purpose of employment. Concerning this, it is not by chance that the right to move within the EU is also the added value of the long-term resident status which is, by now, the closer status to the Union citizen status according to the «linear progression thesis». In more abstract terms, the parameter on which the degree of privilege of a status is measured is liable to change. Currently, security of residence and the rights attached to a continuous period of legal residence in a territory are the elements that mark the value of a status. On the contrary, in the future we can suppose that status won't be any more hierarchically ordered on the basis of these same elements, but the value of a status will be determined in relation to the specific

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[82] Cfr. Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *Report on the implementation of the Global Approach to Migration and Mobility 2012-2013*, COM(2014) 96 final, Brussels, 21.2.2014, at file:///E:/Report %20GAMM%20-%202012-2013.pdf

characteristics of the individual and of its particular needs, and not any more by considering the degree of approximation with the citizen status.[83]

4. Citizenship(s): member states' citizenships and the Union citizenship.

4.1. The citizenship of the Union.

The relation between immigration and citizenship assumes different and new aspects in the EU legal system in comparison with what can be observed in nation states. The novelty aspects are several and connected to the specific characteristic of the Union, the derivative nature of its citizenship added to the shared nature of the competencies that the EU has in the field of immigration. Besides describing the plurality of legal status which can be currently acquired within the EU by non-EU citizens, the research will focus on the role that the citizenship of the Union plays within the above described plurality, and on how this status is used in order to enhance the EU integration project and polity-building. Moreover, it will be interesting to understand if there is an underlying conception of citizen presupposed by EU legal acts and policies on immigration which are not just the sum of member states' views but rather represents an EU tailored citizenship conception. Obviously, the attempt will be to demonstrate that this EU conception exists and that it permeates and models EU legal acts in the above mentioned matters giving them at least a minimum common denominator and coherence[84].

From a comprehensive look at the case-law of the Court of Justice of the European Union (hereinafter ECJ) involving both intra and extra-EU immigration, we cannot but notice that the Union citizenship over time has assumed, first, a leading role in guiding the transformation of one of the four fundamental freedoms, namely persons' freedom of movement. Subsequently, it was used by the Court to extend the beneficiaries of rights before reserved only to economically active mobile citizen, i.e. «EU migrant workers», and this has had a significant impact on the interpretation of the scope of «purely internal situations»[85]. It is quite interesting to notice also that the broadening of the subjective and objective scope of persons' free movement provisions in order to include EU-citizens despite their qualification as workers under the EU law, has been

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[83] «[I]ndeed, different conceptions entailed different views on the purpose and rationale of free movement of workers. It goes without saying that such uncertainty was closely connected to the overall unclear legal and political status of European integration in its early days». A. J. MENÉNDEZ, cit., p. 6.

[84] S. CARRERA, *In Search of the Perfect Citizen? The Intersection between Integration, Immigration and Nationality in the EU*, The Hague, 2009, p. 93.

[85] A. J. MENÉNDEZ, cit., p. 20 and 28.

done by requiring in return a certain time of legal residence, or more precisely, by almost automatically deducing that a certain time of residence implicates the existence of links and ties between the member state and the Union citizen[86]. More recently, the EU citizenship has become a meaningful status for third-country nationals who does not hold it in cases where it has been used by the ECJ as an instrument of last resort when no other means was available to protect EU and non-EU citizens' rights, by according to the latter a right of residence which was firstly refused by national authorities[87].

4.2. The complementary versus *alternative approach.*

The adoption of the «linear progression between status» thesis implies to read the acquisition of the citizenship of an EU member state and, consequently, of the Union citizenship as the expected outcome of a period of permanent settlement of a third-country national within one of the EU member states' territories. On the other hand, the derivative nature of the EU citizenship and the differences that exist between member states' laws regulating the acquisition of national citizenships cannot but question the correctness of the thesis, at least, of its last stage, i.e. the acquisition of the Union citizenship and its role as the most privileged status.

It is sufficient to say here that the lack of harmonisation, but even more of a minimum of coordination between member states' citizenship laws, question the validity of the connection between immigration and citizenship assumed before as valid both for member states and for the EU. Therefore, a tension is visible between the formal approach adopted by the EU in regulating immigration and its relation with the citizen status, and the modes in which this relation really works, considering the different visions, histories, choices and, eventually, legislation in force at the same time within the EU.

In putting forward the hypothesis of the existence of a tension within the EU between the formal approach and the *de facto* approach in the related fields of immigration and citizenship, the attempt is to transfer at the EU level the, so called, «complementary» versus «alternative» perspective debate[88] that takes place at the national level.

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[86] Ib., 32.

[87] Cfr. *Gerardo Ruiz Zambrano v. Office national de l'emploi (ONEm)*, C-34/09, 8 march 2011; *O., S. v Maahanmuuttovirasto, and Maahanmuuttovirasto v. L.*, C−357/11 C−356/11, 6 December 2012; *Yoshikazu Iida v. Stadt Ulm*, C-40/11, 8 November 2012, not yet published; *Kreshnik Ymeraga, Kasim Ymeraga, Afijete Ymeraga-Tafarshiku, Kushtrim Ymeraga, Labinot Ymeraga v. Ministre du Travail, de l'Emploi et de l'Immigration*, C-87/12, 8 May 2013; *Adzo Domenyo Alopka, Jarel Moudoulou, Eja Moudoulou v. Ministre du Travail, de l'Emploi et de l'Immigration*, C-86/12, 10 October 2013, not yet published.

[88] T. Huddleston, M. P. Vink, *Membership and/or rights? Analysing the link between naturalisation and integration policies for immigrants in Europe,* cit.

In general, scholars adopting the former see naturalisation policies as means of immigration policy and, even more, as a tool for integration of third-country nationals[89]; conversely, scholars adopting the latter perspective consider naturalisation, i.e. formal membership through the acquisition of the citizen status, as alternative to other means of granting equal rights to foreigners based on legal residence[90].

Considering that naturalising in one of EU member states for a third-country national means, even if not formally, to acquire a «double» citizenship, we observe that the EU adopts a formal «complementary» approach but a *de facto* «alternative» approach. This is, partially, due to the derivative nature of the EU citizenship which exclude EU institutions, at least formally, from the set of actors that can decide on procedures and criteria for naturalise in EU member states. Moreover, and more importantly, because the legal status preceding the acquisition of the citizen status by naturalisation, can become, in specific circumstances, a potentially permanent status. As the naturalisation process necessarily requires the will of the individual in order to be started, then, for many different reasons[91], the third-country national could also decide or prefer not to naturalise in an EU member state. This could be the case if the status that he/she already held entails rights almost equal to those of EU citizens, and naturalisation will not expand in a meaningful way the set of rights he/she can benefit from nor their security, but will, on the other hand, imply the loss of the citizenship of origin or of relevant rights and links with the home country (properties, inheritances, identity, free entry and exit right)[92].

Granted that, the inner progression of status within the EU immigration policy can be considered to be the result of the adoption of a «complementary» approach: naturalisation is considered a means for, and the natural continuation of, the integration process and permanent settlement of a third-country national. This approach entails the

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[89] As representative of this view see R. HANSEN, *The Poverty of postnationalism: Citizenship, immigration, and the new Europe*, in Theory and Society, 38, 2009, p. 1-24. R. BAUBÖCK, *Civic citizenship: a new concept for the New Europe*, in R. SÜSSMUTH, W. WEIDENFELD, *Managing integration: the European Union's responsibilities towards migrants,* Migration Policy Institute, Washington, D.C. and Bertelsmann Foundation, Brussels, 2005, p. 122-138.

[90] For the main contributions exploring the 'alternative' perspective see D. KOSTAKOPOULOU, *Why Naturalisation?*, in *Perspectives on European Politics and Society*, 4, 2003, p. 85-115; E. GUILD, K. GROENENDIJK, S. CARRERA (EDS.), *Illiberal liberal states: Immigration, citizenship, and integration in the EU*, Farnham, 2009.

[91] For example, one of the reasons could be the necessity to renounce to its previous citizenship, or that the status already hold guarantees sufficient rights and security. Obviously, the aspects related to identity and membership attached to the citizen status are voluntarily ignored, firstly because they cannot be transposed in legal terms, secondly because their relevance and role as determinant reasons to naturalise can profoundly vary from individual to individual.

[92] An analysis conducted on sixteen European countries to determine what are the crucial determinants for immigrants' propensity to naturalise has shown that the level of development of the country of origin is a crucial factor. However, citizenship policies - i.e. their openness or restrictiveness - play a relevant role for immigrants from less developed countries in their decision to naturalise as are relevant the human capital factor and the employment status. Cfr. M. P. VINK, T. PROKIC-BREUER, J. DRONKERS, *Immigrant Naturalization in the Context of Institutional Diversity: Policy Matters, but to Whom?*, in *International Migration*, 5, 2013, p. 14-15.

progressive acquisition of status which give access to rights which are as near as possible to those granted to EU citizens, increase their security and the expand the fields in which equal treatment is granted. Nevertheless, at the same time, the identical legal acts above considered can be also seen as the outcome of the adoption of a *de facto* «alternative» approach, considering the context in which these policies and legal acts are embedded. In fact, these status are not necessarily stages of a process of which conclusion is naturalisation in one of the EU member states, but can be considered also as permanent status and not a quasi-automatic stage in the integration path of a third-country national[93].

The supposed coexistence of opposed approaches within the EU immigration and integration policies and legal acts, and regarding more specifically the relation among its immigration policy and the citizenship status, needs to be explored. Moreover, the outcome of this analysis could be certainly relevant in the understanding of the EU vision of concepts as citizenship, membership, identity, and how these visions are reflected and shape rights of third-country nationals and EU citizens. If we consider that the opposed approaches within the EU immigration and integration policies lead to a set of residency-based status - which are more flexible in relation to life choices of individuals and identity aspects - we perceive that this second approach could potentially result to be more close to the EU conception of not only citizenship itself, but even more of the underlying idea of *homo economicus* which still pervades the EU legal acts regarding free movement of persons.

At the same time, even if the complementary approach is presented as more linear in relation to the alternative, and the one which permits the acquisition of the more secure and privileged status as a citizen in the sense explained above, another element of complexity should be added and will be further analysed in the second part of the present research. The status as an EU citizen itself is made by a plurality of status, which vary, as previously seen for third-country nationals, through time and in relation to the economic or non-economic activity that justify the move to and the residence of the EU citizen in another EU member state. In particular, this emerges from the differences in rights and fields where equal treatment is granted that vary in accordance to the time of residency of the EU citizens in the territory of an EU member state of which they are not

[93] T. HUDDLESTON, M. P. VINK, *cit.*, p. 6 and 12-13. This interpretation, of the long-term resident status as a potentially permanent status for third-country nationals, is reinforced by the affirmation made by the authors that no correlation between naturalisation policies and long-term residents policies and rights. In fact, the only aspect in which a correlation is found are related to the security of the latter. There is positive correlation - i.e to a more secure long-term resident status correspond a more complementary naturalisation policy in Benelux countries and Nordic countries, which are the case studies of this research. Moreover, the fact that there is not a unique correlation among naturalisation policies and long-term resident rights across Europe but two patterns emerge, we can derive from this a confirm of the existence of a double approach within and by the EU which combine the 'complementary' and the 'alternative' approach contemporarily.

nationals[94]. But EU citizens are not, or were not equal also in relation to the member state from which they came from. The reference is evidently made to the recently expired differentiation in treatment between EU citizens nationals of the last States which have joined the EU in 2007 Romania and Bulgaria, which, *de facto*, has created a sub-category among EU citizens.

By taking into account the reasons which justify the exercise of the right to free movement and residence of an Union citizen within the EU territory, we further notice that be a worker, a student, a researcher or a family member lead to distinctions in the set of rights from which the EU citizen could benefit from, in their security and in the extension of the fields in which equal treatment is granted. These different reasons at the basis of movement and residence are attached to diverse status. Furthermore, as was previously seen for third country nationals, even for EU citizens the element of possession of «sufficient resources»[95] is an alternative requisite which counterbalance the fact that the EU citizen is not a worker.

The coexistence within the EU of the research for a unique and uniform status for third-country nationals workers within the EU and, at the same time, the increasing specification of different status of the different types of mobile non-EU and EU citizens can be seen as a proof of the existence and operating of the tension above mentioned within EU institutions and visions on how immigration to EU member states should be regulated in the future. More specifically, the contrast is between the vision of the third-country national who wish to progressively set and become a permanent resident, integrate and eventually become a citizen, with the migrant which is a mobile worker and who is constantly moving from the EU to its country of origin and vice versa, or within the EU solely, i.e. a circular migrant. Moreover, from this new focus on circular migration, but even before this was not put into question, emerges quite clearly that the shift from the prototypical EU rights-holder who is an economically active person who moves to employment purposes was never abandoned in favour of the EU citizen *per se* or intermediate figures, but was only over time divided into more specialised status[96].

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[94] 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 amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, OJ L 158, 30.4.2004.

[95] Cfr. arts. 7.1 lett. (b), 8.3, 12.2 and 13.2 lett. (d), Directive 2004/38/EC cit.

[96] A. J. MENÉNDEZ, *European Citizenship after Martínez Sala and Baumbast. Has European law become more human but less social?*, cit., 5; Cfr. also ECJ, *Mrs M.K.H. Hoekstra (née Unger) v Bestuur der Bedrijfsvereniging voor Detailhandel en Ambachten (Administration of the Industrial Board for Retail Trades and Businesses),* Case 75/63, 19 March 1964, where the Court exposed the necessity to forge an EU definition of 'migrant worker' as it could not be a matter to be left to member states to define because, on the contrary, equal treatment could not be granted.

Consequently, two interpretations are possible: the first sees an emerging inner contrast between two incompatible visions of the future mobile migrant within the EU. On the one hand, the non-EU citizen migrant worker is someone whom, with the passage of time and through the acquisition of even more privileged status, will settle into one of the EU member states and, finally, become an EU citizen. On the other hand, the third-country national migrant worker is primarily a source of labour force which contributes to the economic development of the EU and of its home country through circular migration. Then, integration, permanent residence, and eventually citizenship acquisition are not anymore the first concern both of third-country national migrants and of EU policies. This interpretation put into question the emancipatory function attributed to citizenship until this moment within EU labour immigration policies. Instead, the second possible interpretation is that through the improvement of intra-EU mobility rights also for third-country nationals workers and by enhancing circular migration, the attempt is to grant them the most valuable right attached to the Union citizenship, namely the freedom of movement and residence, although limited, in the EU member states and a status as a quasi-citizen in relation to equal treatment vis-à-vis nationals.

In conclusion, two main points have to be recalled: the supposed unifying and unique character of the Union citizenship deduced by the study of the EU legal acts regulating economic migration of third-country nationals has to be putted into question by both the inner tension which emerges from the complementary vs. alternative approach, and secondly by the inner plurality of the status as Union citizenship itself. Moreover, it appears that more than the citizen status, both for the EU and third-country nationals, it is the worker status which emerges as the most valuable and privileged one, i.e. (still) a production factor within the common market.

5. Conclusions.

The *fil rouge* of the research is the concept of plurality of personal legal status within the European Union. Multiple status can be found within the EU common immigration policy, specifically concerning economic migration of third-country nationals, but also within the unique status as a Union citizen. Interestingly, the elements that are common and mark the passage from one status to the other both for third-country nationals and EU citizens are very similar: i.e the qualification of the migrant - more precisely, the reason which justify the entry and stay within the territory of one of the EU member states - or in alternative the possession of resources and of a health insurance, and the time of legal residence in the member state's territory. What vary over the status is the strictness of the same requirements.

The plurality of status within the EU economic immigration policy and within the Union citizenship will be analysed as if there is a unique line that unit the very first status that a third-country national can acquire within the EU to the very last and most secure and privileged status that a Union citizen can hold when residing in a member state of which he/she is not a national. This approach implicitly presumes that all these status have been though to follow one the other, that citizenship is considered to be the most valuable status among the others, and, eventually that its acquisition - which in the EU means for a third-country national the naturalisation within a EU member state - is the natural consequence and end of a process of progressive settlement and integration within the EU. This thesis has been resumed in the previous paragraphs with the expression «linear progression between status».

Moreover, within some member states further sources of plurality of status are present at the sub-national level, or at the supra-national level due to the specific constitutional features, division of competencies and international obligations that these member states have. Thus, it is interesting to analyse also how these different sources of plurality relates within these national legal systems. Consequently, as the competence on economic immigration of third-country nationals within the European Union is shared between EU institutions and member states, considered the presence of these further sources of plurality of status at the sub-national and supra-national level, added to the derivative nature of the Union citizenship - which implicate that third-country nationals will acquire the same status through different procedures and fulfilling diverse requirements, not to mention national competencies on integration of foreigners - national laws on economic immigration, naturalisation and integration of foreigners of chosen member states will be studied in details.

The second part of the research will be dedicated to exploring the plurality of status within the Union citizenship. The aim is to explore the evolving meaning and contents assumed over time by the Union citizenship in relation to immigration rules, before only regarding EU citizens, that is intra-EU immigration, but, as above said, ever more also in relation to economic migrants who are third-country nationals. This analysis, by taking into consideration the last development of the EU global approach towards immigration of the EU, will show that in the future evolution of the EU immigration policy and in its relation with the EU citizenship we will possibly witness to a change which could potentially lead to the loss of validity of the «linear progression between status» thesis.

At the very end of the research the attempt will be to try to understand if there are other possible ways in which the relation between these status can be framed, and, more importantly if the relation between the Union, the national citizenships and the sub-national status can be improved. The question then is: Is there a legal system where the

coexistence of a plurality of status have found an effective and coherent, even if not perfect, legal framework? The Swiss legal system seems to be a useful case study to look at in this respect. Then, the concluding part of the research will be focusing on the Swiss triple citizenship(s) and on its naturalisation procedure. Due to the *sui generis* characteristics of the Swiss federation, the study of its naturalisation procedure will be particularly useful to observe how plural status and citizenships are regulated within the same nation-state and, at the same time, how the three-level citizenship have modelled the requisites and the procedure for the acquisition of the unique national citizenship by foreigners, and currently deeply influence the attempts to reform and enhance the coherence of the model, at least at a minimum level.

By preceding the conclusions with the study of the above-mentioned specific aspects of a different, even if geographically and legally close, legal system, we believe that it would be possible to observe the EU with a more critical and comprehensive 'look from the outside'. The expectation is that this point of view will allow to better understand and see the weaknesses and imperfections of the current state of affairs, and to situate our conclusions and proposals in a more broader context, as citizenship and immigration matters are fields which every day more have to be studied in a more broader scenario as it involves global scale phenomena. The desired outcome is, through the advancing of the harmonisation of EU Member States legal acts in these fields, to increase the coherence of the legal discipline of immigration and naturalisation throughout the EU, and between the EU and its Member States. A higher degree of coherence in these related and, practically and symbolically, relevant fields will not only ameliorate individuals' lives, but will also certainly contribute to the emergence of that commonality between the EU and its Member States which is considered to be fundamental for the advancement of the EU integration process.

At last, through the analysis of the consequences of the plurality of legal status for individuals and for all the institutions to which these status are related, we pursue, in the end, a last series of objectives. The first is to highlight the incongruences and imperfections of the status themselves from how they emerge through their relation with other status. The second objective is to explore the diverse meanings that the same status assumes in different legal systems and how these different conceptions cohabit and relate.

As well known, the meanings attached to the notions of citizen, foreigner, integration, membership, identity, nation are historically and spatially determined, they vary across territories, time, and on the basis of the objectives that the different actors want to achieve through them, which in turn reflect, more generally, their sub-national, national and supra-national building processes, and, to close the circle, their understanding of the above mentioned concepts. This argument is based on the

assumption that, generally, institutions (national, sub-national and supranational) discipline immigration, naturalisation policies, integration policies and legal acts regarding citizenship on the basis of their idea of the 'perfect citizen', i.e. the person capable of concentrating all the virtues and values that, in abstract and ideal, other than unrealistic, terms, all their citizens should posses[97]. Furthermore, these same concepts unavoidably include narratives and identity-building strategies and processes, which in turn reflect and disclose the self-image that sub-national, national and supranational units and institutions have builded over time, would ideally have, and on which they shape current legal acts and policies regarding immigration and citizenship. Therefore, the overall research is also aimed at understanding and analysing these notions and their relations for all the institutions involved at the sub-national, national and supra-national level.

[97] «(…) 'national models of integration,' certain naturalisation requirements are interpreted to be proxies for national political philosophies of assimilation, multiculturalism, republicanism, and so on.», T. HUDDLESTON, M. P. VINK, *cit.,* 3. See also S. CARRERA, *In Search of the Perfect Citizen? The Intersection between Integration, Immigration and Nationality in the EU*, cit., 90.

SECOND CHAPTER
PERSONAL STATUS OF INDIVIDUALS IN THE EUROPEAN UNION.

Summary: 1. Introduction - 1.2. Labour migration in the European Union. First phase. - 2. The second phase of development of EU rules on labour movement. - 2.1. Foreword. - 2.2. From Free Movement of Workers to the Union citizenship and beyond. - 2.2.1. The Citizenship of the Union and free movement of persons. - 3. The EU legislation on legal migration of third-country nationals: from Schengen to Amsterdam. - 3.1. The Schengen *acquis*. - 3.2. From Maastricht to Amsterdam. - 3.3. From Tampere to Stockholm and beyond. - 4. The multi-level dimension of the EU labour migration policy. - 4.1. The Single Permit Directive. - 4.2. The «Researchers» and the «Blue Card» Directives. - 4.3. The Long-Term Resident Directive. - 5. The Union citizenship. - 5.1. The (supposed) emancipation of the market citizen. - 5.2. From the Treaty of Maastricht to the *Alokpa* case. - 5.3. Ambiguities and developments: the Union citizenship confronted with the Union and Member States. - 6. Towards a transnational democracy?

1. Introduction.

Movement is one of the cornerstones of the European Union (hereinafter EU) from its origins, the common element to the four fundamental freedoms: free movement of persons, capitals, goods and services. Therefore, its role in the achievement of the (economic) objectives of the EU integration process has been fundamental. Accordingly, EU legislation has developed over time to improve the circulation through EU member states of these four factors of production by decreasing and, at last, progressively eliminating obstacles to movement originated by differences among national legal systems of member states. First and foremost discrimination on the basis of nationality, the «twin principle» of free movement[1].

We leave aside movement of capital and goods and, for the moment, also of services, to focus only on movement of persons. Despite the use of such word, we should read in backlighting of the word «person» «worker», i.e. an economically active person who move in order to pursue an activity passible to be a source of income[2]. Therefore, for the major part of the advancement of the EU integration, and until the Court of Justice of the European Union (ECJ) started its action of expansion of workers' rights also to non-economically active individuals in the mid-nineties, movement of persons

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[1] S. O'Leary, *Free movement of persons and services*, in P. Craig, G. De Burça, *The Evolution of EU Law*, Oxford, 2011, p. 499.

[2] S. Giubboni, G. Orlandini, *La libera circolazione dei lavoratori nell'Unione europea*, Bologna, 2007, p. 11.

was instrumentally used for the realisation of the single market and the achievement of EU economic objectives. Nevertheless, the regulation of movement of labour by the EU has not filled a space left empty by neither nation states[3] nor international organisations. In fact, this legislation on labour have interlaced with other acts, policies and objectives which need to be considered as essential parts of the wider context in which the EU legislation aiming at regulating labour movement is included[4]. Moreover, even if the main object of EU legislation was to regulate movement of labour, since this entails the cross of national borders by individuals, this body of legislation inevitably ends to concern matters that have been for a long time exclusive prerogatives of modern nation states, such as internal security, control of borders, movement and residence of non-nationals in national territories, rights of aliens: i.e. immigration and citizenship regimes. Thus, when accounting for the evolution of the EU legislation on labour movement, the development of deeply intertwined ambits as borders control - a fundamental step in the creation of an «area without internal frontiers» as the common market is defined - and the EU legislation aiming at regulating movement and residence of non-EU citizens, i.e. the EU immigration policy, has to be included in the analysis.

The EU was preceded and is currently surrounded by other areas of free movement of persons, therefore, it is not the only legal system source of legal status for individuals other than those provided at the state level. Nevertheless, as we will extensively account for in the second part of the research, the stage of development of the EU in relation to movement of persons and connected ambits has currently not equals[5]. Through the on-going process of evolution «beyond labour» or, if preferred, beyond the sole common market, the EU has enriched the spectrum of status for individuals moving and residing into the EU territory, and, as an unavoidable consequence, has deeply conditioned member states' spectrum of individual status, i.e. national immigration and citizenship regimes.

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[3] The reference is mainly to national systems of temporary work recruitment to accelerate reconstruction and compensate for the loss of manpower (so called guest-worker systems) set by nation states in the aftermath of WWII through bilateral recruitment agreements. Interestingly enough since most of European states which would sign the Rome Treaty in 1957 had established a system as such: Belgium, the German Federal Republic, France and the Netherlands. S. CASTLES, *The Guest-Worker in Western Europe - An Obituary*, in *International Migration Review*, 4, 1986.

[4] The main international actors which have adopted significant acts for the development of EU legislation on migration are the Council of Europe, the International Labour organisation and, more recently, the World Trade Organisation. Cfr. European Convention on the Legal Status of Migrant Workers, Council of Europe, Strasbourg, 24.11.1977. In addition to the instruments adopted specifically directed to protect workers' rights, also general human rights international treaties contain relevant rights for migrant workers. Cfr. UN, art. 13, Universal Declaration of Human Rights, 1948; art. 12, International Covenant on Civil and Political Rights, 1966; Council of Europe, art. 2, Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain rights and freedoms other than those already included in the Convention and in the first Protocol thereto as amended by Protocol No. 11, Strasbourg, 16.9.1963.

[5] E. GUILD, *Immigration Law in the European Community*, The Hague, 2001, p. 9

As just said, the EU has enriched the spectrum of status of individuals moving and residing in EU member states' territories, but it has not overcome the sharp division on which the main classification of status is based: i.e. the distinction between citizens and aliens. On the contrary, it has adapted it to its ends, using it as a criterion to identify the categories of individuals to which are reserved benefits of, in this case, EU membership[6]. Therefore, even if the subject of this chapter is the evolution of EU legislation and policies on movement of individuals across borders, we have to account for partially different, although interlaced, histories as regards Union citizens, on the one side, and third-country nationals on the other. Secondly, the EU has created a range of «in-between» or quasi-status for both Union citizens and third-country nationals of temporary and potentially permanent nature, given raise to parallel «classes» of citizens[7].

The EU legislation on labour movement of third-country nationals resembles under many aspects EU laws on movement of EU workers, at least in its early stage of development. Primarily, in its piecemeal approach based on the different economic value of the economic activities carried on by individuals within the EU, somehow replicating the model of the «market citizen» that the EU has applied to Union citizens until the late nineties. However, at the same time, the EU legislation on migration has been profoundly conditioned in its evolution by the stage in which the EU integration process was when it was though and transposed into various sources of law, and by what were, at that time, the objectives of the EU in adopting those acts and policies. They are, in fact, path-dependent pieces of legislation: free movement of persons to the realisation of the common market[8]; the EU policy on migration of third-country nationals towards EU member states to the objectives of the area of freedom, security and justice (AFSJ)[9]. In addition, pressing exigencies to coordinate member states' labour migration policies related ambits, as integration and family reunification of third-country nationals, were present.

The differences among the stages of the EU integration process in which they were enacted and of the objectives pursued mean that different instruments were used to

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[6] S. O'LEARY, *The Evolving Concept of Community Citizenship. From the Free Movement of Persons to Union Citizens*, London, 1996, p. 103.

[7] We are referring to, as regards Union citizens, transitional agreements for new member states after the 2004, 2007 and 2013 enlargements; to Turkish nationals on the basis of the various agreements signed with the European Union from 1963, and to Union citizens family members who are third-country nationals. Cfr. Agreement Establishing an Association Between the European Economic Community and Turkey (Signed at Ankara, 1 September 1963) (OJ L 217, 29.12.1964) - Additional Protocol to the Agreement establishing an Association between the European Economic Community and Turkey (OJ L 361/1, 31.12.77) - Council Decision of 13 June 2005 on the signature of the Additional Protocol to the Agreement establishing an Association between the European Economic Community and Turkey following the enlargement of the European Union OJ L 254/57, 30.9.2005.

[8] Art. 45, Treaty on the Functioning of the European Union (TFEU), OJ C 326, 26/10/2012.

[9] Art. 79. 1 and 2, TFEU.

their achievement. Precisely, diverse were the competences, the role played by EU institutions and, respectively, by member states, and the principles of EU law applicable.

The objective of this chapter is to account for the diverse regimes regulating labour migration of nationals of EU member states and non-EU nationals - i.e. rules determining conditions of entry, residence and movement of Union citizens and non-EU nationals in the territories of EU member states[10]. Our interest is, therefore, to describe the above mentioned rules, their origins and developments but, more importantly, the content of individual status that are made available to individuals, their evolution over time, their points of contact and reciprocal influences.

We should be aware of the fact that we are talking of a, hopefully more and more, harmonised matter at the EU level, but still differentiated at member states' level as regard both EU citizens and third-country nationals. However, the need of a coordinated and harmonised approach to the government of migration among EU member states has been spelled out more than two decades ago[11]. Therefore, although the discourse has to be certainly differentiated when referring to EU citizens and non-EU citizens, the aim is to emphasise their increasing proximity and convergence along similar patterns and lines of development.

As previously said, in doing this we cannot leave aside the context in which those status are operating. However, chronological analyses of EU individual status are numerous[12] and one more is not needed. Since our concern is to understand how *others* outline of territory in free movement areas influences the content of individual status, the chosen approach would privilege a reconstruction of these migration regimes capable of

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[10] The focus is, thus, limited to voluntary migration to pursue, supposedly, an economic activity. Forced migrations, thus legislation regulating asylum, refugees status and other status attributing international protection are excluded from the research ambit. Nonetheless, we acknowledge that, *de facto*, mixed motivations lay at the basis of individuals and groups decisions to leave a country, and that an interplay between regular and irregular channels of migration, and the use of those which are more easily available at the moment, is the norm. The points of contact among asylum law, EU immigration laws and EU free movement legislation, however, are not at all negligible. Refugees or beneficiaries of other types of protection are entitled to rights of similar content if compared to the rights attached to the status of certain categories of economic migrants, and family reunification of refugees and economic migrants is governed by the same instrument. Moreover, to asylum seekers whose application failed is not precluded to shift to and benefit from, if they have the chance, a more favourable status, e.g. as an EU citizen family member, or as a citizens of a country which has signed an association agreement with the EU as regards free movement, and even if the status as a refugee was fraudulently obtained. Cfr. ECJ, C-127/08, *Metock and Others,* 25 July 2008, ECR I-6241; C-337/07, *Ibrahim Altun,*18 December 2008, ECR I-10323, pts. 41-64. On the autonomy of the asylum matter in relation to rules aiming at regulating immigration, C. Favilli, *Immigrazione (diritto dell'Unione europea)*, in *Enc. Dir.*, Annali V, 2012, p. 676.

[11] Tampere European Council, 15-16 October 1999, Presidency Conclusions, para. 20.

[12] E. GUILD, *Immigration Law in the European Community*, The Hague, 2001; P. BOELES, M. DEN HEIJER, G. LODDER, K. WOUTERS (EDS.), *European Migration Law*, Antwerp, 2009; K. HAILBRONNER, *Immigration and Asylum Law and Policy of the European Union*, The Hague, 2000; S. PEERS, *EU Justice and Home Affairs Law*, Oxford, 2011; F. WEISS, F. WOOLDRIDGE, *Free Movement of Persons within the European Community*, The Hague, 2002. D. ACOSTA ARCARAZO, *The Long-Term Resident Directive as a Post-National Form of Membership. An analysis of the Directive 2003/86*, Leiden, 2011.

exploring the different degrees and forms of the relationship between the migrant worker and the EU legal order. Thus, instead of a chronological outline we would prefer to order individual status in a hierarchical scale. More precisely, through the identification of a set of shared elements between status of EU citizens and non-nationals migrant workers, the attempt will be, each time, to underline the differences among status, the reasons justifying them and the objectives pursued by the Union in attributing a certain status to a migrant worker with determined characteristics.

The *fil rouge* holding together the analysis and the status, regardless of their being affiliated to different migration regimes and frameworks - the common market and the area of freedom, security and justice (AFSJ) - is represented by their common characteristic of being attributed to individuals who are non-nationals of the member state in which they are residing, whom are carrying on an economic activity or rather fulfil determined requirements[13]. Therefore, despite the differences, in both cases we are assisting to a quite similar phenomenon of progressive shift of competences and powers from member states towards the EU in determining the conditions of entry and residence, and rights of non-nationals workers into the national territory.

As regards Union citizenship we should be more specific, though, considering the evolution experienced by this status in the last decades and its shift, at least formally, from a status tailored on the migrant worker national of an EU member state to the Union citizen *per se*, i.e. regardless of the pursue of an economic activity. However, as it will be pointed out for all the status considered, the exercise or not of an economic activity, even if it is not an essential prerequisite to hold a specific status, has, though, a high impact on their «quality»: i.e. on their content and security over time.

The common elements that will be considered each time to describe individual status of migrant workers and, thus, to subsequently compare them, are: the characterisation, if any, of the status in relation to a specific economic activity, equal treatment rights, the degree of security of the status or, more precisely, of residence and, if any, movement rights. This *modus operandi* will allow to progressively place the status in the above-mentioned hierarchical scale, justifying each time the position on the scale of a status with the different degree of protection or extension of rights in relation to the previous status.

As stressed above, the chosen approach won't be chronological although it cannot be a-historical. Therefore, before going into details of every status, a general

[13] The reference is made to the requisites of having sufficient resources in order not to become a burden for the national social system and a sickness insurance covering all risks in the member state of residence, which fulfilment are equally required to EU citizens and third-country nationals when they are not economically active categories.

outline of the context within which the construction of the common market took place as well as the EU policy on migration is necessary.

Despite the undeniable partial overcome of the paradigm of the pure «market citizen», the significance of movement across EU borders of economically active persons for the achievement of EU aims is not at all declined or, in other words, we could say that it has partially moved its focus from Union citizens to third-country nationals labour migrants.

Several and diversified elements have marked the stages of EU policies on movement of persons, and led to a progressive enlargement of both the personal and material ambit of the related policies. While, firstly, the EU was only concerned with the intra-migration of EU citizen workers, over time, the control of external borders and the security dimension have become the main aspects considered both in terms of resources and efforts[14]. Therefore, a forerunner of EU policies targeted on third-country nationals has been the Schengen *acquis*, a body of rules dealing with the control of external borders, that was followed by the progressive abolition of internal EU frontiers in the view of realising the common market. Subsequently, common rules among EU member states have had to be progressively settled in all that fields that were somehow interested by the joint management and control of borders, such as rules governing entry and residence of lawful migrants and irregular migration. At last, it was within the same 1999 Amsterdam Treaty[15] that the Schengen *acquis* was incorporated within the EU framework, and EU laws on migration of third-country nationals took their first fundamental step.

Recently, a partial shift in the approach towards the government of migration at the EU level has taken place[16], while the importance of the external dimension of EU policies has increased as well as the necessity to better connect and coordinate EU internal and external policies part of the AFSJ[17]. Consequently, aspects as migrants' contribution to the EU economic growth, their integration within host member states, as well as the migration-development and migration-mobility dual concepts are now more

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[14] E. GUILD, cit., p. 18. D. BIGO, *Security and Immigration. Toward a Critique of the Governamentality of the Unease*, in *Alternatives: Global, Local, Political*, 2002, p. 63.

[15] OJ C 340, 10.11.1997.

[16] S. CASTLES, *Guestworkers in Europe: A Resurrection?*, in *International Migration Review*, 4, 2006, p. 755-763.

[17] Cfr. European Council Conclusions, 26-27 June 2014, Brussels, 27 June 2014, EUCO 79/14 CO EUR 4 COCL 2, p. 1 and 3.

relevant parts than before within the EU (attempts to build a) coherent and comprehensive immigration and asylum policies[18].

We identify three main phases of development of EU policies aiming at regulating movement across its internal and external borders. This framing seems to be appropriate and useful in the framework of this research, since it allows to emphasise from the very beginning the relevance of, and the connections among, the legislative acts that have regulated over time movement across EU borders and the exercise of an economic activity. Furthermore, it permits also to account for the impact that has the citizenship hold by the person on the exercise its right to move towards and within the EU, and to reside in the territory of an EU member state. More precisely, the analysis will focus on the similarities among the rules that have governed movement of persons in the EU - of EU citizens before, and third-country nationals after - to highlight the changing role that the EU citizenship has played within EU laws regulating internal and external migration. The thesis underneath this approach is that the EU is replicating and applying to migration of non-EU citizens the same model applied previously to regulate movement of EU citizens.

The first phase goes from the foundation of the EEC to the entry into force of the Maastricht Treaty. The second and the third phase of development of EU migration policies are distinct even if they can be seen as a bifurcation of the post-Maastricht phase. This period is characterised by the formalisation within the Maastricht Treaty of the Union citizenship[19], and by the very first steps of the EU common immigration policy[20], which would see its real start with the Treaty of Amsterdam in 1999 in order to «establish progressively an area of freedom, security and justice»[21].

1.2. Labour migration in the European Union. First phase.

A useful starting point to outline the context within which the EU legislation and policies on labour migration have developed is the description of the changing patterns of migration experienced by European countries in the aftermath of the Second World War (WWII) and the parallel formation and evolution of the EU integration process,

[18] Cfr. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *The Global Approach to Migration and Mobility* {SEC(2011) 1353 final}, Brussels, 18.11.2011 COM(2011) 743 final. p. 2-3; Communication from the Commission to the European Parliament and the Council, *5th Annual Report on Immigration and Asylum (2013)*, {SWD(2014) 165 final}, Brussels, 22.5.2014 COM(2014) 288 final, p. 13-14.

[19] Cfr. art. 8, Treaty on European Union (Maastricht, 1992), OJ C 191, 29.7.1992.

[20] Cfr. art. K.1, para. 3, Treaty on European Union (Maastricht, 1992), cit.

[21] Cfr. art. 73i, in particular, lett. b, Treaty on European Union (Amsterdam 1997), OJ C 340, 10.11.1997.

since they are deeply intertwined phenomena[22]. In addition, two out of three free movement areas that will be considered in the second part of the research were established in the same period. Therefore, at the end of the fifties, the Benelux regional cooperation, the Nordic cooperation and the Treaty of Rome establishing the European Economic Community (EEC) would have envisaged free movement of persons within a supranational area[23]. Switzerland, the third case study considered, that was part of a free movement area – the European Free Trade Association (EFTA)[24] - with a group of states that are not EU members, can be considered to form a free movement area with the EU[25] from the late nineties - has experienced similar patterns of migration flows[26] such as those of founder states of the, at time, EEC, and has adopted alike instruments to regulate them over time, *in primis*, a guest-worker system until the eighties.

Three phases can be distinguished in the immigration history of EU member states since the aftermath of WWII, and alike we identify, for our purposes, three phases in the development of EU labour migration legislation since the establishment of the EEC in the late fifties. Although they do not precisely correspond, their parallel outline is telling to understand the reciprocal influences that, over time, changing patterns of migration towards and across the EU has had on the legislation adopted by the EU to govern them.

It goes without saying that the evolution of EU migration legislation has been influenced by global historical events as decolonisation, the 1973 oil crisis, the end of the West-East division, and, more recently, the Western Balkans conflict and the 9/11 events, as well as the 2008 economic crisis[27]. At the same time, also events that have had also a specific EU relevance - EU Treaties amendments, the 2000s enlargements towards Central and Eastern European countries, in addition to the changes in the dimension and types of flows of migrants that member states have experienced in the last seventy years

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[22] S. CASTLES, H. DE HAAS, M. J. MILLER, *The Age of Migration* (5th ed.), New York, 2014, p. 123-124.

[23] To those free movement areas we should add the Common Travel Area (CTA) between the United Kingdom, the Channel Islands, the Isle of Man and Ireland. Cfr. W.R. BOHNING, *The migration of workers in the United Kingdom and the European Community*, London, 1972.

[24] Cfr. Convention establishing the Free Trade Association (Stockholm, 1960), consolidated version 1 July 2013.

[25] Those states are, in turn, part of the European Economic Area (EEA), an area of free movement including EFTA member states, excluded Switzerland, and EU member states. Cfr. Agreement of the European Economic Area, OJ L 1, 3.1.1994, p. 3, lastly amended by the agreement on the participation of Croatia in the European Economic Area of 11 April 2014, OJ L 170, 11.6.2014, p. 5.

[26] J. F. HOLLIFIELD, *Immigrants, Markets, and States. The Political Economy of Postwar Europe*, Cambridge, 1992, p. 49.

[27] P. BOELES, M. DEN HEIJER, G. LODDER, K. WOUTERS (EDS.), cit., p. 8-9; H. U. J. D'OLIVEIRA, *Fortress Europe and (extra-communitarian) Refugees: Cooperation in Sealing Off the External Borders*, in H. G. SCHERMERS ET AL., *Free Movement of Persons in Europe. Legal Problems and Experiences*, The Hague, 1993, p. 167.

- have also played a relevant role in shaping the EU approach towards the government of movement of persons across its internal and external borders. The object of further paragraphs is, then, to account for a mixture of reactive and proactive pieces of legislation and policies in the matter of movement of persons within and across EU borders. At last, this historical excursus permits also to become aware of the circularity of certain modes of action in the government of labour migration in Europe[28], despite the changing circumstances.

The first phase of EU law governing labour movement is characterised by the conception of freedom of movement of persons as one of the four fundamental freedoms[29], hence a basic element for the completion of the internal market. It can be labelled as the pre-Maastricht/pre-EU citizenship phase, that goes from the foundation of the European Economic Community (EEC) with the Treaty of Rome in 1957, to the beginning of the nineties, when the Maastricht Treaty was signed, the Single Market had to be completed[30], and secondary legislation was adopted including and grating rights also to non-economically active but self-sufficient Union citizens, as students, pensioners and job-seekers[31]. It comprises the - identified as - first two phases of migration towards and within the European continent in the WWII period, phases separated by the 1973 oil crisis and the restructuring of European economies. Within these two phases also migration flows changed over time their composition, being made by mainly workers in the fifties and sixties, firstly from Southern European countries and subsequently from the, so called, developing countries, to family members and lately refugees in the nineties.

In the aftermath of WWII those Western European countries, the then advanced industrial countries which would have given origin to the EEC in 1957 - Italy excluded -

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[28] The immediate reference to, and one of the, we believe, best example of this, supposed, circularity, is the recognisable similarity between the scheme established by the Single Permit directive and the German guest-worker system of recruitment started in the mid-1950s. This required to the migrant, in order to be able to enter the national territory and be employed, to hold a residence and a labour permit, which was released for a specific job or area of the labour market. Moreover, no family reunifications rights were provided to these, considered to be, temporary labour migrants, although dependants were able to enter and stay in the country, in turn, as labour migrants themselves. J. F. HOLLIFIELD, cit., p. 59-60.

[29] Even in a very recent document, there is no reference to the EU citizenship, on the contrary, whenever the right to move and reside within the EU of Union citizens is mentioned, it is still the four fundamental freedoms that are call in question. Cfr. European Council Conclusions, 26-27 June 2014, cit., p. 6 and 17.

[30] Cfr. Art. 13, Single European Act, OJ L 169, 29.06.1987.

[31] Cfr. Council Directive 90/364/EEC of 28 June 1990 on the right of residence; Council Directive 90/365/EEC of 28 June 1990 on the right of residence for employees and self-employed persons who have ceased their occupational activity, OJ L 180, 13.7.1990, p. 26–29; Council Directive 90/366/EEC of 28 June 1990 on the right of residence for students, subsequently annulled by the Court of Justice, but which has maintained its effects until it was replaced by Council Directive 93/96/EEC of 29 October 1993 on the right of residence for students, OJ L 317, 18.12.1993, p. 59–60.

experienced a phase of massive inflow mainly of unskilled labour migrants coming from less developed European states, and of third-country nationals «colonial» migrants towards, the latter, France, the Netherlands and Britain[32]. The main channel of migration, which was in this period driven by economic reasons for both migrants and receiving countries due to post-war recovery and capital accumulation[33], were the, so called, «guest-workers» systems. These were state-controlled systems of recruitment of foreign workers which provided a flexible and mobile labour force in order to meet employers' requests, and were though to be of temporary nature. They provided a first legal framework of coordination of national legislation on intra-European migration and set the scene for future developments at the EU level.

The recruitment was carried out by *ad hoc* governmental offices, or by employers directly, on the basis of bilateral agreements signed with countries of origins of migrants, mainly Southern European countries[34], which saw such agreements as useful decompression valves for unemployment. As just said, this was thought to be a temporary source of labour or, differently said, an employers' request for recruitment. Thus, in order to prevent migrants to permanently settle, work permits were granted for limited periods of time and jobs, or areas of the labour market, no rights additional to those strictly related to the work activity were provided, as social, civil rights and family reunification rights[35], a part when migrants were seen also as a solution to low birth rates, as was in the Belgian and French case.

Alongside the entrance of labour migrants through this mode of recruitment, spontaneous[36] and unlawful entries should be reported as an additional and highly significant source of labour migration in the same period. These have been implicitly encouraged by a relaxation of rules in the sixties, due to competition for manpower among those European countries in need of foreign workers, and the request of a more stable labour force by employers. Moreover, despite the attempts to impede family reunification, dependents legally entered as workers themselves, or illegally when no other lawful means were available. These, among other reasons, has transformed the

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[32] A first differentiation among individual status provided to non-nationals can be already observed in relation to these two groups of migrants, as "colonial" migrants were generally entitled to civil and political rights in comparison to the remaining non-nationals guest-workers whose rights were largely restricted. S. CASTLES (ET AL.), cit., p. 110.

[33] The growth of labour supply provided by labour migrants is considered to be an essential pre-requisite to capital accumulation. ID., *The Guest-Worker in Western Europe*, cit., p. 772-773.

[34] Italy, in the first place, followed by Spain, Portugal, Greece, and North-African countries as, Morocco and, Tunisia, in addition to Turkey and lately Yugoslavia.

[35] M. CONDINANZI A. LANG, B. NASCIMBENE, *Citizenship of the Union and Free Movement of Persons*, Leiden, 2008, p. 66.

[36] E.g. having a tourist visa followed by a period of unlawful presence because of overstay since they found a job and were regularised, as happened in Belgium since the beginning of 1960, as the obtainment of a residence permit was not made dependent of the hold of a work permit, or in France, as well. IB., p. 763.

temporary nature of this source of labour into permanent settlement of foreigners, despite the attempt to maintain it as such trough the above legal framework described, leading to the breakdown of guest-workers systems of recruitment in the seventies[37].

In the meanwhile, the Treaty establishing the European Coal and Steel Community (ECSC), signed in 1951 by the same countries that would have signed six years later the EEC Treaty - the Benelux countries, France, the Federal Republic of Germany and Italy - contained already the basic elements that would have characterised the provisions on free movement of persons after introduced in the EC Treaty. Alike provisions were introduced in the 1957 Treaty establishing the European Atomic Energy Community (EAEC). Each Treaty determined, on the basis of the same framework, the conditions of entry, stay, the rights of those workers, who were nationals of states parties of the Treaty, that would have taken up employment in the specific area of labour market concerned by the treaty itself - coal mining and steelmaking - and workers specialised in nuclear industry. For instance, art. 69.1 of the ECSC Treaty established that workers holding the necessary qualification to prove their belonging to the categories of workers covered by the personal ambit of the Treaty were allowed to carry on that activity in the signatory state. Thus, should have been provided common definitions of skills and qualifications among state parties. Restrictions on the basis of nationality had to be removed, as well as discriminatory measures on remuneration and working conditions. The former were allowed as long as they were justified by requirement of public policy, public health and public security. At last, state parties were required to coordinate their arrangements to match vacancies with jobseekers, and to adopt measures in order to avoid their social systems to pose obstacles to movement[38]. Similarly was stated by the EAEC Treaty, signed simultaneously with the EEC Treaty, and to which the latter was not allowed to derogate. *A contrario*, in the ambits not determined by the EAEC Treaty, EEC Treaty provisions were applicable[39].

The Treaty of Rome (TEEC) provided free movement rights to workers, establishers and service providers, specifying the residual nature of the latter, limited to movements not covered by measures regulating movement of goods, capitals and

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[37] S. CASTLES, *Guestworkers in Europe: A Resurrection?*, cit., p. 743-744.

[38] Art. 69, Treaty establishing the European Coal and Steel Community, 1957 (in force, January 1958).

[39] Arts. 96 and 97 EAEC Treaty, implemented by the directive of 5 March 1962, OJ 57, 6.7.1962, p. 1633; art. 232. 2, Treaty establishing the European Economic Community, 1957.

persons[40]. As regards workers in particular[41], they were entitled to move to and within the territories of member states in order to respond to a job offer, to take up employment, to reside there at this scope, and to remain after the ceasing of such activity in accordance to the conditions established by the following regulations. With the view to assuring effectively this right, discrimination on the basis of nationality had to be eliminated, and limitations to its exercise are justifiable only for reasons of public order, public security and public health. Thus, two criteria has to be fulfilled by the individual to be entitled to exercise the right to move and reside: be a national of a member state and justify movement and residence by the pursue of an economic activity.

The EEC Treaty established a transitional period to end in 1969[42], during which measures had to be taken in order to assure free movement of workers[43]; the Council was the institution in charge of adopting the necessary legislation to guarantee workers' free movement, i.e. to implement article 48, TEC. Therefore, a series of regulations and directives were adopted in 1961 and 1964 to gradually realise it. The 1961 acts still left significant competences to member states regarding access to national labour markets through the principle of the «national preference»[44], impeding this way the effective realisation of equal treatment in employment conditions. These acts were, in turn, substituted by the adoption of a new regulation and directive in 1964[45], repealing the obstacles that impeded equal treatment in employment conditions[46]. In addition, the directive 64/221/EEC[47] was adopted to coordinate «special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health».

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[40] Arts. 48-66, EEC Treaty. In particular art. 60.1.

[41] We will further focus our attention only on workers, thus excluding from the research object self-employed persons and services providers. Our interest is to further compare Union citizens individual status with those provided to third-country nationals included in the broad category of mobile economic migrants. Therefore, this limitation is helpful in the view of better comparing in the continuation of the chapter individual status granted to those two categories of labour migrants by EU law, also considering that establishment and provision of services do not necessarily require movement of persons. On this point see E. GUILD., cit., p. 27.

[42] Cfr. Art. 8.1, EC treaty

[43] Cfr. Title III, Chapter I, TEC.

[44] Regulation (EEC) No 15/61/EEC relatif aux premières measures pour la réalization de la libre circulation des travailleures à l'intérieur de la Communauté, OJ 1961 1073/61.

[45] Council Regulation No 38/64/EEC of 25 March 1964 on freedom of movement for workers within the Community, OJ 1964 965/64; Council Directive 64/240/EEC of 25 March 1964 on the abolition of restrictions on the movement and residence of Member States' workers and their families within the Community, OJ 62, 17.4.1964, p. 981–983 (no official English translation).

[46] Cfr. Art. 2, Council Regulation No 38/64/EEC.

[47] Council Directive 64/221/EEC of 25 February 1964 on the co-ordination of special measures concerning the movement and residence of foreign nationals, OJ 56, 4.4.1964, p. 850–857 (no official English translation).

However, only with the adoption of the 1968 Regulation no. 1612 on workers freedom of movement within the Community, and of the Directive no. 360 on the abolition of restrictions on movement and residence within the Community for workers of member states and their families[48] - which repealed the above mentioned acts adopted in 1964 - this fundamental freedom was given full effect by abolishing every discrimination based on nationality on conditions of employment, remuneration and other related labour conditions[49]. Nevertheless, the 64/221/EEC directive would cease its effects only in April 2006, when the terms for the transposition of the 2004/38/EC directive expired.

Among these acts, the 1612/68 Regulation is of a major significance since it is still one of the sources of rights of mobile EU workers. It was not totally amended by the 2004/38/EC Directive[50] which, currently, is the principal act establishing the rights of mobile EU citizens and their family members[51]. The just mentioned Regulation states in its preamble the two basic principles for the realisation of free movement of workers: abolition of obstacles - administrative procedures, practises, and waiting periods for access to employment - and non-discrimination on the basis of nationality. From this moment onwards, the limits of the definition of worker, or rather, what can be considered to be a work activity - thus, qualifying a mobile EU citizen as a worker - under EU law, and the consequent progressive enlargement of the ambit of application *ratione personae* of these provisions, would have been performed by the CJEU case-law in the following years[52].

Alongside the above described developments in workers' free movement legislation, first steps were also taken as regards third-country nationals[53]. In 1963, the EEC-Turkey Association Agreement was signed[54], and initially it was thought that it could have been a vehicle to accession. It is worth to mention because - as further

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[48] OJ L 257, 19/10/1968, p. 13–16.

[49] OJ L 257, 19/10/1968, p. 0002 – 0012.

[50] 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, OJ L 158, 30.4.2004, p. 77–123.

[51] The quoted Regulation was been codified (due to its numerous amendments by the following acts Council Regulation (EEC) No 312/76, OJ L 39, 14.2.1976, p. 2, Council Regulation (EEC) No 2434/92, OJ L 245, 26.8.1992, p. 1, Directive 2004/38/EC of the European Parliament and of the Council, OJ L 158, 30.4.2004, p. 77) by Regulation (EU) No 492/2011 of the European Parliament and the Council of 5 April 2011 on freedom of movement for workers within the Union, OJ L141, 27.5.2011.

[52] The first case on free movement of workers was cfr., ECJ, *Württembergische Milchverwertung Südmilch AG v Salvatore Ugliola*, Case 15/69, judgment of 15/10/1969. S. GIUBBONI, G. ORLANDINI, cit., p. 33-34.

[53] Those agreements were concluded ex arts. 300 and 310 EEC Treaty which attributed to the Community the related competence and established the procedure.

[54] Agreement establishing an Association between the European Economic Community and Turkey (Ankara, 12 September 1963), OJ 1964 p. 3687/64. See also the Additional Protocol signed on 23 November 1970, OJ L 293, 29 December 1972, p. 4.

amended - it is currently in force, and determines rights of Turkish workers when moving to, and residing in, one of EU member states. This, with the further association agreements signed in that period and modelled on the former[55], constitutes the first step towards the establishment of a common set of rules at the EU level on rights of third-country national workers. Therefore, they set the scene for future agreements sharing the same content - more relevantly those concluded in the early nineties with Central and Eastern european countries - and were one of the elements of influence on EU law on migration that would have been developed from the late nineties.

As stressed above, guest-workers systems in the late sixties progressively broken down since they were not able to achieve anymore their objectives: to provide for foreign labour force on the basis of a «rotation» model, thus temporarily, for a, on the contrary, permanent labour demand. In addition, it become unavoidable and necessary to start to deal with the growing numbers of undocumented migrants and the unforeseen consequences of such a model, i.e. its incapacity to prevent family reunification and permanent settlement of migrants. The post-war economic boom of those countries importer of foreign labour force was coming to an end as well, a parallel reorganisation of world economies towards higher level of globalisation was taking place with a consequent decrease in the demand of low-skilled workers from developed economies[56]. At last, the above mentioned elements had led also to a wide reduction of the advantages of employing temporary foreign workers, which were flexibility, low wages and almost absent social costs (i.e. housing, education, and, generally, infrastructures).

Officially, guest-workers systems of recruitment were stopped in 1973[57], firstly by Germany, then following the remaining countries, owing to the «oil crisis» and the consequent period of high unemployment and economic recession[58]. However, if third-country nationals could be expelled, being an exceeding labour force, EU member states

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[55] With the EEC-Greece Association Agreement signed in the same year, these were the first agreements with third-countries that contained provisions on rights of third-country national workers in the Community. That same year also the Yaounde Agreement was signed with a group of eighteen African countries which had been European colonies or somehow ruled by European states. However, this agreement did not had provisions on labour until the second and third renegotiations which took place in 1975 and 1979. In 1976, an agreement with the Maghreb countries were signed, anticipated by the Yugoslavia agreement (Brussels, 19 March 1970) which lasted three years and was followed by a further agreement signed in 1973, and, at last, by a Cooperation agreement in 1980, and by the 1975 Lomé agreement and the renewed 1980 Lomé II agreement signed with the, so called, ACP countries (a group of African, Caribbean and Pacific states), all these containing provisions aiming at regulating labour of nationals of those third-countries in the Community.

[56] S. CASTLES (ET AL.), *The Age of Migration*, cit., p. 111.

[57] The context and the steps that led to the join of the EC of this group of countries are described in more details in the fifth chapter of the present work.

[58] Unemployment, however, had been increasing already since the late sixties, leading to the use by some member states of the safeguard clause provided by Regulation 38/64, and in relation to third-country national to the "exportation of unemployment". H. TER HEIDE, *The Free Movement of Workers in the Final Phase*, in *CMLR*, 4, 1969, p. 467; OECD, *Economic Survey of Europe 1967*, Geneva 1967, p. 49.

could not prevent the entrance and stay of migrant workers who were EU nationals and, similarly, they could not expel them if not on grounds of public policy, public security and public health. Thus, the «exportation of unemployment» towards migrants' countries of origin was not practicable, at least, in relation to these latter group of foreign workers.

In this same period, European countries of destination of migrants experienced a change in the patterns of migration. The composition of flows changed, as a reaction to the stop of labour migration, and, in that period, became mainly composed by family members and refugees. The country of origin of migrants changed as well, since the majority came from Eastern European and non-European countries. These changes identify the, so called, second wave of migration towards European countries in the post-WWII period, which would last until the early 1990s, characterising these two decades as a second distinguished phase of post-war migration history towards European countries[59]. Furthermore, a new segmentation of the labour market took place, as labour intensive productions were gradually transferred to other areas where low-skilled and low-wages jobs still guarantee a profit, and, especially, major cities of Western Europe started to become poles of attraction of high-skilled workers[60].

In addition, from the mid-eighties onwards, those Southern European countries which had been sources of foreign labour force from the beginning of the twentieth century for founding EEC countries, experienced a migration transition, becoming progressively countries of destination of increasing migration flows, rather than countries of origin, since their economies developed similar characteristics to those of former destination countries. However, a different management of these migration flows has characterised the national approach of those countries generally considered, till today, i.e. the predominance of irregular migration flows and the employment of migrants mainly in the underground economy followed by periodical regularisations. This is worth to be mentioned since the large part of those same countries, namely Greece (1981), Spain and Portugal (1986), would have been part of the second and third enlargements, by becoming members of the EC in that same decade[61].

In 1973, the first enlargement of the EC also took place: the United Kingdom, Ireland and Denmark joined the Community, further expanding the free movement area.

As regards the development of the EC legislation on movement of workers, the Court of Justice has asserted itself as one of the primary forces in this process, exhausted the momentum of regulation of labour migration in the Community soon after the

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[59] S. CASTLES, A. DAVIDSON, *Citizenship and Migration. Globalization and the politics of belonging*, London, 2000, p. 55.

[60] S. CASTLES, *The Guestworkers in Western Europe: An Obituary*, cit., p. 775.

[61] C. PRESTON, *Enlargement and Integration in the European Union*, 1997, London, p. 46 ff.

expiration of the transitional period in 1969[62]. Through its case-law, increasingly relevant in this regard from the mid-seventies, Community's interpretations of concepts as public policy and public security, grounds on which basis the admission of a non-national could be refused by a member state, as well as an expulsion from the national territory could be justified, were progressively affirmed over the definitions, obviously differing, of member states' national laws[63]. Moreover, already before the end of the transnational period, the Court progressively construct a Community tailored content of «worker», a definition which was absent in the EC Treaty, tracing the limits of member states' national definitions and discretionary power, that, on the contrary, would applied nationals parameter in order to determine if an activity could be defined as «work» and an national of another member state as an «employed person»[64]. This could not be allowed since «it would therefore be possible for each Member State to modify the meaning of the concept of 'migrant worker' and to eliminate at will the protection afforded by the Treaty to certain categories of person»[65]. Through this case-law, the ECJ would have gradually enlarged, or rather, diluted the definition of worker, expanding the range of individuals and situations included in the field of application of art. 48 of the EEC Treaty. This process has gone to the benefit of non-economically active citizens of member states, and led to the adoption of a tailored secondary legislation in the 1990, which conferred them the right to move and reside in another member state, originally only provided to the above mentioned categories of economically active EU citizens, as a result of the ECJ judgments which had already established in this sense[66]. A detailed overview of the relevant case-law in this regard will be carried out in the following paragraph, in view of considering it a significant step in the path towards the establishment of the Union citizenship in 1992 by the Maastricht Treaty.

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[62] After the above mentioned Regulation No 1612/68 and Directive No 360/68, the only significant act adopted in the field of workers movement was the Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community, accompanied by implementing Regulation (EEC) No 574/72, OJ L 149 of 05.07.1971 (Consolidated version, OJ No L 28 of 30.1.1997), OJ L 74 of 27.03.1972. Both would be repealed in 2004 by the Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems, OJ L 166 of 30.04.2004.

[63] ECJ, C-41/74, *Van Duyn*, 4 December 1974, [1974] ECR 1337.

[64] The reasoning and the conclusions reached by the Court of Justice as regards workers are extendible to activities ex arts. 49 and 52, i.e. establishment and providers of services, as ", [T]he third question is whether the applicable Community rules require the Member States to issue a residence permit to a national of another Member State where it is not disputed that the person concerned is carrying on an economic activity, the only point at issue being whether it falls to be classified as employment within the meaning of Article 48 of the Treaty or activity as a self-employed person within the meaning of Article 52 of the Treaty". Cfr. ECJ, C-36/74, *Walrave*, 12 December 1974, [1974] ECR 1405, par. 23; C-363/89, *Roux*, 5 February 1991, [1991] ECR I-273, par. 22.

[65] ECJ, C-75/63, *Hoekstra (née Unger)*, 19 March 1964, [1964] 1964 ECR 00347; see also C-53/81, *Levin*, 23 March 1982, [1982] ECR 1035.

[66] M. CONDINANZI, A. LANG, B. NASCIMBENE, cit,. p. 69-71.

2. *The second phase of development of EU rules on labour movement.*

2.1. Foreword.

As stressed above, this whole chapter focuses on the development of EU legislation on movement of persons developed alongside the changing structure of migration flows experienced by European countries while progressively joining the European Union Community. It considers, thus, the broadening of the area of free movement among European countries progressively joining the EU, and the passage of nationals of those countries from the status as foreign workers to that of citizens of the Community. The attempt is to grasp the reciprocal influences between those phenomena, and to describe the adoption of legislation on migration of EU citizens and third-countries workers as a result of dynamics of action and, mostly, reaction to the changing patterns of migration flows to and within EU member states.

The regulation of movement and residence of third-country nationals workers and their family members across EU borders and within EU member states' territories begin to find an embryonic common discipline at the EU level only in the post-Maastricht era, even if EU member states had started to cooperate in connected fields - namely those that later would be part of the AFSJ[67] - already before. Moreover, as highlighted earlier, the Community, already before, had started to regulate conditions of entry and residence of selected third-country national workers into member states' territories through association agreements[68], and of family members of workers who were Union citizens[69].

A second phase of development of EU legislation on movement of persons, thus, can be identified starting from the mid-eighties until the late-nineties. This is characterised, as regards EU legislation on third-country nationals, by the signature in 1985 of the Schengen agreement between the Benelux countries, France and Germany[70] to end with the Amsterdam Treaty signed in 1999, when decisive steps were taken to the establishment of an EU body of rules on labour migration of third-country nationals - who were not already beneficiaries of work and residence rights based on association

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[67] Policies on borders check, asylum and immigration, judicial cooperation in civil and criminal matters and police cooperation. Cfr. Title V, TFEU.

[68] See supra note 53.

[69] Cfr. Arts. 10-12, Regulation (EEC) No 1612/68. See also Regulation (EEC) No 15/61, arts. 11-14, which provisions were reaffirmed by Regulation (EEC) No 38/64.

[70] Agreement between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, OJ L 239, 22.9.2000, p. 11.

agreements - and the Schengen *acquis* was incorporated into the Community framework. The second phase, then, inaugurates the cooperation, on an intergovernmental basis, among some EU member states as regards control of borders and related matters[71].

The process that led to the development of the Schengen *acquis* before its incorporation in the EC framework, and the evolution of the EU in one of its critical moments - i.e. the completion of the common market and the set of a common currency and of a political union - have certainly reciprocally conditioned one another and have progressed alongside[72], despite their advancement as formally separated processes. Signed in 1986 and entered into force in June 1897, the Single European Act set the first necessary arrangements for the completion of the internal market by December 1992, defining it as a «single» market where the free movement of goods, persons, services and capitals was ensured in accordance with the provisions of this Treaty[73]. The abolition of obstacles, among other factors of production, as regard movement of persons - to mean abolition of controls on internal borders on persons moving within the Community territory - has inevitably raised the question of controls on the entrance and stay of persons crossing internal and external borders of member states regardless of their nationality. Consequently, it became also clear the necessity to provide for a set of common rules regarding conditions of entry and stay of third-country nationals[74], implicitly asking for a devolvement to the Community of a part of national control over immigration regimes regarding, potentially, all individuals entering the territory of member states[75]. Therefore, attempts to develop a body of EC rules on the management of external borders and free movement of non-EU citizens were done in connection with

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[71] As the Benelux Economic Union and the Nordic cooperation demonstrate, the abolition of internal borders and the free movement of persons were already a reality for countries that would became EU member states in the following years. Cfr. arts. 1, 2.2, lett. a) and 55, Treaty establishing the Benelux Economic Union (16 September 1958), and arts. 1-8, Convention containing the transnational provisions; cfr. also arts. 1.1 and 1.3, Convention between Denmark, Finland, Norway and Sweden concerning the waiver of passport control at the intra-Nordic frontiers, 12 July 1957 (consolidated version 18 September 2000).

[72] A further demonstration of the deep interconnections between the two processes was the identity among the ambits touched by the Schengen agreement and implementing convention with those of the «Palma Document» on which basis EC member states discussed in order to set the rules concerning free movement of persons while completing the internal market. J. J. E. SCHUTTE, *Schengen: its meaning for the free movement of persons in Europe*, in *CMLR*, 1991, 28, p. 563; D. O'KEEFFE, D. O'Keeffe, *Union Citizenship*, in D. O'KEEFFE, P. M. TWOMEY (EDITED BY), *Legal issues of the Maastricht Treaty*, 1994, Chichester, p. 194.

[73] Moreover, the SEA provided for the transformation of the common market in a single market by 1 January 1993. Cfr. Arts. 13, Single European Act.

[74] E. GUILD, cit., p. 17.

[75] IB., p. 220.

the foreseen completion of the internal market[76]. Nevertheless, these rules were not adopted within the Community framework since the legal basis within the Single European Act (SEA) were considered not to include the competence for EU institutions to adopt acts aiming at regulating immigration of non-Community nationals[77]. This was made pretty clear by the ECJ judgment in which it has declared void, for lack of competence, the Commission Decision No 85/381 «setting up a prior communication and consultation procedure on migration policies in relation to non-member countries»[78]. The Court, anticipating the further unavoidable developments which were just about to come, made clear that, although at the Community level the only relevant ambits as regards workers third-country nationals were those having an impact on working conditions and on the employment market, ex art. 118 TEC, not the whole immigration policy felt within the scope of public security, thus, was an exclusive and untouchable national competence[79]. For this reason, the Schengen process, at least initially, has been seen as a compensating process for the lack of progress of the EC law in what, would have become, the AFSJ[80].

As previously stated, from the mid-eighties, Southern European countries that, in the previous decades had been the main providers of foreign labour force for the post-war economic boom and reconstruction of Western European countries, experienced a migration transition, becoming, in turn, countries of destination and simultaneously joining the EC. In fact, in 1981 and 1986, the above-mentioned second and third enlargements would take place. Greece, Spain and Portugal became EC members after the fall of dictatorships.

In both enlargements, a transitional period, of six and seven years respectively, has been applied as regards free movement of workers, a field of EC legislation which, on the contrary, was not included in transitional arrangements of the first enlargement. Those measures have had the effect of delay the application of EC rules in this field, by allowing member states to, potentially, continue to apply national laws as regards access to their national labour markets, thus to continue to apply a different treatment on the basis of nationality. Therefore, for the period during which transitional measures were in

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[76] White Paper «Completing the Internal Market», Commission of the European Communities to the European Council, Milan 28-29 June 1985, COM(85) 310, Brussels 14 June 1985, p.t 55. The European Council at the ending of 1988 pointed out that an «appropriate harmonisation or approximation» of the areas related to the completion of the internal market was necessary. Cfr. Rhodes European Council, Presidency Conclusions, 2-3 December 1988, p. 3.

[77] Cfr. arts. 100, 100a, para. 2, and 235, Single European Act, OJ L 169, 29.6.87.

[78] Commission Decision of 8 July 1985 setting up a prior communication and consultation procedure on migration policies in relation to non-member countries, OJ 1985, L 217, p. 85.

[79] ECJ, C-281, 283-5 and 287/85, *Germany and others v. Commission*, [1987] ECR 3202.

[80] D. O'KEEFFE, *The Emergence of a European Immigration Policy*, in *E.L.Rev*, 20, 1995, p. 33.

force, the status of those new EC nationals still varied across EC member states, further postponing the harmonisation of workers' free movement rights, and producing a «[…] differentiated membership [and a] post-accession conditionality»[81]. Nevertheless, as the increase of migrants' inflow feared by EC member states did not happened, transitional measures stopped to be applied after five years. This was also due to the transformation of such states in countries of immigration in the same period[82]. In addition, this aspect is worth to be mentioned as it will represent the only precedent experience available as regards transitional arrangements on workers' free movement provisions when the fourth and fifth enlargements would take place in 2004 and 2007[83].

By the end of the eighties, another highly significant event has marked migration flows towards Europe, with a relevant part of the European continent entering among the group of migrants sending countries, namely Central and Eastern European countries (CEECs)[84]. This event has obviously impacted on volumes, on composition of migration flows and, consequently, on the Community and member states' reactions which, in turn, have been reflected on their migration regimes. Although the 1989 events have had an huge impact on migration flows from those countries towards Western European countries, by the mid-1990s was already clear that the foreseen boasted "invasion" would not take place in the dimensions predicted[85]. For the major part, the East-West migration flows were composed by ethnic minorities[86] towards their kin-states, on which territories they were allowed to entry and stay and to easily acquired citizenship.

The bilateral agreements[87], that would been the first steps of those countries on the way towards their accession in the mid- and late-2000s, have clearly acquired this

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[81] M. CREMONA, *EU Enlargement: Solidarity and Conditionality*, in *E.L.Rev.*, 2005, 30, p. 22.

[82] M. KRAUS, R. SCHAWGER, *EU Enlargement and Immigration*, in *JCMS*, 2004, 42, p. 170-171.

[83] The transitional arrangements provided for the second and third, and the fourth and fifth enlargements have been compared on the basis of the, supposed, similar economic conditions at the act of accession of these two groups of countries. The aim was to rely on the consequences of the second and third enlargements and effects of transitional arrangements on migration flows and patterns to predict the effects on migration from the EU8 and EU2 towards «old» member states. However, geographical (share of common borders) as well as political differences make under numerous points those processes not comparable. S. CURRIE, *Migration, Work and Citizenship in the Enlarged European Union*, Farnham, 2008, p. 14-16.

[84] The countries comprised in this group are those which would joined the European Union in 2004 and 2007 enlargements, namely Bulgaria, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Romania, Slovakia and Slovenia.

[85] S. CASTLES, H. DE HAAS, M. J. MILLER, *The Age of Migration*, cit., p. 115.

[86] A forerunner phenomenon of the mentioned movement of ethnic minorities coming from the CEECs starting from the late eighties was represented by the inflows of colonial migrants from colonies or former colonies in the immediate post WWII period towards countries as the United Kingdom, France and the Netherland. Those migrants provided the needed labour forced nearby the recruitment through guest-workers programs, while be grated easily modes of acquisition of citizenship or, in any case, more rights in relation to third-countries migrants. S. CASTLES, A. DAVIDSON, *Citizenship and Migration*, cit., p. 55.

[87] Hungary (1991), Poland (1991), Romania (1993), Czech Republic (1993), Slovakia (1993), Bulgaria (1993), Latvia (1995), Estonia (1995), Lithuania (1995), Slovenia (1995).

bridge-nature from the Copenhagen Council of June 1993[88]. Movement of workers, right of establishment and to provide services, of citizens of CEECs, and towards these countries by EC nationals[89], were some of the matters regulated by these agreements, although these did not contain any free movement right for would-be employed workers. This was explicable by considering the high rates of unemployment presented by member states at that time. In fact, by this time, EC member states and institutions had acquired enough experience in relation to agreements with third-countries to avoid their unwanted side-effects[90]. Nevertheless, non-discrimination rights were conferred as regards working conditions, remuneration or dismissal, partially resounding art. 39(2) of the EC Treaty. Moreover, access to the national labour market of the member state of residence was granted also to family members of the worker for the same duration of its stay in the territory, in addition to an elementary form of coordination of social security.

Those agreements were significant as they represent another example of *in-between* status - between that of an EU national and a third-country national no further defined - as still is that of Turkish national workers on the basis of the EEC-Turkey Association agreement. Furthermore, they have been bridge-status, although only for a certain category of CEECs citizens, to the status as an EU citizen that they would acquire in the double round of accessions of 2004 and 2007. Nevertheless, the passage of status for those category of CEECs citizens included in the ambit of application *ratione personae* of the European agreements, as well as to those excluded, did not happened at the same time in all EU member states. These, in fact, could adopt transitional arrangements, i.e. progressively open their national labour markets to workers coming from newly EU member states for a period of seven years after their accession.

These provisions provide a framework for a gradual application of EU free movement rights only of workers, since other categories of potential mobile citizens as students and pensioners were not included. Moreover, and differently from European agreements, access to the labour market and residence rights were granted, regardless of the application of the transitional provisions, to those workers and family members if they were already present in the territory at the date of accession, and have been granted access to the labour market for a minimum of twelve months. However, they were not granted any right to move to another member state, and the definition of family members

[88] M. MARESCEAU, E. MONTAGUTI, *The Relations Between the European Union and Central and Eastern Europe countries: A Legal Appraisal*, in *CMLR*, 1995, 32, p. 1327-1367. Cfr. criteria for membership of CEECs outlined at point 7, Conclusions of the Presidency, European Council in Copenhagen 21-22 June 1993, SN 180/1/93 REV 1, p. 12-16.

[89] An important leading force for the signature of this agreements was, in fact, the will of EC member states to have access to the CEECs markets.

[90] Cfr. ECJ, C-192/89, *Sevinge*, 20 September 1990, [1990] ECR I-3461 on the Turkish Association Agreement; ECJ, C-18/90, *Kziber*, 31 January 1991, [1991] ECR I-199.

was stricter if compared with that of the 2004/38/EC Directive[91]. Therefore, the coexistence of national and EU status for workers citizens of the CEECs of new accession continued[92] till the expiration of the possibility to apply those transitional measures. Member states interests (and fears) beyond the adoption of those measures, despite the partially improved economic situations of both new and old member states in comparison to that of the early nineties, were not so different from those advanced to justify the exclusion of free movement rights of workers from national labour markets when the European agreements were signed: i.e. «invasion» of low-skilled EU citizens willing to accept low-wages.

At the national level, the 1990s were characterised by a tightening of migration regimes, whether of economic or forced migrants, according to which access to national territory of third-country nationals were allowed on exceptional, or rather, selective basis. Illustrative of this attitude towards labour migration can be considered to be the, so called, "new guest-workers programs" implemented by Germany in 1991 and by the United Kingdom in 1997[93]. Simultaneously to the restrictive shift of national migration regimes, a significant point not properly highlighted until now but quite relevant in this second phase of development of EU legislation on movement of persons, is the increasing relevance of forced migration, being the composition of flows towards member states more and more composed by asylum seekers. Nearby the flows coming from CEECs, a huge part of forced migrants seeking entrance into the territory of member state was brought by people escaping the 1990s former Yugoslavia conflict. The interplay among national legislations regulating the entrance and stay of labour migrants adopted in this decade and those regulating rights and conditions of residence of asylum seekers and, in case, refugees is telling as it shows the fluidity of the status of asylum seeker and that of, so called, voluntary migrant, i.e. their potential interchangeability and instrumentality to the achievement of the final aim: to be recognised a status, and an attached residence right, as more secure as possible. This aspect is worth to be considered since, while national migration regimes became more selective in relation to labour migration, at the detriment of low-skilled workers, Community institutions signed

[91] Cfr. art. 2, n. 2, Directive 2004/38/EC; Act concerning the conditions of accession of the Czech Republic, […] and the adjustments to the Treaties on which the European Union is founded, Annex II «Free movement of persons», OJ L 236, 23.9.2003, p. 179.

[92] See A. ADINOLFI, *Free movement and access to work of citizens of the new Member States: The transitional measures,* in *CMLR*, 2005, 2, p. 469-498.

[93] For a brief and contextualised description of these two schemes see S. CASTLES, *Guestworkers in Europe: A Resurrection?*, cit., p. 750-754. This point is going to reveal its relevance in the following chapter when the side-effects of the maintenance of parallel national schemes and status for migration towards EU member states of third-country national workers and long-term residents will be highlighted. Cfr. paragraphs 3 and 4.

the above mentioned «European Agreements» with CEECs regulating the entry and stay of (only) labour migrants CEECs nationals, being the CEECs a group of countries from which, at the same time, there was a high pressure to emigrate towards member states[94]. Secondly, the interplay is obviously relevant as in the period here considered the EU framework on both third-country national labour migrants was under construction as well as the EU legislation on asylum.

At last, in 1992, the EEA Agreements was signed and, in 1994, the fourth enlargement took place, with the accession to the EU of Austria, Finland and Sweden.

2.2. From Free Movement of Workers to the Union citizenship and beyond.

Free movement of workers and, what would became, the Union citizenship have always been deeply interrelated concepts, at least in the expectations, from the very beginning of the European integration process, since to persons' free movement was assigned the instrumental function to open the track to the gradual emersion and transformation of what was, in the beginning, considered to be «an incipient form of European citizenship»[95]. Their relation was defined as such from the moment in which free movement become a reality with the adoption of the 1968 legislation on the matter at the end of the transitional period established by the EEC Treaty. However, from the mid-eighties, those never really clarified references to an European citizen status[96] started to acquire a more defined content, precisely on the basis of the development of free movement rights of workers during the previous decades, being free movement and the attached right of residence the cornerstone of the Union citizen status. The underlying necessity, leading the attempt of filling up the citizenship concept at the Union level was to increase the democratic legitimacy of the EU[97] or, to overcome its democratic deficit and, using the words of the 1984 Fontainebleau Council, to the basis

[94] E. GUILD, *Immigration Law in the European Community*, cit., p. 181. This reciprocal influence between asylum and economic migration from CEECs in this period is pointed out by E. GUILD, in F. NICHOLSON, P. TWOMEY (ED.), *Refugee rights and realities: evolving international concepts and regimes*, Cambridge, 1999.

[95] This expression was used by the Commission relying for the major part on workers free movement rights. Cfr. Bull. EC, 11-1968, p. 5-9.

[96] H. U. JESSORUN D'OLIVEIRA, *European Citizenship: Its Meaning, Its Potential*, in R. DEHOUSSE, *Europe After Maastricht*, München, 1994, p. 126.

[97] Conclusions of the Presidency, European Council in Rome, 27-28 October 1990, SN 304/90 REV 2, p. 3.

of the «expectations of the people of Europe by adopting measures to strengthen and promote its identity and its image both for its citizens and for the rest of the world»[98].

The leading factor of the gradual shift from a mere economic to a more general status has been the progressive enlargement of the personal ambit of application free movement provisions[99], with the aim to realise the passage from a mere economic to a more general status[100], although never forgetting the instrumentality of the citizen status for the market[101]. In fact, it was pointed out that the establishment of the Union citizen status in the Maastricht Treaty was the result of a codification process of persons' free movement provisions and their incorporation into the Community primary law, although we have not witnessed for a long time to an according change of the ECJ attitude in the judgments involving EU citizens, as the Court has continued to apply the pre-Maastricht, i.e. single market based, logic until recently[102].

If this reasoning is accepted, it is worth to account for the steps that have marked the transformation process of persons' free movement rights into the Union citizen status to subsequently better comprehend its relation with the other status that will be conferred to third-country national economic migrants following the Amsterdam Treaty. Thus, we will look at these case-law to the extent that it allows to highlight the focal points of the progressive emancipation of the Union citizen status from its strict economic connotation, or, if preferred, to the gradual inclusion within the realm of the EC nationals protected by workers' free movement provisions of those who have found themselves in situations which more and more have seen fading their strict economic implications. This process would end with the emergence of a more, at least formally, general status attributed to the individual *per se* considered. It has been pointed out that the further development of workers free movement rights beyond the its initial ambit of application, *ratione personae* and *materiae*, was a consequence somehow implicit in the evolution of

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[98] The Fontainebleau Council established an *ad hoc* Committee to deal with this issue. Precisely the second Addonino's Report, «A People's Europe», outlined the special rights that were to be recognised to Communities' citizens in a number of fields, as well as it dealt with the modes to construct the image and identity of the EC. Cfr. European Council meeting in Fontainebleau, Conclusions of the Presidency, 25-26 June 1984. p.t 6, p. 8; Reports of the ad hoc Committee on a People's Europe to the European Council, Supplement 7/85, Bull. EC, p. 18.

[99] D. O'KEEFFE, *Union Citizenship*, cit., p. 93.

[100] Nearby this affirmation, it was also acknowledged that measures needed to be taken also to provide third-country nationals with a legal status able to be a vehicle of consolidation of long-term communities of non-EC citizens. Cfr. Commission communication, Guidelines for a Community policy on migration, COM(85)48 final, p. 6-7.

[101] Cfr. European Parliament's resolution of 18 November 1983 on migrant workers; Conclusions of the Council of 22 June 1984 concerning a Community medium-term social action programme, OJ C 175, 4.7.84; Commission communication, Guidelines for a Community policy on migration, cit., p.t 4.

[102] D. KOCHENOV, R. PLENDER, *EU Citizenship: From an Incipient Form to an Incipient Substance? The Discovery of the Treaty Text*, in *E.L. Rev.*, 2012, 37, p. 372-373. This assumption has gone far enough to affirm that the market-paradigm was, in the end, abandoned, only with the 2008 CJEU Rottmann judgment. D. KOCHENOV, *A Real European Citizenship: A new Jurisdiction test: a Novel Chapter in the Development of the Union in Europe*, in *Columb. J. Eur. L.*, 2011, 18, p. 75.

the internal market, and in the impossibility to trace a line between economic and non-economic relevant situations when the whole range of surrounding relevant facts linked to, and influencing the, work activity started to be considered by the Court of Justice[103].

This approach will turn to be useful also in the continuation of the analysis, in which other areas of free movement will be considered but within which, on the contrary, a comparable path of evolution of individual status has not taken place. In the concluding part we will try to provide an explanation for this different paths that individual status have taken in different free movement areas in Europe. Furthermore, if the gradual, so called, emancipation of the EU citizen from its strict market connotation was implicit in the evolution of the single market, we are, then, tempted to ask if a similar development path will be experienced by third-country nationals economic migrants in EU member states. In the part devoted to the analysis of third-country nationals status in the EU, we will point out that a process as such could be already in progress[104].

The ECJ case-law on workers free movement has been abundant and largely analysed by scholars, which has considered how the fundamental elements of the right to move and reside for the exercise of a work activity have progressively developed. These elements are: non-discrimination on the basis of nationality and removal of objectives to free movement. Nearby, Community definitions of work activity and, consequently, worker, and of public policy, public security and public health - the grounds on which basis entry and stay in the EC member states territories and expulsion of non-nationals were justified under EC law - have been progressively affirmed. The relevance of the gradual assertion of these Community concepts can be fully realised once we recall two basic characteristics of Community law: the first, direct effect[105], the second, supremacy of EC law over, contrary, national law. The EEC Treaty conferred rights directly on individuals which could be invoked against member states, i.e. vertically, but also horizontally, among individuals themselves[106], and have to be guarantee by national courts when applying Community (now EU) law.

In the period that goes from the seventies to the early nineties, when the Union citizenship was established as a formal status by the Maastricht Treaty, the Court, has progressively filled with content the Community definition of worker, stating that it had

[103] D. KOCHENOV, R. PLENDER, cit., p. 374; E. GUILD, *Immigration Law in the European Community,* cit., p. 16. See also R. PLENDER, *An Incipient Form of European Citizenship*, cit., p. 39.

[104] D. ACOSTA ARCARAZO, *The Long-Term Residence Status as a Subsidiary Form of EU Citizenship*, Leiden, 2011.

[105] Cfr. Direct effect as regards art. 39 TEC (former art. 48) C-41/74, *Van Duyn*, 4 December 1974, [1974] ECR 1337, paras. 12-13; C-13/76, *Dona*, 14 July 1976, [1976] ECR 1333, para- 20.

[106] Cfr. ECJ, C-26/62, *Van Gend en Loos*, [1963], ECR 1; C-36/74 *Walrave*, [1974] cit.

to be interpreted broadly since it defined the scope of a fundamental freedom[107]. It has been noted, however, that even if member states were deprived of the possibility to apply their own national parameters to identify a work activity when those felt under Community law, they still hold a very powerful instrument to limit the range of beneficiaries of that fundamental freedom, i.e. nationality. Although, workers' free movement rights were not reserved to nationals of member states in the EEC Treaty[108], it subsequently was by the Court and secondary legislation[109], giving to member states an enormous discretionary power and the possibility to create «second class citizens»[110], since in the matter of nationality, formally[111], there were not any transfer of sovereignty from member states to the Community. The only ambit regarding member states nationalities on which the ECJ has intervened is as regards modes of acquisition, establishing the impossibility for member states to discriminate EU citizens questioning the mode in which a member state nationality was acquired[112].

Consequently, the Court has, then, indicated the basic elements that identify an employment relationship, thus, a person as a worker: «[The essential feature of an employment relationship, however, is that] for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration,[113]. However, the work activity[114] is required to be genuine and effective, as marginal and ancillary activities were not covered by Community law, hence those EC nationals exercising them could not rely on workers' free movement rights, however, the

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[107] ECJ, C-53/81, *Levin,* 23 March 1982, [1982] ECR 01035, para. 12.

[108] As regards the right of establishment and provision of services, those free movement rights were explicitly reserved by the EEC Treaty only to nationals of EC member states. Cfr. arts. 52 and 59, EEC Treaty.

[109] Cfr. art. 1 of Regulation (EEC) No 1612/68, cit., and art. 1 of Directive No 68/360/EEC, cit.

[110] R. PLENDER, *An Incipient Form of European Citizenship*, cit., p. 44. This danger would become manifest on the occasion of the *Kaur* judgment, in which the United Kingdom 1972 declaration would be considered «as an instrument relating to the Treaty for the purpose of its interpretation and, more particularly, for determining the scope of the Treaty *ratione personae*». Therefore, the rights of Mrs. Kaur, a British overseas citizen, could not be protected by Community Law, grating her the right to reside in the United Kingdom, since «such rights never arose in the first place for such a person». ECJ, C-192/99, *Kaur*, 20 February 2001, [2001] ECR I-01237, paras. 24-25.

[111] Formally because, on the contrary, over time phenomena of *de facto* convergence among member states nationality laws indirectly connected to the EU integration process are observable, as the creation of easy tracks for EU citizens to naturalise in another member state. D. KOCHENOV, *Member State Nationalities and the Internal Market: Illusions and Reality,* in N. N. SHUIBHNE, L. W. GORMLEY, *From Single Market to Economic Union: Essays in Memory of John A. Usher*, Oxford, 2012, p. 243-244.

[112] ECJ, C-136/78, *Auer*, 7 February 1979, [1979] ECR 00437, para. 28; C-369/90, *Micheletti*, 7 July 1992, [1992] ECR I-04239, para. 10

[113] ECJ, C-66/85, *Lawrie-Blum,* 3 July 1986, [1986] ECR 2121, para. 17; Case 344/87 *Bettray* [1989] ECR 1621, paras 11-12, C-197/86 *Brown*, [1988] ECR 3205, para. 21; Case C-3/90 *Bernini,* 26 February 1992, [1992], ECR I-01071, para. 14

[114] For an activity to fall under the definition of «work» ex Community law the economic sector is, likewise, not relevant as long as «it constitutes an economic activity within the meaning of Article 2 of the Treaty». ECJ, C-36/74, *Walrave,* [1974] ECR 1405, para. 4; Case C- 415/93, *Bosman,* 5 December 1995, [1995] ECR I-049211, paras. 73-75.

evaluation of the possession of these characteristics was in charge of national courts[115]. Nearby, a distinct definition of worker for the purpose of securing the co-ordination of national social security systems was elaborated as «any person who has the capacity of a person insured under the social security legislation of one or more Member States, whether or not he pursues a professional or trade activity»[116] ex art. 1 (a) of Regulation 1408/71.

This gradually broader definition of work activity and worker has allowed to include within the category of beneficiaries of free movement rights also EC nationals who, after having moved and worked in another member state, has changed its activity by engaging in full time study, if such change was done «for improving [its own] professional qualifications and promoting [its own] social advancement», therefore, «provided that there is a link between the previous occupational activity and the studies in question»[117], or have moved to seek work in another member state[118], or to engage in occupational training[119]. Nonetheless, it was equally made clear that to the enlargement of the range of beneficiaries of free movement rights did not correspond an access to equal treatment rights with the same extent of those who perfectly fit into the, although enlarged, worker category[120].

Nearby the gradual enlargement of those falling within the category of worker, the Court has also expanded the range of those mobile EC nationals, and family member, who were entitled to social benefits[121], ex art. 7 Regulation No. 1612/68, on an equal foot with nationals in the member state where they were carrying on their activities and residing[122], to such an extent to include mere potential beneficiaries of services[123]. Otherwise a different treatment would be either a discriminatory treatment on the basis of nationality and an obstacle to the exercise of free movement, however, graduating and differentiating such access in relation to the role and contribution gave by the mobile EU

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[115] ECJ, C-139/85, *Kempf*, 3 June 1986, [1986] ECR 01741, para. 10-14; See also Case C-413/01 *Ninni-Orasche* [2003] ECR I-13187, para. 32.

[116] ECJ, C-182/78, *Pierik*, 31 May 1979, [1979] ECR 01977, para. 4.

[117] ECJ, C-39/86, *Lair*, 21 June 1988, [1988] ECR 3161, par. 22.

[118] ECJ, C-292/89, *Antonissen,* 26 February 1991, [1991] ECR I-745, para. 37.

[119] ECJ, C-3/90, *Bernini,* paras. 14-17.

[120] "[T]he equal treatment with regard to social and tax advantages which is laid down by Article 7 (2) of Regulation No 1612/68 operates only for the benefit of workers and does not apply to nationals of Member States who move in search of employment", ECJ, C-316/85, *Lebon*, 18 June 1987, [1987] ECR 02811, paras. 25-26; C-187/86, *Brown*, 21 June 1988 , [1988] ECR 03205, paras. 18-19.

[121] The adoption of a broad conception of social benefit beneficiary has been adopted by the Court from the very beginning, identifying it as a worker covered by a social security system rather than a person bounded by an employment relationship. Cfr. ECJ, C-75/63, *Unger*, 19 March 1964, [1964] ECR 347. For the definition of "social benefit" see ECJ, C-39/86, *Lair*, cit., para. 20; C-207/78, *Even*, [1979] ECR 2019, para. 22.

[122] S. O'LEARY, *Developing an Ever Closer Union Between the Peoples of Europe?,* Edinburgh Mitchell Working Papers 6/2008, p. 4-6.

[123] ECJ, C-186/87, *Cowan*, 2 February 1989, [1989] ECR 00195, para. 17.

national to the market, and as a mode of protecting the market from potentially distorted dynamics[124]. In any case, this was enough to affirm that this case-law line has contributed in filling up with a social content persons' free movement rights[125].

It is worth to mention that the question at stake in these quoted judgments were if the grant of certain social advantages, to which only workers were beneficiaries, was allowable to an EC national, even if the activity that it was carried on in the territory of another member state did not permitted to include it in the to the workers' category as defined until that moment. Questions on the relation between access to welfare state benefits in another member state and the typology of activity that an EC national carry on in the same have not lost its relevance as time passes, as demonstrated by the very recent cases on the, so called, «social tourism» practices of EU citizens alimenting the fears of member states asking for restrictive measures by EU institutions to restrict movement in order to impede the abuse of their national welfare systems[126].

At last, a further move towards a less strict conception of the economic qualification of the activity in order for the EC national to be protected by Community law, and a simultaneous confirmation of the preference reserved to the pure economic active on the potential economic active, emerges from the treatment reserved to those EC nationals seeking employment in another member state. This right was not envisage by the Treaty neither by the 68/360/EC directive, nevertheless on its basis to job-seekers where conferred a right to move and reside in another member state for a maximum of three months. Further on, the Court departed from this fixed period, stating that even if is still remain in charge of member states to determine the period during which EC national looking for a job were allowed to reside in the national territory, as this time was not fixed by Community law, this should be reasonable and at this expiration should not lead to expulsion if it could be demonstrated that the person had "genuine chances of being engaged"[127].

The trend of expansion of rights to the not directly active EC mobile nationals have been subsequently codified in secondary law, enlarging the range of subjects entitled to the right to reside in another member state to law, this should be reasonable

[124] S. GIUBBONI, *Free Movement of Persons and European Solidarity*, in *ELJ*, 13, 2007, p. 361, 365.

[125] S. O'LEARY, *Developing an Ever Closer Union Between the Peoples of Europe?,* cit., p. 8; S. GIUBBONI, *Free Movement of Persons and European Solidarity*, cit., p. 368.

[126] CJEU, C-333/13, *Dano*, 11 November 2014, not yet published.

[127] ECJ, C-292/89, *Antonissen*, cit., paras. 13 and 12; C-344/95, *Commission v Belgium*, 20 February 1997, [1997] ECR I-01035, paras. 15-17.

and her defined[128], pensioners[129] and students[130]. A set of alternative conditions were therefore formulated and has to be fulfil in order to benefit from the right to move, reside and have access to a tailored equal treatment in another member state. Nevertheless, even if we could see a depart, also in legislation, from the required strict economic connotation of the activity carried out by the mobile EC national in order to benefit from the right to move and reside in another member state and to be granted equal treatment, we, nonetheless, observe that this was done always making sure that the mobile individual if not directly contributing to the internal market still maintain a (potential future) link with it[131] and assure not to became, at least, an obstacle to its enhancement, becoming an was done always making sure that the mobile individual if not directly contributing to the internal market enhancement in another member state. Nevertheless, even if we could see a departure from the «market citizen» we somehow find it implicitly reaffirmed in the requirement to possess sufficient resources to avoid becoming a burden on the social assistance system[132]. Even more, there were all adopted on the basis of art. 235 EEC Treaty, i.e. because they were necessary to realise, through the functioning of the common market, one of the objectives of the Community. However, the expansion of the worker definition and of the scope *ratione personae* of EEC provisions on persons' free movement led to a more and more uncertain situation, since the criteria used to determine if a case felt under the Community law ambit of application became the (sole) contribution of the person to the Internal Market, which did not contribute to the predictability and legal certainty of the Courts' case law.[133]

In the pre-Maastricht phase, the conditions to be fulfilled in order to establish if a situation falls under the scope *ratione materiae* and *personae* of Community law were – and previously stated that the individual holds a member state nationality, as defined for

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[128] Cfr. art. 1, Council Directive 90/364/EEC of 28 June 1990 on the right of residence, OJ L 180, 13.7.1990, p. 26–27.

[129] Council Directive 90/365/EEC of 28 June 1990 on the right of residence for employees and self-employed persons who have ceased their occupational activity, OJ L 180, 13.7.1990, p. 28–29.

[130] Council Directive 90/366/EEC of 28 June 1990 on the right of residence for students, subsequently annulled by the Court of Justice, but which has maintained its effects until it was replaced by the Council Directive 93/96/EEC of 29 October 1993 on the right of residence for students, OJ L 317, 18.12.1993, p. 59–60.

[131] "Access to vocational training is in particular likely to promote free movement of persons throughout the Community, by enabling them to obtain a qualification in the Member State where they intend to work and by enabling them to complete their training and develop their particular talents in the Member State whose vocational training programmes include the special subject desired". Cfr. ECJ, C-293/83, *Gravier*, 13 February 1985, [1985] ECR 00593, paras. 21-26. See also ECJ, C-357/89, *Raulin*, 26 February 1992, [1992] ECR 01027, para. 33.

[132] Cfr. arts. 1, supra note 115 and 116.

[133] S. O'LEARY, *Putting flesh on the boned of European Union Citizenship*, in *EL Rev*, 1999, 24, p. 68. A. TRYFONIDOU, *In Search of the Aim of the EC Free Movement of Persons Provisions: Has the Court of Justice Missed the Point?,* in *CMLR*, 2009, 46, p. 1615.

the purposes of Community law - the establishment of an economic link of a cross-border nature with the Internal Market[134]. It is worth to highlight at this point this set of criteria since the EU citizenship would potentially expand the scope *ratione personae* of EC law to all nationals of Member states regardless of their connection with the Internal market, thus, leaving the task to determine if an individual can benefit from rights and protection conferred by the EC law to the sole scope *ratione materiae* of EC law, which, necessarily, was subjected to an "enlargement effect" through the ECJ case-law in the post Maastricht era, especially broadly interpreting the principle of non-discrimination on the basis of nationality[135]. [136]

The depart from a characterisation of the mobile EC national as a mere economic actor, represented by the expansion of the category of persons entitled to the exercise of free movement and attached rights also to the no directly economic active, or not active any more, EC nationals, has been welcomed as an awaited, desired (and positive) sign of humanisation of the Community and of a gradual emergence of human rights above the sole market rights[137]. However, the above mentioned directives further fragmented the already fragmentary category of EC nationals entitle to move, reside and to benefit from the attached rights, but more importantly, it has made alternatives the economic and the self-sufficiency conditions, although connecting the latter to the potential recourse to the social assistance system of the state of residence. Although all these status would be reunited after under the umbrella of the Union citizen status, the alternation[138] as well as the different treatment and access to rights that it entails, will emerge clearly precisely in the provisions of the Union citizens' rights directive, which has as one of its aims to overcome the former piece-meal approach[139]. In fact, the EU citizenship directive, as we will explain later on when analysing the content of the status, has certainly eliminated the formal division in categories between EU citizens exercising their right to move and reside, but, substantially, it has internalised the division, by maintaining the alternation between those moving for the exercise of a work activity and those fulfil the self-

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[134] E. SPAVENTA, *Seeing the Wood Despite the Trees? On the Scope of Union Citizenship and its Constitutional Effects*, in *CMLR*, 2008, 1, p. 16. A. TRYFONIDOU, cit., p. 1606.

[135] E. SPAVENTA, cit., p. 22.

[136] E. JOHNSON, D. O'KEEFFE, *From Discrimination to Obstacles to Free Movement: recent developments concerning the free Movement of Workers 1989-1994*, in *CMLR*, 6, 1994, p. 1313-1346.

[137] M. J. ELSMORE, P. STARUP, *Union Citizenship-Background, Jurisprudence and Perspective*, in *YEL*, 2007, p. 69-70; A. DUFF, *The main reforms*, in A. DUFF, J. PINDER, R. PRYCE (ED.), *Maastricht and Beyond: Building the European Union*, 1994, London, p. 29.

[138] Cfr. ECJ, C-139/85, *Kempf*, cit., para. 16.

[139] Cfr. preamble and art. 7.1, Directive 2004/38/EC, cit.

sufficiency and insurance condition, and once again confirming the, really never declined, preferential treatment reserved to the "market citizen"[140].

2.2.1. The Citizenship of the Union and free movement of persons.

As said many times above, the Maastricht Treaty signed in February 1992, and entered into force in November 1993, established the "Citizenship of the Union"[141] in the II part of the EC Treaty. This, on paper, general status was established simultaneously with the creation of a political union[142], with the establishment of the EU nearby the Economic Community, and of the Internal market, an "area [with the ambition to be] without internal frontiers". The concept, its future content and aims at the Union level, however, has been the object of discussions and official acts of EU institutions already from the mid-seventies until its establishment in the Union primary law[143], and, from the beginning, civil, social rights, and subsequently the establishment of an ombudsman and diplomatic protection were consider to be part of its future content nearby economic rights, i.e. free movement rights. The decisive step towards a citizen status capable of going beyond the creation of a mere category of "privileged migrants" but, on the contrary, to be "inherent in the framework of the Union", on the threshold of the Maastricht Summit, was contained in a Memorandum on Union citizenship of the Spanish government[144] whose reflects are to be founded in the framing of the Union citizenship by the Maastricht Treaty.

The Union citizenship as a, formally, economically neutral status[145] that has reunited under the same roof economically active and inactive EU citizens and (some of)

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[140] S. GIUBBONI, *Free Movement of Persons and European Solidarity*, cit., p. 364. M. DOUGAN, E. SPAVENTA, *"Wish You Weren't Here..." New Models of Social Solidarity in the European Union*, in M. DOUGAN, E. SPAVENTA (ED.), *Social Welfare and EU Law*, 2005, Oxford, p. 190.

[141] Cfr. arts. 8-8e, Treaty on European Union, OJ C191 29.7.1992.

[142] Cfr. art. B, Treaty on European Union. See also H. U. JESSORUN D'OLIVEIRA, *European Citizenship: Its Meaning, Its Potential*, cit., p. 131.

[143] Cfr. Resolution for the Conference of Heads of Government in Paris on 9 and 10 December 1974, p.t 11 and the Commission implementation report "Towards European Citizenship", COM (75) 321 final, Brussels, 2 July 1975, Bulletin of the European Communities, Supplement 5/75, pages 26-32; Report by Mr Leo Tindemans, Prime Minister of Belgium, to the European Council, Report on European Union, Bulletin of the European Communities Supplement 1/76, p. 26-27; Conclusions of the Presidency, European Council in Rome, 14-15 December 1990 SN 424/1/90 REV 1, p. 7.

[144] This Memorandum is reproduced in *XLIII Revista Española de Derecho International*, 1991, p. 265.

[145] Although this is not confirmed by secondary law where conditions to exercise of the right to move and reside in EU member states of Union citizens were and still is connected with the fulfilment of economic requirements. Á. CASTRO OLIVEIRA, *Free Movement of Persons: Step-by-step from Movement to Citizenship - Case Law 1995-2001*, in *CMLR*, 2002, 39, p. 78.

the rights (already) granted them[146]: the right to move and reside in EU member states[147], the core of the status[148], the right to vote and stand for election in municipal elections and elections to the European Parliament, diplomatic protection and consular assistance by a member state authority in a third-country where the member state of nationality is not represented, the right to petition to the European Parliament and to apply to the Ombudsman[149]. Their exercised is linked to residence in another member state, and, apart from the last two, to (free) movement. However, Union citizens' rights go far beyond those listed in arts. 8a-8e of the TEU, and are to be founded in the whole Treaty where other relevant rights and, supposedly, duties attached to this status are detailed[150].

Since the focus and interest stay on the core of the status, persons free movement rights, on this precise point it has been, justly, argued that the Union citizenship has added nothing to the previous movement and residence right granted to mobile nationals of member states[151], since it stated that every Union national is entitled to it, rights which are in their exercise "subject to the limitations and conditions laid down in this Treaty and by the measures adopted to give it effect"[152]. Therefore, the EEC Treaty provisions as amended by the TEU continued to apply and to regulate movement of economically active Union citizens, as shaped by the ECJ case-law, and secondary legislation movement of economically inactive EU nationals[153].

Paragraph two of article 8e provided the basis for the future development of Union citizenship provisions, again manifesting the favour towards economically active citizens, and depicting this status as dynamic since able to be expanded and modified if and when necessary. In fact, provisions to improve the exercise of the already established rights or to add new ones could be adopted by the Council unanimously "without prejudice to the other provisions of this Treaty". Accordingly, provisions to develop further and improve free movement of workers and establishment, as well as rules "providing for special treatment for foreign nationals on grounds of public policy,

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[146] M. J. ELSMORE, P. STARUP, *Union Citizenship-Background, Jurisprudence and Perspective*, cit. p. 57.

[147] Cfr. arts. 48-51, Treaty on European Union.

[148] H. U. JESSORUN D'OLIVEIRA, *European Citizenship: Its Meaning, Its Potential*, cit., p. 132; D. O'KEEFFE, *Union Citizenship*, cit., p. 93.

[149] Cfr. also arts. 138a, 138d, 138e and 138.3, TEU.

[150] This is deductible from para. 2 of art.8 mentioning the rights and duties conferred by the Treaty, as well as from the all relevant rights that are conferred to nationals of member states although not listed by art. 8, as education, social policy, vocational training, consumer protection, public health, culture. In addition to procedural rights as the right to a hearing, the right to transparency, the right to civil society participation, and the right to access to documents ax art. 255 TEC. M. J. ELSMORE, P. STARUP, cit., p. 75.

[151] S. FRIES, J. SHAW, *Citizenship of the Union: First Steps in the European Court of Justice*, in *EPL*, 1998, 4, p. 537.

[152] Art. 8a, para.1, TEU.

[153] D. O'KEFFEE, *The Free Movement of Persons and the Single Market*, in *E. L. Rev*., 1992, 3, p.

public security or public health"[154], as amended by the TEU, had to be adopted following the procedure ex art. 189b according to which the Council acted by a qualify majority. However, that persons' free movement provisions were considered to be sufficient and Union citizens' rights were liable of having effects on national legal systems far beyond the sole ambits touched by the rights listed in part two, were demonstrated, at the one side, by the lack of action by the Council after the Maastricht Treaty entered into force[155], and, on the other side, by some member states declarations on the meaning to be attributed to Union citizenship, firmly reaffirming national sovereignty on nationality definition and modes of acquisition[156].

The major critic to the Union citizen status was that its introduction added little to the previous rights already awarded to mobile nationals of member states[157]. Thus, it is not a so unexpected consequence that the pre-Maastricht case law on free movement of persons have deeply oriented and conditioned the content of the ECJ judgments on Union citizenship also in the decades following its establishment, and was used to continue its action in favour of inactive Union citizens. It is worth, hence, to go through the most significant steps took by the ECJ case-law on Union citizenship, since the further piece of legislation dealing with rights of mobile Union citizens – the 2004/38/EC Directive - would try to overcome the previous sectorial approach and to codify the ECJ case-law on the matter. In spite of that, the Union citizens' Directive has been criticised on the basis of the same arguments that were previously used to highlight the absent improvements brought by the introduction of the Union citizen status, i.e. to merely ratify, when not worsen, the previous legal status as shaped by the ECJ[158]. Therefore, in view of better argue the further proposed description of the relationship among individual status in the EU, our interest stays in the progressive gain of

[154] Cfr. arts. 49, 54.2, 56 and 56.2, TEU.

[155] Cfr. art. 8e para. 2, TEU.

[156] See Declaration on Nationality of a Member State to the Treaty on European Union; Cfr. also the declaration on Citizenship (so called "Edinburgh Declaration") adopted as part of the Conclusions of the Presidency, European Council in Edinburgh, 11-12 December 1992, Section A, p. 53. However, there were declarations on nationality matter made already before the establishment of the Union citizenship By Germany when signing, respectively, the EEC and Euratom Treaties in 1957, and in the 1979 and 1982, attached to the Treaties of Accession, and by the United Kingdom when acceding to the EC in 1972, and replaced in 1983 when the 1981 British Nationality Act entered into force. On the effects and differences among declarations S. HALL, *Nationality, Migration rights and Citizenship of the Union*, Dordrecht, 1995, p. 102-105. See also R. PLENDER, *An Incipient form of European Citizenship*, cit., p. 44-45.

[157] The new rights added were electoral rights in municipal elections and in European Parliament elections, and the right to diplomatic and consular protection, ex art. 8b and 8c EC Treaty. See also Council Directive 93/109/EC of 6 December 1993 laying down detailed arrangements for the exercise of the right to vote and stand as a candidate in elections to the European Parliament […], OJ L 329, 30/12/1993; Council Directive 94/80/EC of 19 December 1994 laying down detailed arrangements for the exercise of the right to vote and to stand as a candidate in municipal elections […], OJ L 368, 31/12/1994. D. KOSTAKOPOULOU, *European citizenship and Immigration after Amsterdam*, in *Journal of Ethnic and Migration studies*, 24, 1998, p. 639.

[158] K. HAILBRONNER, *Union Citizenship and Access to Social Benefits*, in *CMLR*, 5, 2005, p. 1247.

momentum of Union citizenship and, more precisely, on judgments which assume as a fundamental element this status.

Before the entry into force of the Maastricht Treaty, the cases in which, with relatively no doubts, the activity pursued by the mobile Union citizen could be traced back to the (over time become a) broad qualification of economically active person under Community Law – thus, provisions on free movement of persons applied – the Court acted on all those obstacles that could hinder mobility, dedicating particular attention to the principle of non-discrimination in access to material benefits, and to national measures that could potentially provide a worst treatment to those who had made use of their free movement rights. As regards the latter point, significant is the *Surinder Singh* case[159], were a national measure that put at disadvantage a migrant worker when he returned to its country of nationality[160], after having exercised its right to move and reside in another member state, was judged to be contrary to Community law since it could deter the person the exercise in the first place of its right to move. Therefore, significantly to the migrant worker was accorded protection also against its own state of nationality and not only in relation to the provisions as applied by the host state that could possibly constitute an obstacle. This case, in particular, is significant also in relation to what will be said later on the first rulings of the ECJ on the Union citizenship status, and on those cases which would concern, jointly, Union citizens and their family members which were third-country nationals. In fact, in the *Singh* case, through the protection of the applicant's right to benefit from the right of establishment ex art. 52 EC Treaty in its state of nationality, after having exercised its right to move to take up employment in another member state ex art. 48, its family members which were third-country nationals were protected against expulsion, thus granted a right of residence[161]. In addition, this and other cases acted as a push force for a progressive enhancement in the harmonisation of member states' national provisions on rights of mobile workers[162]. This case, furthermore, shed light on the growing relevance that was

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[159] ECJ, C-370/90, *Surinder Singh*, 7 July 1992, [1992] ECR I-04265. This judgment further expanded the *Knoors* ruling dealing with the use of qualifications obtain in another Member States once returned in the member state of origin. Cfr. C-115/78, *Knoors*, 7 February 1979, [1979] ECR 399.

[160] In relation to qualifications obtained in a host member state of which the Union worker ask for the recognition once returned to its own state of nationality in order to take up employment see ECJ, C-19/92, *Kraus*, 31 March 1993, [1993] ECR I-01663.

[161] ECJ, C-370/90, *Surinder Singh*, cit., paras. 21 and 23.

[162] Significant in this regard were the *Trojani* and the *Vlasssopolou* rulings, although they had divergent outcomes - the first case concerned national insurance schemes, the second the recognition of professional qualifications obtained in another member states relevant for the exercise of the right of establishment - since in both the Court boosted the adoption of measures on social security and recognition of qualification in order to reduce the obstacles to free movement created by disparities in national legislation. Cfr. ECJ, C-368/87, *Troiani*, 18 May 1989, [1989] ECR 01333; C-340/89, *Vlassopoulou,* 7 May 1991, [1991] ECR I-02387; E. JOHNSON, D. O'KEEFFE, cit., p. 1333.

assuming the specular phenomenon of reverse discrimination[163], since in a range of cases the Court confirmed the fundamental role of the cross-border element for a situation to fall into the scope of Community law, thus its non-application in purely internal matters, i.e. the previous exercise of the right to move is required in order to benefit from the rights accorded to mobile citizens by Community law and, all the more reason, *versus* its own state of nationality[164].

From the first cases that were decided by the ECJ in the years soon after the introduction of the Union citizenship, it was difficult to grasp the potential implications of this status, since the cases referred by national courts to the ECJ were decided, whenever possible, still applying the specific rules and criteria laid down for the specific categories of economically active Union citizens, manifesting the unwillingness of the Court to rely on citizenship provisions, and the strong relevance and heritage of the previous case law on persons' free movement[165]. Therefore, despite the introduction of a comprehensive status for mobile Union citizens, two line of judgments were still distinguishable in the post-Maastricht ECJ case-law: at the one side, those concerning (even when only potentially) economically active Union citizens, at the other, Union citizens' rights *per se*; a distinction that highlights the residual nature of the the newly introduced status[166], and prompts to pay particular attention to the circumstances of the cases, especially of the very first, in which the Court has relied on Union citizenship provisions to protect rights of mobile Union citizenship whose situations would otherwise fall outside of the scope of application of persons' free movement provisions. However, the establishment of the Union citizenship status has an impact on persons free movement provisions as well, marked by an expansion of the personal as well as the material scope[167], and of the scope of Regulations 1612/68 and 1408/71 as regards social

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[163] E. JOHNSON, D. O'KEEFFE, cit., p. 1334-1340.

[164] ECJ, C-297/88, *Dzodzi*, [1990] ECR I-3763; C-332/90, *Steen*, [1992] ECR I-341; C-379/92, *Peralta,* [1994] ECR I-03453; C-60/91, *Morais*, 19 March 1992, [1992] ECR I-02085, and already in, e.g., C-175/78, *Saunders*, cit.

[165] Cfr. ECJ, C-193/94, *Skanavi and Chryssanthakopoulos*, 29 February 1996, [1996] ECR I-929, in which the Court that the situation felt outside the scope *ratione materiae* of the Treaty, i.e. it was a *wholly internal situation*; Joined cases C-4/95, C-5/95, *Stöber and Piosa Pereira v Bundesanstalt für Arbeit*, 30 January 1997, [1997] ECR I-00511, the Court relied on rules governing access to family benefits of self-employed persons ex Regulation No 1408/71; C-278/94, *Commission v. Belgium*, 12 September 1996, [1996] ECR I-04307, in which was denied that the introduction of the Union citizenship was in some way changed the previous definition of work-seeker for the purpose of Community Law.

[166] J. SHAW, *A View of the Citizenship classics: Martinez Sala and the Subsequent Cases on Citizenship of the Union*, in M. POIARES MADURO, L. AZOULAI (ED.), *The Past and Future of EU law: the classics of EU law revisited on the 50th anniversary of the Rome Treaty*, Oxford, 2010, p. 345.

[167] A. TRYFONIDOU, cit., p. 1606. F. G. JACOBS, *Citizenship of the European Union - A Legal Analysis,* in *ELJ*, 2007, 13, p. 595.

security which filled with content the principle of equal treatment of workers[168]. In addition, we note a decrease in relevance of the economic characterisation of the activity pursued, although differently framed in relation to the category of mobile Union citizen concerned. Stated that the cross-border element was a common and not eliminable pre-condition[169], two significant elements characterised the post-Maastricht Union citizens line of judgments in relation to those cases still relying on persons free movement provisions: the first was the gradual development of an autonomous protection of the right (to continue) to reside in the member state other than that of nationality, even when the economic reasons at the basis of the initial movement, or the integration of the economic self-sufficiency requisite, was become uncertain or very far in time, or when the conditions to be reside being non economically active where not entirely fulfilled. The second, the application of the principle of non-discrimination on the basis of nationality in cases where the implications for the exercise of the right to move, the cross-border element, and on the economic objectives justifying movement were very weak[170].

Finally, it is noteworthy to underline, before moving on with the analysis, that provisions on persons free movement and on the citizenship of the Union will remained separated in the treaties following Maastricht, confirming the devotion to different, although connected, objectives of the rights to move and reside within the EU members states awarded to economically active and the remaining categories of mobile Union citizens, although the Union citizens' Directive has tried to overcome this categorial division, at least in secondary law, providing a common framework and status but internally maintaining the above-mentioned division with the consequent differential treatment.

In the post-Maastricht era, in those cases which could still be solved relying on provisions on free movement of economically active EU citizens, we observe the prosecution of the trend that had led to the progressive enlargement, thus, detachment, of the definition of worker at the Community level from the early established criteria - perform of services, classifiable as a genuine and effective activity, by an individual for and under the direction of another person in exchange of remuneration[171] - or rather, by the inclusion of all those activities that, although only potentially, could demonstrate

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[168] E. JOHNSON, D. O'KEEFFE, *From Discrimination to Obstacles to Free Movement: recent developments concerning the free Movement of Workers 1989-1994*, cit., p. 1322.

[169] Cfr. pre-Maastricht period, C-175/78, *Saunders,* 28 March 1979, [1979] ECR 1129, and C-97/98, *Jägerskiöld*, 21 October 1999, [1999] ECR I-07319; As regards Union citizenship, Joined Cases C-64/96 and C-65/96, *Uecker and Jacquet*, 5 June 1997, [1997] ECR I-3171, para. 23.

[170] Cfr. ECJ, C-148/02, *Garcia Avello*, 2 October 2003, [2003] ECRI-11613.

[171] Cfr. ECJ, C-66/85, *Lawrie-Blum,* cit.; C-53/81, *Levin*, cit.;

their being preliminary and necessary for the future exercise of a work activity, therefore, justified by an, in the end, economic objective thus relevant for the internal market, as was, for example, for vocational training or students. Consequently, on these basis access to benefits in the host state on an equal basis with nationals could be reasonably justified[172]. Moreover, we note, more and more, the continuation in the Courts' rulings dealing with free movement of a trend marked by a gradual decrease in relevance of the economic connotation and value of the activity pursued for the enhancement of the internal market and of the economic objectives of the community. On the contrary, it focused more on national legislations posing obstacles to workers' free movement as regards access to the labour market[173], or putting at a disadvantage workers that have exercised previously their free movement rights, particularly in issues concerning tax rules and access to benefits. In particular that cases dealing with protection against discriminatory treatment are relevant[174], as they somehow disclose that progressive shift towards the citizens *per se* represented by the Union citizenship rulings[175]. The proportionality test that the Court has been developing in relation to these cases will be further applied in Union citizenship rulings, once more confirming the, obvious, links between these two ambits and the reciprocal influences of one on the other. We could say that in the first years of coexistence of free movement of persons and the Union citizen status, as regards the former workers' right to move has still played the most prominent role on all the attached rights, but when some years after the introduction of the Union citizenship an autonomous case line was developed on the basis of this sole status, the right of residence assumed a most significant role, being the exercise of the right to move its mere pre-condition, and the basis to protect Union citizens against discriminatory treatment in access to benefits in the host State. The prominence of residence over movement, or rather, on reasons at the basis of movement, would reflect and influence also the relation between movement and residence in cases concerning economically active Union citizen, but in which just the purpose to reside in another member state and not the exercise of an economic activity would be the reason justifying movement[176].

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[172] See *supra* note 111.

[173] Cfr. ECJ, C-281/98, *Angonese*, 6 June 2000, [2000] ECR I-4139; C-415/93, *Bosman*, 15 December 1995, [1995] ECR I-4921.

[174] Á. CASTRO OLIVEIRA, cit., p. 89-91.

[175] A. J. MENÉDEZ, *European Citizenship after Martìnez Sala and Baumbast: Has European Law Become More Human and Less Social?*, in M. POIARES MADURO, L. AZOULAI (ED.), cit., p. 364.

[176] Cfr. the «Ritter-Coulais» line of cases. A. TRYFONIDOU, *In Search of the Aim of the EC Free Movement of Persons Provisions: Has the Court of Justice Missed the Point?,* cit., p. 1395 ff.

For the case-law line on Union citizenship, the turning point was considered to be represented by the line of cases that have followed the *Martinez Sala*[177] ruling, and some years latter the *Baumbast and R* judgment[178], in which article 8a of the EC Treaty were filled with content, jointly with the Union citizen status, beyond the poor expectations of the beginning[179]. Furthermore, these rulings are particularly relevant in the framework of this work since they have had the merit to highlight the role that the Union citizen status could play as a means of protection for those foreigners residing in member states with particularly restrictive modes of acquisition of nationality, and, on the other side, as a means for family members who were third-country nationals to be protected against expulsion, therefore to hold a more secure status. Both aspects will be of a major importance in the last line of cases on Union citizenship in which this status seemed to have, in the end - although only in specific circumstances, or rather, to avoid particularly heavy outcomes as statelessness and expulsion - departed from the economic logic underlying its previous application[180].

Particularly interesting is the progressive emersion of the elements characterising those cases within which Union citizens could benefit from the above mentioned rights but neither persons' free movement provisions nor secondary legislation on free movement rights of mobile (but) inactive Union citizens found application. In fact, the relevance of the shift that would take place five years later in the consideration by the Court of the Union citizenship emerges also, by contrast, by looking at some of the first rulings that came after the introduction of the new status, in which the Court has continued to base its decisions on free movement provisions, still relying on the broad reading of free movement rules and the definition of worker under Community law in the sense saw above[181], although Advocates General and the referring national courts referred to the newly introduced status as a further parameter under which the compatibility of national laws with Community law should have been considered. Tellingly and revealing the near shift in the case-law were Advocates General opinions, stating that although the Union citizen status was certainly built on the existing development in Community law «[…] it is for the Court to ensure that its full scope is attained. If all the conclusions inherent in that concept are drawn, every citizen of the Union must, whatever his nationality, enjoy exactly the same rights and be subject to the

[177] ECJ, C-85/96, *Martinez Sala*, 12 May 1998, [1998] ECR I-2691.

[178] ECJ, C-413/99, *Baumbast and R*, 17 September 2002, [2002] ECR I-7091.

[179] C. TIMMERMANS, *Martinez Sala and Baumbast revisited*, in M. POIARES MADURO, L. AZOULAI (ED.), cit., p. 345.

[180] D. KOCHENOV, R. PLENDER, *EU Citizenship: From an Incipient Form to an Incipient Substance? The Discovery of the Treaty Text*, cit., p. 371.

[181] Cfr. ECJ, C-193/94, *Skanavi*, 29 February 1996, [1996] ECR I-00929, para. 2.

same obligations»[182]. Therefore, it should emerge the separation of «freedom from its functional or instrumental elements (the link with an economic activity or attainment of the internal market)» and its raise «to the level of a genuinely independent right inherent in the political status of the citizens of the Union»[183].

The detachment of the Union citizenship case-law from the previous line of cases build upon persons free movement rights was progressive, the heritage of the latter being clearly visible in the *Martinez Sala* case. This can be considered a *bridge*-case since, despite that it would be solved for the first time relying on the rights conferred to the claimant as a Union citizen lawfully residing in a host member state, the ECJ - as well as the national court in posing the preliminary questions - would still rely on legislation provided for, and on the status of, workers under Community law, at least in tracing back the refused child-raising benefit - a non-contributory benefit - to those family benefits falling under the scope of application of Regulation 1408/71 and, considering it a social advantage, of Regulation 1612/68, hence falling under the scope *ratione materiae* of Community law[184], although none of the Regulations applied to the case. In fact, the Court left to the national court to decide if the applicant could be defined as a worker for the purpose of benefit of the protection of the above-mentioned Regulations. Nevertheless, this case was ground-breaking as the Court considered the situation to fall under the scope *ratione personae* of Community law since the applicant was lawfully residing in the host member state ex art. 17(2) EC[185], therefore she was entitled to rely on art. 12 EC, i.e. on the principle of non-discrimination on the basis of nationality. Consequently, it was discriminatory thus contrary to Community law to refuse such a benefit on the basis that the claimant was not in possession of a residence permit when the request was made when such a requirement did not need to be fulfilled by member state nationals. The specific circumstances of the case made unnecessary for the Court to verify the lawfulness of the residence, as well as the reasons at the basis of movement from its state of nationality and those justifying its residence during the period previous to the benefit demand. In fact, it emerged pretty clearly from the facts that the applicant would, supposedly, have been already a citizen of the member state from a long time before if it was not for the restrictive German nationality law of the time[186].

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[182] ECJ, C-214/94, *Boukhalfa*, 30 April 1996, [1996] ECR I-02253, Opinion of Advocate General Léger, delivered on 14 November 1995, para. 63.

[183] ECJ, Joined cases C-65/95 and C-111/95, *Shingara and Radiom*, 17 June 1997, [1997] ECR I-03343, Opinion of Advocate General Ruiz-Jarabo Colomer, delivered on 26 November 1996, para. 34.

[184] ECJ, C-85/96, *Martinez Sala*, cit., para. 28.

[185] Ib., para. 61.

[186] A. J. MENÉDEZ, *European Citizenship after Martìnez Sala and Baumbast: Has European Law Become More Human and Less Social?*, cit., p. 375.

The *Martinez Sala* case made the way for a further range of cases which would set the content and the limits of the rights attached to the Union citizen status, clarifying some of the questions left unanswered by it, since in the following rulings the right to reside of Union citizens concerned and its security over time could not be taken for granted as it was, on the contrary, for Ms. Sala. Therefore, the situations of the next cases would be considered to fall under the scope *ratione materiae* of Community law on the basis of the previous exercise by Union citizens of their right to move ex art. 18 EC[187], and already examined aspects of national laws as well as profiles never considered before would from that time on be scrutinised by the Court through the lens of the principle of non-discrimination on the basis of nationality and proportionality.

The far reaching potential of this new case-law line emerged in the *Bickel and Franz*[188] ruling of some months later, in which the language regime of criminal proceedings of the Italian autonomous province of Bolzano, an ambit never considered before, was scrutinised by the Court. This case is another example of the in-betweenness of the first cases in which the Court has relied on the Union citizen status, in which free movement provisions, although not anymore in a resolutive manner, were not abandoned and were used in addition to Union citizen provisions to support the reasoning. If in *Martinez Sala* the possible inclusion of the applicant under the workers category was left to the national court to determine, although the case has been decided on the basis of the Union citizen status regardless of the result of this evaluation, in *Bickel and Franz* the double classification of the claimants as potential recipients of services and as Union citizens that had exercised their right to move ex art. 18 EC, was used as a reinforcing argument to affirm that it was a discriminatory practice, thus contrary to Community law ex art. 12 EC, not to confer the right to communicate with the administrative and judicial authorities of a member state on the same footing as nationals[189].

That the way was paved for the emergence of a self-standing status emancipated from the broad category of mobile persons protected by free movement provisions, but was a process still at its initial stage, is perceivable by two rulings that followed *Bickel and Franz.* The *Calfa* case[190], regarding an Italian citizen who, caught drug-dealing in Greece, would face expulsion and a lifetime ban on re-entry according to Greek criminal law, was judged to be a disproportionate consequence and a discriminatory treatment on the basis of nationality in comparison to Greek nationals who, on the contrary, would not

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[187] E. SPAVENTA, *Seeing the Wood Despite the Trees? On the Scope of Union Citizenship and its Constitutional Effects*, cit., p. 14.
[188] ECJ, C-274/96, *Bickel and Franz*, 24 November 1998, [1998] ECR I-7637.
[189] Ib., para. 26.
[190] ECJ, C-348/96, *Calfa*, 19 January 1999, [1999] ECR I-00011, paras. 16-17.

face the same consequences if convicted for the same crime. However, both the Advocate General and the Court have based their reasoning on provisions protecting recipients of services, recalling the *Cowan* case and considering sufficient to rely on the protection accorded to mobile economically active Union citizens by directive 64/221[191]. The second ruling shows that even if free movement of persons has been a fundamental element of the European integration since the very beginning, and that a variety of acts were in place to assure its exercise, the necessity to coordinate connected collateral ambits, as border controls, to guarantee its effectiveness could not be postponed any longer. In the *Wijsenbeek* case[192], the Court ruled agains the applicant, considering that member states «retained the right to carry out identity checks at the internal frontiers» and to impose penalties for their violation as long as they did not consist in disproportionate measures and were not differentiated on the basis of nationality. The Court remarked that Community law was not harmonised as regards borders control and there were not common rules, therefore even if article 14 did have direct effect, the ruling could not have been different considering where «Community law stood at the time of the events in question»[193]. Interesting, in view of the subsequent relevant cases on Union citizenship, is the Commission's position stating that, although limited and conditioned by Treaty provisions and implementing measures, Union citizens' right to move and reside «constitutes an autonomous substantive right»[194]. Finally, it is noteworthy, in view of the next paragraph in which the state of the art at the time of the case will be described as regards borders control and provisions on immigration at the Union level, that the Advocated General, in order to justify its assumption referred to the Schengen *acquis*, and its future integration within Community law by the Amsterdam Treaty that would enter into force that same year, establishing an area of Freedom, Security and Justice which would bring under the same Title (IV) persons' free movement and immigration matters.

The direct effect of article 18 EC is affirmed in the already quoted *Baumbast and R*[195] case, for this reason considered with *Martinez Sala* the second representative ruling of the citizenship turn in the Court's case-law. Moreover, it is worth of attention in view of the further developments of the case-law on Union citizenship in the post-2004/38 Directive era, as this case has paved the way for the milestones cases *Chen*[196] and, even

[191] See *supra* note 47.

[192] ECJ, C-378/97, *Wijsenbeek*, 21 September 1999, [1999] ECR I-06207.

[193] Ib., paras. 40-45.

[194] Ib., para. 36.

[195] *Supra* note 177. *A contrario* see J. D. MATHER, *The Court of Justice and the Union Citizen*, in *ELJ*, 11, 2005, p. 727.

[196] ECJ, C-200/02, *Zhu and Chen*, 19 October 2004, [2004] ECR I-09925.

more, *Ruiz Zambrano*[197]. The joined cases regarded two mixed couples to which residence in the United Kingdom initially granted was, instead, subsequently denied for a series of changes occurred in their personal situations. In particular, the object of both cases was the right to reside of minors, some holding double nationality of a member state and of a non-member state, of third-country national spouses of Union citizens, once divorced in *R* case, and primary care of the children, and finally the same right of a Union citizen, considering that the applicant did not qualified any longer as a worker under Community law, and that the requirements established by Directive 90/364 in order to reside in the host member states were, consequently, not fulfilled anymore.

The Court's positive answer as regards the right to reside in the host member state of both the children and the spouses third-country nationals of Union citizens, even after divorce of one of the couples, did not required to make any reference to the Union citizen status, since it was sufficient to rely on the previous case-law[198] and on art. 12 of Regulation 1612/68 conferring a right to reside in a host Member State in order to attend general educational courses to children who moved and installed in the host state as a consequence of the exercise of the right to move and reside, in order to pursue a work activity, by one of its parents who was a Union citizen. It follows that to the parent, third-country national, primary care of the children, is equally granted the right to reside in order to facilitate its exercise by the children. Both rights were not questioned by a subsequent divorce, or by the no longer qualification as a worker for Community law of the Union citizen from which the right was derived at time[199].

The most relevant part of the judgment regards the possible grounds on which Mr. *Baumbast* could still be granted a right to reside in the host member state. The Court remarked that since the Union citizen status was established the conferral of the right to move and reside to Union citizens has been detached from the exercise of an economic activity. Thus, even if initially, in the case at stake, its exercise was based on the pursue of such an activity, its further end did not prejudice the enjoyment of the right itself, which is granted to the citizen *per se* on the sole basis of the hold of a member state nationality. Therefore, the applicant «enjoy [there] a right of residence by direct application of Article 18(1) EC». As for the conditions and limitations ex art. 1(1) Directive 90/364 for its exercise, stated that the possession of sufficient resources was fulfilled, the Court affirmed that, considered the specific circumstances of the case, it would be disproportionate, thus not in compliance with the general principle of

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[197] ECJ, C-34/09, *Ruiz Zambrano*, 8 March 2011, [2011] ECR I-01177.

[198] Cfr. ECJ, C-389/87, *Echternach and Moritz*, 15 March 1989, [1989] ECR 00723, para. 21; C-267/83, *Diatta*, 13 February 1985, [1985] ECR 567, para. 18; C-249/86, *Commission v Germany*, 18 May 1989, [1989] ECR 1263, para. 11; C-85/96, *Martinez Sala,* cit., para. 32.

[199] ECJ, C-413/99, *Baumbast and R*, cit., paras. 63 and 75.

proportionality, to deprive of the enjoyment of a residence right solely on the basis of the lack of a sickness insurance in the state of residence, considering also that the applicants and its family members had not ever made use of the social assistance system during their residence[200]. The significance of the case stays on the affirmation of the direct effect of rights ex art. 18 EC[201], which hereinafter became directly enforceable and justiciable by member states' courts against that national measures disproportionally limiting its exercise beyond those limitations and conditions imposed by Community law, which themselves cannot unjustly restrict those rights.

A case decided three days after the *Baumbast* ruling, is worth of notice, besides for its being one of the main quoted cases for the statement that «[U]nion citizenship is destined to be the fundamental status of nationals of Member States […]»[202], for having a similar reasoning structure with the *Baumbast* case - the affirmation of the residence right of the applicant on the sole basis of the Union citizen status was followed by the analysis of the relevance on the same of the conditions set for its exercise by secondary law; secondly, by contributing in tracing the framework of the relation between the fulfilment of the conditions set by secondary law for the exercise of the right to (move and) reside in a host member state of economically inactive mobile Union citizens, and the rights of Union citizens *per se.* In other words, we could say that, although, as will be highlighted, the circumstances of the cases were pretty diverse, nonetheless, they were, deeply interrelated cases in their outcomes. Similarly, the *Grzelczyk* case[203] set the scene as regards to the extent to which the fulfilment of secondary law conditions can question the security of residence of a Union citizen in a host member state. Moreover, in both cases, the Union citizen status and the rights conferred on the sole basis of its possession acted as a residual and last resort means of protection of the Union citizen rights, specifically security of residence, because the applicants were not, or did not qualify anymore, as a worker.

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[200] Paras. 92-93 of the judgment.

[201] Doubts have arisen on this statement because of the formulation not in absolute terms of art. 18 EC, that make the exercise of the rights conferred conditional upon «the limitation and conditions laid down in this Treaty and by the measures adopted to give it effect». However, by affirming the «clear and precise» substance of art. 18 EC rights, the Court seems to have used the same interpreting instruments used in relation to other (economically) fundamental freedoms such as the right of establishment and provision of services. M. CONDINANZI A. LANG, B. NASCIMBENE, *Citizenship of the Union and Free Movement of Persons*, Leiden, 2008, p. 26.

[202] This affirmation was borrowed by the Court from Advocate General Opinion in the case *Martínez Sala*, in which AG La Pergola stated that Union citizenship «is the fundamental status guarantee to the citizen of every Member State by the legal order of the Community and now of the Union. This results from the unequivocal terms of the two paragraphs of Article 8 of the Treaty». Cfr. Opinion of Advocate General La Pergola, 1 July 1997, Case C-85/96, *Martínez Sala*, para. 18.

[203] ECJ, C-184/99, *Grzelczyk*, 20 September 2001, [2001] ECR I-06193.

Mr. *Grzelczyk* was a French student which moved and took residence in Belgium for the purpose of following a university course. He was denied from a certain point in time the grant of a non-contributory social benefit - a minimum subsistence allowance - on the basis that this was granted only to Belgian citizens *per se* and to those Union citizens who qualify as workers under Regulation 1612/98. For the Court this was clearly a case of discrimination on the basis of nationality, as a Belgian citizen in the same conditions of the claimant would have been entitled to the benefit. Because Mr. *Grzelczyk* was a Union citizen lawfully residing in a host member state, he could not be discriminated on the basis of nationality ex art. 6 EC. Moreover, the case felt within the scope, not only *ratione personae*, but also *ratione materiae* of Community law because of the introduction of the Union citizen status, education and vocational training within Community competences and the adoption of the Directive 93/96 on student rights[204]. As regards the impact that the recourse to social assistance could have on the student's security of residence, since it could affect the fulfilment of the sufficient resources requirement, the Court has specified that although the member state was not prevented to make residence conditional upon the request of the benefit, the lost of the right could not be, on the other side, an automatic consequence of it. Consequently, it has, implicitly, introduced a proportionality test, indicating the parameters that should be considered by the member states when assessing the financial position of the student - the temporariness of the financial difficulties, and their unpredictability at the time of the declaration of possession of sufficient resources[205] - when evaluating the situation as possible being an «unreasonable» burden for the public finances[206]. Therefore, Union citizen status «enabl[e] those who find themselves in the same situation to enjoy the same treatment in law irrespective of their nationality, subject to such exceptions as are expressly provided for»[207].

In the following relevant judgments build upon the Union citizen status, the Court went ahed in defining more precisely the, so called, residence test, i.e. how the residence of the Union citizen should have been until that moment in order to justify its reliance on art.12 EC, i.e. not to be discriminated on the basis of nationality in relation to nationals, in most of the cases as regards access to social benefits. This test, in turn, specularly defined the limits of member states when putting at risk the security of residence of Union citizens in the national territory - by making expulsion a consequence

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[204] Para. 35 of the judgment.

[205] On this point the Court remarked the difference between students and workers residence, since as regards the latter category Directives 90/364 and 90/365 indicated the minimum level of income that the citizen should hold in order to exercise its residence right. Cfr. ECJ, C-424798, *Commission v. Italy*, [2000] ECR I-4001.

[206] Ib., paras. 40-45.

[207] Para. 31 of the judgment.

of recurse to the national social assistance system - on the basis of their fulfilment of the requisite of possessing sufficient resources, a requirement that is the other side of the coin of being an economically active citizen. Moreover, although these and the further cases all contributed in filling with content and defining the range of action of the Union citizen status, they also contributed in confirming its residual character in relation to the others more defined status, stepping in when otherwise no other means of protection would be left to the Union citizen object of a not justifiable discriminatory treatment.

In this regard, the Court come back to the relation between (the security of) residence in a host member state and the access to social benefits, once more of the Belgian *minimex* benefit, in a case of some years later, this time regarding a Union citizen who, similarly to *Grzelczyk*, for the referring national Court he did not qualified as a worker under the scope of Regulation 1612/68. Moreover, this case gave the occasion to the ECJ, as stressed above, to continue in the process of interpreting the conditions laid down by the 90/364 Directive when their fulfilment was not sure, with the effects of putting into question the security of residence of the Union citizen in the host Member State. Mr. *Trojani*[208] was a French citizen residing in Belgium, and pursuing there a work activity of a limited number of hours per week as part of a personal socio-occupational reintegration programme. His request to be granted the *minimex* was rejected by national authorities because he was not a Belgian citizen, nor it qualified as a Community worker for the purpose of the above mentioned Regulation, the only two conditions under which the benefit could be granted.

The Court, asserted that the applicant did not qualified neither as a provider of services not as a self-employed person, left to the national court to ascertain if, considered the characteristics of the activities pursued, he could claim to be granted a right to reside in the host member state as a worker ex art. 39 EC, as broader defined by the Court's case-law. In case of a negative response, the Court stated, basing its response on the direct effect of art. 18 EC affirmed in *Baumbast*, that simply as a Union citizen the applicant benefited from a right to reside in the host member state. However, as in the quoted case, the turning point of the case stayed in the fulfilment of the conditions on which the residence right was made conditional. In relation to other cases, in this ruling the Court needed to make a step further, as it recognised that not to grant a residence right to the claimant, thus expelling him, could not be considered to be a disproportional consequence, however it could not be an automatic result of recourse to the national social assistance[209]. It appeared clear that the applicant did not fulfil the condition of having sufficient resources, nonetheless, it has lawfully resided for a certain time in the

[208] ECJ, C-456/02, *Trojani*, 7 September 2004, [2004] ECR I-07573.
[209] Paras. 30-36 of the judgment.

host member on the basis of a residence permit released by national authorities. Therefore, as a Union citizen residing in another member state, as was the case in *Martinez Sala*, he could relied on the right not to be discriminated ex art. 12 EC. At this point the outcome of the case was easily predictable, since, already in *Grzelczyk*, the Court found that the conditions on which the grant of the benefit object of the judgment were made conditional were discriminatory towards non-worker Union citizens.

It is worth to note that the Court has widely based this ruling on the *Grzelczyk* case findings. Nonetheless, what the Court has affirmed in that case was also deeply related to the distinctive character of students, in comparison to the other Union citizens categories considered by the remaining, so called, residence Directives, on their tailored type of the declaration of possession of resources to exercise the right to reside, and on the specific kind of financial difficulties towards they could run into. Therefore, although the Court failed in determine the precise mining of the expression «a certain time of residence», that it considered as an alternative to the possession of a residence permit, the continuation and the security of residence seemed to be the good protected, allowing for the «sufficient resources» requirement to be integrated ex post and through the recourse to the national assistance system, and to has been extended to all the categories of economically inactive Union citizens.

In the *D'Hoop* case[210] the Court made two important steps ahed. This ruling concerned a Belgian student to which an unemployment benefit - so called tide-over allowance - was refused because, having exercised its right to move ex art. 18 EC and obtained her diploma in another member state - she did not fulfil the national legislation requirement to be granted such a benefit. The Court, relying on the deterrence principle, stated that, however she did not qualify neither as a recipient of services nor she has followed a vocational training, thus, she could not rely on the previous case-law[211], nevertheless, having exercised the right to move ex art. 18 EC, she could not be discriminated ex art. 12 EC, i.e. be treated less favourably of sedentary Union citizens[212]. On the contrary, Union citizens would be deterred of making use of their rights. This said, a first relevant element is that the claim of the applicant was directed towards her own state of nationality, implying that what was affirmed by the Court in relation to economically active citizens in the Singh case should be, from this case onwards, applicable also to inactive citizens as well[213]. Secondly, however the object of the benefit

[210] ECJ, C-224/98, *D'Hoop*, 11 July 2002, [2002] ECR I-06191.

[211] Cfr. ECJ, C-293/83, *Gravier*, cit.; C-263/86, *Humbel*, [1998] ECR 5365.

[212] Paras. 30-35 of the judgment.

[213] Cfr. ECJ, C-370/90, *Surinder Singh*, 7 July 1992, [1992] ECR I-04265; M. J. ELSMORE, P. STARUP, *Union Citizenship-Background, Jurisprudence and Perspective*, cit., p. 86. See also *supra* note 158.

justifies, in general, to ask for the existence of a «real link between the applicant […] and the […] employment market concerned», such a link could not be «too general and exclusive» as it was in this case, i.e. it was disproportionate, as it went beyond what is necessary to attain the objective.

The Court relied on this finding in the further *Pusa* case[214], regarding the impossibility to deduce a tax payed by a Finnish citizen living in Spain on its Finnish pension, because he was residing in another member states as a consequence of having exercised its right as a Union citizen conferred by the Treaty. Since Union citizens could not be put at disadvantage for having exercised their rights ex art. 18 EC, not even by its own state of nationality, therefore, being treated less favourably of those that did not take advantage of their Union citizen's rights as this would result in a differentiated treatment on the sole basis of nationality, thus contrary to Community law. However, the Court left to the national court to determine, on the basis of the criteria provided in the judgment, if the reasons justifying the differentiated treatment pursue in proportional manner a legitimate aim. A noteworthy finding of this case, beyond the reliance on the *D'Hoop* ruling and on the deterrence principle, is that the tax rules (now) felt under the scope *ratione materiae* of Community law (simply) because it could affect the equal treatment right to which Union citizens are entitled when exercising their fundamental freedoms. In fact, prior to the introduction of the Union citizenship, it was not sufficient to an Union citizen residing in another member state, but not for the purpose of exercising there an economic activity that, on the contrary, took place within its state of nationality, to be protected from a discriminatory treatment as regards taxation in comparison to non-mobile Union citizens[215].

The Court has relied on the deterrence principle, has better outlined the limits that member states encounter when making Union citizens' access to benefits dependant on a certain type and length of residence on the national territory, and has made evident the residual nature of the Union citizen status in relation to provisions protecting workers in the *Collins* case[216]. Precisely, the case regarded a job-seeker, Mr. *Collins*, an Irish national who was looking for a job in the United Kingdom and asked for being granted a job-seekers' allowance which required the beneficiary to be «habitually resident» in the UK. The characteristics of the case did not allowed to qualify Mr. *Collins*' situation neither as that of a worker for the purposes of Regulation 1612/68, particularly art. 7(2) granting equal treatment in relation to social and tax advantages, nor as a person to

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[214] ECJ, C-224/02, *Pusa*, 29 April 2004, [2004] ECR I-05763.

[215] Cfr. ECJ, C-112/91, *Werner*, 26 January 1993, [1993] I-00429. D. KOCHENOV, *A Real European Citizenship: A new Jurisdiction test: a Novel Chapter in the Development of the Union in Europe*, cit., p. 65.

[216] ECJ, C-13/02, *Collins*, 23 March 2004, [2004] ECR I-2703.

which a right of residence could be granted on the basis of Directive 68/360 because it did not qualified as a worker in the first member state[217]. Since, doubtlessly, the situation felt under the personal and material scope of Community law, it was to ascertain if the residence condition for the benefit to be granted was discriminatory on the basis of nationality, thus contrary to the principle of equal treatment. Therefore, even if the applicant did not qualified as a worker, because of the introduction of the Union citizen status and of the previous development in the case-law as regards equal treatment of Union citizens, the benefit object of the case - access to employment in another member state - could not be considered any longer to fall outside the scope of the Treaty[218]. Recalling *Grzelczyk* and the criteria set out in *D'Hoop* - that, in principle, a requirement aiming at establishing if «a genuine link exists between the person seeking work and the employment market» is not discriminatory as such - if the link existence is verified through a residence requirement this should be proportionate, i.e. not go beyond what is necessary to attain that objective[219]. An example of what reasons could justify the conditionality of a benefit on a residence requirement in compliance with the principle of proportionality, was given in the *De Cuyper* case[220]. It is worth of notice since, contrary to the previous cases, the Court found that the withdrawal of an unemployment benefit from a Union citizen who had made use of its rights to move and reside in another member state was not disproportional. In fact, the objective justifying the obligation to reside in the member state responsible for the payment could not be pursued with less restrictive means[221].

In the end, the Court went ahead in defining the parameters of the proportionality test and limits of member states requirements in assessing the conditions for a benefit to be granted to a student in the *Bidar* case[222], at last reversing the *Brown* judgment[223]. Even though the case dealt with maintenance grants differently from *Grzelczyk*, the ruling was build upon two out of three basic statements already made in the former case,

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[217] Cfr. ECJ, C-316/85, *Lebon*, cit., para. 27.

[218] Paras. 62-63 of the judgment.

[219] An indication of the content of a «real link between the applicant and the geographic employment market concerned» that could justify the grant of the same type of benefit object of the *Collins* case, was provided in the *Ioannidis* ruling. Or rather, in this case the Court stated that was disproportional, therefore resulting in a discrimination on the basis of nationality, to refuse such a benefit only because the applicant had obtained its diploma of secondary education in another member state and it was not dependant on parents that were migrant in the host member state in which the applicant was residing. The Court relied, as said before, on the *Collins* and *D'Hoop* rulings to reach such a conclusion, however it was not necessary to consider the case under the Union citizen provisions as the situation of the applicant felt under those protected under art. 39(2) EC Treaty, i.e because it was a job-seeker. Cfr. ECJ, C-258/04, *Ioannidis*, [2005] ECR I-08275, in particular paras. 25, 28-29 and 31.

[220] ECJ, C-406/04, De *Cuyper*, 18 July 2006, [2006] ECR I-06947.

[221] Cfr. paras. 44-46 of the judgment.

[222] ECJ, C-209/03, *Bidar*, 15 March 2005, [2005] ECR I-02119.

[223] ECJ, C-197/86, *Brown*, 21 June 1988, [1988] ECR 3205. Cfr. also C-39/86, *Lair*, [1988] ECR 1361.

i.e. the introduction of the Union citizenship, and of education and vocational training among Community competences. Interestingly, the third argument was based on art. 24(1) Directive 2004/38 - confirming that this ambit falls now under the scope of Community law, as was not still the case in *Brown* - which allows member states to graduate the grant of students' maintenance grants on their qualification as economically active Union citizens or on the length of their residence.

Once the introduction of Union citizenship extended the personal scope of Community law, potentially, to all those citizens holding the nationality of a member state[224], the burden of justifying the fall into the scope of Community law of a situation shifted entirely on its material scope, that is presenting the situation under consideration a cross-border element, represented by a previous exercise of the right to move and reside ex art. 18 EC by the Union citizen[225]. Therefore, in order to enlarge the group of individuals who could made use of Union citizens rights and be protected by Community law, specifically of the right not be discriminated on the basis of nationality ex art. 12 EC, the material scope was stretched to its limits. However, during this *enlargement* process the Court was not, simultaneously, capable of providing a clear set of criteria on which basis the material scope could thus be identified[226].

Even though the Court has not relied on the Union citizen status, thus, this case is part of the group of cases solved on the sole basis of free movement provisions, it is worth of mention because of its object - the (derived) right of residence of Union citizens' family members third-country nationals - which has assumed importance in the recent developments of the Court's case-law on Union citizenship, and for its being another example of the porosity character that the demarcation line between purely internal situations and those that, instead, falling under the scope of Community law is assuming. Therefore, the *Carpenter* case[227], regarding the rights of a service provider protected ex art. 49 of the Treaty, is relevant anyway, as a derived right of residence of the foreign spouse of the service provider is asked to be granted in its own state of nationality and not in the member states where the fundamental freedom happened to be exercised. On the basis of the role played by Ms. Carpenter in the applicants' family life,

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[224] Although the situation of citizens of Member States' overseas territories should be considered in particular circumstances, as the territorial scope of application of EU law does not totally correspond purely to the sum of Member States' territories. Cfr. Case C-300/04, *Eman*, [2006] ECR I-8055; See D. KOCHENOV, *The Impact of European Citizenship on the Association of the Overseas Countries and Territories with the European Community*, in *Legal Issues of Econ. Integration*, 36, 2009, p. 239.

[225] Or this is, at least, what is inferable from a overall consideration of the *Martinez Sala, Grzelczyk* and *D'Hoop* rulings. J. D. MATHER, *The Court of Justice and the Union Citizen*, cit., p. 740.

[226] D. KOCHENOV, *Citizenship Without Respect: The EU's Troubled Equality Ideal*, Jean Monnet Working Paper No. 08/10, 2010, p. 41 ff.

[227] ECJ, C-60/00, *Carpenter*, 11 July 2002, [2002] I-06279.

the Court has recognised that, if the right was not been granted, the Union citizen would have been obstructed in the exercise of one of its fundamental freedoms, which would resulted in a discriminatory treatment, as already affirmed in the *Singh* jurisprudence[228], and in conformity with the deterrence principle. Although, national measures liable to obstruct the exercise of a fundamental freedom could be justified by reasons of public interest if compatible with the respect of fundamental rights, a deportation decision would be a disproportionate measure in relation to the fundamental right of respect of the family life ex art. 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)[229].

Related to the above case, although this time also considering rights conferred to Union citizens, as demonstrating the potential power of expansion of the scope *ratione materiae* (merely) to all those situations involving the exercise of fundamental freedoms without the (previously required) need to establish an economic link[230], is the *Garcia Avello* case[231]. The changed approach of the Court emerges even more if we confront it with the *Konstantinidis* ruling on the same issue, in which, on the contrary, a Greek law which imposed a transliteration of the German applicants' name liable to modify its pronunciation, and resulting in a distortion, since it could «expose[s] him to the risk that potential clients may confuse him with other persons», was found to be contrary to art. 52 of the Treaty[232]. The outcome was, therefore, guided by the necessity not to obstruct the applicant's exercise of freedom of establishment, instead of on the protection of its fundamental rights[233]. That is to say that the case felt under the scope of Community law solely because of its effects on the exercise of a fundamental freedom. In connection with this last point, the case under consideration is noteworthy as the Union citizens

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[228] See *supra* note 203.

[229] Paras. 39-46 of the judgment. Furthermore, a similar use of the potential broad-spectrum of the category of provision of services in order for a situation to fall under the scope of Community law resound the approach used by the Court in the free movement case *Cowan*. See *supra* note 122.

[230] J. SHAW, *A View of the Citizenship classics: Martinez Sala and the Subsequent Cases on Citizenship of the Union*, cit., p. 360. That no economic fundamental freedom come into consideration in the *Avello* case was also pointed out in the AG Opinion, stating that «[I]t considers however that Article 18 EC may be relevant - although not Article 43 EC, which concerns freedom of establishment, a matter obviously not in issue with regard to minor children concerned by an application for a change of surname.» Cfr. Case C-148/02, Opinion of Advocate General Jacobs, delivered on 22 May 2003, para. 42.

[231] ECJ, C-148/02, *Garcia Avello*, 2 October 2003, [2003] ECR I-11613.

[232] Cfr. ECJ, C-168/91, 30 March 1993, *Konstantinidis*, [1993] ECR I-01191. In particular, para. 15.

[233] An approach which, on the contrary, had been suggested by the AG Jacobs in his opinion. Cfr. Case C168/91, Opinion of the Advocate General Jacobs, delivered on 9 December 1992, paras. 31 ff., in particular para. 46, that contains the famous statement: «[H]e is in addition entitled to assume that, wherever he goes to earn his living in the European Community, he will be treated in accordance with a common code of fundamental values, in particular those laid down in the European Convention on Human Rights. In other words, he is entitled to say 'civis europeus sum' and to invoke that status in order to oppose any violation of his fundamental rights.» An interpretation more incline to the fundamental rights protection argument was given in the *Grunkin and Paul* case, G. ROSSOLILLO, *Personal Identity at a Crossroads Between PIL Human Rights and EU Law*, in A. BONOMI P. VOLKEN (ED.), in *Yearbook of Private International Law*, 11, 2009, p. 155-156.

minors of the *Garcia Avello* case have resided since their birth in one of their member states of nationality, thus they have never exercised their right to move and reside conferred on Union citizens.

The case concerned a Belgian authorities' rejection of a request made by a Belgian-Spanish couple to change the surnames of their minor children - holding the double nationality, and residing in Belgium since birth - according to the Spanish law that, differently from the Belgian rule, combines the father's and the mother's surnames. The part of the judgment regarding admissibility as well as that on the alleged discriminatory effects of the Belgian law on surnames contains interesting elements. In the part of the ruling on admissibility, as regards personal scope it's easily said as the children possess the nationality of two member states. Instead, more space needed to be devoted to explain why this did not have to be considered a purely internal situation, with no link with Community law. Asserted that the matter of surnames is an exclusive member states' competence, to be exercised in conformity with Community law, and citizenship provisions are not intended to extend its material scope, in order to fall under the latter a cross-border element was to be found. Accordingly with the previous case-law, this was represented by a preceding exercise of the right to move and reside in another member state, even when the right not to be discriminated on the basis of nationality was, then, claimed in relation to the member state of nationality after return. The Court explicitly recognised that subjects of the case were the children, and not their parent as legal representatives, therefore the cross-border element could not be represented by the previous exercise by Mr. *Avello* of its right to move and reside in another member state. On the contrary, this was found in the possession of double nationality by the children. Thus, on the basis of a *fictio*, and because the applicants' Spanish nationality had to be recognised by Belgium nearby the Belgian[234], the children were considered to be lawfully residing in another member state, thus the situation to fall under the material scope of Community law[235]. Carried the extension of the material scope so far, the Court analysed if the national rule was in compliance with art. 12 EC, i.e if the applicants were not discriminated on the basis of nationality, considering that the national law provide the possibility to derogate to such a rule to Belgian who found themselves in the same situation of the applicants. Since Union citizens in the same situation were treated differently solely on the basis of their nationality, that none of the grounds provided a valid justification - prevent risks of confusion as to identity or parentage of persons, and integration - and the outcome was disproportionate[236], jointly

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[234] On the basis of the *Micheletti* ruling, cfr. ECJ, C-369/90, *Micheletti and Others*, [1992] ECR I-4239, para. 10.

[235] Paras. 22-28 of the judgment.

[236] Paras. 40-44 of the judgment.

applying art. 17(1) and art. 12 EC, the national rule was found to be not in compliance with Community law.

To summarise, this case is relevant for involving minors Union citizens, economically inactive and, at the time of the case, sedentary, and a matter that, almost certainly, would fall out of the scope of Community law in the pre-Maastricht era. Finally, a very rapid reference was made to the possible obstacle that having different surnames could pose to an hypothetical future will to profit from diplomas and documents in the other member state, implicitly referring to a potential exercise by the claimants of their right to move and reside in another member state[237]. It appears, therefore, that although the subject of the case was the «right to a name», a fundamental right falling under civil matters of exclusive national competence, and, differently from *Konstantinidis*, the Union citizen status *per se*, regardless of any economic link, was posed at the basis of the reasoning. At last, the approach chosen was (still) that of the reflects on the exercise on the exercise of free movement rights, somehow confirming a convergence of approaches among the different branches of free movement law[238]. This, if it emancipates, at this point in time, Union citizens from the market paradigm, at the same time, it confirms, the migration paradigm, although under a new light, i.e. as a future possibility and not as a precondition. The full significance of this, however, would be entirely understood a decade later, in relation to a series of cases where the absence of physical movement from one member state to another, similarly, won't impede the Court to consider the situation to fall under the material scope of EU law[239].

Points of contact can be found with the majority of the above mentioned cases in the above quoted *Zhu and Chen* case[240], since the situation similarly regards, firstly, the basis on which a (minor) Union citizen can lawfully reside (and the security of this residence) in another member state, the grant of a (derived) right to reside to its family member and primary carer who is a third-country national (*Carpenter*). In the second place, the recognition by a member state of another member state nationality without imposing further conditions (*Avello*), and, in the end, the interpretation of the conditions as regards both the residence right of the Union citizen and of its family member as established by Directive 90/364 (*Baumbast*). Catherine, one of the applicants, was born in Northern Ireland from a non-Union citizen, and, accordingly to the Irish nationality law, she acquired the Irish nationality, thus the Union citizenship, on the basis of the *jus*

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[237] Cfr. para. 56 of the AD Opinion and para. 36 of the judgment. See *supra* note 223.

[238] J. SHAW, *Citizenship: Contrasting Dynamics at the Interface of Integration and Constitutionalism*, in P. CRAIG, G. DE BÚRCA, *The Evolution of EU Law*, cit., p. 589 and 591.

[239] K. LENAERTS, *'Civis europaeus sum': from the cross-border link to the status of citizen of the Union,* in VV. AA., *Free movement and the Court of Justice of the European Union,* in *Online Journal on free movement of workers within the European Union*, 3, 2011, p. 8.

[240] ECJ, C-200/02, *Zhu and Chen,* 19 October 2004, [2004] ECR I-09925.

soli rule and for not having acquired another nationality, precisely, her mother's and father's Chinese nationality. Subsequently, she and her mother moved to the United Kingdom[241], where the child received a series of services[242]. On the sole basis of UK national law none of the applicants were allowed to reside on the national territory. The Court found that on being the applicant a Union citizen ex art. 17(1) EC, she could relied on the right to reside in another member state ex art. 18 EC, a right «granted directly to every citizen of the Union by a clear and precise provision of the Treaty[.]». On the basis of this statement, and as already affirmed after the *Baumbast* ruling, to the right to reside of Union citizens *per se* considered was given the status of a self-standing right.

That Ms. *Chen* explicitly admitted that she wanted to profit from the *jus soli* conferral of Irish nationality to her daughter to, subsequently, derive a right to reside for both on the territory of another member state, was not passible to question the possibility for the Union citizen to rely on the rights by the sole virtue of this status, which acquisition none of the parties has questioned[243]. As regards the limitations and conditions to which this right was subjected, the applicant fulfil both requirements posed by the 90/364 Directive, i.e. having a sickness insurance and sufficient resources, through its mother. On the basis of a broad interpretation of the right to move and reside, not to recognise the fulfilment of the latter requirement since the resources were not possessed personally by the Union citizen but by its family member would go beyond what necessary for the achievement of the objective, thus it would be disproportionate. This last point was, in view of the further developments of its case-law on Union citizenship, perhaps, the most relevant. According to the 90/364 Directive, a derived right of residence is conferred solely to a «dependant» family member of the Union citizen, a characteristic that certainly Ms. Chen did not have, as in this case she found itself in the opposite situation as that described by the Directive. However, the object

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[241] Interestingly the Court recalled the *Avello* case in order to state that: «[T]he situation of a national of a Member State who was born in the host Member State and has not made use of the right to freedom of movement cannot, for that reason alone, be assimilated to a purely internal situation […]» even if in this case a cross-border element was clearly present and it was asserted in a previous paragraph of the judgment that the minority age of the applicant did not conditioned its capacity to be a holder of the rights conferred on Union citizens by the Treaty, firstly the right to move and reside in another member state. An element which was only *de facto* present in this case and which was, on the contrary, one of the elements at the basis of the reasoning in the previous cases, was the possibility to affirm on the basis of the facts that the residence in a member state other than that of nationality of the Union citizen was lawful. Cfr. paras. 9 and 20 of the judgment.

[242] However, in the first place, the Court stated that the applicant could not be considered a recipient of services and, consequently, to be able to rely on the rights conferred by Directive 73/148 in order to be recognised a right to reside in the UK as the latter was the place of its principal residence, and the receipt of services was programmed for an indefinite period. Paras. 21-23 of the judgment.

[243] The circumstance, and the consequences as the principles to be respect in any action taken, of a proved «abuse of right» situation found place within art. 35 of Directive 2004/38. Furthermore, the refusal by the Court to consider the «state of mind» of the applicant, can be put close to its similar approach in persons' free movement cases. Cfr. K. E. SØRENSEN, *Abuse of rights in Community law: A principle of substance or merely rhetoric?,* in *CMLR*, 43, 2006, p. 423–459.

that made the Court to decide anyway for the grant to the applicant of a right to reside deriving from its daughter (original) right, was to avoid the consequence that a contrary decision would given rise. On the basis of Ms. *Chen* role as primary carer of a minor Union citizen, she was granted a right to reside, because on the contrary, the right of the Union citizen would be deprived of «any useful effect»[244]. That is equivalent to say that as a result of a balancing, relying on broad interpretation to be given to free movement provisions, as long as the condition and its underlying aim is fulfilled, prevailed the «*effect utile* preservation» principle.

In conclusion of this overview of some of the most relevant cases that have marked and signed the citizenship of the Union from its establishment by the Maastricht Treaty in 1992 until, and in some cases even further, the adoption of the 2004/38 Directive, a mention has to be done to the treaties that in meanwhile have been signed. If the Nice Treaty, that entered into force in 2003, has not introduced amendments the Union citizen provisions, the Amsterdam Treaty signed in 1997, fundamental in the development of the EU immigration policy in relation to third-country nationals, instead, was also relevant as regard Union citizenship. Following its entered into force in 1999, art. 17 EC (ex article 8) added to the previous formulation of the basic provision on Union citizenship a relevant amendment, as regards the type of relation among the Union citizenship and nationalities of member states. Precisely, it stated that: «[…] Citizenship of the Union shall complement and not replace national citizenship[.]»[245]. This addition on a formal level can be considered to have added almost nothing to the previous formulation, and to have just confirmed national sovereignty in citizenship matters, and (some) member states attitude already made clear in occasion of the Maastricht Treaty ratification[246]. Although citizenship provisions found their collocation on a separated title, the establishment of the «area of freedom, security and justice» in Title IV, comprising, provisions on, among others, policies related to free movement of persons,

[244] Para. 45 of the judgment.

[245] Two other changes have to be mentioned. The first, the introduction of a new right by art. 21 (ex art. 8(d)) of the EC Treaty, amended to insert the right of Union citizens to write to the EU institutions (mentioned in the article or in article 7) in one of the official languages ex art. 314, and to receive an answer in the same language. Secondly, the legislative provision for the implementation of free-movement principle has been changed to co-decision, but still submitted to unanimity in the Council. Cfr. arts. 21 and 18, Treaty establishing the European Community (Amsterdam consolidated version), OJ C 340, 10/11/1997.

[246] The reference here is to the Danish Declaration on citizenship of the Union in occasion of the Maastricht Treaty ratification, to which Heads of States and Government reacted in the following European Council of 11-12 December 1992, restating that: «The provisions of Part Two of the Treaty establishing the European Community relating to citizenship of the Union […] do not in any way take the place of national citizenship.» It has been observed that Danish *fears* as regards possible not foreseen effects of the Union citizenship could be linked to the use, at the national level, of the same term, *borgerskab*, meaning both nationality and citizenship. G.-R. DE GROOT, *Towards a European Nationality Law*, in *Electronic Journal of Comparative Law*, 8, 2004, p. 4, Cfr. OJ C 348, 1992.

could not but have effects on Union citizenship development[247], at least as regards control on persons when crossing internal borders[248]. The content of this Title of the Amsterdam Treaty will be analysed in details in the following paragraphs. As regards the enhancement of the existing, and addition of new, rights of Union citizens, the Amsterdam Treaty has not a strong impact either. Nonetheless, worth of notice are novelties in the area of fundamental rights and non-discrimination.

As regards fundamental rights, firstly, it was clearly stated, amending art. 6 TEU, that the Union was founded, among others principles which are common to member states, on respect for human rights and fundamental freedoms. Art. 46 of the EU Treaty has also been amended: the ECJ jurisdiction was expanded in order to assure the respect of fundamental rights - comprehensive of those protected by the ECHR and resulting from common constitutional traditions of member states - (at least) by the acts of EU institutions[249]. On non-discrimination, the grounds on which it is prohibited when EU law applies were enlarged with the addition of art. 13, and comprehended, in addition to nationality (art. 12) and, as far as equal pay was concerned, equality between men and women, sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation[250]. The Community, therefore, departed from its focus limited to discrimination based on nationality and on sex grounds, providing the basis to the Commission to embrace a more *horizontal* approach adopting common measures including all (new) grounds on which discrimination is prohibited[251].

The attempt so far has been to describe the content and evolution of the right to move and reside, and of those rights related to it, such as, most importantly, the right not to be discriminated on the basis of nationality, when exercised before by (mainly) workers nationals of Community member states, and, after, by Union citizens *per se*. Acknowledged that the right to move and reside is only one among other rights provided to Union citizens, nonetheless, the analysis has had such a limited objective because this choice is coherent with the whole aim of the research. In fact, on the basis of this right, precisely on the criteria guiding its attribution and exercise, it is based one of the basic

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[247] J. SHAW, *Constitutional Settlements and the Citizen*, in K. NEUNREITHER, A. WIENER, *European Integration after Amsterdam*, Oxford, 2000, p. 307-308.

[248] Cfr. art. 62(1), Treaty establishing the European Community (Amsterdam consolidated version), OJ C 340, 10/11/1997.

[249] Worths a mention also the mechanism introduced by art. 7, establishing a procedure to be followed - after having been *activated* by a Commission's proposal or by one-third of member states - to be determined, by the Council, that a serious and persistent breach of the founding principles of the Union has taken place, after an assent of the European Parliament voting with a majority of two-thirds.

[250] More extensively on the issue, L. FLYNN, *The Implications of Article 13 E.C. after Amsterdam. Will some forms of discrimination be more equal than others?*, in *CMLR*, 1, 1999, p. 1127-52.

[251] M. BELL, *Article 13 EC: The European Commission Anti-Discrimination Proposal*, in *Industrial Law Journal*, 29, 2000, p. 80.

assumptions of this work, i.e. the possibility to grasp from the extent to which such a right is granted to individuals by EU law the *value,* or in other words, the role attributed to a specific category of individuals in the European integration process, in the pursuing of its objectives, and in its possible future directions.

The analysis of the major right that have shaped workers treatment within the EU and the content, shaped by the ECJ case-law, of the Union citizen status, has been done at this point of the present work with the aim that, afterwards, the heritage relationship between the EU immigration policy, as regards legal economic migration of third-country nationals, and the EU legacy on movement (and residence) of its citizens results more easily perceivable. Because of this, only after the status, relevant for the research, attributed to third-country nationals legal migrants in the framework of the Union immigration policy will have been considered, the discourse on the content of the Union citizens status will be resumed, and will, still, only focus on the right to move and reside[252]. Therefore, the 2004/38 Directive will be take into consideration as the EU piece of legislation that, having repealed almost all the other EU laws concerning this right, at present, regulates it.

The reasons laying behind and justifying the adoption of certain provisions and policies could not be entirely understood if detached from the historical period in which the need of their adoption arisen, and, similarly, the point of advancement and the objectives of the moment of the EU integration process cannot be avoided to be considered as fundamental pushing factors. Therefore, the aim of the next paragraph is to account, alike done above, for the context in which the EU immigration policy has evolved, from its embryonic form, represented by the Schengen agreement of the mid-eighties, to arrive at the last proposals advanced by stakeholders and EU institutions for the adoption of new directives on legal economic migration of third-country nationals, and the next five-year plan that would take the place of the Stockholm programme ended in 2014.

3. The first phase of EU legislation on legal migration of third-country nationals: from Schengen to Amsterdam.

3.1. The Schengen acquis.

The progressive shift of borders from the internal to the external dimension has been a decisive incentive for the further coordination of all other policies that could

[252] Cfr. paragraph 4.

possibly have an impact on the effective elimination of controls on persons at internal borders. The «elimination process», in fact, could be seen as a *do ut des* process or, if preferred, a process respecting the law of communicating vessels: i.e. if the total amount of security within the EU could not be decreased, then all the necessary measures to ensure the same level of security at the external borders should have been adopted[253]. Therefore, the starting point of the analysis cannot but be the birth and development of the Schengen *acquis*[254], firstly, for a chronological reason that it is easily said. The signature of the Schengen agreement in 1985, the 1990 Convention (Implementing Convention) and the following attached acts have come ahead during times in which EU laws was leading with the consequences of the cross of EU borders by EU and non-EU citizens, and it was clear from the very beginning that the Schengen process was meant to pave the way for EU provisions in the same areas, since the objective to be achieved were almost identical[255]. In addition, specifically in the framework of the present work, a further reason of interest in the development of the Schengen *acquis* stays in being the Benelux countries one of the first members of the Schengen area, and in the leading role they have had in the drawing of the Schengen *acquis*, putting at disposal of other parties - specifically, during the negotiation process of the Implementing Convention - their experience as regards the abolition of controls on persons at internal borders and of a group of countries that had implemented a common visa policy since the 1960s[256]. At last, an outline of the evolution of the Schengen *acquis* is relevant as the countries further considered, all current members of the Schengen Area, have become members of the same in different points in time, therefore it is significant to point out how was the state of the art in the moment in which their membership was finalised.

We find a great correspondence among the current AFSJ ambits and those on which France, the Federal Republic of Germany[257] and the Benelux countries agreed, signing in 1985 the Schengen agreement to gradually abolish checks at their common

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[253] F. W. HONDIUS, *Legal Aspects of the Movement of Persons in Greater Europe*, in *Yearbook of European Law,* 1990, 10, p. 300. See also, Communication of the Commission on the abolition of control of persons at the Intra-Community borders, Brussels 7 December 1988, COM(88) 640 final, p.t 11.

[254] A. GEDDES, *The European Union. Supranational Governance and the Remaking of European Migration Policies and Politics*, in J. F. HOLLIFIELD, ET AL. (eds.), *Controlling Immigration. A Global Perspective*, Stanford, 2014, p. 438.

[255] J. J. E. SCHUTTE, *Schengen: its meaning for the free movement of persons in Europe*, in *CMLR*, 1991, 28, p. 565-568; Cfr. art. 13 Single European Act; cfr. also Communication of the Commission on the abolition of control of persons at the Intra-Community borders, cit., Annex, p. 13.

[256] D. O'KEEFFE, *The Schengen Convention: A Suitable Model for European Integration?*, in *Yearbook of European Law*, 1991, 11, p. 187. More extensively on the Benelux countries and on their role in the European integration process, see chapter IV.

[257] France and Germany had already eased control on persons at the Franco-German border with the signature of the Saarbrück Agreement in 1984. This agreement is seen as the genesis of the following Schengen agreements. Art. 31 of the Schengen agreement provide for the necessary coordination between the two treaties.

borders. This agreement of 33 articles contained short-term measures to enter immediately into force to instantly ease controls on common borders as regards movement of goods and services, and listed a set of compensating, long-term measures to be adopted by January 1990, in view also of progressively transfer such controls at the external borders. These measures found place in the more detailed 1990 Implementing Convention and concerned movement of goods, police and judicial co-operation, harmonisation of national laws on narcotic drugs and weapons, the set of the Schengen Information System (SIS) and, finally, movement of persons. However, the Convention entered into force only five years later, as it demanded the parliamentary ratification by all signatories states[258]. Furthermore, between the signature of the Schengen agreement and the Implementing Convention, fundamental political events took place concerning the progress of the EU project, and regarding the situation in Central and Eastern Europe, in addition to the reunification of Germany[259].

In particular, title II of the Implementing Convention dealt with movement of persons[260]. It contained measures on checks at the internal and external borders, visas, movement of aliens, accompanying measures - i.e. carrier sanctions - and rules on asylum applications. It was made clear that the abolish of control at internal borders and their transfer to external borders would require harmonisation of national laws dealing with movement of persons. Specifically, of national laws on visas « in order to avoid the adverse consequences in the field of immigration and security that may result from easing checks at the common borders»[261] - and admission conditions of aliens[262].

The definition of internal and external borders and third states as «any State other than the Contracting Parties»[263], could have raise the expectation to find a strictly Schengen definition of alien[264], interestingly enough, aliens were, instead, defined as « any person other than a national of a Member State of the European Communities». Therefore, EC rules on persons free movement were not, in principle, concerned by Schengen rules[265]. On the contrary, as regards movement of third-country nationals,

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[258] By that time, Italy, Spain, Portugal, Greece, Austria, Denmark, Sweden and Finland were became Schengen members as well as EU member states, a part from Denmark which had already joined the EU in 1973.

[259] Cfr. Preamble of the Implementing Convention.

[260] Title II, Implementing Convention, cit.

[261] Art. 7, Schengen agreement, cit.; Arts. 9 and 10, Implementing Convention, cit.

[262] Art. 20, ib.

[263] Art. 1, Implementing Convention, cit. Moreover, a definition of «third states» as such could impact on visa requirements as nationals of third State could potentially be subject to visa arrangements. Cfr. art. 9.2, Implementing Convention.

[264] K. GROENENDIJK, E. GUILD, P. MINDERHOUD (EDS.), *In Search of Europe's Borders*, The Hague, 2003.

[265] J. J. E. SCHUTTE, cit., p. 553.

many elements of the Schengen *acquis* will be found in EU laws on immigration, as it will emerge more clearly later on.

For our purposes the relevant measures of title II of the Implementing Convention were those on the cross of external borders, visas, rules governing movement within the Schengen area, reasons for refusing entry and the consequent readmission[266]. Stated that control at internal borders were abolished, and were replaceable only when reasons of public policy or national security required to adopt not postponable measures, conditions for aliens for legally cross external (Schengen) borders, and to move within the Schengen area, were differentiated if their stay was of up to three months or exceeding that period.

The cross of external borders and stays of no more than three months were allowed if the alien hold a residence permit of a Schengen country; or, in alternative, a valid document to cross the border - if necessary, a visa - and documents reporting the purpose and conditions of its stay, that it had sufficient means of subsistence for the stay period and the return to the sending country, that it was not issued in its regard an alert precluding its entry, and, finally, that it did not constitute a threat to public policy, national security and international relations of any of the Contracting parties[267]. For stays of this length a Schengen uniform visa would be provided for reasons of transit or travel[268]. On the contrary, for stays longer than three months only national visas were released in accordance with national requirements and proceedings. A right to freely move within the, at time, Schengen area, were granted to aliens for a maximum period of three months or for the shorter period of validity of the visa, once they had legally entered the territory, holding a visa if required, or a residence permit issued by one of the Contracting parties.

Persons who did not fulfil the above-mentioned conditions were refused entry to the Schengen area as a whole[269] or were required to leave if already on the territory[270]. Among Schengen members there were reciprocal obligations to readmit on their territories aliens holding a residence permit, but who were not regularly staying on the territory of another Schengen member state. Finally, aliens who did not leave voluntarily, or had to leave for reasons of national security or public policy, were expelled to their country of origin or another country where they were admitted, as established by

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[266] Arts. 5-27, Implementing Convention.

[267] Art. 5(1), lett. (a) - (e), ib.

[268] In the meanwhile national visas of Schengen member states should be reciprocally recognised. Cfr. art. 10, para. 1 and 2, Implementing Convention.

[269] A member states could exceptionally admit an alien even if it did not fulfil all the conditions set out by art. 5(1) on humanitarian grounds or for reasons of national interest or international obligations. Cfr. art. 5(2), Ib.

[270] Arts. 5(2) and 23, Ib.

readmission agreements if concluded. Lastly, carriers were particularly burden of responsibilities at the point to be made almost detached frontier guards. They were in charge of assure that aliens were in possess of the necessary travel documents, and penalties could be imposed on them if they transported aliens who did not hold them. Moreover, if an alien that they transported were refused entry, they were obliged to take responsibility of the persons, and bring the alien back to the third-country from which it come from[271].

The Schengen framework posed a range of questions, especially on the protection of individual rights that exemplified the problems that could raise once common provisions on the cross of borders were not followed by the harmonisation or, at least, coordination of national laws on related matters, namely visa and immigration laws, and by a proper mechanisms of judicial control. These elements were particularly significant in view of the subsequent absorption of the Schengen *acquis* into the EU framework three years after its becoming operative, and of their still current relevance.

Firstly, it has been noted that aliens seeking entry into the Schengen area were submitted to a double discretionary decision, as regard the release of the visa and on the fulfilment of art. 5 conditions. Despite the proposals of harmonisation of national laws on visas and admission conditions of aliens, these ambits were both left at the mercy of national requirements and proceedings, originating a cumulative and stricter effect. Thus, to be admitted into the Schengen area aliens were required to satisfy the sum of the conditions posed by national laws of all parties, in addition to the obligations imposed on carriers, hindering the entrance of vulnerable subjects as family members of refugees and asylum seekers[272]. A second concern regards the possibility to refuse an alien to entry and stay into the Schengen area on the basis of an alert - reported by the Schengen Information System - adopted by one of the Schengen states on the basis of its national laws. The alert may have been based on risks to the public order, public or national security that the alien may pose, or if measures conditioning or prohibiting its entry and residence have been adopted[273]. Having no harmonised concepts of public order, public or national security, every contracting state relied on its own, conditioning the entrance and stay, and also the attached right to circulate, in the all Schengen area. A connected and similar concern regards (still) a negative condition not to be refused entry and stay into the Schengen area, i.e. not to be a threat to the public policy and security or to the international relations of any of the contracting party. Therefore, as immigration laws

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[271] Arts. 26-27, ib.

[272] D. O'KEEFFE, *The Free Movement of Persons and the Single Market,* cit., p. 15; ID., *The Schengen Convention: A Suitable Model for European Integration?,* cit., p. 194.

[273] Art. 96, ib.

were not harmonised, there was a cumulative effect of all national admission requirements that an alien have to satisfy to be allowed entrance and stay in the whole area. Both conditions can be derogated on the basis of specific grounds by one contracting party, but in this case the alien would have been deprived of the right to move in the remaining Schengen member states.

In addition to the adverse effects that divergences among national laws on the above mentioned ambits could have on the effective exercise of aliens' movement rights in the Schengen area, no judicial control and remedies were provided other than those at the national level and those related to the data contained in the SIS[274]. This last point is significant since the Court of Justice, on the other side, has been balancing national concepts as public policy conditioning freedom of movement of workers - precisely their admission and security of residence, not leaving its definition only to national institutions and impeding its operating against the objectives of the Community[275]. Moreover, this lack of supranational judicial control in what would become part of the AFJS matters is worth of notice also in light of the fact that, even after integration of the Schengen *acquis* into the EC legal order, the jurisdiction of the ECJ over AFJS matters has also been for a long time limited, having been extended to police and judicial cooperation, former third pillar matters, only by the Lisbon Treaty[276].

A last critical point of the EC/Schengen relation is noteworthy. As anticipated, the above provisions on movement were applicable only to aliens, i.e. non EU citizens. On the contrary, since definitions of internal and external borders were strictly Schengen definitions[277], rules on checks at internal and external borders were applicable also to EC citizens. Therefore, at the one side, controls at Schengen borders were meant to be systematic and on all persons[278]. On the other side, checks at internal EC borders should have been carried out in way not to obstacle the building of the internal market, being an area meant to be without internal frontiers. According to the ECJ case-law, such controls should not have been an obstacle to the free movement of persons in the Community, they could not be carried out in a systematic, arbitrary or unnecessarily restrictive

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[274] Cfr. arts. 106 and 111, Implementing Convention.

[275] Cfr. ECJ, C-30/77, *Régina,* 27 October 1977, [1977] ECR I-01999, p.t 35. On the desirability of a Community approach on, what would become, AFSJ matters, for reasons of judicial control and uniform application ex art. 177 EEC, D. O'KEEFFE, *The Free Movement of Persons and the Single Market,* cit., p. 7.

[276] Cfr. arts. 35 EU Treaty and 68(1) EC Treaty, limiting the Court's jurisdiction in this area. They have been repealed by the Lisbon Treaty. Now the court can give preliminary rulings on judicial cooperation and criminal matter without the necessity to previously has its jurisdiction recognised by a member state declaration. However, these provisions were submitted to a five-year transitional rule. Moreover, on the remaining AFSJ matters, former first pillar, any national courts, and not only those of last resort, can send preliminary rulings to the ECJ. Cfr. Art. 10, Protocol (No 36) on Transitional Provisions, TFEU (consolidated version), OJ C 326, 26/10/2012. See also P. CRAIG, *The Lisbon Treaty: Law, Politics and Treaty Reform*, Oxford, 2013, p. 132-133.

[277] Cfr. art. 1, Implementing Convention.

[278] Cfr. art. 6, ib.

manner[279], and should had remained limited to identity controls[280]. Moreover, even when controls were carried on grounds of public policy, safety and health, they had to be spot checks and, in any case, subjected to judicial control[281].

That Schengen and EC advancements in the management of borders and related ambits were meant to be complementary processes, although it was still not clear the modes and the time-table, emerges from the attention paid by the Implementing Convention to the relationship between the Schengen framework and Community Law. More precisely, these provisions seemed to have paved the way for the future integration of Schengen in the EC framework[282], establishing a hierarchy at the advantage of EC laws and of the object of completing the internal market[283]. Moreover, it was foreseen that the ongoing construction of «an area without [internal] frontiers» would led the Community to develop its proper rules on external frontiers and related ambits.

Specifically, mechanisms of coordination and avoidance of contrasts were provided by the last articles of the Convention. Accordingly, Schengen provisions would apply as long as they were compatible with Community law, and if Conventions were concluded among EC Member States to realise the internal market, Schengen parties could amend or replace the related provisions of the Implementing Convention accordingly, and shall adapt those in contrast[284]. The content of art. 134, in particular, has raised the question of the compatibility of the Schengen *acquis* with human rights obligations assumed by the Community, especially as regards the respect of the European Convention of Human Rights, or with the 1957 European Agreement on Movement of Persons[285], to which the Schengen Convention made no reference[286]. Problems have arisen, in particular, in relation to family members of Community citizens and refugees which were third-country nationals, in relation to which was not clear what rules would apply when crossing Schengen borders. Instead, as regards asylum seekers, it is the 1990 Dublin Convention, determining the state responsible for examining

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[279] ECJ, C-321/87, *Commission of the European Communities v. Kingdom of Belgium*, 27 April 1989, [1989] ECR 997, p.t 15.

[280] ECJ, C-68/89, *Commission of the European Communities v. Kingdom of the Netherlands*, 30 May 1991, [1991] ECR I-2637, p.t 11.

[281] D. O'KEEFFE, cit., p. 9-10.

[282] However, at that time, the Schengen framework, in the light of the poor developments achieved by the Community, both by EC institutions and through intergovernmental cooperation, was also seen as a possible alternative to the Community and not as a model or as an forerunner.

[283] J. J. E. SCHUTTE, cit., p. 566.

[284] Cfr. arts. 134, 136 and 142, Implementing Convention.

[285] European Agreement on Regulations governing the Movement of Persons between Member States of the Council of Europe, Paris, 13.XII.195.

[286] Nevertheless the Implementing Convention made reference to at least twelve Treaties, and in particular to the EEC Treaty and to the 1951 Geneva Convention on the status of refugees and to the 1967 New York Protocol. Cfr. Preamble and arts. 28 and 135, Implementing Convention. F. W. HONDIUS, cit., p. 303.

applications lodged in one of the EC member states, and, in turn, provisions of the Implementing Convention dealing with the assignment of responsibility for processing asylum applications lodged within the Schengen area[287], which were liable to pose some concerns on human rights protection[288].

3.2. From Maastricht to Amsterdam.

In the meanwhile, the process that would led to the signature of the Maastricht Treaty at the end of 1992 was in progress. Decisive steps were taken towards an European Monetary Union and, following the 1990 Dublin European Council, on the basis of a Belgian memorandum and of a Franco-German initiative towards a political union. It was not by chance that these were the same EC member states that has initiated the Schengen process, which had as one of its *raison d'être* the advancement in areas where the EC process seemed to progress slowly. Thus, by the time in which negotiations among Schengen members were conducted and ended with the signature of the 1990 Implementing Convention[289], the, at time, twelve EC member states were discussing how to realise the internal market by December 1992, as set out by article 8a introduced by the SEA amending the EEC Treaty, and defined as «an area without internal frontiers in which free movement of goods, persons, services and capitals is ensured in accordance with the provisions of the Treaty»[290]. Indeed, the same month in which the Schengen agreement was signed, the Commission White Paper on «completing the Internal Market» was released, and contained the Commission proposals related to the advancement of free movement of persons[291]. Therefore, while trying to complete the framework for their economic cooperation, EC member states would have to deal with matters that go beyond it.

In this view, pre-Maastricht intergovernmental negotiations on external borders and movement of non-EC nationals across internal borders were conducted in view of realising free movement of persons as an essential element of the internal market[292]. An

[287] Cfr. arts. 28-38, Implementing Convention.

[288] D. O'KEEFFE, *The Free Movement of Persons and the Single Market*, cit., p.. 14-15; See also H. U. J. D'OLIVEIRA, *Fortress Europe and (extra-communitarian) Refugees: Cooperation in Sealing Off the External Borders*, cit., p. 172-182.

[289] The European Commission, like Italy, has been an observer to the negotiations of the Schengen Convention.

[290] Cfr. art. 13, Single European Act, OJ 1987 L 169.

[291] Commission of the European Communities, Completing the Internal Market, White Paper from the Commission to the European Council, Milan 28-29 June 1985, COM(85) 310, Brussels, 14 June 1985.

[292] Cfr. Political declaration by the Governments of the Member States on the free movement of persons, OJ 1987 L 169, p. 26.

Ad hoc Group on Immigration was established in 1986[293], and dealt with matters as asylum, external border controls and visas. This has elaborated the Dublin Convention determining the state responsible for examining asylum applications lodged in one of the Member states and a Convention on external borders. Instead, the Coordination Group on the Free Movement of Persons, set up in 1988, drew up the «Palma Document» approved at the Madrid European Council in 1989[294], containing measures on easing control at internal borders and reinforcing those at the external borders of the EC. Both groups acted outside the Community framework, i.e. at the intergovernmental level, since those were sensitive issues, seen as essential parts of home affairs and regarding internal security, therefore, matters on which member states were unwilling to renounce to their national sovereignty[295]. But, at least on asylum, EC members were able to advance in parallel with the Schengen process. The Dublin Convention[296] was signed by all Member states, excluded Denmark, in 1990[297], while the Convention on the crossing of external borders failed due to the lack of an agreement between the United Kingdom and Spain on the status of Gibraltar[298].

As anticipated, on movement of third-country nationals across internal borders questions were more, and more complex. From one side, it was obvious that abolish control at internal borders for EC-nationals would inevitably require to adopt common measures also on movement of non-EC nationals. However, the Community competence

[293] Yet in 1975, the TREVI Group, a cooperation group among Member states on, among other matters, fight against irregular migration and coordinate the fight against terrorism had been established, and was composed by Ministers of Home Affairs and Justice of the twelve EC Member States, in addition to external members as representatives of Canada and the United States of America. In 1985 its mandate was extended to comprise also international crimes. The group has been institutionalised by the Maastricht Treaty.

[294] Madrid European Council, Presidency Conclusions, Madrid 26-27 June 1989, DOC nr. 254/2/89, 27/06/1989, p. 6. The Palma Document compiled by the Coordinators Group - a group of senior national officials who report to the European Council - has had the merit to list all the relevant issues related to the abolition of external border controls, trying to somehow summarise the achievements of all the groups which were discussing on that matters. For the text of the document see E. GUILD, J. NIESSEN, *The developing Immigration and Asylum policies of the European Union,* The Hague, 2001, p. 443 ff.

[295] D. O'KEEFFE, *The Free Movement of Persons and the Single Market,* in *ELR*, 3, 1992, p. 6; F. W. HONDIUS, cit.. Cfr. General Declaration on Articles 13 to 19 of the Single European Act, OJ 1987 L 169, p. 25.

[296] The Dublin Convention assumed, differently to Schengen provisions on asylum applications, that internal borders were still present. Cfr. art. Dublin Convention OJ ; Further to the signature of the Dublin Convention, the European Council at Luxembourg stated that harmonisation of asylum laws should be pursued and that such harmonisation should be broadened in order to include also national immigration laws. Cfr. European Council Luxembourg,

[297] Denmark signed the Dublin Convention on year later: 13 June 1991.

[298] The draft of the «Convention on the crossing of external borders of the Member States of the European Communities» laid down admission conditions of third-country nationals to the territory of the EC Member States and a set of principles for the development of a common visa policy. However, it did not provide for the elimination of controls at internal frontiers.

to rule on this matter, already declared by the ECJ to fall partially outside them[299], was not at all clearly attributed[300], since it was not, in the first place, achieved a common interpretation among member states on what the concept of «internal market» entails. Thus, also because of this uncertainty, intergovernmental cooperation was preferred to the Community method. It has to be also noted, that the intergovernmental forum instead of the supranational, allowed member states not to delegate power to Community institutions, precisely, to the Commission, nor to be subjected to the ECJ control[301].

At the same time, the increasing migration flows of the mid-eighties and nineties towards European states, revealed the inefficiency of uncoordinated national immigration policies, and called for some form of coordination and further harmonisation, in the first place, of aliens entry conditions and visa policies[302]. The need of a «global approach», as an element of the Community external policy, was recognised by the Commission in its double communication on immigration and asylum of 1991, calling for joint measures at the EU level to deal with the immigration pressure, precisely to flows control and the adoption of integration measures towards legal migrants[303].

It is in the Treaty on European Union (TEU), signed in Maastricht in 1992 and entered into force the following year[304], that, for the first time, matters of visas, asylum

[299] The Court made clear that «in the present stage of development of Community law» notification and consultation on migration policies of Member States in relation to non-EC nationals «falls within the competence of Member States». Joined cases C-281, 283, 284, 285 and 287/85, *Federal Republic of Germany and others v. Commission of the European Communities*, judgment of the Court of 9 July 1987, ECR-03203, 1987, para. 30.

[300] The grounds on which it was possible to assume that the EC was not totally lacking competence as regards movement of non-EC nationals were articles 52, 59 and 48 SEA dealing with free movement of persons. In addition, also powers granted to the Council under article 235 in the view of realising the internal market could justify the adoption of measures on this issue, as already had happened in Regulation 1612/68, which personal ambit was extended to include third-country nationals which were family members of EC nationals. J.P.H. Donner, *Abolition of Border Controls*, cit., p. 21.

[301] P. CRAIG, *The Lisbon Treaty: Law, Politics and Treaty Reform*, cit., p. 333-335. See also J. WEILER, U. HALTERN, F. MAYER, *European Democracy and its Critique*, in J. HAYWARD, *The Crisis of Representation in Europe*, London, 1995, p. 29-30.

[302] The mention is to, e.g., the flows of Albanians towards Italy, and from Central and East Europe towards Germany. Not surprisingly, both were already part of the Schengen Area, and Germany, in particular, was one of the promoters within the intergovernmental Conference on Political Union which would led to the drawing up of the Maastricht Treaty, of the communitarisation of the immigration matter. F. LAURSEN, S. VANHOONACKER, *The intergovernmental Conference on Political Union - Institutional Reforms, New Policies and International Identity of the European Community*, Maastricht, 1992, p. 56. The European Parliament was gone even further commenting on the Schengen agreements and the Dublin Convention, by asking to insert immigration within the matters on which the Community would exercise exclusive competence.

[303] Cfr. Commission of the European Communities, Commission Communication to the Council and the European Parliament on Immigration, SEC(91) 1885 final, Brussels, 23 October 1991.

[304] The Maastricht Treaty entered into force in November 1993, after it had been, firstly, rejected by Denmark through referendum, to be consequently secured by the Danish Government after concession were made. This episode will be discussed more extensively in the fourth chapter. See D. CURTIN, R. VAN OOIK, *Denmark and the Edinburgh Summit: Maastricht with Tears*, in D. O'KEFFEE, P. M. TWOMEY, *Legal Issues of the Maastricht Treaty,* Chicster, 1994, p. 349-366.

and immigration were considered by member states to be of common interest[305]. Very relevantly, and staying in the background of the attempt of reconstruction of the relationship among individuals status of third-country nationals and EU citizens further proposed, those matters were considered as such «[F]or the purposes of achieving the objectives of the Union, in particular the free movement of persons[…][306]», thus establishing already between this embryonic version of the EU immigration policy and this fundamental freedom of the common market a connection and dependence in their reciprocal development, as the evolution of one was connected from this moment onwards to that of the other.

The Maastricht Treaty set the well-known pillar structure[307], where the three pillars jointly represent the EU, while the first stays for the European Community (EC)[308], the second pillar is devoted to the EU common foreign and security policy (CFSP), the third-intergovernmental pillar, thus staying outside the EC framework[309], is the Justice and Home affairs (JHA), corresponding to Title VI on the Treaty structure. It follows that the previous attitude of Member States in relation to the preferable framework within which that matters should be deal with did not changed. The sole ambit partially excluded, therefore included in the first-Community pillar, were rules setting a common format for visas and a visa blacklist[310]. Nevertheless, rules on crossing external borders and immigration policies - i.e. conditions of entry and movement, of residence, including family reunion and access to employment, measures to combat unauthorised immigration, rules on residence and work of third countries nationals on the territory of Member States - were two out of the nine matters of «common interest» listed by art. K(1) TEU, which included a form of cooperation, although limited, with EU institutions[311].

On JHA matters, Member States shall act to coordinate their action, informing and consulting one another within the Council[312] «[F]or the purposes of achieving the

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305 Cfr. art. K.1(3), TEC, OJ C 191, 29.7.1992.

306 Art. K.1, TEC.

307 A more detailed overview on the Maastricht Treaty, especially as regards free movement of persons within the process of construction of the internal market and the establishment of the EU citizenship, will be carried out in the third chapter when outlining the first and third phase of development of EU policies on persons movement.

308 Accordingly the EEC Treaty was renamed in Treaty establishing the European Community. Cfr. OJ C 224, 31.8.1992.

309 This solution was that proposed by the Luxembourg Presidency in 1991 within the framework of the Intergovernmental Conference on European Political Union.

310 Art. 100(c) and 100(d), Treaty on European Union, OJ C 191, 1992.

311 L. MANCA, *Immigrazione nel diritto dell'Unione europea*, Milano, 2003, p. 61.

312 This coordination had to take place within the JHA Council, with the involvement of the COREPER, the K4 group - the former *ad hoc* group on immigration - and other sectorial groups. Such heavy structure was criticised by the Council as a factor that would slow down the decision-making process.

objectives of the Union, in particular the free movement of persons»[313]. Measures - i.e. joint actions, joint positions, and the (only) draw up of Conventions, to be adopted by the Council[314], had to comply with the ECHR and the 1951 Geneva Convention relating to the Status of Refugees. The Commission was to be «fully associated» and, with the Member States, shared the power to take initiative in those matters, even though only Member States could make proposals concerning criminal cooperation, customs and police. In the end, a Coordinating Committee, so called, K-4, was set up to support the Council when dealing with JHA matters.

The differences in relation to first pillar matters as regards the role played by EU institutions, emerge more evidently in respect of the European Parliament (EP) and the Court of Justice. In fact, the role of the former was very limited, having only a right to be informed and consulted on the principal aspects of related discussions[315]. The EP had expressed its contrary opinion to such limitation, asking to be previously consulted in the decision making process, and to be made acquainted with the proposals of the Commission and Member States. As regards the ECJ jurisdiction, this was, in principle, excluded on third-pillar matters. Precisely, the Court's jurisdiction was foreseen, as a faculty for Member States, only to interpret, and to settle the disputes on the application of Conventions' provisions ex art. K.3(2)(c)[316]. The lack of any jurisdictional control on the remaining acts adopted perplexes particularly in relation to joint actions, the only binding acts that the Council could adopt, even more because third pillar matters had clear implications for the exercise of individuals' fundamental rights[317]. Finally, on the basis of art. K(9), closing Title VI, the Council, voting unanimously and acting on a Commission or Member States' initiative, could adopt acts on, among others matters, external borders and immigration with the first pillar procedure ex art. 100(c), through which provisions on visas were adopted already. Nevertheless, this, so called, «*passerelle* clause» has never been used during the Maastricht era.

Linger briefly on the the acts adopted under the above mentioned rules is useful in order to be aware of the directions took by the Community institutions, and of the

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[313] Art. K.1, TEU.

[314] A number of Conventions were agreed under the Maastricht Treaty rules, but none on immigration or external borders. Eight were on criminal law, customs and policing - but only five at last entered into force - and two on civil law.

[315] On a number of occasions the EP had complained about its scarce involvement in procedures aiming at adopting acts on third pillar matters, connecting its poor role with the already notice democratic deficit that characterised the third pillar. Cfr. p.t 3, European Parliament Resolution, Resolution on the Communication from the Commission to the Council and the European Parliament on immigration and asylum policies (COM(94)OQ23 — C3-0107/94), OJ 1995 C 269, p. 159.

[316] Five protocols on the Court of Justice were adopted in relation to the Conventions on Europol, Custom and Information System, fraud, service documents and parental responsibility.

[317]

approach chosen in the early stage of development of EU immigration policy. Moreover, being these matters also object of the Schengen agreements, similarities and influences were unavoidable. At last, an aspect worth of notice of the recommendations mentioned below, especially as regards the relationship among EU rules on persons' free movement and other related areas, was the exclusion from their personal ambit of application of citizens who were nationals of countries members of the EEA and their family members[318]. This said, the relevant acts on JHA matters adopted under Maastricht provisions were a series of Council Recommendations, and the 1994 Communication of the Commission «on immigration and asylum policies»[319] which, nevertheless, due to their non-binding nature[320], have had limited effects on Member States' laws and policies.

On the cross of external borders not significant steps forward were taken. In a 1993 Commission Communication a proposal for a Council decision to the adoption of a Convention on external borders, together with a proposal for a Regulation on visas policies, was presented ex art. K.1 TEU[321]. This was based on the already reached consensus among Member States on the issue in occasion to the 1991 failed draft Convention[322] due to the disagreement between the UK and Spain on the Gibraltar peninsula. However, this new proposal was not able to escape the same fate.

On irregular migration[323], nearby the restrictive approach adopted on admission of third-country nationals and their family members, the Commission did not detached itself from the framework adopted by Member States for the same aim, identifying in the prevention of entry, expulsion - as an *extrema ratio* solution to be adopted only when the voluntary return was not successful[324] - and readmission agreements, the main instruments to manage the illegal entry of migrants and its consequences. A succession of Council Recommendations followed with the aim to promote harmonisation of

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[318] E.g., art. 1, Council recommendation of 22 December 1995 on harmonising means of combating illegal immigration and illegal employment and improving the relevant means of control, OJ 1996 C 5, p. 1-3.

[319] Cfr. Commission of the European Communities, Communication of the Commission to the Council and the European Parliament on immigration and asylum, Brussels, 23 February 1994, COM (94) 23 final.

[320] Recommendations are, with regulations, directives, decisions and opinions, among the acts that the EU institutions can adopt to carry out their tasks. Recommendations has no binding force. Cfr. art. 288 TFEU (former art. 249 TCE).

[321] Commission of the European Communities, Communication of the Commission to the Council and the European Parliament (1) proposal for a decision, based on article K3 of the Treaty on European Union establishing the Convention on the crossing of external frontiers of the Member States […], Brussels, 10 December 1993, COM(93) 684 final.

[322] See *supra* note 297.

[323] Despite the issue of irregular migration present varies relevant bifurcations which deserve attention, the focus will be limited to those aspects more strictly related to the cross of external borders, thus to Schengen rules, and to the exercise of a work activity: expulsion, readmission, irregular labour. Therefore, the excluded ambits are acts on trafficking of human beings and marriages of convenience.

[324] Cfr. Communication of the Commission to the Council and the European Parliament on immigration and asylum, cit., p. 31-32.

national rules on controls on foreigners status, to enhance cooperation for the carry out of expulsion decisions already taken by member states, and for the adoption of readmission agreements with third countries as complementary instruments to limit irregular migration[325]. Particularly on the latter, a set of principles and modalities were determined by a number of Community acts, setting a framework for their content and procedural rules on the modes of carrying out the readmission. The ambit of application *ratione personae* of those acts comprised «persons who do not, or who no longer, fulfil the conditions in force for entry or residence on the territory of the requesting Contracting Party»[326]. This is worth to mention since this is a specular definition of the quoted «conditions in force for entry and residence» defining who is considered to be a legal migrant in the territory of the Community. As regards irregular labour, Council recommendations[327] suggested to attribute the power to control the legality of migrants' status before hiring them, and identified in sanctions to be imposed on employees of third-country national workers who did not possessed the necessary authorisation, the instruments through which contrast irregular work.

At last, provisions on visas have to be mentioned not only for the relevance of their specific content, but for its being in part a first pillar matter, thus they provide an overview of the changes that would take place as regard JHA matters with the Amsterdam Treaty, and also of problems that could arise when a matter is placed between two pillars. Using the power conferred by article 100(c) TEU - the Council could adopt an act following a Commission's proposal, after having consulted the EP - two Regulations, on a visa list and on a visa format, were adopted[328]. The visa list Regulation was annulled by the ECJ since the Council did not respected its duty to consult again the EP, whenever the act adopted deviated on substance from the Commission's proposal. However its legal effect was preserved until it was replace, in 1999, by a new Regulation having the same content[329]. Instead, on the power to adopt acts on visas under third pillar rules, a controversy arose between the Council and the Commission on a joint action on an air transport visa list, which was solved, in favour of the Council, interestingly, because those persons were not participating in the internal market, therefore they were not considered to have crossed the Community's external

[325] Council recommendation of 22 December 1995 on harmonising means of combating illegal immigration and illegal employment and improving the relevant means of control, cit.; Council recommendation of 22 December 1995 on concerted action and cooperation in carrying out expulsion measures, OJ 1996 C 5, p. 3-7.

[326] Art. 1, Council Recommendation of 30 November 1994 concerning a specimen bilateral readmission agreement between a Member State and a third country, OJ 1996 C 274, p. 20 - 24.

[327] Council Recommendation of 27 September 1996 on combating the illegal employment of third-country nationals, OJ 1996 C 304, p. 1–2.

[328] Regulation No 2317/95, OJ 1995 L 234/1; Regulation 1683/95, OJ 1995 l 164/1.

[329] Regulation No 574/99, OJ 1999 C L 72/2; Cfr. also ECJ, C-392/95, *EP v. Council*, 1997 ECR I-3213.

borders[330]. Nevertheless, unless the above mentioned acts, the visa policy was almost totally determined by the Schengen agreements, alike for practical measures on the abolition of border controls at internal borders, however being in force only for those EC member states which were party of such area.

The Amsterdam Treaty, signed in 1997, represented the real turning point[331] for the built of an EU common immigration policy. The adoption of rules aiming at regulating conditions of entry and residence of third-country nationals within the EU member states was one, among other components, of the newly established area of freedom, security and justice. In order to maintain and develop the Union as such - which was one of the objectives of the EU according to art. 2 TEU[332] - measured to assure freedom of movement of persons, and those related to this aim on external borders, asylum and immigration, as well as, to prevent and combat crime would be taken, in addition to other measures still on asylum and immigration, and safeguarding of the rights of third-country nationals[333]. To this aim, almost all issues part of the JHA-third pillar under the Maastricht Treaty, i.e visas, asylum, immigration and judicial cooperation in civil matters were transferred to the first pillar governed by the community method, becoming Title IV of Part III, specifically, arts. 61 to 69 of the EC Treaty.

The FSJ area was, thus, a sum of the former fist and third pillar matters as regards third-country nationals, even if, remained within the third-pillar, therefore governed by the rules applicable within it, the police matter and judicial cooperation in criminal matters. Finally, the Schengen *acquis* was integrated, by a Protocol[334], in the EC framework[335], and art. 100(c) and 100(d) of the Maastricht Treaty were repealed. In addition to not having transferred all the listed matters ex K.1 TEC under Maastricht to the first pillar under the Amsterdam Treaty, member states retained also relevant powers as regards the maintenance of law and order, and the safeguarding of internal security

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[330] ECJ, C-170/96, *Commission v. Council,* 1998 ECR I-2763.

[331] However it did not have a revolutionary importance as under many aspect member states managed to maintain a significant portion of their prerogatives in former JHA matters. B. MELIS, *Negotiating Europe's Immigration Frontier*, The Hague, 2001, p. 3.

[332] The pursue of this objective was recalled by the art. 3(d) TEU which foreseen the adoption on «measures concerning the entry and movement of persons as provided for in Title IV».

[333] Art. 61 (a) and (b), EC Treaty.

[334] Protocol integrating the Schengen acquis into the framework of the European Union, OJ C 340, 10.11.1997, p. 93; Cfr. also 1999/435/EC, Council Decision of 20 May 1999 concerning the definition of the Schengen acquis for the purpose of determining, in conformity with the relevant provisions of the Treaty establishing the European Community and the Treaty on European Union, the legal basis for each of the provisions or decisions which constitute the acquis, OJ L 176, 10.7.1999, p. 1–16 .

[335] P. KUIJPER, *Some Legal Problems associated with the Communitarization of Policy on Visas, Asylum and Immigration under the Amsterdam Treaty and Incorporation of the Schengen Acquis*, in *CMLR*, 2000, 37, p. 345.

untouched by Title IV provisions. Furthermore, for an emergency situation provoked by a «sudden inflow» of non-EU nationals, a mechanism was provided: on the basis of a Commission proposal, the Council, by qualified majority, could adopt measures on the issue with a duration of six-month maximum[336].

The Council was the institution in charge of adopting, in a five-year period from the entry into force of the Treaty, the above mentioned measures, and precisely, ex art. 63(3), in these areas, among others, of immigration policy: entry to, residence in, and movement of third-country nationals in the EU member states territories. Significant was the last sentence closing the article, stating that member states as regards the above mentioned Community measures were, nonetheless, allowed to maintain or introduce national measures as long as they were not incompatible with those adopted at the Community level. This space left to member states' future and present discretionary power when dealing with migration of non-EU citizens was, in part, necessary as, obviously, Community measures and objectives in the field of immigration would overlap with those already in place at the national level, pursuing national objectives in accordance with national visions on migration. However, the other (negative) side of this concession and realistic assumption was that the duality in the management of (mostly economic) migration of third-country nationals, and the tensions between the community and, after the EU, and member states policies would be never eliminated, going to the detriment of the coherence, firstly and foremost, of the EU policy and of, most importantly, the achievement of its objectives in this field. The basis on which this last affirmation has been made will emerge with more evidence from the analysis of the low use of the status and deficient transposition of the related Directives adopted over time in the attempt to build the EU immigration policy.

Relevant is to linger over the procedure through which those measures had to be adopted, in connection to what has been stressed above, as regards the role of the Council and member states, and the limited role of the EP in relation to JHA matters under Maastricht rules. Measures in areas listed in art. 63 had to be adopted ex art. 67, i.e. during a transitional period of five years, on a Commission proposal or member states' initiative, Council decisions were subjected to unanimity vote, and could be adopted after having (only) consulted the EP. These procedures and rules would remain applicable irrespectively to the end of the transitional period, to a possible Council decision to extend the ECJ jurisdiction according to the procedure ex art. 251 EC to all or part of Title IV matters. A part from this, expired the transitional period, the co-

[336] Art. 64(1), and (2), TEC.

decision procedure applied[337]. Importantly, member states' power of initiative on these matters would remain fundamental, since even after the expiration of the transitional period, the Commission would have to consider all requests to submit a proposal to the Council coming from member states ex art. 67(2). However, this possibility was never used.

If confronted to the situation under Maastricht rules on the extension of the ECJ jurisdiction on JHA matters, under the Amsterdam Treaty a progress was, undeniably, made. Preliminary rulings could be addressed to the ECJ only by nationals courts or tribunals against whose decision there were not judicial remedy at the national level, and the jurisdiction was completely excluded as regards measures on control on persons when crossing internal borders on the basis of the power conferred to member states ex art. 64(1). i.e. to maintain the law, order and internal security. Thus, despite the progresses in relation to the previous situation, the criticisms and exigencies of accountability that were at the basis of the request to move those areas to the first pillar, in the first place concerns on persons fundamental rights, have not been sufficiently addressed. Even more, if we consider that the integration of the Schengen *acquis* within the Treaty framework - which had raised concerns on respect of fundamental rights previously by itself - and if we recall the fundamental role played by the ECJ in protecting EU citizens' rights when exercising free movement rights as workers before, and as EU citizens after[338].

3.3. From Tampere to Stockholm and beyond.

Despite the (however fundamental) Treaty amendment and novelties saw above, the real driving force of the development on an EU immigration policy were the multi-annual programmes on which the European Council would agreed every five years, starting from 1999, setting the agenda and the principles that, from time to time, would guide the development of the AFSJ, adapting the instruments and the objectives to the changing contexts.

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[337] Rules regarding the release of visas for periods of up to three months were subjected to derogations to this timeframe. Those rules on the list of third-countries whose nationals were exempted or must be in possession of a visa, and on a visa uniform format were subjected to the co-decision procedure already from the entry into force of the Treaty; instead, those on procedure and conditions for the issuing of visas and on rules as regard the uniform format, would be adopted following art. 251 after the transitional period. Cfr. arts. 62(b) and 67 (3) and (4), TEC.

[338] A proposal of the Commission in this sense was made in 2006, and found place in the Lisbon Treaty. Cfr. Commission Communication, Adaptation of the provisions of Title IV of the Treaty establishing the European Community relating to the jurisdiction of the Court of Justice with a view to ensuring more effective judicial protection, COM (2006) 346, 28.6.2006. P. CRAIG, *The Lisbon Treaty: Law, Politics and Treaty Reform*, cit., p. 335.

In Tampere, Finland, the first European Council completely devoted to AFJS matters took place[339], and the political priorities as well as deadlines to the achievement of the objectives were established for the next five years. Despite the numerous difficulties in effectively realise the proposed goals, this first programme set down the guidelines that would lead the development of the EU immigration policy in the next decades and programmes. The aim of the analysis of the legal status of third-country nationals and EU citizens proposed below is precisely an attempt to show how these principles have tried to be transposed in single pieces of legislation and, more importantly, in the interaction among them. In details these guiding principles are all contained in the III part of Conclusions on «Fair treatment of third-country nationals»: to those third-country nationals legally residing, fair treatment should be ensured, and rights and obligations comparable to those of EU citizens should be the aim of a «more vigorous integration policy»[340].

Strictly connected to the previous point was that regarding the legal status of third country nationals, nonetheless with some slight difference but, we believe, revealing. If above the content «fair treatment» objective was identified with the grant of comparable rights to those of EU citizens, thus assuming this status as parameter and status to match, below the parameter of the approximation of legal status were that of Member States' nationals. The category of third-country nationals considered is in both cases those legally residing, although as regards this second point it was further specified, and consequently the category was further restricted, that the residence should have been for a determined time and to be granted such a status (only) to those holding a long-term national resident permit. But again, the definition of the content of this «approximation» was identified in a «a set of uniform rights» and the parameter again shifted to Union citizens status and not to that of Member States' nationals as above.

These were identical to those rights which stays at the basis of EU citizen free movement rights as workers before, and as Union citizens after[341], however with a fundamental exclusion: the right to reside, work and receive an education, and not to be discriminated in relation to nationals of the member state of residence were mentioned (as examples), thus the list was not exhaustive, nevertheless the right to move across member states was not mentioned. In the end, it was somehow implicitly recognised the undeniable higher protection granted by citizenship, in stating that to this selected category of third country nationals the possibility to naturalise or anyhow obtain the

339 Tampere European Council, Presidency Conclusions, 15-16 October 1999, SN 200/99, Brussels.

340 Para. 18, supra note above.

341 They were, in this sense, identifies, as the «EU fair and near-equality paradigm». The latter coupled with the security of residence are principles which can be found in the Community discourse from the 1970s. S. Carrera, *In Search of the Perfect Citizen? The Intersection between Integration, Immigration and Nationality in the EU*, The Hague, 2009, p. 49.

citizenship of the Member State of residence should be provided[342]. Finally, the necessity to approximate national legislations on conditions of entry and residence of third-country nationals was foreseen. It was specifies that this had to be done previously assessing the Union and countries of origin economic, demographic situations, and member states reception capacity and the «historical and cultural links with the countries of origin».

The first act, part of those concrete steps that were going to be taken to realise the Tampere principles, was the Commission Communication of the following year which was, actually, mainly focused on immigration, and, precisely, economic migration of third-country nationals[343]. Still, this was preceded by significant proposal of the Commission already related to the realisation of the EU immigration policy. The most relevant were those proposals to extend Regulation (EEC) No 1408/71 and Regulation (EEC) No 1612/68 on freedom of movement for workers to third-country nationals[344], and the proposal of a directive on family reunification[345]. Excluded the latter proposal, which justification laid in being the family reunion channel the most relevant, in quantitative terms, mode to enter in EU member states territories and by the circumstance that the EU become to adopt its proper legislation on this aspect of immigration already within the regulation of workers free movement and their rights of family reunion, as the derived rights conferred by possessing this status to their family members.

It definitely worths a detailed overview of this act since it provides an explication of concepts and objectives that were left undefined by the Tampere programme, in addition to the establishment of important connections among other relevant fields of Community policies, such as persons freedom of movement. It was recognised that the above programme and the Treaty amendments analysed above on immigration have confirmed the emancipation of the immigration matter from its role of ancillary policy in relation to EU citizens free movement and to ease the functioning of the Single Market. Especially, on economic migration, it was acknowledged that it needed to found legal channels and «an open and transparent» regulation at Community level, in parallel with a coordination of member states policies already in place. The adoption of measures

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[342] Para. 21, Tampere Presidency Conclusions.

[343] Communication from the Commission to the Council and the European Parliament on a Community immigration policy, COM (2000) 757 final, Brussels 22 November 2000.

[344] Cfr. Proposal for a Council Regulation amending Regulation (EEC) No 1408/71 as regards its extension to nationals of third countries (COM (97) 561 final; Proposal for a European Parliament and Council Regulation amending Council Regulation (EEC) No 1612/68 on freedom of movement for workers within the Community (COM (98) 394 final.

[345] The original version of the Proposal had been issued on 1 December 1999 (COM (1999) 638 final) and had been slightly modified on 10 October 2000 (COM(2000) 624 final), and was in the end followed by the Amended Proposal for a Council Directive on the Right to Family Reunification (COM(2002) 225 final).

aiming at achieving these scopes would permit to, first, reduce the use of others illegals channels of entry by economic migrants, illegal work and exploitation of third-country nationals[346]; second, to address labour shortages of both skilled and unskilled workers in a more thoughtful way and in order to meet long-term needs, considering the quick and always evolving situation of nationals and EU labour markets[347]. Nevertheless, the Commission was aware of the profound differences among member states policies in this fields, not only in the objectives to be pursued in channeling economic migration from third-countries, but also in the reaction of national host societies and political leaders, which clearly impacted on nationals integration policies, a basic part of the EU policy on immigration.

The following proposal of the Commission would focus firstly on setting an EU framework on admission conditions. Stated that the task to determine the needs of every national labour market in relation to the various categories of third-country national workers was left to member states, these acts would regards entries for the exercise of employment, self-employment or unpaid activities, and for study or vocational training.

As anticipated before, the proposals would consider national policies and concepts already applied by member states, leaving the necessary space for adaption to national contexts and policies within the Directives' framing. Interestingly was the accent put on the need of an increased mobility across the EU of migrants, and the use of the duration of the legal residence as a parameter on which basis a gradual increase of rights and of their security should be provided. Therefore, a double track was depicted: one for temporary workers - «who intend to return to their countries of origin» - another for those who want to stay to which a permanent status should be provided at the EU level. The interest stays in the apparent contradiction, or at least tension, between the above mentioned concepts: at one side, the value of mobility of the labour force represented by third-country nationals economic migrants was recognised, and will be translated in granting movement rights to certain (high skilled) economic migrants whose economic activities performed were considered to be valuable, and more in line than the unskilled labour, with the EU future economic objectives. At the other side, the reliance on a - as clearly stated - national concept, i.e. to attach greater and more secure rights of non-nationals to the length of their (legal) residence on the national territory, as it was a sort of price for the loyalty demonstrated through sedentariness. Perhaps the contradiction becomes even more evident if we recalled the initiatives already taken by the Commission previously to the Communication, which aimed at extending to third-country nationals fundamental pieces of legislation in the development of EU citizens

[346] Communication […] on a Community immigration policy, cit., p. 14.
[347] Ib., p. 15.

workers free movement such were Regulation (EEC) No 1408/71 and Regulation (EEC) No 1612/68.

At last, the Commission has lingered over integration of third-country nationals, seen as a component of the fair treatment, despite the Community has not competence on the matter. In fact, no reference would be made to integration in the two first proposals that would have been made on family reunification and long-term resident status[348]. For our purposes, the mention of the concept - not defined - of civic citizenship - to be recalled later on - to which the Charter of Fundamental rights would provide a reference, was significant, even more since its acquisition was described as a possible first step in the acquisition of a member state nationality[349].

Despite the dense and pressing plan, the first acts realising it would be adopted only in 2003. Before, the advanced proposal dealing with conditions of entry and residence for paid-employed and self-employed economic activities - that would became the 2011/98/EU Single Permit Directive[350] - was not adopted and the process stopped after the first reading by the Council, despite having received positive response of other EU institutions involved in the process[351]. However, in 2003 other fundamental acts to the development of the EU immigration policy were adopted: the 2003/86/EC Directive on the right to family reunification[352], as amended for the third time, and the 2003/109/EC Directive concerning the status of third-country nationals who are long-term residents[353]. An action for annulment was brought against the Family Reunification Directive by the European Parliament in December 2003, claiming that the derogations allowed by the directive to some obligations imposed were not in compliance with fundamental rights. The judgment was released only in June 2006, and it worth to mention as these derogations regarded integration conditions which fulfilment member states were allowed to demand to third-country nationals family members. The Court, on the contrary, found the provision not to be in breach of fundamental rights, even though it provided member states with indications on how integration conditions should be

[348] More extensively on integration S. CARRERA, *In Search of the Perfect Citizen?,* cit., p. 52-54.

[349] Communication […] on a Community immigration policy, cit., p. 19-20.

[350] Directive 2011/98/EU of the European Parliament and of the Council of 13 December 2011 on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State, OJ L 343, 23.12.2011, p. 1–9. See para. 5.1 below.

[351] Cfr. Opinions of the: European Parliament of 12.2.2003 (A5-0010/2003); European Economic and Social Committee of 16.1.2002 (SOC/084, CES 28/2002); Committee of the Regions of 13.3.2002 (CdR 386/2001).

[352] Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification, OJ L 251, 3.10.2003, p. 12-18. An action for annulment was brought against this Directive by the European Parliament in December 2003. The judgment was released only in June 2006,

[353] Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents, OJ L 16, 23.1.2004, p. 44–53.

interpreted[354]. At last, the above foreseen extension of Regulation 1408/71 on social security schemes to applied to employed persons and their family members was extended to third-country nationals by the Council Regulation (EC) No 859/2003[355].

Some months before that same year, a new Communication was produced by the Commission and this time focused on integration of third-country nationals[356], on the basis of the principles affirmed within the, so called, «Lisbon strategy», setting a new strategic goal for the next decade to come: «to become the most competitive and dynamic knowledge-based economy in the world, capable of sustainable economic growth with more and better jobs and greater social cohesion»[357]. The link existing among immigration, integration and employment policies was quoted as an element that influence their overall effectiveness. Recalled the instruments adopted on the basis of the previous communication, now the proclamation of the Charter of Fundamental rights, although just as a political non-binding declaration in December 2000 at the Nice European Council, could be added as a relevant instrument, as providing a series of rights irrespectively of nationality that would surely contribute in filling with content third-country nationals status. Moreover, still at the European Council in Nice, third-country nationals were identified as one of the categories particularly vulnerable as regards social exclusion and poverty. Specifically on economic migration, it was pointed out that it could contributed to solve labour shortages in specific sectors of nationals labour markets, but it should provide ways though which migrants with the appropriate skills were provided with easiest access to that particular branches of the labour market. As regarded low skilled migrants, the Commission warned member states to not rely excessively on temporary or seasonal schemes to manage migration in order to prevent migrants to settle, since these proved not to be effective in the past, and could turned into a source of illegal migration[358].

The next year, as foreseen, the 2004/114/EC Directive on entries for the purpose of study[359] was adopted, followed by the 2005/71/EC Directive on entries for the

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[354] ECJ, C-540/03, *European Parliament v Council of the European Union*, 27 June 2006, [2006] ECR I-5769.

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

[356] Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions on immigration, integration and employment. COM (2003) 336, 3 June 2003.

[357] Lisbon European Council, Presidency Conclusions, 23-24 March 2000.

[358] Communication from the Commission […] on immigration, integration and employment, cit., p. 14-16.

[359] Council Directive 2004/114/EC of 13 December 2004 on the conditions of admission of third-country nationals for the purposes of studies, pupil exchange, unremunerated training or voluntary service, OJ L 375, 23.12.2004, p. 12–18.

purpose of scientific research[360]. Relevantly, as related events that surely has impacted on the further development of the EU immigration policy were the adoption 2004/38/EC Directive on the rights of citizens of the Union and their family members to move and reside freely within member states territories, and the 2004 sixth enlargement, with ten new member states joining the EU and immigration flows transforming into dynamics of internal mobility, in the beginning according to the transitional agreements, and which impact on national labour markets should be considered when framing future acts to be adopted. It is worth to note that the acts mentioned above and those to which reference will be made below adopted in the years 2004-2005 referred to the provisions on immigration as amended by the Treaty establishing a Constitution for Europe[361]. These have remained unchanged in the Lisbon Treaty, if we exclude the references to the ordinary legislative procedure through which acts on immigration shall be adopted[362].

In fact, that same year the next multi-annual programme on the AFSJ development was framed. Endorsed by the European Council in Brussels in November 2004[363], it took the name of the «Hague Programme» and set the objectives and the timetable for the period 2005-2009. Before looking at the relevant parts of the new programme, fundamental is to mention that the Council has adopted a decision to apply co-decision and qualified majority voting to all fields listed in Title IV except precisely legal migration[364], to which, thus, the procedure ex art. 67(1) TEC would continued to be applied. The basis for the implementation of the Hague programme was provided in a further Commission Communication which set ten priorities related to its realisation[365], the fourth of which was «migration management». Because of the previous failure in the adoption of a legal framework on economic migration of third-country nationals, this was the specific focus of the devoted priorities of the programme, and highlighted the necessity to set criteria and procedures of admission at the EU level, as to provide a secure status and a related set of rights to migrants.

In the end, still in November 2004 on a Justice and Home Affairs Council Meeting, eleven «common basic principles for immigrant integration policy in the European Union» were established. Although integration is a member states' primary

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[360] Council Directive 2005/71/EC of 12 October 2005 on a specific procedure for admitting third-country nationals for the purposes of scientific research, OJ L 289, 3.11.2005, p. 15-22.

[361] Cfr. art. III-267, Treaty establishing a Constitution for Europe.

[362] Cfr. art. 79, TFEU.

[363] Brussels European Council, Presidency Conclusion, 4-5 November 2004, paras. 14-20.

[364] Council Decision 2004/927/EC of 22 December 2004 providing for certain areas covered by Title IV of Part Three of the Treaty establishing the European Community to be governed by the procedure laid down in Article 251 of that Treaty, OJ L 396, 31.12.2004, p. 45.

[365] Commission Communication: The Hague Programme: Ten Priorities for the next Five Years. The Partnership for the European Renewal in the Field of Freedom, Security and Justice, COM(2005) 184 final, 10.5.2005.

concern and duty, as national measures adopted in this ambit were passible to reflect on other member states and on the EU as a whole, these EU principles aimed at addressing future national actions in the matter along common lines and towards common objectives and to comprehend how to better realise them coordinating the actions of different actors at all levels[366].

The debate on the issue was then enhanced through the adoption of a Green Paper exactly on management of economic migration[367]. Within it were explored the possible measures to be adopted to regulate at the EU level admission of third-country national economic migrants, and the added value of an EU framework governing this field. These rules were seen as desirable, from the one side, to avoid the use of alternative illegal channels to entry and to access to nationals labour markets, on the other, they were necessary in order to make immigration really one of the tools to address the consequences of demographic decline and ageing on EU economy and on its competitiveness. A progressive approach was envisaged, where EU rules on admission should have been a «first step legislation»[368], despite leaving the necessity degree of flexibility to member states to adapt rules to the diverse national contexts, and without questioning that they remained those in charge of determining the number of migrants to be admitted.

The Policy Plan on legal migration[369], which adoption was programmed as following on the Green paper, identified in the efficient management of migration flow and phenomenon, which, beyond the economic aspects, comprised the related aspects of integration, employment and (fight against) illegal migration. Interestingly, the plan also recalled the necessity to take into consideration the application of the Community preference principle and of transitional measures regarding EU citizens of newly accession, which were liable to have an impact on national labour markets situations, and, we add, are factors furthers differentiating the status of third-country nationals and EU citizens across the EU.

The plan defined actions to be taken in the last three years of validity of the Hague programme, did not maintained the alternative view proposed in the paper between the adoption of an horizontal general instrument on admission of economic migrants and a sectorial approach through acts targeted at specific categories of workers,

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[366] Council of the European Union, 2618th Council Meeting, Justice and Home Affairs, Brussels, 19 November 2004, Press Release, p. 15-24.

[367] Green paper on an EU approach to managing economic migration, COM (2004) 811 final, 11 January 2005.

[368] Ib., p. 5.

[369] Communication from the Commission - Policy Plan on Legal Migration, COM/2005/0669 final, 21.12.2005.

instead it opted for their joint adoption. These choice was justified by recalling the aversion of member states in relation to the sole horizontal framework, therefore a mixed approach - complementary measures: one providing a general framework, and four specific instruments - was judged to better meet that degree of flexibility that EU measures, to be applied in such diverse national contexts and to meet different needs, must have and provide. Therefore, a procedure for the release of a single work/residence permit was programmed, which main aim, according to the plan, was to provide a set of common framework of rights to third-country nationals already working and residing in an EU member state. The specific instruments were addressed common needs and interest of determined categories of workers which could be identifies beyond nationals differences. These were high skilled workers, seasonal workers, Intra-Corporate transferees (ICT) and, finally, paid trainees[370].

It is interesting to recall at this point the affirmation as regards the rights of economic migrants which was made in the Green Paper. Despite the confirmation of the principle of graduation and differentiation of rights in relation to the length of residence, of which the long-term resident status was brought as the paradigmatic example, it was stated that a secure status, with the inherent set of rights should have been granted regardless of the future intention of its holder to settle in one of the member states or to return or its home country, or, we add, to move across the EU. Secondly, and to be emphasised when the relation among the status will be analysed in details, that their were, before their adoption, described as being related and consequent one to the other, as ordered in a gradual scale.

Of these scheduled acts, in 2007, the proposals of the, to be named, Single Permit Directive and the, so called, Blue Card Directive[371] were made, and the latter was adopted in 2009[372]. In the meanwhile of its proposal and adoption, however, a further Commission Communication[373] was adopted on immigration in 2008, followed by the European Pact on Immigration and Asylum of the European Council[374].

[370] Ib., p. 6-8.

[371] Proposal for a Council Directive on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State, COM(2007) 638 final, Brussels, 23.10.2007; Proposal for a Council Directive on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment, COM(2007) 637 final, Brussels, 23.10.2007;

[372] Council Directive 2009/50/EC of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment, OJ L 155, 18.6.2009, p. 17–29.

[373] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A common immigration policy for Europe: principles, actions and tools, COM (2008) 359 final, 17 June 2008.

[374] Council of the European Union, European Pact on Immigration and Asylum, 13440/08, Brussels 24 September 2008, adopted on 16 October.

In this last Communication, preceding the adoption of the third multi-annual programme for the development of the AFJS, if compared with the previous Communications on the same issue, greater emphasis was put not only on the, already highlighted, fundamental relevance of immigration for the actual performance of the EU economy and for its competitiveness in the future, but also on the connections with integration and employment, where «access to the labour market» was seen as a «path to integration». Moreover, a common framework at the EU level was needed not only to achieve EU economic objectives thorough an effective management of migration, but also because «in an area without internal frontiers» national immigration policies were all unavoidably interconnected and capable of producing consequences on other member states. Therefore such potential external effects needed to be foreseen and coordinated, as possibly addressed towards the achievement of common framework objectives, which was described as a complementary instrument in relation to member states policies. Furthermore, worth of notice was the mention of the external dimensions of immigration policy. As already mentioned in the 2005 Green Paper and previous Commission Communications[375], one of the modes to better manage immigration at the EU level could not but be to cooperate with third-country of origin and transit of migrants, to consider the impact of the phenomenon of the development of sending countries and the role that non-institutional actors as migrants diasporas and communities could played. The external dimension of the EU migration policy, although, only focused on Africa and Mediterranean - as those were, at time, the regions from where the main flows came form - was specifically outlined within the «Global Approach to Migration» (GAM)[376], focusing on fight against illegal migration and human trafficking, and, as stressed above, cooperation with third-countries.

Recovering the already used «ten priorities» approach, the Commission grouped these issues of primary concern in three main categories: prosperity, solidarity and security. The issues classified under the «priority» label, aimed to spell out the lines along which the contribution of legal (economic) migration could bring to the EU

[375] Cfr. COM(2004) 412 and COM(2002) 703 and COM (2004) 811, p. 11.

[376] Council of the EU, Global Approach to Migration: Priority Actions focusing on Africa and the Mediterranean, Council Conclusions, 17 December 2005, 15914/05. See also Communication from the Commission, A Strategy on the external dimension of the Area of Freedom, Security and Justice, COM(2005) 491 final, Brussels, November 2005. The GAM is also supported by programmes of dialogue and cooperation with specific areas and countries: i.e. the EU partnership with African countries (so called Rabat Process Euro-African Dialogue on Migration and Development, started in 2006 with the Rabat Declaration and followed by the Dakar Declaration in 2011), with South-Eastern, Eastern Europe (Czech Republic, Hungary, Poland, Romania and Slovakia), and Central Asia, in addition to Turkey, with the Prague Process started in 2009, and followed by the guidelines set into the "Building Migration Partnerships" Joint Declaration of 2009. In adjunction to these processes we have also the Budapest process, a consultative forum, started in 1991 by Germany and arrived at its third phase. This platform of dialogue on the various aspects of migration is currently chaired by Turkey (with Hungary as co-chair) and have lastly (2010) expanded the interlocutors involved adding the so-called "Silk Routes countries" (Afghanistan, Bangladesh, Iraq and Pakistan).

economy: common EU framework providing «clear, transparent and fair rules», and a fair treatment through the approximation of third-country nationals status to those of nationals of member states. The guideline addressing the management of economic migration, considering the Community preference principle and member states autonomy in deciding the volumes of admission, had to be a needs-based assessment in order to meet labour markets requests of skills and shortages in specific sectors. Finally, the closing priority of the «prosperity» group was integration, to be developed further on the basis of the 2004 common principles. As regards «solidarity» priorities, emphasis was put on the interrelation among member states policies which, despite their different backgrounds, could not ignore the effects of those beyond national borders, therefore needed to be further co-ordinated[377]. In its conclusions, the Commission invited the European Council to back these principles.

This was, supposedly[378], done by the European Council in its «European Pact on Immigration». However, although «in the spirit and light» of the Commission Communication described just above, it organised its future action in «five basic commitments», the first of which was legal migration. Differently from the Commission, and comprehensibly, if we consider the composition of these institutions and their role within the EU architecture, it was stressed the that EU legal migration should be a (more) tailored policy, i.e. based on the needs and reception capacities determined by each member states. Furthermore, and marking the difference of the Pact from the previous Commission act, was the mentioned of the risks of disruption of social cohesions of member states of destination of migrants if the former reception capacities were not considered in the management of migration flows and in determining conditions of entry and stay of migrants. That the focus as the balance were more inclined towards member states exigencies, foreseeing a restrictive turn of national policies or implementation of EU policy, emerged also in points dealing with labour migration, family reunification and integration. If in relation to the first one the already mentioned «national labour market needs» symbolised this inclination, in the last two the effect could be said to be more evident as more than focused on the reciprocal actions that need to be taken by both migrants and the host member states, instead were listed a series of requirements to be fulfilled by migrants in order to benefit from the rights granted them by EU member states or duties to be accomplished[379]. At last, the pact had not only the aim at developing further the Commission Communication but also to

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[377] Communication from the Commission […] A common immigration policy for Europe: principles, actions and tools, cit., p. 5-10.

[378] On these discrepancies between the two acts although, supposedly, they should have been one the prosecution of the other, D. A. ARCARAZO, *The Long-Term Resident Directive as a Post-National Form of Membership. An analysis of the Directive 2003/86,* cit., p. 66-68.

[379] European Pact on Immigration and Asylum, cit., p. 5-6.

already set partially the basis on which the following AFSJ programme should have been build.

The end of 2009, nevertheless, was marked not only by the adoption of the next AFJS programme for the period 2010-2014, to be known as «the Stockholm Programme»[380], but also by the enter into force of the Treaty of Lisbon. The amendments of provisions dealing with legal migration are worth to be mentioned before since the Stockholm programme has been realised on the basis of the changes brought by this last treaty to the AFSJ. As well-know, the Lisbon Treaty has come to an end with the pillars structure, thus all AFJS matters are now grouped under Title V Part Three of the Treaty on the Functioning of the European Union.

Firstly, on the leading provision of the AFJS, art. 67 TFEU, relevant is the added mention of the respect, for fundamental rights and the different traditions of national legal systems and traditions in the development of the area. On decision-making procedure, fundamental is the, in the end, inclusion also of legal migration among the matters on which the Council decide with qualified majority voting and the ordinary legislative procedure applies ex art. 77 TFEU[381]. Moreover, also on judicial control the Lisbon Treaty has significantly changed the previous situation, and now the ECJ can exercise its jurisdiction fully in relation to all matters of Title V[382]. In the end, remembering the many times named interconnections among member states immigration policies and, thus, the necessity to share burdens and responsibilities several times present in Communications and followed EU Council acts on migration, worth to mentions is the provisions of art. 80 TFEU stating that principle of solidarity and fair sharing of responsibility shall be those guiding the policies of chapter 2 on policies on borders checks, asylum and immigration and their implementation. The major novelty contained in art. 79 TFEU, former art. 63 TEC, specifically dealing with immigration, is contained in para. 4, spelling out the role of the EU in relation to member states policies promoting integration as (just) providing support and incentives but avoiding harmonisation. Finally, the newly added art. 68 TFEU, at last recognised the leading role of the European Council in guiding the development of the AFJS, stating that it is the

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[380] The Stockholm Programme - An open and secure Europe serving and protecting citizens, OJ C 115, 4.5.2010.

[381] The unanimity vote and the consultation role of the EP, nonetheless, is still applicable in decisions on passports and identity cards. Cfr. art. 77, TFEU.

[382] However, those matters which were previously part of the Third Pillar - police cooperation and judicial cooperation in criminal matters - are subjected to transitional measures to be valid for the first five years after the enter into force of the Lisbon Treaty, i.e. the power of the ECJ remains unchanged, but they are not valid in case of amendment of a Third Pillar act after the enter into force of the Lisbon Treaty. Cfr. arts. 10(2) and (3), Protocol No 36 on Transitional Provisions.

institution in charge to provide the «strategic guidelines for legislative and operational planning» of the area.

Before the adoption of the new programme a new Communication of June 2009 on the AFSJ[383] was adopted. Within this, in particular, we find confirmed the principles to guide the future development of migration management within the EU, which more and more emphasises the relevance of the external dimension of those policies, a fundamental part of a comprehensive approach. Thus, migration towards the EU appears to be seen less and less as a one-way movement and a life-long decision but, on the contrary, as a phenomenon of which all dimensions should be jointly considered, in order to better understand its dynamics and to provide an effective framework of rules and instruments for its management at the advantage of all the actors involved. After saying this, the basic principles guiding the management and future actions as regards economic migration remained those already affirmed in the previous acts, therefore focused on member states labour markets needs and flexible schemes of admission, although significant is the mention of migrants intra-European mobility as an element that deserves attention. This means that the migration-development link as circular migration are considered as factors that should be considered when laying down EU instruments which attempt its to deal with economic migration of third-country nationals. These principles has to be added to the ever present necessity to provide uniform rights to third-country nationals comparable to those of EU citizens, to improve instruments dealing with family reunification and integration, described again as a result of the efforts of all actors involved.

On the basis of art. 68 TFEU, relying on novelties and changes contained in the Lisbon Treaty as regards the AFJS, and on its 2009 Communication on the AFSJ future, the European Council adopted the Stockholm programme. On legal migration for labour purposes, the programme supports and refers for the major part to what has been already affirmed in the previous acts, precisely, in the 2008 European Pact, recalling its five basic commitments, and on the just mentioned Communication. Even though, it was added that the efforts of matching better labour shortages with migrants skills are to be done also in the view to reduce the loss for migrants of skills and competences previously acquired. A determined reference is made also here to the family reunification

[383] Communication from the Commission to the European Parliament and the Council, An area of freedom, security and justice serving the citizen, COM(2009)262 final, Brussels, 10.6.2009. It has to be considered also the evaluation that has been done on the results achieved by the implementation and realisation of the Hague Programme. Cfr. Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, Justice, Freedom and Security in Europe since 2005: an Evaluation of the Hague Programme and Action Plan, COM(2009)263 final, Brussels 10.6.2009.

directive, and calls for its review, an action which possibility has been already mentioned in the European Pact[384]. As usually happens, these objectives have been detailed and declined in concrete actions to be done and proposals of acts to the adopted within an Action Plan aiming at implementing the Stockholm programme[385]. Followed proposals of two directives to be adopted on intra-corporate transfer of non-EU skilled workers[386], the other on seasonal workers[387]. In 2011, the, so called, Single Permit Directive was, in the end, adopted, and a public consultation on family reunification was started on the basis of a Green Paper[388], to end with the release of a set of guidelines provided by the Commission for a better application of the directive[389]. Moreover, other acts dealing with migration have been inevitably conditioned in their content by the necessity to answer to the challenges brought by the economic crisis started in 2008[390]. Consequently, both in its «Europe 2020» programme and within the new «Global approach on immigration and mobility» (GAMM) of November 2011, the EU Commission has increasingly stressed the role of economic immigration in the achievement of the EU long-term economic objectives[391].

At last, the moment to set again the priorities for the future development of the AFSJ has come, since 2014 was the last year for which the Stockholm programme was laid down. Therefore, preceded by a Commission Communication[392], released after

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[384] A first report on the implementation of the Family Reunification Directive was released at the end of 2008, pointing out integration measures as one of the requisites where the excessive low-level binding character of the Directive has led to an use by member states of their discretion that has lowered the standard of protection of third-country nationals to which the Directives applies. Cfr. Report from the Commission to the European Parliament and the Council on the application of the Directive 2003/86/EC on the right to Family Reunification, COM(2008) 610 final, Brussels, 8.10.2008, p. 7.

[385] European Commission, Communication on Delivering an area of freedom, security and justice for Europe's citizens Action Plan Implementing the Stockholm Programme, COM(2010) 171 final, Brussels 20 April 2010.

[386] Proposal for a Directive of the European Parliament and of the Council on conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer, COM(2010) 378 final, Brussels, 13.7.2010.

[387] Proposal for a Directive of the European Parliament and of the Council on the conditions of entry and residence of third-country nationals for the purposes of seasonal employment, COM(2010) 379 final, Brussels, 13.7.2010.

[388] Green Paper on the right to family reunification of third-country nationals living in the European Union (Directive 2003/86/EC), COM(2011) 735 final, Brussels, 15.11.2011.

[389] Communication from the Commission to the European Parliament and the Council on guidance for application of Directive 2003/86/EC on the right to family reunification, COM(2014) 210 final, Brussels, 3.4.2014.

[390] European Council Conclusions, 26-27 June 2014, cit., Annex I, p. 14.

[391] Communication from the Commission, *EUROPE 2020. A strategy for smart, sustainable and inclusive growth*, Brussels, 3.3.2010 COM(2010) 2020 final; Communication from the Commission to the European Parliament, the Council, The European economic and social Committee and the Committee of the Regions, *The Global Approach to Migration and Mobility* {SEC(2011) 1353 final} Brussels, 18.11.2011 COM(2011) 743 final.

[392] Communication from the Commission to the European Parliament and the Council, the European Economic and Social Committee and the Committee of Regions, An open and secure Europe: make it happen, COM(2014) 145 final, Brussels 11.3.2014, p. 3.

having carried out a broad consultation process[393], the EU Council has defined the new strategic guidelines for the future development of the AFSJ[394]. As regards legal migration, by both the Commission and the Council, it is emphasised the necessity to better implement and effectively transpose the legal instruments already in place, as well as to better coordinate all those policies that deal with the different aspects of movement across borders: access to the labour market, work conditions, border controls and integration. More in general, it is highlighted the role that migration has, and that should be increased, in addressing EU demographic concerns in the near future, and, as instrument to foster the EU growth[395].

4. *The multi-level dimension of the EU labour migration policy.*

The attempt of the previous paragraph has been to provide a, as much as possible, complete outline of the context within which the legislation aiming at regulating the status of individuals in the EU have been conceived and, subsequently, adopted. As emerged, EU legislation as regards mobile EU citizens and third-country nationals economic migrants are products of different moments of the EU integration process. However, their development has come closer over time, and more and more after free movement of persons - i.e. of Union citizens - and EU competences on economic migration of third-country nationals have been reunited under the same roof of the FSJ area. Moreover, as has been described above, acts that were originally adopted to regulate free movement of workers across the EU in the beginning of the development of the Community, was, then, extended to protect third-country national worker rights (e.g. Regulation No 1408/71 and 1612/68). More generally, since we are similarly referring to migration regimes determined at the EU level both as regards EU legislation on third-country nationals and EU citizens, with the obvious distinctions based on nationality and on their diverse historical background, common elements and connections are present.

In fact, a series of continually present concepts results from the overview of the acts of EU institutions intervened over time to define the guidelines and the objectives of an EU policy aiming at regulating migration of third-country nationals for economic purposes. These are - and have not been distorted in their substance from the Tampere programme, thus are present from the beginning of the development of an EU

[393] With the aim to determine the main points on which the future multi-annual programme will have to focus was launched at the end of 2013 the public consultation entitled «Debate on the future of Home Affairs policies: An open and safe Europe – what next?» with the aim to «to collect opinions with a view to contribute to the Commission Communication on the New Agenda for Home Affairs», at http://ec.europa.eu/dgs/home-affairs/what-is-new/public-consultation/2013/consulting_0027_en.htm.

[394] Communication from the Commission […] An open and secure Europe: make it happen, cit., p. 10.

[395] Ib., p. 2 and 19.

immigration policy - firstly, to provide an EU flexible framework to allow the matching between migrants skills and competences with member states labour market needs through the definition at the EU level of criteria and procedures of admission. As will emerge from the status analysed below, labour shortages regard high skilled as unskilled jobs. This effort has been carried out always considering that member states are the only in charge of determining numbers of admission, and that the Community preference clause applies, privileging EU citizens first, and consequently third-country nationals who are from a longer time present on the territory of an EU member state. Therefore, a series of status were provided to differently categories of economic migrants who are third-country nationals, providing beyond the criteria and procedure for their admission, a set of rights of which they can benefit from. As will be highlighted, the differences among these status are based, on the one hand, on the principle of length of residence on the territory of an EU member state, on the other, it seems on the utility of the specific category of economic migrant to the achievement of the EU economic objectives, especially those foreseen in the Europe 2020 strategy.

The principle of length of residence and content of the status guides is relevant also for the second concept that has been remarked along the whole history of the EU migration policy, i.e. the necessity to treat fairly third-country nationals by providing them with secure status, irregardless of their future intentions, but, more importantly, by approximating their status to that of citizens of the Union, an actions that is presented as an instrument of integration. It is worth to mention that the parameter towards which the approximation of status should be conducted varies between that of «member states' nationals» and «EU citizens». It is certainly possible that both references were and are made having in mind the latter, i.e. EU citizens, and not on the national variants of those status that we find at member states level. Therefore, having in mind those principles and the historical development, from the one side of the Union citizen status, from the other side of the EU policy on (economic) migration, the analysis proposed will attempt to understand how and if the objectives of the EU in framing it immigration policy in relation to labour migration has been realised, looking at how those above mentioned concepts reflects on the status granted to third-country nationals and on the relations and consequentialities established among them.

If the multiplicity of status attributed to third-country nationals economic migrants is coherent with the guidelines for the development of this ambit of the AFSJ, and is immediately perceivable from the sole observation of EU laws on labour migration, in a similar way, but less obvious, since it was depicted as a uniform status, is

internally framed the Union citizen status as well[396]. The elements on which basis all these status are internally distinguished are common: the exercise (or not) of an economic activity that justify the entry and residence within the territory of an EU Member State and the length of legal residence within the same territory. Furthermore, it appears that, for both categories of status, these elements stay in an inverse proportional relation: with the increase of the length of residence, formally decreases the relevance of the exercise of the economic activity.

On the basis of these common characteristics, these status are connected and can be considered to be consequent one to the other. Consequently, it is possible to order them along a growing scale that starts with the less privileged and ends with the most privileged status. The position on the scale is assigned by considering what are the necessary conditions to acquire the status, what rights are attached to it, in what fields and with what extension their holders are entitled to equal treatment rights vis-à-vis nationals of the member state of residence, and, in the end, what is the level of protection against expulsion from - differently said what is the security of residence in - the member state in which the holder lawfully resides.

In addition to the shared structure among the just mentioned status and their connections, emerges a second significant element which confirms the possibility to identify a specific EU dimension in the management of economic migration: this is the role that the citizen status plays and the relevance that it has within the EU labour migration policy. In fact, EU laws regarding third-country nationals status always refer to nationals' treatment or to the Union citizen status as the arrival points towards which the approximation of the above mentioned status should be conducted. Thus, third-country nationals' status are connected and valuable also on the basis of their degree of approximation with the (Union) citizen status. However, as it emerged above and will be lately examined closely, this parameter and status is itself internally divided into multiple status which, as the previous, privilege those citizens of the Union exercising an economic activity - although not distinguishing them into different categories anymore - and, in any case, requires the fulfilment of determined requirements in order to benefit from the right granted. Finally, these status altogether draw a path to be followed by third-country nationals, starting from the more general (less privileged) status to the acquisition of the most privileged at the EU level, the Union citizenship. This path, considered the derivative nature of the Union citizenship, inevitably has to take into

[396] In referring to the status conferred to Union citizens, we are mainly referring to the right to move and reside conferred to them and to their family members by the 2004/38/EC directive. Therefore, the remaining rights attached to the EU citizenship, above all political rights, are not taken in consideration in this paper. take into consideration only the situation of mobile-EU citizens and the rights of which they can benefit from. It will be explicitly said when this is not the case.

consideration the different modes in which third-country nationals could acquire the nationality of an EU Member State[397].

The unbalance of the status towards the citizen status, and the constant references to citizens' rights as a parameter on which the value of a status is measured, allow to suppose that the EU adopts in relation to its labour migration policy and, more generally, in framing the relation between migration and citizenship within the EU legal system, formally, a complementary approach: i.e. the access to better rights is provided through access to better status [398]. Secondly, the acquisition of more and more privileged status is seen as a sign, and a consequence of, a progressive integration and demonstrates the will to permanently settle in a determined territory[399].

As emerge from the analysis of 29 European states naturalisation policies and from their relations with integration policies, at the national level there is a «strong coherence across Europe between various integration policies and naturalisation policies», which is equivalent to say that in the majority of the states considered, the complementary approach prevails over the alternative approach: naturalisation is seen as a means to extend rights to non-citizens. By re-framing the complementary view in more general terms, we can say that a complementary approach is adopted when immigration policies and their relation with integration of foreigners rely on the assumption that the more a status is close, in term of security of residence and equal treatment rights, to the citizen status, the more it is valuable, and higher is the level of integration achieved by the third-country national who holds it within the state of residence. According to this more general framing of the complementary approach, the objective is to study the connections among the status attributed by EU directives to third-country nationals who are allowed to enter and reside in an EU Member State to pursue an economic activity, i.e. who are migrant workers, in order to demonstrate that the EU is formally adopting a complementary approach in structuring the relation between its immigration policy and the (Union) citizen status.

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[397] The interpretation of the relation among status as a path provided to third-country nationals to progressively integrate within the EU and to full membership was already pointed out by the Commission in 2003 and by scholars in relation to the long-term resident status. Cfr. European Commission, Communication on immigration, integration and employment, COM(2003) 336, Brussels 3.6.2003; R. BAUBÖCK, *Civic citizenship: a new concept for a New Europe*, in R. SÜSSMUTH AND W. WIDENFELD, *Managing integration: the European Union's responsibilities towards migrants*, Bertelsmann Stiftung, 2005, p. 130.

[398] Cfr. T. HUDDLESTON, M. VINK, *Membership and/or rights? Analysing the link between naturalisation and integration policies for immigrants in Europe*, RSCAS Policy Papers 2013/15, EUDO Citizenship Observatory, at http://cadmus.eui.eu/bitstream/handle/1814/28121/RSCAS_PP_2013_15rev.pdf?sequence=1; See also R. HANSEN, *The poverty of postnationalism: citizenship, immigration, and the new Europe*, in *Theory and Society*, 38, 2009, p. 1.

[399] C. JOPPKE, *Transformation of citizenship: Status, Rights, Identity*, in *Citizenship Studies*, 1, 2007, p. 40.

The following paragraphs focus on the EU legislation regulating labour migration of third-country nationals. In particular, the directives adopted in the field of labour migration will be studied in details, with a special attention to the rights that are conferred to the status' holders, the fields where equal treatment rights are granted and the level of protection against expulsion. Subsequently, the analysis will focus on the Union citizens' rights directive with the aim to highlight the differences, but above all the similarities, with the statutes hold by third-country nationals previously analysed.

The category of economically active migrants is composed by third-country nationals authorised to enter and reside for a variable amount of time in one of the EU Member States in order to pursue a, widely understood, economic activity. We consider included in this group all those categories of economic migrants which status are regulated by an EU directive adopted within the frame of the EU migration policy: seasonal workers, intra-corporate workers, single permit holders, researchers, blue-card holders, and long-term residents. Although the latter is not attributed explicitly to carry on an economic activity, being a general status, attributed, firstly, on the basis of the length of legal residence, it is a basic part of the EU immigration policy, and the status which better represents the complementary approach of the EU.

The EU labour migration policy will be analysed through the lens of the directives which regulate the status conferred to the above-mentioned categories of third-country nationals. Firstly, the focus will be on the EU directive which attributes the most general status among all, subsequently we will consider the other status whenever they provide a better treatment for specific types of third-country nationals workers. The aim is, once again, to highlight the preference that the EU legal order has for the individual, who can actively contribute to the growth and enhancement of the EU as a whole. The aim is to test the thesis which claim that the status that third-country national workers can possibly acquire within the EU are constructed in a way that a «linear progression» among them is recognisable.

4.1. The Single Permit Directive.

The first status and EU directive take into consideration is the Single Permit Directive, as it is the more general status than could be possibly attributed to a third-country national that enter and stay within the territory of an EU member states for work purposes. The long path for the adoption of the Single Permit directive can be seen as a symbol of the difficulties and the complexity that has always marked the legislative process and research of an agreement on issues regarding, in general, the migration of non-EU citizens. But it is also a sign of the necessity at the end of the Stockholm programme, to reflect on the usefulness and effectiveness of an EU labour migration

policy structured as it is now[400]. The relevant impact that a phenomenon as economic migration has on a large number of aspects for both EU and Member States legal systems and economies is tellingly represented by the difficulties that, for a decade, Member States have encountered in find an agreement on a common framework for regulate the entry and residence of third-country nationals workers[401]. Even in other branches of legal migration where was easier to reach an agreement, the vagueness of certain statements and, consequently, the high level of discretionary power left to Member States in not irrelevant aspects, demonstrate how much contested and fragile still is the EU migration policy[402].

Already in the 1999 Tampere programme was spelt out the necessity to provide a fair treatment to third-country nationals through the "approximation of national legislations on the conditions for admission and residence" , by carefully considering the specific characteristics and needs of each Member State on a number of connected aspects[403]. In spite of that, nothing resulted from the Commission's proposal on having a general framework on the conditions of entry and residence of non-EU citizens for purpose of work and self-employment, and the process was able to restart only in 2005, the Commission's Green Paper on economic migration[404]. Within the same and in the following opinion of EU Parliament were addressed both the implications of adopting a sectorial approach in labour migration policy, and the arguments in favour to opt for a general framework concerning the status for third-country nationals workers. At the end of the same year, the Commission Policy Plan tried to keep together both approaches by proposing the adoption of proposals for regulating sectorial status and one for a general

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[400] Cfr. Communication from the Commission to the European Parliament and the Council, the European Economic and Social Committee and the Committee of Regions, *An open and secure Europe: make it happen*, COM(2014) 145 final, Brussels 11.3.2014, p. 3. With the aim to determine the main points on which the future multi-annual programme will have to focus was launched at the end of 2013 the public consultation entitled «Debate on the future of Home Affairs policies: An open and safe Europe – what next?» with the aim to «to collect opinions with a view to contribute to the Commission Communication on the New Agenda for Home Affairs», at http://ec.europa.eu/dgs/home-affairs/what-is-new/public-consultation/2013/consulting_0027_en.htm.

[401] S. PEERS, cit., p. 385.

[402] Not only the texts of the directives mentioned were under some aspects too vague, but in more than one case they were not correctly or completely transposed within Member States legal systems. See, for example, the numerous acts adopted by the Commission in this regard on the implementation of the family reunification directive. Cfr. Report from the Commission to the European Parliament and the Council on the application of Directive 2003/86/EC on the right to family reunification, COM(2008) 610, 8.10.2008; Communication from the Commission to the European Parliament and the Council on guidance for application of Directive 2003/86/EC on the right to family reunification, COM(2014) 210 final, 3.4.2014; S. CARRERA, A. FAURE ATGER, E. GUILD, D. KOSTAKOPOULOU, *Labour Immigration Policy in the EU: A Renewed Agenda for Europe 2020*, CEPS Policy Brief, No. 240, 5 April 2011, p. 3-5, at http://www.ceps.eu.

[403] Cfr. Presidency Conclusions, Tampere European Council, 15-16 October 1999, p.t 20.

[404] Green Paper on an EU Approach to Managing Economic Migration, COM(2004) 811 final, 11.1.2005.

status[405]. A new proposal on a general framework aiming at regulating the status of third-country nationals workers was made in 2007 and recalled in the 2008 Pact on immigration and asylum[406]. However, only in 2010 the Council was able to agree on it: the Single Permit Directive was finally adopted in December 2011, and had to be transposed by Member States by the end of December 2013[407]. It is noteworthy that the adoption of this directive took place after the entry into force of the Lisbon Treaty, and the amendments brought at the decision making procedure were visible in the mode in which the EU Parliament has exercised its role of co-legislator[408]. Nevertheless, although the contribution of this EU institution has been perceivable during the discussion, it showed at the same time the persistent difficulties in finding an agreement on this matter at the EU level[409].

At the very beginning, the single permit directive states its instrumentality for the attainment of EU objectives in the field of labour migration of third-country nationals, which many times has been repeated: an inclusive growth to be achieved through a «forward-looking and comprehensive labour migration policy which would respond in a flexible way to the priorities and needs of labour markets»[410]. Secondly, it is found on the same basic elements on which all the other status given to third-country nationals, with variations in the degrees, are structured. Therefore, the positioning of this status and

[405] Communication from the Commission, Policy Plan on Legal Migration, COM(2005) 669 final, 21.12.2005. Furthermore, it is interesting to remember that in the same period (2004-2006) was under discussion the Directive 2006/123/EC on services in the internal market, in relation to which EU institutions were confronted with the fears coming from the recent enlargement towards central and eastern Europe countries. S. O'LEARY, *Free Movement of Persons and Services*, in P. CRAIG AND G. DE BÚRCA, *The Evolution of EU Law*, Oxford, 2011, p. 501-502.

[406] Cfr. COM(2005) 669, 21.12.2005; COM(2007) 637 and 638, 23.11.2007; Pact on Immigration and Asylum, Council doc. 13340/08, 24.09.2008.

[407] Directive 2011/98/EU of the European Parliament and of the Council of 13 December 2011 on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State, OJ L 343, 23.12.2011. All further references in this subsection are to this text unless otherwise indicated.

[408] In the meanwhile of the discussion process of the Single Permit Directive, the Stockholm programme was adopted, and emphasises the role of labour migration in contributing «to increase competitiveness and economic vitality» and that «[A]ccess to employment is central to successful integration». Cfr. Stockholm programme, cit., p. 29.

[409] Y. PASCOAU, S. MCLOUGHIN, *EU Single Permit Directive: a small step forward in EU migration policy*, EPC, 24 January 2012,at http://www.epc.eu/documents/uploads/pub_1398_eu_single_permit_directive.pdf; E. COLLETT, *Future EU policy development on immigration and asylum: Understanding the challenge,* Issue no. 4, Policy Brief Series, Migration Policy Institute, May 2014, 4, at http://www.mpieurope.org. The recent approval of both directives on seasonal and intra-corporate workers demonstrates that, notwithstanding the adoption of the single permit directive, there is not a will to abandon the development of a parallel sectorial approach. Cfr. Directive 2014/66/EU of the European Parliament and of the Council of 15 May 2014 on the conditions of entry and residence of third-country nationals in the framework of an intra- corporate transfer, OJ L 157, 27 May 2014; Directive 2014/36/EU of the European Parliament and of the Council of 26.2.2014 on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers, OJ L 94, 28.3.2014.

[410] Commission Communication, A strategy for smart, sustainable and inclusive growth, COM(2010)2020 final, Brussels, 3.3.2010.

the objectives that it pursues within the general framework formed by the sectorial directives previously adopted is immediately clear, and highlighted the connections among these elements by stating that equal treatment provisions are aimed at recognising the contribution that third-country nationals give to the Union's economy through their work and tax payment (r. 9), and that they are strictly linked to their legal residence and access to the labour market (r. 21).

The directive pursues a double objective: to simplify and harmonise national laws by providing a single application procedure and a combined title, and make the procedure more efficient and the control of the legality of both employment and residence easier. Therefore, its added value is to provide a unique procedure to obtain a permit to work and reside in an EU Member State and a common set of rights for third-country national workers. The latter are provided to close the «rights gap» between non-EU and EU citizens, but are guaranteed only to those who are already residing in an EU Member State, and who were admitted for work or other purposes, but in this last case are allowed to work (3.1, b and c, and 12.1). Thus, the combination of the efforts both procedural and of «closure of the rights-gap» should lead to a more coherent immigration policy and to a higher degree of integration which to be successful, according to the Stockholm programme, passes through access to employment[411].

The connections and interactions among third-country nationals multiple status emerges from the long list of those who are excluded from the personal ambit of application of the directive (3.2), notwithstanding the directive had been thought to provide a general framework. In fact, if some categories, as posted, intra-corporate or seasonal workers are excluded for being only temporarily or not even part of the EU labour market, others are excluded because, precisely, of their enhanced status. These are long-term residents, or those who on the basis of a specific status can benefit from free movement rights (3.2, a and b). Thus, we can infer that this is an element on which status are distinguished, and that identifies them as better status, if we consider that single permit holders have access to, and can freely move only in the territory of the Member State that has release the permit (11, b).

The single permit status is thought to be the basic status of third-country nationals entering and residing into the EU for work purposes. Therefore, we will focus on some aspects of the procedure and on the rights and fields where equal treatment is granted, with the aim to make easier to understand later on what basis the other status are considered to be more privileged.

For our purposes, the significant aspects of the procedure are the time limit within which the decision on the application shall be adopted and the relation between

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[411] Cfr. no. 16 above.

the single permit and the release of a visa. The competent authorities have a maximum of four months to adopt a decision, even if the time limit can be suspended if additional information or documents are required, or extended due to the complexity of the examination (5.2 and 4). Nevertheless, the release of a visa, if necessary, follows an independent procedure, and this can undoubtedly lead to further delays.

As previously said, equal treatment rights are granted only to certain single permit holders - i.e. those already residing in an EU Member State and initially admitted for work or other purposes (3.1 (b) and (c)) - in the fields of working conditions, freedom of association and trade union membership, recognition of qualifications, education and vocational training, access to good and services, tax benefits, social security, services provided by employment offices (12.1) and payment of pensions (12.4). This having said, these rights are subjected to limitations. Excluded the rights strictly linked with the work activity (working conditions, freedom of association and pension rights), all the others can be subjected to restrictions. In particular, the basis on which limitations are allowed are connected to the qualification of the third-country national: it has to currently be employed, or has been employed at least for six months, in order not to see its social security rights limited (12.2, b). In other cases, limitations are authorised on the basis of the student status, or if the activity of education or training is or is not linked with the work activity. Access to housing can be generally restricted, without having to consider the current situation of the person, or the time of work activity already done (12.2, d (ii)).

The security of residence that a single permit gives - that is inherently linked with the length of the work permit - can be measured by looking at the circumstances under which there could be the renewal, amendment or rejection of the permit. The directive does not specify the substantive grounds of the above mentioned consequences, notwithstanding the reasons should be given in writing and are open to legal challenge (8). Moreover, only applications of third-country nationals that are not yet residing into an EU Member State can be refused because of the exceeding of the admission volume (8.3). Finally, Member States and the Union are allowed to maintain parallel (if more favourable) provisions through bilateral or multilateral agreements or national provisions (13). This cannot but lead to a further multiplication, and fragmentation, of the status provided for third-country nationals workers.

Although the final, and difficult, establishment of a general framework is appreciable, the directive still leaves too wide margins of discretion to Member States in a number of significant aspects. Thus, scepticism is justified regarding the effective level of harmonisation that will be achieved. Questions arise on the added value of this status to the already in place national policies besides the establishment of a common

procedure. But even under this aspect, the wide time limits for the adoption of a decision compared with other directives, the lack of coordination with the procedure for the release of a visa, and the complete discretion left to Member States in relation to the consequences if a decision is not taken within the time limit, discredit the value of this status also in this regard. At last, if the supposed advantage to have a status regulated at the EU level is its potential harmonisation effect, this status falls short in this regard. Furthermore, another significant absence cannot but be noted, i.e. no mobility rights are attached to this status. As will be further underlined, whenever a right to entry is combined with the right to reside in a EU Member state, the right to move within the EU as a whole is always present in all the other status provided to third-country nationals. Therefore, the lack of its inclusion within the rights provided to single permit holders, since it was thought to be a general status for third-country national workers and an instrument to achieve EU objectives[412], is another reason to doubt of its effectivity.

4.*2. The «Researchers» and the «Blue Card» Directives.*

In the attempt of ordering the status provided to third-country nationals by the EU labour migration policy within a growing scale, it is noteworthy the reference made by the single permit directive to the long-term resident status as a more privileged status (r. 8 and 19). But, in-between, two other status can be considered to be, under specific aspects, more privileged in relation to the former, and less if compared to the latter; thus, is relevant for our analysis to linger over the aspects on which these status differ or are similar. We are referring to the status provided to third-country nationals admitted for research[413] or highly qualified employment[414], which both directive were adopted in the pre-Lisbon period. It should be said that the special status of which these third-country nationals can benefit from are provided on the basis of their specific qualification or, more precisely, for the specific character and value of the activity that they carry on, and which are connected with the objectives of growth and development of the EU and are thought to be useful for their achievement[415].

The 2005/71/EC Directive provides for a specific procedure for the admission of third-country nationals for a period of more than three months to carry on a research

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[412] Cfr. Stockholm programme, n. 17 above, p. 27.

[413] Council Directive 2005/71/EC of 12 October 2005 on a specific procedure for admitting third-country nationals for the purposes of scientific research, OJ L289, 3.11.2005.

[414] Council Directive 2009/50/EC of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment, OJ L 155, 18.6.2009, p. 17.

[415] «The Union has today set itself a new strategic goal for the next decade: to become the most competitive and dynamic knowledge-based economy in the world, capable of sustainable economic growth with more and better jobs and greater social cohesion.», Presidency Conclusions, Lisbon European Council, 23-24 March 2000, p.t 5; Cfr. recitals 2, 3, 8, Directive 2005/71/EC, cit..

project (1). As its scope is narrower in relation to the previous directive, the same is for the excluded categories, and more favourable provisions based on agreements or national provisions are allowed, with potential and similar consequences of a further fragmentation as previously seen. The fields in which researchers benefit from a better treatment are, firstly, the duration of the residence permit which should be issued for one year at least, and renewed if the conditions are still met (8). It follows that for a one-year-minimum project the residence is guaranteed as well as the renewal of the permit if needed; thus, the security of residence of this category is higher, also considered that on this point no space is left for Member States' discretion. This, of course, does not prevent Member States not to renew or withdraw the permit if it is fraudulently acquired, conditions are not met anymore, or the third-country national is residing for other purposes (10). Furthermore, although a maximum time limit for deciding on the application is not determined, the directive calls for a decision to be taken "as soon as possible", with the addition to provide for accelerated procedures (15) and facilitations for the obtainment of a visa (14.4). Another aspect under which the research status is more privileged is the possibility of release for the researcher's family members of a residence permit for the same period (9), since the directive is concerned about the preservation of the family unity (r. 18).

Finally, under two further relevant aspects it is possible to perceive the higher value of this status. The first regards equal treatment rights to which its holders are entitled. Excluded the rights which are not relevant for a researcher considering the specificity of its activity (as freedom of association, education and vocational training and access to employment services), the list remain basically the same if compared with the single permit directive, but restrictions are not allowed in relation to tax benefits, access to good and services and social security (12). The second aspect concerns mobility rights. Researchers are allowed to move to another Member State in order to continue their research, having to fulfil the "typical" requirements attached to the right to move within the EU: to have sufficient resources and not to pose a threat to public order, security and health (13). If the stay in another member state is longer than three months, a new hosting agreement may be required. In this case, the fulfilment of the above mentioned conditions are to be met by the agreement itself (6.2, (b) and (c)).

To recapitulate, the exclusion of this category of third-country nationals from those included in the volumes of admission, the minimum of stability granted to their right of residence, included their family members, mobility rights and the delegation of responsibility for all the major aspects of the activity to research organisations are all elements under which this status is privileged. Nevertheless, it falls short in relation to family reunification rights to which no reference is made, therefore the 2003/86/EC

Directive and its minimum standards should be applicable[416]. This, considering the importance that the EU gives to the role of researchers and to research in its future development[417], and how relevant are the ancillary receiving conditions in the host country besides those related to the activity carried on, as family reunion rights certainly are, this aspect cannot but reduce the added value of this status, even more if compared to the privileged treatment reserved to family members of high skilled workers[418].

The following status is that regulated by the 2009/50/EC Directive[419], so called, «Blue Card» Directive, from the name of the special permit that is given to third-country nationals who are allowed to enter and reside in one of the EU Member States in order to pursue a highly qualified employment activity. From its ambit of application are excluded researchers for their specific status (3.1, d)[420], but for similar reasons, the necessity to provide for a specific status to this category of third-country nationals is due to the relevance that highly qualified employees have for the economic development (r. 4), growth and competitiveness of the EU (r. 7) in its process of "becoming a competitive and knowledge-based economy"(r. 3).

Fundamental elements for the achievement of these aims are the provision of special conditions of entry and residence, that is a "fast" admission procedure – a decision shall be taken as soon as possible and in any case within the maximum of ninety days (11.1)[421] - mobility and family reunification rights (6 and 7). For this purpose, derogations are made to the long-term resident directive in order not to penalise blue card holders in the process of acquisition of this more privileged status, due to the exercise of the mobility rights granted to them and their family members. Similarly is established in relation to the 2003/86/EC family reunification directive to provide better conditions, or differently said, to avoid its restrictive effects in particular as regards the

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[416] That these are not the most favourable possible conditions is demonstrated by – and excluded the numerous critics and ECJ judgments on the directive – the derogations to the same contained in the 2009/50/EC directive in order to provide for a better treatment to family members of Blue card holders. Cfr supra note 12; art 15.1, Council Directive 2009/50/EC.

[417] Communication from the Commission, EUROPE 2020. A strategy for smart, sustainable and inclusive growth, COM(2010) 2020 final, Brussels 3.3.2010, p. 10-14

[418] Both the single permit and researchers directives refer to the objectives set in the Lisbon European Council held in 2000, and specifically to the objective for the European Union of becoming the most competitive and dynamic knowledge-based economy in the word by 2010. Cfr. Recital 2, Council Directive 2005/71/EC, cit.; recital 3, 2009/50/EC cit..

[419] Council Directive 2009/50/EC of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment, OJ L 155, 18.6.2009, p. 17–29.

[420] All further references in this subsection are to the Directive 2009/50/EC unless otherwise indicated.

[421] This provision represent a clear aspect of greater privileged at least in the application procedure because is provide a determined and the shorter time limit for the adoption of a decision in addition to the obligation to provide all the necessary facilities whenever is required to obtain a visa. Cfr. art. 7. 1 and 11.1, Council Directive 2009/50/EC cit..

right of residence, access to the labour market, mobility rights and, linked to the latter, the acquisition of the long-term resident status (15 and 19).

Within this directive the connections between the access and permanence into the labour market, the stability of residence, mobility rights and the acquisition of the long-term resident status are clearly visible. The directive define a minimum period of validity of the blue card from one to four years plus three months in case of temporary unemployment (7.2); a circumstance in which the worker can still benefit from its status but only if the length of the unemployment period does not exceeded three months, or it does not happen more than once during the validity period of the card (13.1). Moreover, in evaluating an application, a Member State is allowed to reject it on the basis of volumes of admission (6 and 8.3), and access to the labour market is restricted to determined activities during the first two years of residence (12); furthermore, the renewal of the card can be refused on the grounds of preference for nationals (8.2), EU citizens - the, so called, Community preference clause - (12.5) or third-country nationals already living and working in the member State, who is a long-term residents moving from another member state (8.2). That is equivalent to say that all these categories of EU and non-EU citizens, at least as regards access to the labour market, are privileged over blue card holders on the basis of nationality, or on a first-served basis, taking into account for how long they have been already part of the EU labour market. Finally, the withdraw or a refusal decision can also be based on reasons of public security, order or health, but also on the circumstance that the blue card holder does not have sufficient resources to maintain himself and his family members without recourse to the social assistance national system, or if an application is made for social assistance, having previously received the relative information (9.3 (b) and (c)).

As a counterbalance to these provisions, which cannot but limit the security of the status and, consequently its attractiveness, we find mobility rights and the derogations both to the family reunification and long-term resident directive. These are one of the added values of the status, since it is a mean “for improving the labour market efficiency, preventing skill shortages and offsetting regional imbalances” (rec. 15, 6, 7, 12, 14 and art. 1). It comprises the possibility for the blue card holder and its family members, but just for the purpose of highly qualified employment, to move and reside in another Member State after eighteen months of residence in the first member state of residence, without prejudice to the right of Member States to apply volumes of admission. However, if a negative decision is taken, the first Member State is obliged to readmit the blue card holder and its family members, as it happens in case of refusal for the non-fulfilment of the conditions necessary to exercise a highly qualified employment in the second Member State.

As regards family members, they are favoured in accessing the labour market and in the issue of a residence permit. If mobility rights are exercised, the accumulation of residence periods also in other Member States for the obtainment of an autonomous permit is allowed, or in order to obtain the long-term resident status (15). Nevertheless, recalling the above-mentioned circumstances under which the blue card may not be renewed or withdrawn, these rights appear to be more precarious because they are, at least initially, all linked to the residence right of the blue card holder.

On the derogations allowed to the long-term resident directive, their consist in a set of facilities which basically annul the adverse effects that the exercise of mobility rights could potentially have on the fulfilment of the the long-term resident directive's requirements, first of all, on the accumulation of a period of legal and continuous residence in the same EU Member State. Therefore, even if the accumulation of periods of residence in other Member States is permitted, two years of continuous residence in the same Member State are required in order to submit the application for the long-term resident status (16.1). Moreover, more tolerant rules are provided in relation to the permitted periods of absence from the territory of the whole EU (16.3, 4 and 5). Finally, the sufficient resources (19.3) and sickness insurance (19.2) requirements, always present whenever the right to move and reside is provided to individuals, in this case, have to be fulfilled by family members when applying for the residence permit in the second Member State, in addition to the possession of a (regarded as) normal accommodation (19.4 (a)).

The intricate mixture of derogations in favour of third-country nationals and restrictions which, in turn, seem to favour more member states and their national labour policies and markets, ends up by weakening the security of the status and its attractiveness for highly qualified migrants. In this sense, are significant the restrictions during the first two years of employment (12.1), in addition to the possibility left to Member States to limit equal treatment under some aspects in the listed fields even after that period (12.2) and, more importantly, when there is the exercise of mobility rights (12.4). Moreover, the harmonisation potential of the directive is undermined by the wide margins of discretion left to member states, but the major obstacle to its effectivity are the parallel national systems maintained by member states and focused on the their specific national labour shortages and particular needs[422]. This potential diversification among Member States if, from the one hand, is necessary in order to take into consideration the specific characteristics of national labour markets - and in this sense the first (and powerful) instrument is the determination of volumes of admission - from

[422] Cfr. Communication from the Commission to the European Parliament and the Council on the implementation of Directive 2009/50/EC on the conditions of entry and residence of third-country nationals for the purpose of highly qualified employment, COM(2014) 287 final, Brussels 22.5.2014.

the other hand, impinges on the exercise of mobility rights and in the achievement of the aim at enhancing circular and temporary migration. Considering the statements made within the impact assessment report[423] on the collective public effect of the development of an EU common policy, the above-mentioned aspects stands out even more as negative outcomes. Even if, as pointed out by the first report on the impact of the directive, more time is necessary to effectively evaluate the impact of the same, its main defects are the wide variations among Member States implementations, that in turn are the result of the combination of too broad margins of discretion, and the deficiencies in the transposition within national legal systems. All these elements jointly considered, can provide a partial explanation of its low impact.

4.3. The Long-Term Resident Directive.

The long-term resident directive[424], regulates the last status available to third-country nationals within the EU and, we will see under what specific aspects, also the more privileged[425]. Although numerous provisions of this directive are in line and recall elements and requirements already present in the directives studied above, this presents some relevant aspects of novelty. The commonalities and differences with the other status are a further element that justify the initial assumption of the possibility to order in a growing scale the status acquirable by third-country nationals working and residing within the EU, and to identify as elements which are prerequisites for the advancement the qualification possessed and the time of legal residence, and as elements that reveal the advancement from one status to a more privileged the security of the status, the extension of mobility rights and, in the end, the possible limitations to equal treatment rights.

The most significant element that the long-term resident status has in relation to the status previously analysed, is the connection that it establishes between (a legal and continuous) residence and integration. More precisely, it is the role that residence has, at the same time, as an instrument for a future integration, and in this sense equal treatment

[423] Cfr. Commission working staff Document, Accompanying document to the Proposal for a Council Directive on the conditions for entry and residence of third-country nationals for the purposes of highly qualified employment, summary of the impact assessment {COM(2007) 637 final} {SEC(2007) 1403} SEC(2007) 1382, 23.10.2007.

[424] Council Directive 2003/109/EC cit.

[425] As explained above, the specific third-country nationals who enter into the EU for, widely intended, economic purposes which status (already regulated by EU laws or currently under discussion by the European Parliament and the Council) are not included in the analysis are the same excluded from the personal ambit of application of the above-mentioned directives. They are seasonal workers, intra-corporate workers and posted workers, third-country nationals who benefit from or are waiting for the recognition of some kind of international protection.

rights are seen as an instrument, (r. 12)[426] and as a symbol of an integration already occurred (r. 4, 6, 12). Simultaneously, the added value of this status is the right of the long-term resident (to move and) to reside in another Member State in order to pursue an economic or non-economic activity (14.2), and to acquire the status also in the second Member State (23). The relevance of this right is linked with the achievement of freedom of movement of persons within the internal and in the employment market (18).

We note, however, that a tension is present among the meanings attached to the residence-integration link and mobility rights given to long-term residents. If from the one hand this status is thought to approximate the status of long-term residents with EU citizens through equal treatment and mobility rights, from the other hand, it contrasts with the implicit idea on which the connection between residence and integration is framed, that is on the idea of non-mobile citizens. In fact, it is not a coincidence that in the matter of integration, which cannot but be connected with the specific characteristics of every Member State, the EU has expressly excluded harmonisation, by limiting its activity to a role of support and provision of incentives (79.4, TFEU). In this sense, the blue card status, which provides for derogations to this directive in order not to hinder mobility rights of its holders, it is more coherent with the idea of a mobile individual.

The principal criterion on which basis the long-term resident status is attributed, is a five-year continuous and legal residence in the territory of an EU Member State, with the possibility of periods of absence no longer than six consecutive months or ten months in all (4.1 and 3). Under this aspect, the long-term resident status is a general status which is not formally connected with the pursue of a specific activity within the Member State territory, and it has the function both to stabilise the status of third-country nationals living for a long period in the same Member State, and to recognise in term of (more equal) rights the value of this continuous and legal residence, by approaching their status with that of EU citizens[427]. The (potential), so called, stabilising-effect that this status may have for third-country nationals is testified by the recent inclusion within its ambit of application of beneficiaries of international protection (3.2 (c)), a category which is, on the contrary, excluded from all the previous directives.

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[426] All further references in this subsection are to the Directive 2003/109/EC unless otherwise indicated.

[427] It should be noted that for the first time this directive uses as a parameter for equal treatment rights enjoyed by "citizens of the European Union" (recital 2), even if in the following recitals and articles it continues to use the expression "citizens of Member States" (rec. 12) or "nationals" (11) as previous directives do. Despite the fact that in substance these expression are meant to be interchangeable they are not if we consider that they refer to different set of rights. It follows that when referring to equal treatment is more correct to use as a parameter nationals or Member States' citizens and their status instead of the EU citizen status. Moreover, the double aim of stabilisation of the status and recognition of a de facto already stable residence, has it origin already in the 1999 Tampere programme. Cfr. n. 20 above, p.t 21.

The further conditions that have to be fulfil in order to acquire this status are the 'typical' ones, i.e. to have stable and regular resources which are sufficient to maintain himself/herself and the members of his/her family, without recourse to the social assistance system of the Member State concerned, a sickness insurance (6.1) and a proper accommodation (7.1). We note, in this regard, that notwithstanding the main requirement to acquire this status is a certain length of residence, an economically neutral requisite, the further conditions required, demonstrate that third-country nationals which pursue activities that have an economic value and can contribute to the growth of the EU economy are favoured. Finally, Member States may ask the fulfilment of integration requirements.

As previously said, within this directive, integration is an *ex ante* instrument and an *ex post* result of the status acquisition. Considering the (inevitable) discretion left to Member States in this field, by both the Treaties and the directive, this is a further element of differentiation of the content of this status among Member States[428] and, consequently, an element that hinders its harmonisation at the EU level.

Further aspects that make this status more privileged among others are its security and stability. In the first place, it is a potentially permanent status, with a five-year minimum period of validity and automatically renewable (8.1). In the second place, the attempt to stabilise the residence of third-country nationals is visible also in the reasons for which it can be refused, withdrawn or lost, and in the degree of protection against expulsion from which its holders can benefit from. Precisely, when considering a refusal decision on the grounds of public policy or security, national authorities, in addition to considering the kind of offence, should also consider personal characteristics and, apart from its danger, the duration of residence and the existence of links with the country of residence (6.1) of the third-country national. Thus, as we will see later on, this status shares the same principle that inform the EU citizen status[429], i.e. the length of residence is taken as a parameter to measure the degree of integration in the host state, and higher is the integration, higher should be the protection against expulsion, or differently said, higher is the security of the status.

That a long-term residence is considered to be a sign of settlement and integration into the host society is further demonstrated by the relevance that the absence of a certain length from the territory has in the possible withdrawal or loss of the status, but also in the provision of an easier procedure for its recover in the first Member State on which it has been acquired. It follows that twelve consecutive months of absence from the territory is a reason for withdrawn, or it is the exercise of the right to reside in

[428] K. GROENENDIJK, *Legal Concepts of Integration in EU Migration Law*, in *European Journal of Migration and Law*, 6, 2004, p. 114.

[429] Cfr. recital 24, Directive 2004/38/EC, cit.

another Member State as a long-term resident (9.1 (c)). In any case, a consequent absence of six years, even if the status was not acquired in the second Member State, lead to the lost of the same in the first Member State (9.4). Nevertheless, in both cases a procedure for an easier re-acquisition shall be provided, especially when the absence is justified by study reasons (9.5). Finally, both the loss of the status or an expulsion decision can be found on public policy grounds or, only for an expulsion decision, also on public security grounds. If in case of loss, the seriousness of the offence has to be considered (9.3), in case of a possible decision of expulsion is the actual and serious threat that the third-country nationals poses that has to be considered (12.1). In this case, a set of elements are relevant: the duration of residence, the links with the country of residence, the age of the person and the consequences for the same and its family members.

The right to move and reside in another member state, the enhanced protection against expulsion and the potential permanent character of this status, combined with equal treatment rights, are the elements which approximate this status to the Union citizenship. The list of rights in which long-term residents can benefit from equal treatment are the same of the other status considered, nonetheless rights of social assistance and social protection are added to social security rights (11.1, d), the allowed limitations are less extended and linked, for the major part, to the requisite of having resided in the territory of the Member State to which the benefits are required (11.2). If from a certain point of view this, once again, confirms the value attributed to a stable residence, from another it negatively influences the exercise of mobility rights.

As stressed above, one of the added value of this status is the right to move and reside in another Member State[430]. A right that is not exclusively linked with the pursue of a particular activity (14.2. (c)) but, considering that in the second member state the same requirements already satisfied in the first Member States have to be, once again, fulfilled, third-country nationals who are economically active are similarly favoured. Nevertheless, precisely the exercise of this same right by long-term residents which wish to pursue an economic activity in the second member State is rendered more difficult. This, in fact, may be limited on the basis of national volumes of admission, on other reasons based on the situation of the national labour market, on the basis of the Community preference, or to favour third-country workers coming from another Member State (14.3). Moreover, the effective exercise of the right to move is rendered difficult by the necessity to fulfil the same or even more requirements - as integration

[430] «The facilitation of intra-EU movement for LTRs is one of the main added values of the Directive, contributing to the effective attainment of an internal market», cfr. Report from the Commission to the European Parliament and the Council on the application of Directive 2003/109/EC concerning the status of third-country nationals who are long-term residents, COM(2011) 585 final, Brussels 28.9.2011, p. 7.

measures, if they have not been fulfilled in the first Member States, and to follow language courses (15.3) - in the second Member State, but in this case only to benefit from the right to reside and not for the acquisition of the long-term resident status. Another defect that impinges on the exercise of mobility rights is the non-transportability of the status, and the necessity to integrate again the five-year residence requirement in order to make an application for the same status in the current Member State of residence.

As regards security of residence, this is protected also through the obligation of re-admission upon the first Member State, in case that the residence permit in the second Member State is withdrawn or not renewed. In this case, mobility rights are presented as an alternative solution, since the long-term resident can, in alternative, move to a third Member State (22.5). Finally, a potential removal decision adopted by the second Member State is justifiable only on serious grounds of public policy or security, and if not based on these reasons, should not imply a permanent ban on residence in the EU territory (22.4). Therefore, it seems that the advantage of acquiring the long-term resident status also in the second-Member State does not reside in the equal treatment rights attached, but in the security of the status and in the protection against expulsion conferred.

The content of these provisions again confirms the implicit value that the directive gives to a stable residence and to its being a sign of attachment and integration – as the status is relevant only within a certain territory, that is the one where the third-country national «has put down roots» (r. 6). If this frame of residence is coherent with the aim of approximating the status of third-country nationals with those of nationals of Member States, it is not with the idea of a mobile citizen, and with the value that the EU itself attributes to movement of persons.

In conclusion, if from the one hand, the higher value that has the long-term resident status is visible in the combination of the protection of residence, equal treatment, and mobility rights, which were rights already given also to other status holders, but not with this extension, from the other hand, after a more detailed analysis, emerge also the tensions originated by the coexistence of two opposed visions of citizen at its basis. The national-citizen model from the one side, for which the equation length of residence-greater degree of integration is valid, since we assume that it remains stable and permanently in one territory, and the EU citizen model from the other, by definition a mobile citizen, for which mobility rights and the transportability of the status are relevant. Therefore, it seems that, and precisely because the aim of the directive is to give substance to the connection long-term residence – rights – integration, there is an implicit preference for the model of the nation-state citizen.

The deficiencies and inner contradictions of this status can partially explained the low numbers of long-term residence permits released since the adoption of the directive, and the even lower number of long-term residents that have made use of the mobility rights attached. To the shortcomings of the directive, should be added also the numerous defects in the transposition and implementation by Member States. Thus, it is not surprisingly the 2011 Commission report indicates as further steps that need to be taken initiatives to facilitate access to employment and the acquisition of the status in the second Member State.

It emerged that higher is the value, in terms of economic relevance, of the entry and residence of a third-country national, higher is the importance attributed, or easier is the exercise, of mobility rights. This correlation seems coherent with the importance given to free movement of persons as an element which contributes to the enhancement of the integration process. On the other hand, once the time of residence of a third-country nationals on an EU Member State territory is enough to suppose that his/her residence is not temporary, a more stable and potentially permanent status is acquirable. Thus, residence is favoured towards mobility, and the consequences of a long-term residence within the same territory are recognised as a relevant aspect when considering the stability over time of the status. However, precisely the attempt of coexistence within the same status of mobility rights and rights attached to a long-term residence undermines the efficacy and efficiency of it as a EU status.

5. The Union citizenship.

On the growing scale along which we have tried to order the status attributed to third-country nationals workers at the EU level, the (Union)citizen status is presented as the closing status, since it should be the most privileged as it grants to its holders the higher level of protection against expulsion and the wider extension of equal treatment rights when living in a member state of which they are not nationals. However, precisely, within EU laws on labour migration it is the status of «nationals of Member States» that is used as a parameter and as the status towards which the others should be approximated.

These status can be placed on the same scale, since they are thought to be attributed to similar categories of individuals, i.e. economically active or self-sufficient and mobile persons. We observe, then, that they are based and characterised by similar elements, and precisely, looking at those same basics on which the analysis of third-country nationals status has been structured, we note that the Union citizen status is

internally composed by multiple status as well[431]. These internal status, in turn, can also be ordered on the above mentioned growing scale, and are distinguishable on the basis of the same elements that proved to be relevant in the analysis of third-country nationals status: i.e. the (economic) qualification of the Union citizen and the length of legal residence within the Member State territory[432]. In a similar way, each status presents diverse degrees of protection against expulsion, or security of residence, and extension of equal treatment rights.

As largely known, the Union citizenship is a derivative status, i.e. to acquire it, third-country nationals have to acquire the citizenship of an EU Member State (20, TFEU), which, in turn, have an exclusive competence on the matter, even if it has to be exercised having due regard to EU laws[433]. The first, and more relevant, right of the Union citizen is the right to move and reside in another Member State of which the EU citizen is not a national, as clearly emerges from the very first lines of the directive 2004/38/EC[434], where it is defined as a primary and individual right. These rights are, in turn, the core of the freedom of movement of persons, one of the fundamental liberties of the internal market. Without wishing to underestimate the evolution of the Union citizenship beyond the mere paradigm of the market citizen[435], we should not, at the same, ignore that economic elements still play an important role, and have a great influence on the possibility for EU citizens to really benefit from their status. In fact, we observe that despite the inclusion among the beneficiaries of the rights attached to the EU citizenship of economically inactive EU citizens, the necessity of being in someway economically active is still present and declined as the necessity to demonstrate the possession of sufficient resources in order not to become a burden on the Member States

[431] S. O'LEARY, *Free Movement of Persons and Services*, cit., p. 519.

[432] S. GIUBBONI, G. ORLANDINI, *La libertà di circolazione dei lavoratori nell'Unione europea*, cit., p. 36.

[433] ECJ, C-369/90, *Micheletti*, 7 July 1992, [1992] ECR I-04239, para. 10.

[434] Cfr. Recital 1, Directive 2004/38/EC, cit. All further references in this subsection are to this Directive 2004/38/EC unless otherwise indicated.

[435] In very limited and exceptional occasions, the Union citizenship has operated as an ultimate safeguard for (minor) EU citizens and their family members who were third-country nationals, granting them the right to reside in the territory of the EU as a whole against or partially dissenting from what was, on the contrary, set in national migration laws. This cases are significant in the view of determining the value and usefulness of the Union citizenship for EU citizens since to them have been granted the right to reside within the territory of the Member State of which they are nationals on the basis of the sole possession of this status; moreover, in none of this cases the Union citizens had previously exercised the rights attached to this status, in the first place the right to move freely within the EU, therefore none of these cases presented transnational elements or, differently said, they could reasonably be considered to be purely internal situations to which, by definition, EU laws cannot be not applied, and are cases which should stay outside the European Court of Justice jurisdiction. Cfr. ECJ, C-34/09, *Ruiz Zambrano*, 8 March 2011, ECR I-01177; C-434/09, *McCarthy*, 5 May 2011, ECR I-03375; C-256/11, *Dereci*, 15 November 2011, I-11315. See N. CAMBIEN, *Union Citizenship and Immigration: Rethinking the Classics?*, in *European Journal of Legal Studies*, 5, 2012, p. 33.

social assistance system[436]. Finally, it is noteworthy, recalling the sectorial approach adopted by the Union in dealing with status of economically active third-country nationals, that the 2004/38/EC Directive was thought to remedy to the "sector-by-sector, piecemeal approach to the right of free movement and residence" and to facilitate its exercise. Consequently, the approach adopted by the EU in the management of the labour migration of third-country nationals, could be said to be similar in its evolution to the one adopted in regulating intra-EU mobility until the last decade. Furthermore, the adoption of the single permit directive and of the long-term resident status could be seen as attempts to overcome, also in relation to third-country nationals status, the piecemeal approach, providing the possibility to be granted a general and secure status and related rights, regardless of the economically active category to which the third-country national belong to.

Being the Union citizen the last status of the growing scale, we suppose that its content will be the more coherent with the idea of citizen which has characterised its genesis and evolution. Therefore, it is interesting to focus on the similarities and differences between the Union citizen status with the status as a long-term resident, since, supposedly, they should be the more close status at the EU level.

Mobility rights, security of residence, equal treatment and family members' rights are the basics of the 2004/38 directive. The connection, or rather, the relation of proportionality among the length of residence, the security of the status, and integration is widely stressed (r. 17, 18 and 24). Thus, what is considered to be (potentially) a «genuine vehicle of integration» (r. 18) and a right that «would strengthen the feeling of Union citizenship» and be a «key element in promoting social cohesion» (r. 17) more than the EU citizen status itself, the possession of which is taken for granted, is the right of permanent residence in another Member State. This is understandable considering that the Union has not competence on the modes of acquisition of the status but only in the definition of its content. In fact, the directive, differently from the previous on third-country nationals status, does not determine the terms on which the status is conferred

[436] The increasing cases of expulsion of EU citizens residing in other Member States since they were become an unreasonable burden for the national social assistance system are in this regard meaningful. Cfr. Question for written answer to the Commission Rule 117 Willy Meyer (GUE/NGL),15 January 2014, Subject: Expulsion of EU citizens from Belgium, at http://www.europarl.europa.eu/sides/getDoc.do?type=WQ&reference=E-2014-000335&language=EN. On the added values that a no underestimation of the framing of the Union citizenship as a market citizenship see N. N. SHUIBHNE, *The Resilience of EU Market Citizenship*, cit., p. 1599. S. O'LEARY, *Free Movement of Persons and Services*, cit., p. 518. Cfr. also on the limitations of equal treatment rights for economically inactive Union citizens art. 24. 2, Directive 2004/38/EC.

and withdrawn, but it only aims at regulating the right to move and reside and its limits (1)[437].

The degree of protection against expulsion, i.e. the security of their status, and the extension of the rights conferred to Union citizens, when they exercise their right to move and reside in another Member state, vary in accordance to their belonging to a certain category of citizen and to the length of their residence. For the first three months of residence no distinctions are made, and the right to reside is granted to all Union citizens no further qualified and to their family members on the sole basis of possession of a valid identification document. However, it is further specified below ex art. 14(1) that the right to reside is provided «as long as they do not become an unreasonable burden on the social assistance system of the host Member State», contradicting that «no conditions» clause stated above.

Subsequently, during the period that precede the acquisition of a right of permanent residence - i.e. from three months to five years of continuous residence, fulfilled the other conditions (16) - the Union citizen is again divided in those multiple, and alternative, status which had preceded the introduction of this - in the intentions - uniform and economically neutral status. These are those of economically active or would be economically active Union citizens, and those regulated by the, so called, Residence Directives: students, trainees and self-sufficient citizens no further defined.

Union citizens are granted the right to reside if they are workers or self-employed. The qualification is retained, and the following advantages, even if the persons, for the listed reasons, is not currently pursuing the economic activity related to this status. More precisely, the qualifications as: job-seeker, as long as the worker status has been possessed for a certain amount of time and was involuntary lost, as trainee, providing that a link with the previous job and the training exists, i.e. a link with the national labour market, and as a worker just temporary unable to work, are assimilate to the status as a worker or self-employed. This equalisation among status is fundamental in relation to the protection against expulsion granted, especially if we connect it with the exclusion from the necessity to demonstrate the possession of sufficient resources and of sickness insurance, and of the enhanced protection against expulsion as long as the status as workers, self-employed and job-seekers who has not exercised previously a job activity are retained[438].

In addition to these status of economically active Union citizens, we find self-sufficient citizens and comprehensively insured against sickness - where the parameter

[437] It is noteworthy to underline that family members of EU citizens, irrespectively of their nationality, are beneficiaries of the same rights and have to fulfil the same conditions. Cfr. arts. 5, 7.1 (d), 2003/109/EC Directive.

[438] Cfr. art. 14, para. 4, 2004/38/EC Directive.

of the self-sufficiency is determined by the, already well-known, «burden on the social assistance system». A branch of this category is constituted by students and vocational trainees, which pursue of a study corse or of a vocational trainee give the right to enter the country but which does not exempt them from the obligation to fulfil the above mentioned conditions of self-sufficiency and to be completely insured against sickness. Finally, the last status is that of family member of one of the previous three categories of Union citizens, regardless of the nationality possessed, from which a right of reside is derived as long as the conditions above mentioned are fulfilled by the Union citizen. However, students and trainees benefit from restricted family reunification rights since, in comparison with the other categories, the range of those falling under the definition of family member allow to accompanying or joining the Union citizen, or to which entry and residence shall be facilitate, is restricted[439].

On the sole basis of the length of residence, two status are so far identifiable: the first, possessed during the first three months, the second, for a period up to three months until five years. Relevant is to specify that the time considered is that of legal residence, thus, Member states may require to Union citizens to comply with registration obligations. A certificate stating the lawful residence of the Union citizen is then released, once the fulfilment of the conditions on which its residence right is made conditional are verified. Within this procedure of evaluation of fulfilment of the above-mentioned conditions takes importance the evaluation by national authorities of the «sufficiency» of the resources on the basis of the national social assistance system[440]. Nevertheless, on the basis of the qualification of the citizen on the basis of the activity pursued within the EU territory, a further multiplication of status occurs.

An additional specification is needed. If this division in multiple status in relation to the length of lawful residence is a valid assumption in general terms, the directive confers a privileged treatment to workers and their family members not just in the grant of the right to reside in the way of acquiring the right to permanent residence, but also in reducing the time requirement necessary to acquire it. Therefore, in acquiring this unconditioned right of residence, former workers or self-employed persons are given the possibility to acquire before the fulfilment of the five-year requirement if they have accumulated in the host member state a certain time of residence as workers or self-employed persons and they do not possessed anymore that qualification for reasons independently to they will as it is the reach of the pension age or because they become incapable of working. This easy mode of acquisition of the permanent residence right in the host member state is also granted if the Union citizen move to exercise the economic

[439] Cfr. art. 7, para. 4, and 3(2), 2004/38/EC Directive.
[440] Cfr. art. 8, para. 4, ib.

activity in another member state as long as its residence remains in the host member state and the citizen can assure a minimum of physical presence on the territory on a daily or weekly basis. Relevantly, family members of the above mentioned former or currently economically active Union citizens, irrespectively of their nationality, acquired the same right of permanent residence simultaneously with the Union citizen, regardless of the length of residence that they have accumulated on their own. Hypothesis of an earlier acquisition of the permanent resident right for family members are foreseen even in the case of dead before the previous requisites are fulfilled[441]. However, family members who are third-country nationals are required to integrate the five-year continuos and legal residence requirement on their own if, despite their family relation with the Union citizen has come to an end for reasons of divorce, annulment of marriage, termination of the registered partnership or death, they were in any case allowed to reside on the host member state territory[442].

Economically active and former economically active citizens are privileged also on the grounds of equal treatment. In fact, member states may limit access to social assistance during the first three months of residence, or for a longer period as regards job-seekers, they could extend the duration of this limited access as regards grant maintenance aid for studies during the period that precedes the acquisition of a right of permanent residence but just in relation to those Union citizens who are not workers, self-employed or family members of such categories[443]. At last, economically active Union citizens and their family members are granted an enhanced protection against expulsion while acquiring the right to permanent residence. Excluded expulsion provisions adopted on grounds of public policy, public security, workers, self-employed and job-seekers Union citizens and their family members cannot be deprived of their right to reside, thus be subjected to an expulsion provision. This derogation is relevant as regards the first period of residence, since the right is made conditional, in general terms, on the «do not become an unreasonable burden on the social assistance system» clause. Nevertheless, in relation to the right to reside up to three months, this protection against expulsion granted on the sole basis of the possession of the status appears to be just a confirmation of its extension, that was, although, already derivable from the sole reading of art. 7, para. 1, lett. a[444].

Relying on the principle that associate an enhanced protection against expulsion with the length of residence seen as a sing of an increasing integration in the host member state, protection against an expulsion decision taken on grounds of public policy

[441] Cfr. art. 17, paras. 3 and 4.
[442] Cfr. art. 18.
[443] Art. 24, para. 2.
[444] Art. 14, para. 4.

or public security is explicitly graduated in relation to the length of residence. Therefore, a series of elements have to be considered in order to come up with an evaluation of the cases on individual basis, and regardless of the activity pursued on the host member state, even if the economic condition in one of the criteria to consider. However, if the right of permanent residence has been acquired, then, the public policy or public security reasons justifying a possible expulsion decision are asked to reach the «serious» level. But if the Union citizen has resided on the host member state territory for the previous ten years only imperative grounds of public policy or public security can in that case justify its and its family members expulsion[445].

In conclusion, on the basis of the elements highlighted above, the Union citizen status can be parted in four status if we consider as a distinguishing factor the length of (its continuos and legal) residence on the the territory of the host member state. This appears to be in line with the principle, affirmed irrespectively of the nationality of the persons, thus also in relation to third-country nationals, that sees in the length of residence a sing of integration and of a will to settle on a not temporary basis in the host member state. Thus, in view of not to hinder this integration process, a progressive and higher protection against expulsion, i.e. a grater security of residence and of the rights attached to the possession of the status, is provided accordingly. Nonetheless, the aim of the Union citizen status to overcome the previous situation of fragmentation along multiple status, and even more to distinguish citizens of the basis of their degree of contribution to the common market through the pursue of an economic activity, has not been achieved. As some commentators has pointed out, this is not necessarily, in the present stage of the EU integration, a negative outcome[446].

From the analysis of the long-term resident and the EU citizen status have emerged a number of shared elements among these status; on those is significant to spend more words about to grasp on which elements they differ and with what degree.

Firstly, among the requirements that have to be fulfilled in order to be granted the rights attached - and which we have seen to be a set of always present requirements when mobility and residence rights are granted - there are the possession of sufficient resources and a comprehensive sickness insurance. If the latter condition is identical for both status, the former presents slight but significant differences. In fact, for the long-term resident the requirement is a pre-condition for the acquisition of the status, and the sufficiency is demonstrated by avoiding any recourse to the Member State social assistance system. Moreover, even if the renewal or withdrawal of the status in the first

[445] Or if the Union citizen is a minor, unless the decision is taken for the best interest of the child. Cfr. art. 28.

[446] N. N. SHUIBHNE, *The Resilience of EU Market Citizenship*, cit., p. 1624-1626.

Member State does not depend on the fulfilment of the above-mentioned requisite after the acquisition, on the contrary the non-fulfilment can constitute a ground for its withdrawal in the second Member State[447]. While for the EU citizen is sufficient only not to become an unreasonable burden for the social assistance system before the acquisition of the right of permanent residence, or to be a worker or a self-employed person in order to benefit from the right of residence for a period longer than three months. Furthermore, the directive lists a series of circumstances in which an Union citizen maintain the worker or self-employed status even if he/she is no longer pursuing an economic activity, and it stresses again the higher level of protection accorded to workers or self-employed persons by excluding them from the possible addressees of an expulsion measure whenever the conditions laid down for being granted the right of residence are not fulfilled anymore. This particular protection against expulsion is relevant if we consider that the continuity of residence, necessary to acquire the right of permanent residence, is broken by an expulsion decision[448]. In relation to the extension and limitations to equal treatment rights, by definition, Union citizens and family members benefit from a better treatment in relation to long-term residents, and of the best available treatment as non-nationals in the Member State of residence «in accordance with the conditions and limits defined by the Treaties and by the measures adopted thereunder»[449].

As regards the protection against expulsion, like for third-country nationals status, public policy, public security and public health are the grounds on which a possible expulsion decision can be based. If the threat to public policy and security that a long-term residents pose have to be actual and sufficient[450], a similar decision addressed to an Union citizen have to be proportional, and based on the personal conduct that, in turn, «must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interest of society»[451]. In addition to the graduation of the seriousness of public policy, public security grounds in relation to the length of legal and continuos residence of the Union citizen on the host member state territory[452].

In conclusion, it seems possible to affirm that the complementary approach adopted by the EU in framing the relation between migration and citizenship finds its

[447] Art. 22, para. 1, b, 2003/109/EC Directive.

[448] Art. 21, 2004/38/EC Directive.

[449] Art, 24, para. 1, 2004/38/EC Directive and 20.3, TFEU.

[450] Art.12, para.1, 2003/109/EC Directive.

[451] Art. 27, para. 2, 2004/38/EC Directive.

[452] These grounds have to be taken into account also when the expulsion decision is a penalty or a legal consequence of a custodial penalty; furthermore, after two years of its issue it has to be considered if the threat is current and genuine, and is material changes have occurred in order to enforce the decision. Cfr. Art 33. 1 and 2, Council Directive 2003/109/EC, cit..

natural and expected end with the Union citizen status, since it is the most privileged as it confers the best (because higher in number, extension and security) rights. This is the only transportable status among the status above mentioned, as it moves with the individual who holds it. This characteristic of the EU citizen status is a logical consequence and an advantage of its derivative nature, since the transportability characteristic derives from the possession of a nationality of an EU Member State, a status that is conferred to the individual *per se*, and not to the individual as long as he fulfil certain (economic) conditions and, excluded the hypothesis of loss of the national citizenship[453], once for all. From this point of view the EU citizenship is a transnational status, but it shares also a fundamental characteristic with citizenship, that is their formal legal neutrality character. On the other hand, the *de facto* preference granted to the economically active EU citizen, is explicit and undeniable, and this cannot but highlights, as previously said, that the model of citizen on which all these status are based is similar, and it is the individual which can contribute, through its activity, to the growth and enhancement of the EU process.

5.1. The (supposed) emancipation of the market citizen.

Since 1993, when it was formalised in the Treaty on European Union[454], the citizenship of the Union has made its way. Profiting both from the specific features of the EU[455], but also from the meanings and powers attributed to the concept of citizenship by nation-state building processes[456], this status has acquired importance for a growing category of individuals and in an increasing range of ambits over time.

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[453] As it is well known, the role as an *ultima ratio* safeguard that the EU citizenship can play in these cases is exemplifies by the Rottmann case. Cfr. ECJ, C-135/08, *Rottmann*, 2 March 2010, ECR I-01449; H.U. J. D'OLIVEIRA, G. R. DE GROOT, A. SELING, *Court of Justice of the European Union: Decision of 2 March 2010, Case C-315/08, Janko Rottman v. Freistaat Bayern Case, Decoupling Nationality and Union Citizenship?*, and Note 2 The Consequences of the Rottmann Judgment on Member State Autonomy – The European Court of Justice's Avant-Gardism in Nationality Matters, *in European Constitutional Law Review*, 7, 2011, p. 138-160.

[454] Cfr. arts. 8, 8A, Treaty on European Union, OJ C 191, 29.7.1992. «Indeed, from the 1970s onwards, drawing on what one might call the 'proto-citizenship' case law of the Court of Justice, some lawyers were talking of an 'incipient form' of European citizenship». J. SHAW, *Contrasting Dynamics at the Interface of Integration and Constitutionalism*, in P. CRAIG, G. DE BÚRCA (EDS.) *The Evolution of EU Law*, Oxford, 2011, p. 582.

[455] The EU citizenship benefited from the long-lasting rhetoric that permeates the concept of citizenship. Cfr. Presidency conclusions, Laeken, 14 and 15 December 2001: «Within the Union, the European institutions must be brought closer to its citizens. Citizens undoubtedly support the Union's broad aims, but they do not always see a connection between those goals and the Union's everyday action.», Annexes to the Presidency conclusions, Laeken, 14 and 15 December 2001, 20, SN 300/1/01 REV 1; See J. SHAW, *cit.*,p. 583, 588; R. BELLAMY, *cit.*, p. 597.

[456] P. HANSEN, S. BRIAN HAGER, *The Politics of European Citizenship*, New York, 2012, p. 23-24.

Born and judged in the beginning as nothing more than a market-citizenship, meaningful only for mobile citizens[457], in these last two decades it has turned into a vehicle through which people have access to certain rights in the territory of the Union as a whole, namely (a certain) security of residence and equal treatment *vis-à-vis* nationals. The same rights, before, were accessible only by virtue of the possession of a Member State citizenship and uniquely within the territory of the such State.

The EU identity crisis regards the economic as well as the political aspects of the integration project. Without question, the former has accelerated the necessity to address the still unresolved aspects of the latter, namely, among others, the democratic accountability of EU and national decision-making processes, its limits and undesirable consequences[458]. It is suspected that something more than only institutional arrangements[459] are necessary to invert the long-lasting decline of EU citizens involvement and trust in EU affairs[460].

5.2. From the Treaty of Maastricht to the Alokpa *case.*

«Union citizenship is destined to be the fundamental status of nationals of the Member States, enabling those who find themselves in the same situation to enjoy the same treatment in law irrespective of their nationality, subject to such exceptions as are expressly provided for»[461].

The famous and largely quoted statement made by the Court of Justice of the EU in the *Grzelczyk* judgment[462], is generally considered to be a sign of a change of attitude of the CJEU in the use of the EU citizenship within the construction and regulation of the adverse effects of the common-market - although, initially, at least, only as a

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[457] M. EVERSON, *The legacy of the market citizen*, in J. SHAW, G. MORE, *New Legal Dynamics of the European Union*, Oxford, 1995, p. 73; D. KOSTAKOPOULOU, *Ideas, Norms and European Citizenship: Explaining Institutional Change*, in *MLR*, 1995, 2, p. 234.

[458] The necessity to address the so called democratic deficit problem of the EU was clear since the beginning of the 2000s - clearly showed by the failed referendums in the Netherlands and France on the Constitutional Treaty and the first Irish referendum on the Lisbon Treaty - and tried to be solved by providing some institutional arrangements before in the Constitution for Europe and after was maintained in the Lisbon Treaty, mainly by the increase decision-making power of the EU Parliament and with the ECI (European Citizens Initiative). M. PETERS, *The Democratic Function of the Public Sphere in Europe*, in *German Law Journal*, 5, 2013, p. 687-688. R. BELLAMY, *cit*., p. 603, 609. M. MAZOWER, *What Remains: On the European Union*, September 5, 2012, *The Nation*; F. DE WITTE, 'The Social Question', in *German Law Journal*, 5, 2013, p. 584. M. WILKINSON, *The Spectre of Authoritarian Liberalism: Reflections on the Constitutional Crisis of the European Union,* in *German Law Journal*, 5, 2013, p. 528; J. MENÉNDEZ, *The Existential Crisis of the European Union,* in *German Law Journal*, 5, 2013, p. 454.

[459] Cfr. art. 10, para.. 3, 4 and art. 12, Treaty on European Union (Consolidated version) OJ C 326/13, 26.10. 2012.

[460] M. PETERS, cit., 686; M. HARTMANN AND F. DE WITTE, cit., 450; R. BELLAMY, cit., 606.

[461] Case C-184/99 *Grzelczyk v. Centre public d'aide sociale d'Ottignies-Louvain-La-Neuve* [2001] ECR-I 6193, para. 31.

[462] *Supra* note 460. Cfr. also Case C-413/99 *Baumbast and R* [2002] ECR I−7091, para. 82.

rhetorical argument[463]. However, it is relevant to underline that the enlargement of the beneficiaries of this status was made in the view to pursue the same final aim as before, that is to enhance the common-market. Because a student or a job-seeker non-economically active today[464], that is not deprived of access to certain rights in another Member states, is more likely to become an economically active EU citizen tomorrow, and to contribute to the common-market advancement[465].

Subsequently, another phase in the CJEU case-law regarding the EU citizenship status is recognisable by looking at the last decade of judgments concerning this issue, and, especially, through a couple of milestone decisions[466], which have been both anticipated and followed by a range of judgments on similar questions that have helped in correctly understanding the statements of the Court and the limits of the *doctrines* therein designed[467]. In this last phase the Court identifies a set of (potential and disproportionate) harmful consequences originated by a Member state decision towards an EU citizen which cannot but be avoided, because if not, the Union citizenship status will become meaningless. These consequences are, first, the «deprivation of the genuine enjoyment of the substance of rights conferred by virtue of [this] status», the second is statelessness[468]. Therefore, the CJEU have designed a (temporary and *de facto)* hierarchy among legal status and have attributed the Union citizenship an *extrema ratio* role. The Union, saying it differently, has not bypassed national laws in fundamental fields as are the modes of acquisition and loss of citizenship and the management of immigration. Nevertheless, when no other means of protection are available[469], a citizen of a Member state can count on the complementary and derivative but, in the end, significant legal status as a citizen of the Union to avoid disproportionate consequences as statelessness or expulsion from the territory of the Union.

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463 S. BESSON, A. UTZINGER, *Toward European Citizenship,* in *Journal of Social Philosophy*, 2, 2008, p. 185.

464 Case C-85/96, *María Martínez Sala v Freistaat Bayern* [1998] ECR I-02691; C-184/99 *Grzelczyk*, cit.

465 Y. BORGMANN-PREBIL, *The Rule of Reason in European Citizenship*, in *ELR*, 3, 2008, p. 332-334.

466 Case C-34/09 *Gerardo Ruiz Zambrano v Office national de l'emploi (ONEm)* [2011] ECR I-01177. Case C-135/08 *Janko Rottmann v Freistaat Bayern* [2010] ECR I-01449. For a critical analysis of the meanings and consequences of the Rottmann judgment, see J. SHAW ET AL., *Has the European Court of Justice Challenged Member State Sovereignty in Nationality Law?*, *EUDO Observatory on Citizenship,* at http://eudo-citizenship.eu/commentaries/citizenship-forum/254-has-the-european-court-of-justice-challenged-member-state-sovereignty-in-nationality-law 15.

467 See e.g. Case C-200/02 *Kunqian Catherine Zhu and Man Lavette Chen v Secretary of State for the Home Department* [2004] ECR I-09925; C-434/09 *Shirley McCarthy v Secretary of State for the Home Department* [2011] ECR I-03375; Case C-256/11 *Murat Dereci and Others v Bundesministerium für Inneres* [2011] ECR I-11315; Case C- 40/11 *Yoshikazu Iida v Stadt Ulm* [2012] not yet published; Cases C-356/11 and C-357/11 *O. and S. v Maahanmuuttovirasto and Maahanmuuttovirasto v L.* [2012] not yet published; Case C-86/12 *Adzo Domenyo Alokpa and Others v Ministre du Travail, de l'Emploi et de l'Immigration* [2013] not yet published.

468 Case C-34/09 *Ruiz Zambrano,* cit., para. 42, 44; Case C-135/08 *Rottmann,* cit., para. 54, 55.

469 It is relevant to underline that in both *Zambrano* and *Rottmann* cases the EU secondary law was not applicable.

The process of transformation of the Union citizenship in an *extrema ratio* safeguard is marked by other changes in the Courts' approach which goes further than the sole enlargement of the range of individuals that can benefit from it. In fact, we also note a gradual attenuation of the transnational aspect of the cases considered[470], and the progressive interference of the Court in matters which were previously considered to be an exclusive competence of Member states[471]. Both these features continue to characterise the last phase of the CJEU case-law on Union citizenship[472], even if some noteworthy novelties are also present. Firstly, the CJEU had intervened in cases concerning the effects produced by the lack of coordination among Member states citizenship laws. Even though this was not the first time in which the CJEU decided a case involving the antinomies among Member states laws on citizenship[473], the novelty stays in being the main point of the Court's argumentation uniquely the potential loss of the EU citizenship status[474].

Secondly, by assuming this role as an *extrema ratio* safeguard in specific circumstances, to EU citizens and their family members, by the only virtue of possession of the Union citizenship, is granted a right that before could be considered to be one of the cornerstones of (only) national citizenships: i.e. the security of residence both in the Member State of which they are citizens and in the EU territory as a whole[475]. This was once again reaffirmed by the Court in the *Alokpa* judgment[476], in which the refusal of a residence permit by a Member state to a third-country national mother of two infants EU citizens and French citizens, although they were born and have lived in Luxembourg since that moment, was not considered to be in contrast with the EU law as long as France could grant to the mother of the Union citizens a residence permit as their care-keeper. It has to be underlined that in cases in which the Union citizenship had been used

[470] Cfr. Case C-413/99 *Baumbast*, cit.; Case C-127/08, *Metock and Others* [2008] ECR I-06241.

[471] One of the first cases from which this «erosion process» started was the *Garcia Avello* decision. This case regarded the Belgian regulation of the use of surnames which could result in an obstacle for the children, born and resident in Belgium, of a Spanish couple that had exercised the right of free movement. Cfr. Case C-148/02 *Garcia Avello v Belgium* [2003] ECR I-11613, para. 20-28.

[472] Both cases, in fact, are characterised by the respective governments' allegations stating that the cases at stake were «wholly internal situation[s]»: in one case the EU citizens involved have never exercised their right to free movement within the EU, in the other all the elements of the case could be determined by national authorities regardless of the previous exercise by the EU citizen of his right of residence in another Member state. On the contrary, the CJEU stated, in the *Rottmann* case also against the AG Opinion,that these cases concerned situations that are covered by the EU law, thus the Court had jurisdiction on the case. Cfr. Case C-34/09 *Ruiz Zambrano,* cit., [37]; Case C-135/08 *Rottmann,* cit., [37 and 38]; Opinion of Advocate general Poiares Maduro, 30 September 2009, C‒135/08 *Janko Rottmann v Freistaat Bayern* [24, 34-35]. G. DAVIES, *The entirely conventional supremacy of Union citizenship and rights*, in *Has the European Court of Justice Challenged Member State Sovereignty in Nationality Law?*, EUDO Observatory on Citizenship, at http://eudo-citizenship.eu/commentaries/citizenship-forum/254-has-the-european-court-of-justice-challenged-member-state-sovereignty-in-nationality-law.

[473] Cfr. Case C-369/90, *Mario Vicente Micheletti and Others v Delegación del Gobierno en Cantabria*, [1992] ECR I-04239.

[474] Case C-135/08 *Rottmann,* cit., para. 54, 55.

[475] S. BESSON, A. UTZINGER, *cit.*, 192.

[476] Case C-86/12 *Adzo Domenyo Alokpa and Others v Ministre du Travail, de l'Emploi et de l'Immigration* [2013], not yet published.

as an *extrema ratio* it had protected EU citizens against the decisions of Member states of which they were national citizens, and this protection derives only from the possess another (precisely because it is a) complementary status: the Union citizenship.

Finally, another feature has to be taken into account, to - at least - attenuate an incorrect first impression that may derive from the two judgments that have setting the scene of its last phase of case-law on EU citizenship. The CJEU has not intended to undermine Member states competences in the fields of citizenship and immigration by imposing *ad imperium* the EU citizenship as a legal status to which everything is allowed. In fact, a decisive role is left to national judges. They are the ones in charge both of the application of the proportionality test[477] - through which the compatibility with the EU law of some consequences prescribed by certain Member states laws on citizenship acquisition and loss will be assessed. Moreover, it is up to them to determine if, taking into account the specificities of the case, a national decision regarding a family member of a Union citizen has the «effect of depriving citizens of the Union of the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union»[478]. These means that when the Union citizenship becomes relevant in a Court judgment, even if it is used as an *extrema ratio* instrument to protect EU citizens against some potential harmful decisions taken by their own (Member) states, the role of Member states and of the ways in which their national laws interact with the Union citizenship play a fundamental role.

5.3. Ambiguities and developments: the Union citizenship confronted with the Union and Member States.

As stated in the closing lines of the previous section, an analysis of the role assumed by the Union citizenship within the EU policy on immigration is a useful instrument to identify the defects and limits of this status which represent, although in miniature, another sign of the EU identity crisis. Moreover, considering the current crisis of the EU integration project, it can be also a mirror in which we find reflected the inherent contradictions of the EU project itself.

The interactions between citizenship and immigration were proved to be a telling point of view on the ways in which nation states pursue a certain self-vision of themselves and construct their nation-building policies and narratives[479]. Thus, the

[477] Cfr. Case C-135/08 *Rottmann,* cit., para. 55-57.
[478] Cfr. Case C-34/09 *Ruiz Zambrano,* cit., [42]; Case C-86/12 *Alokpa,* cit., para. 33.
[479] R. BRUBAKER, *Citizenship and Nationhood in France and Germany*, Cambridge, 1992, p. 75-77; C. JOPPKE, *Citizenship and Immigration*, Cambridge, 2010, p. 18-20.

analysis of how these two fields are related nowadays within the EU legal system[480] provides a meaningful insight on some current features of the EU as a *polity*[481].

The relevance that the EU citizenship has maintained until now in immigration policies of the EU, at least symbolically speaking, emerges from the very beginning[482]. In fact, when the Amsterdam Treaty entered into force in 1999, and the Tampere Programme was adopted by the Council some months later, the provisions concerning third-country nationals stated that «[T]he 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» and «[T]he legal status of third country nationals should be approximated to that of Member States' nationals»[483]. Thus, if we recall the laconic provisions designing the framework of the Union citizenship, the fact that the Citizens' Rights Directive[484] was adopted only ten years after its formalisation in the Maastricht Treaty[485], the use of the Union citizenship status as the ideal status and *polar star* for EU policies concerning third-country nationals led to a controversial relation between these two fields from its origins[486].

The ideal role which is assigned to the EU citizenship emerges even more clearly by looking at the legal acts adopted by the EU in order to *build* its policy on immigration[487]. The Single permit Directive[488] and Long-Term resident Directive[489], taken as examples of the broadening range of acts adopted by the EU in order to develop a common approach to migration, provide third-country nationals with a variety of status to be acquired over time. Each status gives third-country nationals a set of common rights - where the commonality stays in the obligation of Member states to grant them in a certain number of fields equal treatment *vis-à-vis* EU citizens - and an increasing security of residence[490]. Every status should, then, progressively reduce the distance with

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[480] See S. CARRERA, cit., 423; P. HANSEN, S. BRIAN HAGER, *cit.*, 127.
[481] N. N. SHUIBHNE, *The Resilience of Market Citizenship*, cit., p.1602.
[482] Cfr. Tampere European Council 15 and 16 October 1999, Presidency Conclusions, para. 3.
[483] Cfr. ib. [18, 21].
[484] 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, OJ L 158/77, 30.4.2004. Leaving aside the still current difficulties and defects of implementation by Member states highlighted by the Council. Cfr. COM(2008)840, at p. 3.
[485] J. SHAW, *Contrasting Dynamics at the Interface of Integration and Constitutionalism*, cit.
[486] E. GUILD, *Citizens Without a Constitution, Borders without a State: EU Free Movement of Persons*, in A. BALDACCINI, E. GUILD, H. TONER (EDS.), *Whose Freedom, Security and Justice?*, Portland, 2011, p. 39.
[487] For a reconstruction of the development of the EU policy on immigration within the area of Freedom, Security and Justice, see N .WALKER, I*n search of the Area of Freedom, Security and Justice: A constitutional Odyssey*, in N. WALKER (ED.), *Europe's Area of Freedom, Security and Justice*, Oxford, 2006, p. 32-37.
[488] Directive 2011/98/EU; Council Directive 2009/50/EC.
[489] Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents, OJ L 16/44, 23.1.2004.
[490] Cfr. arts. 11-12, Council Directive 2003/109/EC.

the status as a Union citizen. Thus, the multiple status provided to third-country nationals appear to be based on the same pillars of the Union citizenship, which are, at the same time, the elements that make it possible for individuals to benefit from the common-market: i.e. the binomial freedom of movement/equal treatment[491]. Nevertheless, despite the efforts, at least on paper, to approximate the status of third-country nationals to the Union citizenship status, the situation of these two categories of individuals within the EU are characterised by numerous contradictions.

The first and immediately visible is strictly linked with the derivative nature of the EU citizenship: the broad differences of the modes through which a third-country national might acquire a Member state citizenship and, thus, the EU citizenship cannot but lead to discriminatory effects[492], without mentioning the schizophrenic image of the EU citizenship and of the Union itself reflected as a result of twenty-eight different ways to acquire a unique status[493]. The EU proposes the Union citizenship as the most privileged status that a third-country national can acquire but, at the same time, it lacks the competences to harmonise at least at a minimum level the modes of its acquisition. Then, although the EU can discipline the status of third-country national and the rights attached to them since the moment that the non-EU citizens enter in the territory of one of the twenty-eight Member states, it is unable to show the way - at least formally[494] - for the acquisition of its own citizenship. An harmonisation in this field would not mean to undermine Member State's quasi-exclusive competence but would signify the EU's ability to exclude the adverse effects caused by the broad differences among Member states legal systems in this field.

The evolution through which the Union citizenship has gone since its formalisation, the developments of the EU policy on immigration and the showed connections between these two ambits, reflects the EU's advance towards the creation of a Union «closer to the needs and desires of its citizens» and of its non-citizens. On the other hand, the discriminating and exclusionary features of the same relation highlighted above, reveals the presence within the EU of contrasting visions on what should be the future step of its process of approximation between its «social reality and [the] political translation»[495].

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[491] W. MAAS, *Migrants, states, and EU citizenship's unfulfilled promise*, in *Citizenship Studies*, 6, 2008, p. 583.
[492] S. BESSON, A. UTZINGER, *cit.*, p. 193.
[493] R. VAN OERS, E. ERSBØLL AND D. KOSTAKOPOLOU, *A Re-definition of Belonging? Language and Integration test in Europe*, Leiden, 2010, p. 321-325.
[494] D. KOCHENOV, *Rounding up the circle: Rounding up the Circle: The Mutation of Member States' Nationalities under Pressure from EU Citizenship*, EUI Working Paper RSCAS 2010/23, p. 2, at http://cadmus.eui.eu/bitstream/handle/1814/13634/RSCAS_2010_23.corr.pdf?sequence=3
[495] M. HARTMANN AND F. DE WITTE, cit.

The next question that arises is: how the Union citizenship may help in the search for a «new normative paradigm for the European Union» by reflecting in its legal acts and institutional architecture the «tangible reality» that the EU already is for its citizens[496] and non-citizens?

6. Towards a transnational democracy?

Requiring the EU citizenship to assume at the EU level the same function that national citizenships have had during the era of nation states[497], means to ignore the «new legal order»[498] nature both of the EU and of its citizenship[499]. At the same time, the constitutional features of the EU allows one to look at it as a «citizenship-capable polity», and to explore the ways in which it could develop some aspects of its citizenship in order to enhance its meaning and usefulness both for the yet EU citizens and for the future Union citizens[500].

It could be argued that all that is necessary to bring closer again (or to begin, at least) the EU to its citizens and non-citizens is already in place, but needs to be revitalised or, maybe, fully realised. As for other related aspects of the EU integration project, its the complementary character of the EU citizenship or, saying it differently, its interdependence from Member states, that, despite having been presented as one of its main defects, could prove to be, on the contrary, one of its major contributions to the advancement of the EU. Moreover, by enforcing the complementary character of the EU citizenship for what concerns its rights and participation aspects, we believe that the belonging aspect of the same and of the EU itself, afterwards, will benefit from it[501].

Two proposals will be addressed in this conclusive part and will focus, respectively, on two deeply connected spheres: the first is the modes of acquisition of citizenship, and the second is immigration. Both rely on the assertion that complementarity requires also - at least a minimum level of convergence[502].

In spite of the fact that national laws on citizenship are one of the expressions of national sovereignty and deeply contribute to define Member states identities which the

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[496] See M. HARTMANN, F. DE WITTE, *cit.,* p. 441.
[497] See R. BRUBAKER, *cit.*, 21. E. J. HOBSBAWM, *Nations and Nationalism since 1780*, Cambridge, 1990, p. 81-82.
[498] Case C-32/84 *Van Gend & Loos* [1985] ECR 00779; See N. NIC SHUIBHNE, cit., p. 1599.
[499] Cfr. Art. 17, Treaty of Amsterdam, and arts. 9 TEU and 20 TFEU.
[500] J. SHAW, *Contrasting Dynamics at the Interface of Integration and Constitutionalism*, cit., 577.
[501] N. REICH, *Union Citizenship-Methaphor or Source of Rights?*, in *ELJ*, 1, 2001, p. 9.
[502] A. GEDDES, *The Europeanization of What? Migration, Asylum and the Politics of European Integration*, in T. FAIST, A. ETTE (EDS.), *The Europeanization of National Policies and Politics of Immigration*, 2007, New York, p. 56-60.

EU respect[503], at the same time, these identities are not *monads*, and the membership in the EU have shaped not only Member states' legal systems but their national identities too. Focusing only on non-automatic modes of acquisition of Member states' citizenships, a minimum of convergence on this issue at the EU level is desirable and convenient. This convergence could increase the meaning of the Union citizenship status both for third-country nationals and for Union citizens. By being based on common features and values shared by Member states and their ideas of the «perfect citizens»[504] it will not undermine their specificities and identities, but, instead, it will make explicit the elements that keep together the peoples of Europe. In relation to third-country nationals, the above-mentioned convergence will increase the relevance of this status before its acquisition and will avoid, at least partially, the otherwise mere identification of it as only a «packet of new rights»[505].

The second proposal aims at showing that the meaning and relevance of the Union citizenship can be enhanced if the convergence among Member States legislation in two strictly related ambits is anticipated: i.e. Member states' laws on nationality and the EU policy on immigration. It relies on an already present status within the EU that is common to almost all[506] Member states: the long-term resident status. The requirements that have to be satisfied in order to acquire it are nearly the same that are required by some Member states to naturalise, although they differ in details and degrees. As the long-term resident status aims at granting rights «as near as possible to those enjoyed by citizens of the European Union»[507], a further step towards convergence may be taken by providing long-term resident status holders a fast track to naturalisation, as it already possible in some Member states for EU citizens[508]. Moreover, as it is an EU status and its holders benefit from the (albeit limited) right to move within the EU, the exercise of this right should not be turned into a disadvantage and a discriminatory element between the mobile and economically active and the non-mobile long-term resident. For this reason, in relation to the criterion of continuous and lawful residence required for naturalise, it should be impeded the complete loss of the previous periods of residence accumulated in another Member state, for example, by counting them partially if the

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[503] Art. 4, para. 2, Treaty on European Union.
[504] B. ANDERSON (2013), *Us & Them?*, Oxford, p. 3; S. CARRERA, *cit.*, p. 447.
[505] R. BELLAMY, *cit.*, p. 603.
[506] A part from Denmark, Ireland and the United Kingdom which have opted out from the Long-term residents' Directive.
[507] Cfr. w. 2, Council Directive 2003/109/EC; Even if the Long-Term resident Directive has two «Achilles' heels»: integration requirements and and the rules on access to employment. See S. BOELAERT-SUOMINEN, *Non-EU nationals and Council Directive 2003/109/EC on the status of third-country nationals who are long-term residents: Five paces forward and possibly three paces back*,i in *CMLR*, 2005, 4, p. 1023; K. GROENENDIJK (2011) *The Long-Term Resident Directive, Denizenship and Integration,* in A. BALDACCINI, E. GUILD, H. TONER, cit., p. 442.
[508] D. KOCHENOV, *cit.*, p. 3.

long-term resident decides not to naturalise in the first Member state which attributed him the status[509] as it is already possible for blue card holders.

Both proposals of convergence rely on the belief that by increasing common aspects of Members states' laws on citizenship and immigration by giving them a more European nuance, and consider that they are the means to have access to a common status and to common rights, a mere «commonality in the law» will have an influence on the participation and belonging related aspects of the EU citizenship and of the EU as a whole both for non-EU citizens and EU citizens[510].

[509] See D. ACOSTA ARCARAZO (2011), *The Long-Term Residence status as a Subsidiary Form of EU Citizenship*, cit., p. 230-233.

[510] G. DAVIES, *'Any Place I Hang My Hat' or: Residence is the New Nationality*, in *ELJ*, 1, 2005, p. 55-56.

THIRD CHAPTER
THE SPACE BETWEEN IMMIGRATION AND CITIZENSHIP IN BELGIUM.

Summary: 1. Introduction - 1.1. The Benelux heritage. - 2. The multi-level government of immigration. - 2.1. The Belgian federalism. - 2.2. The reforms of the Belgian state and the competence on immigration matters. - 3. Immigration in-between the national level and the EU level. - 3.1. Union citizens and third-country nationals status as transposed in the national law. - 3.2. Labour migration of foreigners. - 3.3. Integration paths for third-country nationals at the sub-national level. - 4. Become a Belgian citizen. Towards the 2012 Nationality Code amendment. - 4.1.1 From the Constitution to the Nationality Code. - 4.1.2. The 1990s and 2000s amendments. - 4.2. The 2012 reform of the Nationality Code. - 5. Conclusive considerations. - 5.1. On the reformed Nationality Code. - 5.2. Residence, labour, nationality, integration.

1. *Introduction.*

The Kingdom of Belgium is the first (member) State chosen to explore further the spectrum of individual status in the European Union (EU). Among all EU member states, Belgium is a particularly interesting subject of study as regards movement of persons across national borders, and the relation between immigration and citizenship for a number of reasons. In particular, it is possible to observe in action within the same member state an early regulation of non-nationals individual status at the supra-national level, and subsequently, the dynamics that exist between the federal level and the sub-national level in the government of immigration and citizenship acquisition. Therefore - granted that despite the historical importance of the Benelux membership in the matter of persons free movement it has been absorbed by the EU membership - the analysis will aim at looking at the interplay between the EU supranational level, the federal level and the sub-national level in the fields of government of immigration and citizenship acquisition. This could be particularly telling as regards the relations among the various circles described in the introduction to this second part, since due to the particular nature of the Belgian federalism - jointly based on territorial and linguistic-group based entities, respectively, regions and communities - policies are, by definition, multi-level. Specifically, to sub-national units are attributed competences that allow them to shape according to their views and conceptions the above mentioned policies, and specifically as regards third-country nationals integration. Therefore, in the Belgian case, the govern of immigration from third-countries and movement and residence of EU citizens - with

the relative implementation and transposition within the national legal system of the respective legislation - intersects a complex dynamic made of attempts of territorial accommodation of diversity and conflict management between the two co-dominant groups of Flemish and French language, in addition to the German speaking minority group, already from the beginning of the twentieth century. Since these events obviously impacted on the division of competences between the federal level and the sub-nationals levels also as regards immigration and integration of foreigners, thus shaping and differentiating at the sub-national level the content of the related legislation.

At last, the Belgian Nationality Code has been amended very recently with the aim at avoiding citizenship acquisition to be (just) a mode to obtain a secure residence title. Thus, the amendments pursue the scope to make citizenship acquisition «neutral from the immigration point of view»[1], rendering the possession of a secure residence title by the third-country national a pre-requisite rather than a result of naturalisation. The (renewed) relevance of the integration criteria within the procedure connects and emphasises the significance of the role played by sub-national units in these fields.

The first reason justifying the attention devoted to this member state among others is twofold, and unites the history of immigration government in the country with the primary role it has played in the EU integration process from the very beginning. Belgium is part of that group of Western industrialised countries that since the end of the WWII has imported foreign workers, implementing, as others EU founding member states, a guest-worker system. Nonetheless, since the country was definitely not new to the practice of recruitment of foreign labour force through such system[2], the first law aiming at regulating labour migration was adopted in 1930, setting a framework that inform the national government of labour migration until today. Foreigners, in order to be able to exercise a work activity in the country, should previously obtain the authorisation of the minister of Justice, an issue that was conditioned by the presentation

[1] Cfr. the title of the law of reform, Loi du 4 décembre 2012 modifiant le Code de la nationalité belge afin de rendre l'acquisition de la nationalité belge neutre du point de vue de l'immigration, M.B., 14 décembre 2012, 2e éd., p. 79998.

[2] The import of foreign labour was an instrument which was already used in the post WWI period, and the recruitment of foreign labour force was particularly directed to the Walloon region industries. Workers came from the neighbouring countries - mainly from the Netherlands - as from Italy and North-African countries. In the early-twenties, coinciding with an upsurge in immigration - the recruitment happened through the set of public labour-exchange offices jointly administrated with employers and trade unions, even if they did not succeeded to achieve an effective control of labour market. The first act aiming at regulating the recruitment of labour force was the royal decree of 15 December 1930, asking for a permission to entry. Simultaneously, the modes of acquisition of the Belgian nationality were modified - with the royal decree of 15 December 1922 - and this was not granted anymore on the sole basis of birth on the Belgian territory. Instead, the Belgian nationality had to be expressly chosen at the reach of the majority age, and dual nationality was no longer tolerated. In additional a six-year period of residence was required to those born on the national soil. Moreover, a declaration of loyalty towards the Belgian state became a pre-requisite, and anyone, due to the publicity given to the procedure of nationality acquisition, could put into question the loyalty to the Belgian state of the applicant. F. CAESTECKER, *Aliens Policy in Belgium, 1840-1940*, New York, 2000, p. 58-59.

of a labour contract. A subsequent legislation would assigned to the State the competence to establish the annual quota of foreign workers to be admitted and the modalities of recruitment to be imposed on employers[3]. On the basis of such act the recruitment of the WWII period has been based.

From the mid-forties to the seventies, in order to revitalise the coal production, essential to the reconstruction of the country[4], it has signed a series of bilateral agreements, starting with Italy in 1946[5] to end with Yugoslavia in 1970[6]. Differently from other countries - e.g. Switzerland - importing foreign labour through guest workers systems as well, Belgium also provided for family reunification rights through which it aimed at addressing not just labour shortages but also demographic concerns as low birth rates and the ageing of the population[7]. Noteworthy, Belgium and Italy were also signatory members in 1951 of the Treaty of Paris establishing the European Coal and Steel Community (ECSC), which had entered into force in 1952. Although art. 69 of the treaty provided for free movement of coal and steal workers - considered to be «a first step in the creation of a common market for labour» - in order to be effective it required an unanimous agreement among the all six member states. Therefore, despite the Council, composed of representatives of national governments, was able to reach the necessary unanimity at the end of 1954, the agreement was able to enter into force only after the last ratification of Luxembourg which took place in September 1957[8].

Despite the policies in place for foreign labour recruitment, the country was still in need of much more labour force at the beginning of the sixties. Therefore, the application of the 1936 legislation governing labour migration was suspended by the Justice ministry. These has meant that a work permit was not necessary anymore to be granted a right to reside in the country. Migrants, actually, were invited to come to Belgium on the basis of a tourist visa and, once in the territory, to regularise their situation. In addition, for the reasons explained above, also the come of family members

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[3] Cfr. arrêté royal du 15 December 1930 and arrêté royal du 31 Mars 1936 (M.B., 7 avril 1937).

[4] The national labour force was insufficient to produce the necessary quantity of coal in order to go ahead with the reconstruction. This was also due to the reluctance of Belgians to work in a sector with high percentage of labour incidents.

[5] The agreement established that in exchange of 2000 Italian workers per week - recruited on the basis of a labour contract type which included the provision of a *proper* accommodation - Belgium would provide 200 kilos of coal for each working day of every Italian worker in the mines.

[6] Belgium has to expand the geographical reach of recruitment of foreign labor force from 1956. Actually, after the well know incident at the Marcinelle mine, where a high number of Italian miners died, the Italian government demands for a higher security in the workplace were not accommodated and the previous so massive send of workers was interrupted. Therefore, Belgium signed bilateral agreements with other Southern European countries, such as Spain (1956) and Greece (1957), and also with Morocco and Turkey (1964), Tunisia (1969), Algeria and Yugoslavia (1970). Those agreements, differently from that with Italy covered also other sectors of the labour market beyond coalmining, as transport, metallurgic and chemical industrial productions. None of these agreements were published until 1977. Cfr. M.B., 17 Juin 1977).

[7] H. BOUSETTA, S. GSIR, D. JACOBS, *Belgium*, in A. TRIANDAFYLLIDOU, R. GROPAS (EDS.), *European Immigration: A Sourcebook*, Ashgate, 2007, p. 33.

[8] W. MAAS, *Creating European Citizens*, Plymouth, 2007, p. 16-17.

were encouraged[9]. Nevertheless, due to the progressive worsening of the economic situation from 1967 and of the consequent raise of unemployment, the application of the stricter rules were asked to be restored. In 1967 a new legislation was adopted, amending the 1936 act, and regulating the typology of work permits to be issued, and trying to allow entries in order to meet shortages of only those specific sectors of the labour market. The possibility of workers to take up an employment in a labour sector different from that to which the permit had been issued was limited.

Within these dynamics a significant role was played starting from the late sixties by the European integration process. Although the Rome Treaty establishing the European Economic Community was signed already in 1957 and entered into force in 1958, free movement of persons, (to be read: workers, as progressively defined by Community law) established by art. 48 of the EEC Treaty, become fully effective after the expiration of the transitional period in 1969 but, more importantly, with the adoption of Regulation 1612/68 and Directive 68/360. As regards Belgian immigration policy, this was particularly relevant since, as saw above, the countries of origin of more than a half of foreign workers residing in the country were or would become in a two-decade period EC member states. Thus, workers which were nationals of an EC member state - until the eighties this would be relevant mostly for Italian workers - were allowed to enter the country without the necessity to posses a work permit but just with an identification document and could take up employment without having to posses a previous authorisation. Moreover, they could also benefit from the right of not being discriminated on the basis of nationality. Considering the deterioration of the economic situation in West European countries which was previously importing foreign labour in the late sixties, this assumed particular significance as its enforcement took place simultaneously to the reintroduction by the national government of stricter legislation, and that unemployment was a possible ground for expulsion. On the contrary, EC workers (and their family members), in relation to third-country nationals, were protected against arbitrary expulsions, and benefited from the right the not to be discriminated on the basis of nationality in having access to rights connected with the work activity, such as unemployment benefits.

As stressed above, in the last sixties a restrictive policy on labour migration was reintroduced, drive by the effects of the economic recession and restructuring of Western economies and by the 1973 oil crisis[10]. In 1974 a new legislation aimed at imposing an official ban on (mainly) unskilled immigration of non-EC nationals, and to allow entries only of foreign workers in possession of the qualification of the related sectors were

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[9] In 1965 a flyer titled «Vivre et travailler en Belgique» was made, exposing family and social rights of which migrants could benefit in the country, in addition to religious freedom.

[10] S. CASTLES, H. DE HAAS, M. MILLER, *The Age of Migration*, New York, 2014, p. 110- 111.

labour shortages were present, in addition to the provision of sanctions for employers which did not respect such limitations. The restrictive policy adopted since the late sixties, however, has not the desired effect of stopping (not needed labour) immigration but, on the contrary, has the opposite result of increasing the number of unlawful third-country nationals migrants entering and residing in the country. Therefore, in order to temporary solve this adverse outcome of the «zero-immigration» policy, still in 1974 a first regularisation campaign was conducted in favour of those foreigners irregularly working and residing in the country, providing them with residence permits[11]. It is relevant to emphasise the change of paradigm of the Belgian immigration policy that took place in the mid-seventies, since the fictitious «zero-immigration» policy started in those years was never officially abandoned, despite the obvious continuation of immigration towards Belgium and its characterisation as an immigration country.

In 1980 significant steps were taken for the management of migration, within the second reform of the State[12]. The «*loi du 15 décembre 1980 sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers*»[13], and the following amendments adopted in order to include the necessary amendment consequent to the transposition of the EU legislation on migration, is the law that currently regulates immigration in Belgium. However, since the content of the Belgian immigration policy cannot but be deeply connected with the progressively federalisation of the State started in 1970 with the first reform of the State, this will be analysed in details and contextualised in the following paragraph.

Five years later of the adoption of such law, in 1985, Belgium would be also among the six signatories of the Schengen agreement providing for the elimination of control at internal borders, and of their progressive move to external borders of signatories parties. A result for which achievement the 1990 Implementing Convention was adopted. As the early development of the Schengen acquis was already described in the framework of this research, its mentioning is relevant in order to highlight another of the reasons for which the analysis of this country is meaningful as regards persons' free movement and immigration, i.e. its membership in the Benelux Economic Union.

[11] It was estimated that this first regularisation campaign involved approximately 9000 foreigners, and benefited particularly third-country nationals of Moroccan and Turkish nationality.

[12] Loi spéciale du 8 août 1980 de réformes institutionnelles (M.B. 15 août 1980).

[13] Cfr. Loi du 15 décembre 1980 sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers, M.B. 31 décembre 1980 (entrée en vigueur, 1er juillet 1981); Arrêté royal sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers du 8 octobre 1981 (M.B. 26 octobre 1981).

1.1. The Benelux heritage.

The role of primary importance that the Benelux countries has played in the development of the European Union is acknowledged, not just as being among the founding members of all that organisations that have preceded the establishment of the EU - ECSC and the EEC - but also in the separated but parallel development of the Schengen *acquis*[14], to be incorporated in the EU framework by the Amsterdam Treaty in 1999. This leading role relies and goes back to the membership of Belgium, with the Netherlands and Luxembourg, to the Benelux Union Customs since 1948[15].

This intergovernmental cooperation agreement was initially limited to a monetary and customs union[16] - providing for the elimination of internal tariffs and for the establishment of a unique external tariff for products coming from non-Union members - through the signature of a monetary agreement in 1943 and of a custom convention in 1944. Followed by a Protocol in 1947, they entered into force in January 1948. The cooperation between Benelux countries progressively expanded its scope to other matters[17], to end with the signature of the Treaty establishing the Benelux Economic Union in 1958, which entered into force in 1960[18]. Nonetheless, in the meanwhile a series of agreements and treaties were signed aiming at regulating movement across borders of diverse categories of persons and to create a «common labour market»[19]. As regards the latter category, relevant is the The Hague Labour Treaty concluded in 1956 between the three Benelux countries regarding nationals employed by private employers, which was preceded by a Provisional Labour Agreement which

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[14] L.D.H. HAMER, *Free Movement of Persons An Exploration from a Dutch Perspective*, in *Legal Issues of Economic Integration*, 1, 1989, p. 49. AA. VV., *Benelux*, in *Annuaire Europeen 1989 - European Yearbook 1989*, Council of Europe/Conseil de L'Europe, The Hague, 1991, p. 11-12.

[15] The Union, however, was already agreed in principle in 1944 by the countries government-in-exile in London.

[16] An attempt of a more closer economic cooperation between Belgium and the Luxembourg, aiming at creating a custom and monetary union was already done in 1922, to be known as the *Belux Union*. This was followed by a further agreement in the pre WWII period, between those two countries and the Netherlands in 1932, the *Ouchy* agreement. However, this failed after the International court ruling in favour of the Great Britain claim on the basis that such agreement was not in compliance with international law. In 1930, a convention - the Oslo Convention - was also signed between Benelux countries and Scandinavian countries, establishing an obligation to consult the signatories countries in case of a decision to set up customs duties was taken. E. D. HANSEN, *European Economic History: From Mercantilism to Maastricht and Beyond*, Copenhagen, 2001, p. 248.

[17] Further protocols were added to those entered into force in 1948, and comprised cooperation on agriculture products (1950), on economic, commercial and social policies (1953) and on capital movements (1954). Moreover, in 1955 the Benelux Inter-parliamentary Consultative Council was established, providing a framework for regular meeting among parliamentary representatives of the three countries. This institution would further become one of the institutions of the Benelux Economic Union.

[18] The Treaty was concluded for a duration of fifty years. Cfr. art. 99, Treaty establishing the Benelux Economic Union.

[19] In 1953, Belgium and the Netherlands signed an agreement on Minor Frontier Traffic allowing for the cross of common borders during the day. This was amended in 1955 extending the permission to cross common borders without time restrictions. Followed agreements on seamen and refugees, and on the removal of undesirable persons.

established the right of nationals to accept labour offers from private employers and to be treated on an equal basis with nationals of the state on this regard.

The Benelux Economic Union concerned free movement of persons[20], goods, capital and services. In particular, nationals of signatories parties were granted the right to freely enter within and leave the parties' territories, and were granted equal treatment as nationals as regards freedom of movement and residence, the pursue of economic activities and related rights as employment conditions, social security benefits, taxes and charge[21]. Moreover, the 1958 Treaty established that a convention would has been concluded in order to regulate the consequences on persons' freedom of movement, residence and related ambits of national interest based on grounds of public order, public security, public health or morality[22]. To this aim a convention on establishment was concluded in 1960, reaffirming the provision which allowed the cross of common borders with the sole possession of an identity card, and, more relevantly, the right of nationals of contracting parties to establish themselves in the territories of the Benelux countries providing they had adequate means of substance and are of a good character. Moreover, it was established that they could be expelled on the sole basis of threats posed to the national security or public order.

It was acknowledged that free movement of persons would required to gradually eliminate controls at internal borders and to subsequently shift them at external borders, with the consequent progressive harmonisation of the related polices, i.e. on aliens and visa, in addition to the recognition of the advantages in economic terms that would derive from the adoption of such a measure. Therefore, still in 1960, a second convention on the transfer of immigration formalities to external frontiers[23] and, in 1969, a protocol on the abolition of checks and formalities at internal borders and barriers to freedom of movement were signed, in addition to the establishment of a common visa for the Benelux countries. As foreseen, a gradual harmonisation of provisions regarding conditions of entry, residence and movement of non-Benelux nationals took place. Aliens were admitted if they, alternatively, could provide for themselves carrying on a legal employment activity or by possessing sufficient resources. Moreover, legally entered

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[20] However, freedom of movement of nationals of Belgium and Luxembourg was provided even previously - after having been in force already in the immediate post-WWII period - with the signature of a supplementary agreement in 1949 establishing that nationals of those states could cross the respective borders without the necessity of carrying a passport, but just by showing an identity card or aliens' card issued by their respective state of residence. An agreement with an identical content was signed in 1950 between Belgium and the Netherlands. That same year Belgium and Luxembourg substituted the previous agreements and listed the document with which the respective national frontiers could be crossed and extended this possibility to aliens holding an identity cards issued by Switzerland. R. PLENDER, *International Migration Law*, The Hague, 1988, p. 275.

[21] Cfr. arts. 1 and 2, ib.

[22] Cfr. art. 55, ib.

[23] Convention concerning the Transfer of Entry and Exit Controls at External Frontiers of the Benelux Territory, 1960.

aliens were free to move in the Benelux area and could cross internal borders on the basis of the residence permit issued by one of the Benelux countries. The gradual approximation of national legislation went ahed on related areas of the consequences of breaching the above mentioned rules, admission of refugees, and the possibility to restore controls at internal frontiers for public policy or national security reasons[24].

The proximity of the contents of such agreements which those which would be signed more than a decade later in the town of Schengen is not difficult to perceive. The 1985 Schengen agreement brought together the will of the Benelux countries and that of France and Germany to issue control at their common borders. The latter had already given content to this will by signing in July 1984 the bilateral Saarbrücken agreement which envisaged, between other connected measures, the immediate abolition of control on persons at common borders and their shift to external borders, the harmonisation of policies on visa and aliens policies, as well as on the issue of passports. Consultations between France, Germany and Benelux countries at the ministerial level were already going on as regards movement of goods and were further expanded to comprise questions of control at borders. On the basis of a joint initiative of Benelux ministers, the Schengen agreement was signed in June 1985 setting down the principles of these cooperation on border controls. The detailed measures were subsequently agreed in the 1990 Implementing Convention which, nevertheless, took already five years to enter into force after ratification by all signatories parties[25], which was, at time, seven out of the fifteen EU member states[26]. Furthermore, this move some of EC member states outside the EC framework was, however, in line with similar objectives expressed as regards the future development of the whole EC as expressed by the European Council in Fontainebleau in June 1984, asking for member states to explore measures to be taken in order to, among other objectives, « the abolition of all police and customs formalities for people crossing intra-Community frontiers»[27]. Although, over time, the EU integration process overlap the Benelux Union as regards persons free movement and border controls with the incorporation of the Schengen *acquis*, this continued to pursue its action in other relevant fields.

In 2008, a new Benelux Treaty was signed in The Hague - this time without a limited duration - and entered into force in January 2012. It provides the framework for the prosecution of cooperation between these countries around three principal objectives: a common market and an economic union, an agreed durable development, justice and

[24] R. PLENDER, cit., p. 276.

[25] Despite for the difficulties of the technical matters to be decided, another significant event which slowed down negotiations was the simultaneous process of reunification of Germany. R. ZAIOTTI, *Cultures of Border Control: Schengen and the Evolution of European Frontiers*, Chicago, 2011, p. 71-72.

[26] To the six signatories countries has to be added Portugal and Spain which had joined the EC in 1986.

[27] European Council, Conclusions, Fontainebleau, 25-26 June 1984, p. 229.

home affairs. The latter ambit comprises cooperation as regards visa and immigration policies, cooperation in the management of crises and prevention of disasters, and the combat of terrorism and fraud[28]. On movement of persons, the attention is focused on the joint adoption of readmission agreements with third-countries and on agreements on control on persons at external frontiers, in particular concerning the exemption from the obligation of obtaining a visa to enter the Benelux area.

2. The multi-level government of immigration.

Having described the role of the Benelux Union in shaping significant parts of the govern of immigration and movement of persons at the EU level, the focus will now be directed again at the national and sub-national level. The following paragraph is devoted at exploring the interrelations between the levels of government that intervene in the governing of immigration within the country, to reserve particular attention at the end to the role of sub-nationals units, specifically as regards third-country nationals integration. The development of the Belgian immigration policy, leaving for a moment aside the EU level, cannot be detached, thus, has to be preceded and, after, be described in parallel with the taking shape of the Belgian federation and of the followed reforms of the state concerning, among other ambits, the division of competences on immigration and related fields between the federal level and sub-national units.

2.1. The Belgian federalism.

The Constitution of Belgium dates back to 1831, however, the series of reforms of the State - to arrive at the recently approved sixth reform[29] - which started the progressive federalisation of the country finalised in 1993, has initiated more than a century later, in 1970. Nonetheless, the transformation process of the country in its actual federalised form marked the history of the Belgian (unitary) state from the beginning, the leading force of it being, at least until the reforms started in the 1970, the cultural-linguistic-social claims of its Dutch speaking population and the progressive recognition of the multi-linguistic and multi-national nature of the state. The 1831 Constitution, establishing the Belgian state as a parliamentary monarchy and a centralised state, although recognising the freedom of choice as regards the use of language, at the same

[28] Cfr. art. 3, para. 2, lett. c, Treaty revising the Treaty establishing the Benelux Economic Union, 3 February 1958.

[29] Cfr. Loi spéciale relative à la Sixième Réforme de l'Etat, 6 Janvier 2014; Loi relative à la Sixième Réforme de l'Etat concernant les matières visées à l'article 78 de la Constitution (1); Loi relative à la Sixième Réforme de l'Etat concernant les matières visées à l'article 77 de la Constitution, M.B. 31 Janvier 2014.

time proclaimed French as the State's official language. In the period between the two world wars, a first attempt was made to address the linguistic question and the growing claims of the Flemish-Nationalist movement.

In 1921 a law was passed to regulate the use of other languages than French within the public administration and services. The approach adopted by this legislation would conditioned the future approach to the issue until nowadays. Actually, the national territory was divided in linguistic regions based on the principle of linguistic separatism: Dutch, French and bilingualism for the Brussels region. This structuring was further confirmed by a law adopted in 1932 on education, determining the use of language in primary and secondary schools, and in 1935 reforming the judicial system and procedure, which is still in force[30]. Therefore, every linguistic group was associated with a specific portion of the national territory, and the determination of the language to be used within it was established on the basis of the decennial national census: i.e. the language used in a certain municipality by the majority of adult citizens. This first accommodation, although judged insufficient after, of the linguistic claims of the Flemish movement, contributed in transforming it from a cultural-linguistic movement into a nationalist one, asking from more extended forms of self-ruling[31].

The census method, however, was subsequently judged to be insufficient to really protect the Dutch language, since the following censuses showed the progressive increase of the French language hegemony, especially in those municipalities which stayed at the border of the linguistic regions, as it was for municipalities surrounding Brussels. Therefore, the census method of adaptation of linguistic regions was in the end refused by the Dutch speaking group, which asked for the consolidation of the linguistic boundaries with a definitive determination of the language to be used, and of the possibility to directly manage education as administrative institutions[32]. These claims resulted in the «1962-1963 linguistic laws package» on, respectively, linguistic territorial borders, education, the linguistic regime of the region of Brussels and, at last, the administration of the State. Thus, Dutch, French, German were, and have remained, the languages on which basis the linguistic borders shall have been defined, in addition to the confirmed bilingualism character the Brussels region. These laws, in addition, did not proceeded with a new demarcation of linguistic borders according to the census method but, on the contrary, fixed them in conformity with the previous situation. Furthermore, in those same years, also the situation of the Walloon and Flemish regions on economic

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[30] Proceedings are to be conducted in the language of the region in which they are initiated. Nonetheless, the defendant may ask the proceeding to be moved if it is not proficient in the language, or the parties, jointly, may ask the proceeding to be moved to another region. Cfr. arts. 4 and 7, Law of 15 June 1935.

[31] W. SWENDEN AND M. T. JANS, *'Will it stay or will it go?' Federalism and the sustainability of Belgium*, in *West European Politics*, 2006, 5, p. 878.

[32] E. WITTE, H. VAN VELTHOVEN, *Langue et Politique: la situation en Belgique dans une perspective historique,* Brussels, 1999, p. 57.

terms departed even more[33], and at the end of the decade national political parties broke along linguistic lines, regionalising the party systems in accordance with the ethnic-linguistic-cultural division. On these basis in 1970 began the season of reforms and the parallel gradual devolution of competences from the central level to sub-national units.

2.2. The reforms of the Belgian state and the competence on immigration matters.

The first four reforms of the Belgian state, to which corresponds the same number of amendments of the 1831 Constitution combined with related laws further defining the institutional reforms, marked the process of the transformation of Belgium from being a unitary state to become a federation[34].

In 1970 the first reform of the state took place and the process of devolution of powers from the central level to sub-national units began. The three linguistic Communities were established - Dutch, French and German - which territorial boundaries corresponded to those of the linguistic regions fixed by the 1962-1963 legislation. Thus, the territory of the communities perfectly corresponded to those of the monolingual regions, apart from the bilingualism status of Brussels which was maintained. Communities - which were named «Cultural Communities» in this first phase of their functioning - were provided with a Council made of, respectively, Dutch-speaking and francophones members of the national Parliament, and of directly elected members from 1973 in the case of the German-speaking community which, nevertheless, had only an advisory role. Only the Councils of the French and Dutch communities were given legislative powers on the sole matter regarding the use of language and the cultural policy. They were also provided with their own executives which, nevertheless, were answerable to the national government. However, this setting was far from being in line with the claims advanced, considering that administrative powers were still completely in charge of the central government, and Communities had not any kind of fiscal autonomy and proper resources.

If the establishment of Cultural Communities was a response to the Flemish group demand of a greater cultural autonomy, Regions were supposed to met the requests of having more autonomy in economic matters made by the French speaking

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[33] Since the Flemish GDP exceeded for the first time that of the Walloon region, which major industries were passing through to a restructuring period and which was asking for the grant of an higher degree of autonomy in socio-economic matters and for interventions of economic support from the central level. W. SWENDEN AND M. T. JANS, cit., p. 879.

[34] The Belgian federation has been considered an exemplary form of consociationalism, a *federalism by disaggregation* and an ideal-type dual federation, where federalism was used as a tool of conflict management, A. LIJPHART *Democracy in plural societies: a comparative exploration*, London, 1977, p. 230; K. DESCHOUWER, *The Politics of Belgium: Governing a Divided Society*, Basingstoke, 2012, p. 34.

group of the Walloon Region and of Brussels[35]. Nonetheless, in the first reform this institutions were just depicted but not implemented.

The competences regarding the government of immigration followed the decentralisation general move. In 1974, competences which previously were all in charge of the Ministry of Labour started to be partially transferred to federate units. Simultaneously with the law quoted above which had decided the ban of unskilled immigration, the competences on the *accueil* (welcoming) of migrants were transferred to the just outlined regional institutions[36]. In this first period the newly established regional entities did not differentiated their policies aiming at integrating foreigners from those adopted by the central government in the previous period, continuing to finance non-profit organisations that provided language course and socio-economic assistance to foreigners[37].

A decade later, in 1980, the second Reform of the State took place laying down the foundations of the final federalisation of the State in 1993. The executives of the Communities were not answerable any longer to the national executive, and the legislative powers of the German community were equalised to those of the other two major communities. Communities, moreover, lost their definition as (just) «cultural» since their competences were expanded to comprise, so called, «personal matters», i.e. health policies and assistance to individuals. More importantly, the process of establishment of Regions were finalised. They had their own Councils, which were made of members of the national parliament, and the regional executives were answerable to the regional Council. To the French and the Walloon Regions - the Brussels Capital Region was established subsequently in 1988 with the third reform - were in the end attributed significant competences on employment policy, public investment, economic development, housing policy and structural planning. If the French Community and the Walloon Region remained separated entities and maintained each one their respective institutions, the Dutch Community and the Flanders Region merged, having from this moment onwards a unique Council (parliament), government and administration[38]. Relevantly, in view of the division of competences established by the second reform, was the simultaneous institution of the «Court d'Arbitrage» in 1984, to which was attributed the competence to solve, precisely, the conflicts that would surge between the federal, regional and community levels on the division of competences.

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[35] W. SWENDEN, M. BRANS, L. DE WINTER, *The politics of Belgium: Institutions and policy under bipolar and centrifugal federalism*, in *West European Politics*, 2006, 5, p. 870.
[36] Cfr. arts. 4 and 6, Loi du 1er aout 1974.
[37] I. ADAM, *Immigrant Integration Policies of the Belgian Regions: Sub-state Nationalism and Policy Divergence after Devolution*, in *Regional and Federal Studies*, 2013, 5, p. 553.
[38] From this point onwards we will use Flemish Region or Flemish Community as synonymous.

Within the framework of expansion of Communities competences, those previously attributed to Regions as regards the reception and integration[39] of migrants were transferred to the French and Flemish Communities. Regions would remained in charge of the implementation of laws concerning employment of foreign workers, which, nonetheless, was a national competence. Actually, as reported previously, in 1980 the law regulating immigration - entry, residence and expulsion of foreigners - was adopted and regulates the just mentioned ambits at the national level as amended over time in order to transpose EU legislation on the matter.

As regards reception and integration policies addressed to migrants, the policies put in place by the two Communities did not departed in their content until the mid-eighties, continuing to relying on the inherited national approach based on the joint action of associations, trade unions, regional advisory councils and (French Community) administration[40]. In 1984, the first step towards diversification at the community level were taken, once the Flemish Community recognised the activities of integration centres at the sub-regional level and established a specific institution to coordinate their action (VOCOM, *Vlaams OverlegComité Opbouwwerk Migratie*) at the regional level. On the contrary, the French community opted for the implementation of more *laissez-faire* assimilationist policies not specifically targeted on foreigners but framed as general social policies. However, scholar commonly agree that integration policies at the sub-national level started to take different paths at the end of the 1980s, being the definitive incentive to divergence of communities' integration policies the 1988-1989 third reform of the State, the final institution of Brussels Capital Region and the far-right move of Flanders.

The third reform did not touched specifically competences regarding immigration, having at its principal object the institution of the Brussels Capital Region, and a better definition of competences among Communities and Regions. In particular, competence on education was attributed to Communities from this moment onwards. Actually, despite competences on reception and integration were already transferred at the sub-national level, the whole remaining basic competences regarding foreigners and related aspects of migrants' rights continued to be exercised by the federal level. These regarded, in addition to those object of the 1980 law - entry, residence and expulsion - civil and political rights, access to (almost all) welfare rights, anti-discrimination policies and, not least, citizenship acquisition. Therefore, a series of initiatives were taken as

[39] The latter term was added to the sole «reception» denomination of the central policy and was taken as a sing of the progressive change of attitude towards the foreign population living in Belgium, which was now considered beyond their only instrumental function related to the national labour market. C. JEAN-YVES, R. ANDREA, *Les étrangers en Belgique: étrangers, immigrés, réfugiés, sans-papiers?*, Dossier du CRISP, 54, 2001.

[40] Those policies were classified as being «slightly interventionist multiculturalist», I. ADAM, *Immigrant Integration Policies of the Belgian Regions,* cit*.*, p. 553.

regards immigration policies to provide a framework for coordination among the actors involved in the government of immigration. The «Royal Commissariat for Immigrants Policy» - an institution created at the central level - was established in 1989 having the task to provide policy recommendations on the issue of integration to sub-national units. Although these were initially followed, since Communities had not still development their own policies[41], their were progressively ignored. Nearby, within the realm of the numerous bodies of intergovernmental cooperation, the «Inter-ministerial Conference for Immigrants Policy» was established with the aim to provide a ground for the exchange of information between ministers of sub-nationals units dealing with immigration issues. If the conference has some relevance this was due to the set up of initiatives financed by the central level, but at the end of the 1990s it ceased its activity[42].

In 1993 the fourth reform of the state happened, ending the path towards the transformation of the Belgian state in a Federation. The Constitution stated that the Belgian federation is composed by three Communities - Flemish, French and German speaking - and three Regions - Flemish, Walloon and Brussels. Furthermore, the country is divided in four linguistic regions: Dutch, French, bilingual (French-Dutch) and German. Specifically, on competences division, social assistance policies of Communities were expanded and, more significantly, it was established that the French Community could devolve part of its competences to the Walloon Region and to the French Community Commission (Cocof) of Brussels Region. Accordingly, the competence on reception and integration of immigrants - which is part of the «matiére personalisable» and, more specifically, of that of «aidé aux personnes» - was transferred from the Community to the Walloon Region and to the Cocof from the 1st of January 1994. Simultaneously, at the federal level, a further body attempting (also) at coordinating sub-national policies on integration was established: the federal Centre for Equal Opportunities and Opposition to Racism (CEOOR)[43].

It is worth at this point, since the Belgian State as a federation was at last established, to spell out three principles on which the division of competences and their exercise by Belgian federal institutions and sub-national entities are founded. The first is the absence of shared competences, thus, all competences are exclusive of an entity, and federal competences are those which are not assigned to other levels of government, i.e. the residual criterion applies[44]. Second, the federal and the sub-national levels of

[41] This was also created in response of the rise of the far right in Flanders in the 1989 regional elections and in the 1991 national elections.

[42] I. ADAM, D. JACOBS, *Divided on immigration, two models for integration. The multilevel governance of immigration and integration in Belgium*, in E. HEPBURN, R. ZAPATA-BARRERO (EDS.), *The Politics of Immigration in Multilevel States: Governance and Political Parties*, Basingstoke, 2014, p. 108.

[43] Law of 15 February 1993, M.B., 17 March 1993.

[44] Art. 35 of the Constitution.

government are not hierarchically ordered, thus, the federal and the federate entities are on equal footing and equally does their legislative acts: federal laws and decrees adopted by sub-national units are equipollent. Third, the *in foro interno, in foro externo* principle implies that the competences attributed to a certain entity within the federal organisation of the State, it is also attributed to the same entity as regards it external exercise, i.e. at the international and supranational level[45]. Therefore, when it comes to the application and implementation of EU law, Communities and Regions as federal institutions are exclusively competent in accordance with the division of their competences[46].

The introduction of these principles is useful to provide a ground for understanding the relations between the levels of government in Belgium and the EU process, also in light of the parallel processes, at the one side, of gradual (and partial) devolution of member states competences in a number of areas to the EU level as, e.g., in the field of legal immigration of third-country nationals, not to mention the entry and residence of EU citizens, with that, at the other side, of devolution of competences in the opposite direction, i.e. from the federal level to Communities and Regions. In the case of Belgium, it has been argued that this double dynamic has, on the one hand, forced all levels to cooperate, providing to that aim specific institutions and procedures, on the other hand it has contributed in maintaining the central role of the federal level and of federal competences, preventing its absorption by Communities and Regions, in relevant policies areas[47].

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[45] The fourth reform of the State of 1993, according to the *in foro interno, in foro externo principle*, has attributed to Communities and Regions foreign policy competences in all spheres in which, in turn, domestic competences were attributed.

[46] Nevertheless, as well-known, is the national level only that is responsible for the wrong or non-implementation of EU law and it cannot rely on the internal division of competences in order to justify non compliance. In the event of an ECJ *erga omnes* decision - preliminary rulings are excluded - stated that Belgium has not fulfilled its obligations under EU law, or has acted in breach of it, the Constitution provides for a substitution mechanisms for the federal level to act in place of the Community or Region to which the violation was imputable. Cfr. ECJ, C- *Commission v. Belgium*, 2 February 1982; *Commission v. Belgium*, 14 January 1988. The same principle is applicable at the international level, where the sole (federal) State is a subject of international law and responsible for its obligations. Cfr. art. 2, Convention on Rights and Duties of States, Montevideo, 26 December 1933. Cfr. also art. 169 Constitution; Special Act of 5 May 1993, amending art. 16, para. 3 of the Special Law of 8 August 1980, determines the procedure to be followed to substitute the federate entity.

[47] J. BEYERS, P. BURSENS, *The European rescue of the federal state: How Europeanisation shapes the Belgian state*, in *West European Politics*, 2006, 5, p. 1058.

3. Immigration in-between the national level and the EU level.

The law of 15 December 1980 regulating the «accès au territoire, le séjour, l’établissement et l’éloignement des étrangers» as further amended[48], and the law of 30 April 1999 on the «occupation des travailleurs étrangers» with the respective regulations given them execution[49] are the pieces of legislation of reference to comprehend how labour migration of Union citizens and third-country nationals is regulated at the national and sub-national level in Belgium. Actually, they are the body of legislation of reference as regards the transposition of the EU immigration policy directives - 2003/109/EC directive on the long-term resident status[50], 2005/71/EC on researchers[51] and 2009/50/EC directive on high qualified employment, so called, blue card[52] - and of the 2004/38/EC directive on rights of Union citizens and family members when moving to and residing in a Union member state[53]. As regards the entry and residence in the national territory, the competent authorities are the Minister of Home Affairs[54] and the mayor. However, the ministerial competence has been subsequently delegated to the federal administrative Office of Immigration[55]. Instead, the competent authorities for the application of the regulation on the exercise of work activities by foreigners are the Flemish and French regional administrations and the German-speaking Community[56].

The 1980 law defines foreigners as non-nationals and divides them, as expected, in two main categories: Union citizens - to which family members regardless of their

[48] *Supra* note 12. The last amendment dates back to the «Arrêté royal modifiant l'arrêté royal du 2 août 2002 fixant le régime et les règles de fonctionnement applicables aux lieux situés sur le territoire belge, gérés par l'Office des étrangers, où un étranger est détenu, mis à la disposition du Gouvernement ou maintenu, en application des dispositions citées dans l'article 74/8, § 1er, de la loi du 15 décembre 1980 sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers» 17 October 2014, M.B. 21 October 2014.

[49] Cfr. Loi relative à l'occupation des travailleurs étrangers, 30 Avril 1999, M.B. 21 Mai 1999; Arrêté royal portant exécution de la loi du 30 avril 1999 relative à l'occupation des travailleurs étrangers, 9 Juin 1999, M.B. 26 Juin 1999.

[50] Cfr. «Loi modifiant la loi du 15 décembre 1980 sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers, 15 Avril 2007, M. B. 10 Mai 2007». This law has transposed the 2009/109/EC directive on the third-country nationals long-term resident status, the 2004/38/EC directive on the rights of Union citizens and its family members when exercising their right to move and reside in another member state, and the 2005/85/EC directive on minimum standards on procedures in Member States for granting and withdrawing refugee status.

[51] Cfr. Loi modifiant la loi du 15 décembre 1980 sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers, 21 Avril 2007, M. B. 27 Avril 2007.

[52] Cfr. Loi modifiant la loi du 15 décembre 1980 sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers, 12 Mai 2012, M.B. 31 Aout 2012.

[53] *Supra* note 49.

[54] The authority has been transferred from the Ministry of Justice to the Ministry of Home Affairs in 1992. Cfr. Loi du 8 juillet 1992; Arrêté royal du 13 juillet 1992.

[55] Cfr. Arrêté ministériel du 17 mai 1995 portant délégation des pouvoirs du Ministre en matière d'accès au territoire, de séjour, d'établissement et d'éloignement des étrangers, M.B. ; Arrêté ministériel portant délégation de certains pouvoirs du Ministre qui a l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers dans ses compétences et abrogeant l'arrêté ministériel du 17 mai 1995 portant délégation des pouvoirs du Ministre en matière d'accès au territoire, de séjour, d'établissement et d'éloignement des étrangers, M.B. 26 Mars 2009.

[56] Art.1, para. 5, Arrêté royal du 9 Juin 1999, cit.

nationality are assimilated - and third-country nationals, to further distinguish among the latter those non-nationals in refugees or beneficiaries of other forms of international protection. More precisely, sub-classifications in addition to those just mentioned are present thus, the related status are regulated[57]: the status of students, victims of human trafficking, third-country nationals which are long-term residents, researchers, blue card holders and unaccompanied minors. Therefore, the national transposition of the corpus of directives regulating the status attributed to third-country nationals within the framework of the EU labour immigration policy analysed in the previous chapter, as well as the status of Union citizens - can be founded within this piece of national legislation. Therefore, the nationality possessed by the non-national, its family relations, and the reasons justifying its request of being admitted to entry and stay in the national territory and to reside for a certain amount of time are the elements that determines, in turn, the conditions of its entry and stay.

One of the not so unexpected consequences of the immigration policies which were adopted in the following years was the increase in the number of irregular migrants[58], and the shift of numbers recorded of formal justifications asking for entry and residence into the country from economic reasons to family reunification and asylum, which from the eighties has become the two major sources of the growing number of foreigners in Belgium. Precisely with the aim to reduce the high numbers of irregular migrants[59], a law was adopted in December 1999, establishing the procedure and requirements for an operation of regularisation[60] of irregular migrants who were unlawfully living in Belgium until 1st October 1999[61].

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[57] Cfr. Arts. 58 - 61/25, Loi du 15 decembre 1980 cit.

[58] A policy and approach towards immigration which was defined a «myth» by some Belgian scholars and «no longer appropriate» by the EU Commission in 2000. See B. VAN DER MEERSCHEN, *Régularisations: un petit tour et puis s'en vont?*, Revue du droit des étrangers, n. 121, 2002, 789, 795; Cfr. also Communication of the Commission to the Council and the European Parliament on a Community immigration policy, COM(2000) 757 final, Brussels, 22.11.2000, 3.

[59] It is not by chance in fact that the Interior Minister of the time had connected the high numbers of irregular migrants living in the Belgian territory to the excessive length of the national asylum procedure and to the insufficient execution of return decisions. Cfr. Doc. Parl. Sénat., 2-202/3-1999/2000, rapport de la Commission de l'Intérieur du Sénat, 8 décembre 1999, p. 2.

[60] The decision to adopt this kind of law was based on the government agreement of 7 July 1999 where the will to adopt such a measure was announced. Nevertheless, the adoption of an act with the legal form of a law was preceded by the attempt of the Interior Minister to adopt the same measure through a regulation, an act which has the advantage to avoid a public discussion on the reasons sustaining the government decision, and the show of the different motivations within the same government majority. However, the proposed regulation was suspend by the Conseil d'Etat because of it lacked an appropriate legal basis. Cfr. B. VAN DER MEERSCHEN, *Régularisations: un petit tour et puis s'en vont?,* cit., 790.

[61] Loi du 22 décembre 1999 relative à la régularisation de séjour de certaines catégories d'étrangers séjournant sur le territoire du Royaume, publiée au Moniteur belge du 10 janvier 2000, p. 578. For a comment see J. -Y. CARLIER, *Loi relative à la règularisation des étrangers*, Journal des tribunaux, n. 5954, 2000, 77 et s.

3.1. Union citizens and third-country nationals status as transposed in the national law.

Union citizens, in compliance with the 2004/38/EC directive, are authorised to enter the country and to reside for a period up to three months having only to posses and present at the border a valid identity card or passport, or other means proving that it is a beneficiary of the right to entry and stay on the basis of its status of Union citizen. The same right is accorded to the members of its family[62], distinguishing the necessary documents needed to be able to enter and stay the country on the basis of their nationality[63]. Recalling the relevant CJEU case-law analysed in the previous chapter, it is worth of notice that the last amendment of the 1980 law has specified that among those family members who can benefit from the right of entry and residence in Belgium are comprised the father and the mother of a Union citizen of minor age at the condition that they are in charge of the minor and that they have effectively its custody. This disposition has to be read in conjunction with the further specification that, in the case just mentioned, the right to reside within Belgium is granted as long as the above-mentioned members of the family of the minor Union citizen posses sufficient resources not to become a burden on the national social assistance system and a sickness insurance covering all risks[64].

The right to reside in the national territory for periods longer than three months is granted if the Union citizen falls within the following categories: employed, self-employed or job-seeker[65]; or if it possesses sufficient resources not to become a burden

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[62] These are listed at art. 40bis which was inserted by the law implementing the 2004/38/EC directive and was further amended in 2011. The list of Union citizens family members to which a right of entry and residence is granted comprise: the spouse, or the foreigner to which the Union citizens is bound by a registered partnership - which is recognised to be equivalent to marriage by the Belgian law or is considered to be a registered partnership according to a foreign law. In this last case, a set of conditions listed shall be fulfilled. Moreover, a royal law determines the partnerships that can be considered to be equivalent to marriage according to the Belgian law. Moreover, family members are also considered to be its descendants or the descendants of its spouse or (registered or assimilated) partner of less than twenty one years old or who is at its charge, who are joining or accompanying them, at the condition that the foreigner has the right of custody, and its ancestors or those of its spouse or partner of which they are in charge. Cfr. Loi modifiant la loi du 15 décembre 1980 sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers du 25 avril 2007, M.B. 10 Mai 2007; Loi modifiant la loi du 15 décembre 1980 sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers en ce qui concerne les conditions dont est assorti le regroupement familial, 8 Juilliet 2011, M.B. 12 setembre 2011.

[63] Third-country nationals who are Union citizens family member ex arts. 40bis and 40ter have to be in possess of a valid passport and of a visa, if needed, to entry the country, according to the provisions of the Council Regulation (EC) No 539/2001 of 15 March 2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement, OJ L 81, 21.3.2001, p. 1–7.

[64] Art. 17, Loi modifiant la loi du 15 décembre 1980 sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers, 19 Mars 2014, M.B. 5 Mai 2014.

[65] Precisely, these rights are granted if the Union citizen has entered in the country to look for a job and it allowed to stay as long as it is demonstrated that the search is continuing and that the it has real chances to be employed. Cfr. art. 40, para. 1, no. 1, Loi modifiant la loi du 15 décembre 1980 sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers, 25 avril 2007, M.B. 10 Mai 2007.

on the national social assistance system and a sickness insurance covering all risks; or student possessing, as well, a sickness insurance covering all risks, and declaring or in any case demonstrating that it is in possession of sufficient resources not to become a burden on the national social assistance system for the duration of its stay. To the categories of Union citizens to which is required to demonstrate the possession of sufficient resource are joined or accompanied by their family members

The conditions of entry and stay of Union citizens and their family members have been outlined, in order to comprehend how the member state has exercised its discretions in defining those details which was not determined specifically by the EU directive. Moreover, the outline serves as a parameter to perceive more clearly under what aspects third-country nationals are treated differently as regards the grant of the same rights, that are, firstly, entry, residence and purse an economic activity in the national territory.

A third-country national is authorised to enter the country if he is in possession of a valid document and a visa, if required. Nevertheless, he can be refused entry if he cannot demonstrate to posses sufficient resources to provide for its subsistence during its stay and for return to its country of origin or transit, and he is not in the conditions to acquire them. The possession of such resources, however, can be substituted by a declaration stating that a Belgian citizen or of a foreigner admitted to unlimited residence in Belgium will provide, for a period of two years minimum, such resources[66].

The right to stay in the country for more than three months is granted to a non-national if it is recognised by an international treaty, a law or royal decree. Secondly, if the foreigner fulfil the requisites necessary for the recovery of the Belgian nationality[67]; in the end, are similarly authorised family members of a foreigner admitted or authorised, at least after twelve months, to reside unlimitedly, or to which has been granted, at least after twelve months, the right of establishment. To the first and second category of foreigners are asked to demonstrate the possession of resources stable, sufficient and regular to provide of their need and not to become a burden for the public powers. The latter category shall proof to dispose of a proper accommodation for its family members and of a sickness insurance covering the risk in the Belgian territory for

[66] Further conditions precluding the third-country national to enter the country are to have been signalled by the Schengen Information System as a persons not to be admitted or to which residence in the area is interdicted, those related to reason of public policy, public order and national security or to be passible of compromising the country international relations, of previous expulsion after no more than ten years of residence, to have been object of an interdiction of entry by another third-country national. Cfr. art. 3, no. 5 - 9.

[67] Nonetheless, it is required to have established the residence in Belgium in the previous twelve months and to officially declare the will to recover the nationality. To this category has to be added the women who has lost its Belgian nationality as a consequence of its marriage or because its husband has acquired a foreign nationality. Cfr. art. 10, para. 1, no. 2 and 3, as amended by the law of 19 March 2014 modifying the 1980 law, entered into force 15 May 2014, M.B. 5 May 2014.

his and its family members. The request for its authorisation - to be valid in the whole national territory - has to be addressed to the mayor of the place of residence which will transmit the request to the competent minister or to its delegate. Once the foreigner is admitted to reside for a period up to three months it is registered in the foreigners register by the municipal administration of its place of residence. This residence permit has a limited duration which is determined by the activity that the foreigner has been authorised to carry on in the country. Actually, detailed provisions are applicable to students, employers, self-employed, family reunification, house-sharing, adoption, entry on the basis of a visa for marriage in Belgium[68].

The residence authorised on the basis of this permit is considered to be of a limited duration for a three-year period following the introduction of the request. Expired such period, as long as the conditions on which the issued was based, it acquires an unlimited duration[69].

Finally, attention has to be payed to the right of establishment granted to foreigners, which corresponds to an authorisation to reside in the national territory for a unlimited period of time[70]. This has been modified following the transposition of the 2009/103/EC directive on the long-term resident status of third-country nationals and of the 2004/38/EC directive. Thus, it is granted to a foreigner which demonstrate a lawful and continuos residence of five years in the country, and to the family members of a foreign to which such a right has already been granted[71]. Thus if the foreigner is a Union citizen, it corresponds to the right of permanent residence, but it also includes all those categories of non-nationals which are not a third-country national no further defined[72], to which, instead, the following article is devoted.

As expected, a series of conditions are added in order to grant the same right to a third-country national not falling under the above mentioned categories, which corresponds to those to which the 2009/103/EC directive applies. That the right of establishment is a general right comprising within it the right of permanent residence of Union citizens and the right of long-term residence of third-country nationals is further demonstrated by the specific provisions devoted to the latter. Therefore, in addition to an equal requirement of five years of lawful and continuos residence, it is required to posses

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[68] Cfr. arts. 10 and 10 bis, ib.

[69] Cfr. art. 13, para. 1.

[70] Cfr. art. 18.

[71] Even though it is, in this case, limited to the spouse and to the partner living with them. Cfr. art. 15, para. 1.

[72] These are those third-country nationals possessing the nationality of a state member of the European Economic Area or with which a bilateral or multi-lateral agreement between the European Union only or with member states has been singed, or just between a member state and a third-country, but at the condition that it has entered into force before the 2003/109/EC Directive. Cfr. art. 3, para. 3, Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents, OJ L 016 , 23/01/2004.

stable, regular and sufficient resources to cover the necessities of the person[73] and of the family members of which it is in charge in order not to become a burden for the public powers, and of a sickness insurance covering the risks in Belgium. More favourable conditions are provided for the fulfilment of the five years of residence to those third-country nationals who are high qualified workers, thus have been authorised to reside on the basis of a blue card. Therefore, the sum of the periods spent in other member states is possible in order to fulfil the five-year requirement as long as these has been similarly authorised on the basis of a blue card and the two previous years of residence has been in Belgium. Once the foreigner has been granted the right of establishment it is inscribed in the population register of its municipality of residence.

In the part of the 1980 law devoted at transposing the status attributed to third-country nationals on the basis of EU directives, are outlined the provisions applicable to those third-country nationals who enter the country by virtue of possessing a long-term resident permit issue by another member state. Thus, the authorisation of more than three months, and a residence permit of a limited duration, according to the activity to be pursued in the country, will be issued, if the third-country national has entered the country in order to exercise a salaried or no-salaried activity, to follow a study course or vocational training, or for other reasons. In the first case it has to prove to have been authorised to work in the country, or to be exempted from this requirement, and to posses a work contract or a proposal of a work contract, or the qualifications necessary to exercised the no-salaried activity and to be able to earn from these activities stable, regular and sufficient resources to cover the necessities of the person and of the family members of which it is in charge in order not to become a burden for the public powers. If the entry has not specific reasons it is added to the resources requirement the posses of a sickness insurance covering the risks in Belgium. In the end, in the case of an entry for study reasons or vocational training the conditions are those already spelled out in general for third-country nationals asking for a permission to reside in the country for a period longer than three months for the same reasons[74].

The law of 21 April 2007 amending the 1980 law on access, residence and expulsion of foreigners has transposed the 2005/71/CE Directive and the relative procedure for admitting third-country nationals for the purposes of scientific research, adding a new chapter (VI) to the present law. This is one of those case for which the request of the grant and renewal of the residence permit should be made for a limited

[73] Les moyens de subsistance vises à l'alinéa 1er doivent au moins correspondre au niveau de ressources en deçà duquel une aide sociale peut être accordée. Dans le cadre de leur évaluation, il est tenu compte de leur nature et leur régularité.

[74] Cfr. arts. 58 - 61, Loi sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers, 15 Decembre 1980.

period, but longer than three months. In particular, the third-country national aiming at entering the country in order to carry on a research project, which shall has been agreed within the framework of a convention signed with an appropriate research centre, is in charge of asking for the permit before entering the country or after to the mayor of its municipality of residence. The permit will have the same duration as the research project and will be issued if the required documents are produced[75]. The right of residence of the researcher family members are submitted to the same conditions required to students to comply with in order to be accompanied or joined by its family members: stable, regular and sufficient resources to cover the necessities of the person and of the family members of which it is in charge in order not to become a burden for the public powers, appropriate accommodation, not to be interdicted to enter the country ex art. 3, para. 1, no. 5-8 and, finally, not to have caught a disease - listed in the law - passible to put in danger the public health[76].

The last status provided to third-country nationals by EU law to be considered and the last to be transposed within the national law was that regulating the conditions of entry and stay for the purpose of high-qualified employment as determined by the 2009/50/EC directive, the, so called, blue card directive[77]. A new chapter (VIII, arts. 61/26 - 61/31) titled «travailleurs hautement qualifié - carte bleue européenne» has been introduced. Consequently, the articles regulating the admission of third-country nationals for periods longer than three months, of its family members and the conditions to be fulfilled to accompany the blue card holder, as the (more favourable) conditions to be granted the status of long-term resident has been amended accordingly. Similarly to the permit granted to those third-country nationals admitted for the purposes of scientific research, this permit and the conditions for its issue as well constitutes a specific typology of the permit issued to entry and reside within the national territory for a period longer than three months[78]. The request of a blue card can be made when the third-

[75] These are a travel document, agreement with the research centre, medical certificate proving that it has not the diseases listed by the present law, and a further certificate proving it has not been convicted for common crimes. Cfr. 61/11, para. 1, no. 1-4.

[76] Crfr. art. 61/13, as lastly amended by the «Loi visant à corriger plusieurs lois réglant une matière visée à l'article 78 de la Constitution» du 25 Avril 2014, M. B. 19 aout 2014.

[77] Cfr. Loi modifiant la loi du 15 décembre 1980 sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers, 15 Mai 2012, M. B. 31 aout 2012.

[78] As know the list of those categories of non-Union citizens to which this directive does not apply is long and comprises: third-country nationals beneficiaries of some kind of temporary protection or have applied to obtain such protection, international protection, protection accorded on the basis of national law, researchers, family member of Union citizens who have benefited from their derived rights of move and reside ex 2004/38/EC directive, holders of a long-term residence permit who entered the country to exercise an economic activity, seasonal and posted workers, categories admitted for reasons of trade and investment on the basis of an international agreement, those whom expulsion has been suspended for reasons of fact or law or those third-country nationals who can benefit from free movement rights comparable to those of Union citizens on the basis of agreements. Cfr. art. 3, 2009/50/EC Directive and art. 61/26 «Loi sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers» cit.

country national is still in a third-country, or if the third-country national has been already authorised to enter and stay for maximum three months or for a longer period the request can be addressed to the mayor of the municipality of residence. In both cases the competent ministry or its delegate would provide the permit only if the required documents are provided and at condition that the competent regional authority issues a temporary employment authorisation («autorisation d'occupation provisoire») to the employer. These two conditions are interrelated since among the documents requires there is a copy of the work contract. However, if the third-country national has previously resided in another member state as a blue card holder for a period of minimum eighteen months, the request of a permit for a period longer than three months in order to exercise a high qualified employment activity can be made and it is not subjected to any additional authorisation from regional authorities[79]. The third-country national is also required to establish its domicile in Belgium.

The period of validity of the blue card will be the same of the authorisation of residence, and such is renewable for a further period of thirteen months. After two years holding a valid blue card, at the following renewal, the holder is authorised to reside for a period of three years. Nonetheless, the authorisation to reside can be withdrawn or the renewal refused for number of reasons as if, among others, the conditions seen above are not satisfied any more; if the work activity does not respect anymore the parameter to be defined as high employment as determined by the regulation on the employment of foreign workers; or if the holder has been unemployed for three consecutive months or more than once during the authorised period of residence, or if the holder does not possessed anymore sufficient resources to satisfy its needs and those of its family members not to become a burden for the public powers[80].

As well known, member states were supposed to transpose the 2011/98/EC directive, so called, single permit directive, by 25 December 2013. Nevertheless, Belgium has not complied with such obligation yet. This delay can be seen as the outcome of the overlap between two events, i.e. the expiration of the deadline just mentioned with the changes introduced in the division of competences by the sixth, and last, reform of the State. This sixth reform, entitled «[A] more efficient federal State and

[79] Cfr. art. 61/27, para. 3.

[80] The other grounds on which a decision to withdraw the permit or not to renew it can be based are: if the holder has used false information, documents or has recurred to he lack of 3° a utilisé des informations fausses ou trompeuses, des documents faux ou falsifiés, a recouru à la fraude ou à d'autres moyens illégaux;

5° s'est abstenu de communiquer au ministre ou à son délégué les modifications visées à l'article 61/29, § 4, alinéa 1er, pour autant que l'absence de notification ne soit pas liée à une raison indépendante de sa volonté.

2° n'a pas, conformément à l'article 5 de la loi du 19 juillet 1991 relative aux registres de la population, aux cartes d'identité, aux cartes d'étranger et aux documents de séjour et modifiant la loi du 8 août 1983 organisant un registre national des personnes physiques, communiqué l'établissement et le changement de sa résidence principale en Belgique.

more autonomous entities», is based on a institutional agreement - the, so called, Butterfly agreement - reached in December 2011 - which has been realised through a series of changes that took place in a dilated period of time. The reform has provided for the division of the electoral district of Brussels-Halle-Vilvoorde in one electoral district for Flemish Brabant and one for Brussels-Capital[81], for the modification of the division of competences with a further devolution from the federal level to federate units of a number of matters with the related personnel and budget, a major reform of the special finance act, for the reform of the Parliament and the abolition of direct election for the Senate. The legislation on the necessary constitutional amendments and on the special law were enacted on 6 January 2014, published on 31 January, and has, lastly, entered into force 1 July 2014[82].

On the competences transferred - and the related finances for their exercise - from the federal level to Communities and Regions those relevant for our purposes are family allowances to the formers and, even more, certain aspects of the employment policy[83] to the latter. Nonetheless, as transfers need to be gradual, the federal state has continued to exercise the transferred competences until the end of 2014, but from the 1 January 2015 Regions and Communities were supposed to substitute the federal level. exercise. Nevertheless, for they case in which they are not still able to, a further transitional period of one year has been foreseen during which the federal state will continue to perform the above-mentioned competences on the behalf of the federate entities. In particular, on family allowances, the administration and the payments will continue to be in charge of the federal state until the end on 2019[84].

As regards, more precisely, the competences related to the labour market, individual and collective labour rights, social security, social consultation and the wage policy are still federal competences. On the other hand, a transitional period for the exercise of the competences transferred to Communities and Regions from 1 July 2014 has been programmed for the subsequent six months, thus ended the 31 December 2014 - during which the federal personnel has exercised such competences on the behalf of Communities and Regions. Actually, the respective budgetary transfers had took place from 1 January 2015, and the transfer of the personnel will be done by 1 April 2015. In details the regionalised competences are those concerning policies addressed to target groups as elderly, young, and long-term inactive persons, employment services and employment local agencies, financial aid in case of return to work or alternative training,

[81] 19 JUILLET 2012. - Loi portant réforme de l'arrondissement judiciaire de Bruxelles (1)
[82] Loi spéciale relative à la Sixième Réforme de l’Etat, 6 Janvier 2014, M.B. 31 Janvier 2014. Cfr. in particular art. 67.
[83] The law of reform has amended, specifically, the «loi spéciale du 8 août 1988 et modifié par les lois spéciales du 16 juillet 1993 et du 13 juillet 2001».
[84] Art. 44, para. 1 bis.

unemployment benefits, vocational training. The competences on labour of foreigners has been for the major part also transferred to Regions and they regard, specifically, the issue of labour permits to non-nationals entering the country in order to perform a work activity and consist in the issue of, so called A and B permits, blue card, permit in order to pursue a vocational training activity, au pair workers, single permits and permits for the exercise of seasonal activities.

This is the context within which the transposition of the single permit directive will have to be done. The reform entered into force July last year has transferred to Regions the (legislative) competence - and not just the competence to carry out regulations as before - on foreign labour force. Therefore, the directive - that provides for a procedure to grant a work and residence permit to third-country nationals - poses particular problems as it encounters competences of two different levels of government. Actually, if the issue of the work permit to exercise the kind of work activities covered by the objective scope of application of the single permit directive is a regional competence, on the contrary, the issue of the residence permit is still a federal competence. The overlap of these competences, thus, requires a coordination between the two levels of government as regards the transposition. To this aim, this is currently a matter of discussion within the Employment Inter-ministerial Conference and of a technical group composed by representatives of the three Regions, of the German-speaking community, of the «Service Public of Employment» and of the «Office des étrangers». Therefore, in order to comprehend in more details how EU directives on labour migration of third-country national interacts with the national legislation on the matter, with the division of competences, and what are the differences in the treatment in this regard between Union citizens and third-country nationals it is necessary to look in more details at national laws regulating labour migration of non-nationals.

3.2. Labour migration of foreigners.

As mentioned above, labour activities of non-Belgian nationals are regulated by the «Loi relative à l'occupation des travailleurs étrangers» of 30 April 1999 as further amended[85], and by the «arrêté royal» giving it execution of 9 June 1999. In particular, this legislation has been amended to provide for transitional periods to be applied to Union labour migrants nationals of those member states that have become members of the EU in the 2007 and 2013 enlargements, namely Romania, Bulgaria and Croatia.

[85] The last amendment has been brought by the «Arrêté du Gouvernement de la Région de Bruxelles-Capitale modifiant l'arrêté royal du 9 juin 1999 portant exécution de la loi du 30 avril 1999 relative à l'occupation des travailleurs étrangers» of 13 November 2014.

Three transitional periods, of two years each, have been applied from January 2007 to end in December 2013 to Bulgarian and Romania Union citizens labour migrants[86]. However, in case of labour shortages in a certain specific sector proved by the employer, more favourable provisions have been provided for[87]. For Union citizens labour migrants of Croatian nationality a first transitional period from 1 July 2013 to 30 June 2015 is in force[88].

The above mentioned legislation is applicable to persons aiming at pursuing a labour activity in Belgium but who are not of Belgian nationality. The personal scope of application, thus, does not distinguished among Union citizens and assimilated categories as regard the exercise of movement and residence for labour reasons, and third-country nationals no further defined. Nonetheless, the nationality of the would be labour migrant is relevant since it is the criterion that determines if it is required to fulfil the obligation to hold a work permit. These pieces of legislation adopted at the end of the 1990s do not, nonetheless, modified the approach adopted from the mid-1970s as regards immigration. More precisely, the general attitude towards the phenomenon officially it is still that of «zero-(unskilled)immigration», even though over time preferential lanes have been provided for specific categories of non-nationals labour migrants as high-skilled and professional sport players.

By looking at the requirements to be fulfilled in order for the non-national to exercise a salaried activity in Belgium it is perceivable that still before the sixth reform of the state above described, an overlap between federal and regional competences was already present. Nevertheless, it is worth to remember that before the sixth reform Regions had only regulative - and not legislative - powers.

In order for the non-national to exercise a work activity a series of requirements by the would-be worker and by the employer have to be fulfilled. These requisites as the procedure change in relation to the type of work permit that is required and to its duration. In all cases, however, the employer who desire to engage a non-national worker has to, previously, obtain an authorisation, so called, «autorisation d'occupation», by the competent regional - for Flanders and the Walloon Region - or community authority - for

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[86] Arrêté royal du 24 avril 2006 modifiant l'arrêté royal du 9 juin 1999 portant exécution de la loi du 30 avril 1999 relative à l'occupation des travailleurs étrangers en vue de la prolongation des mesures transitoires qui ont été introduites suite à l'adhésion de nouveaux Etats membres à l'Union européenne (Moniteur belge du 28 avril 2006); Arrêté royal du 19 décembre 2006 modifiant, suite à l'adhésion de la Bulgarie et de la Roumanie à l'Union Européenne, l'arrêté royal du 9 juin 1999 portant exécution de la loi du 30 avril 1999 relative à l'occupation des travailleurs étrangers (M. B. du 28 décembre 2006).

[87] Arrêté royal du 23 mai 2006 relatif aux modalités d'introduction des demandes et de délivrance des autorisations d'occupation et des permis de travail visés à l'article 38quater, §3 de l'arrêté royal du 9 juin 1999 portant exécution de la loi du 30 avril 1999 relative à l'occupation des travailleurs étrangers (Moniteur belge du 31 mai 2006);

[88] Arrêté royal du 24 juin 2013 modifiant, suite entre autres, à l'adhésion de la République de Croatie à l'Union européenne, l'arrêté royal du 9 juin 1999 portant exécution de la loi du 30 avril 1999 relative à l'occupation des travailleurs étrangers (M. B. du 28 juin 2013).

the sole German-speaking community. Instead, the non-national future worker shall posses a work permit. The obligation to posses a work permit in order to exercise a work activity in the country marked the fundamental difference of treatment between Union citizen and other listed categories of non-nationals and third-country nationals. To be exempted of the obligation of holding a work permit means that these categories of on-national workers are not touched by the consequences of the considerations that, on the contrary, conditioned the issued of such a permit. Differently said, they are the beneficiaries of the application of the preference clauses, i.e. the permit is issued only if another worker, with the required competences, is not already present and available in the labour market. It is worth to recall in this regard, that, certain categories of third-country nationals possessing an EU status to which are granted the right to move and to exercise a work activity in another member states on the basis of their EU status - i.e. blue card holders[89] and long-term residents[90] - are conditioned in such exercise by the Community preference clause.

Excluding those workers who on the basis of the specific characteristics of their professions are exempted from the obligation to obtain a work permit[91], the relevant categories of non-nationals workers not subject to this requirement are nationals of the member states of the European Economic Area (EEA)[92] and Switzerland[93], third-country nationals family members of a Union citizen possessing a residence permit or who have acquired the right of permanent residence, a third-country national to which the right of establishment or of residence for an unlimited duration has been granted, refugees, third-country nationals already possessing an A, B, or C work permit in order to carry on a work activity in the territory for which another authority is competent for the issue of such permits. This said, the remaining categories of non-national are required to hold a work permit in order to pursue a labour activity in the Belgian territory.

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[89] Cfr. art. 12, para. 5, Council Directive DIRECTIVE 2009/50/EC of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment.

[90] Cfr. art. 14, para. 3, Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents, OJ L 016 , 23/01/2004.

[91] These are, e.g., journalists, ministers, artists for less than three months, professional sport players, trainees at Belgian public institution, researchers at the conditions established by the provisions transposing the 2005/51/EC directive, post-doctoral researchers, specialised technicians for urgent jobs of reparation of specific machineries, etc. Cfr. art. 2, Arrêté royal du 9 juin 1999 portant exécution de la loi du 30 avril 1999 relative à l'occupation des travailleurs étrangers (M.B. 26.6.1999).

[92] These are EU member states plus EEA EFTA states: Iceland, Liechtenstein and Norway. Cfr. Agreement on the European Economic Area, OJ No L 1, 3.1.1994, p. 3. Third-country nationals who are provider of services of an enterprise based in a EEA member state or who come to Belgium to be trained for less than three months by a multinational corporation based in a EEA member state are similarly not required to hold a work permit. Cfr. art. 2 no. 14 and 29, l'arrêté royal du 9 juin 1999 portant exécution de la loi du 30 avril 1999 relative à l'occupation des travailleurs étrangers.

[93] Swiss nationals have been included among the categories of exempted workers by the amendement followed the «arrêté royal du 17 juillet 2013 modifiant l'arrêté royal du 9 juin 1999 portant exécution de la loi du 30 avril 1999 relative à l'occupation des travailleurs étrangers (M.B. 26 juillet 2013, Ed. 2).

A significant reform of labour migration, in particular, concerning work permits, has been done in 2003 by the federal government[94], adding to the already present A and B types of work permit, permit C. More generally, as a result of the reform, the right of residence and of work have been linked, the duration of the first determining the extent and the conditions of access of the third-country national to the labour market, with the aim not only to introduce a further type of permit but also to enlarge the categories of non-nationals who could be potential beneficiaries of a work permit[95].

Permits of the A and C type can be jointly considered since they are though to be granted to foreigners already lawfully residing in the country and to the employers it is not required to previously obtain an «autorisation d'occupation». Actually, the demand for their issue has to be done by the foreign worker itself to the regional authority of its place of residence[96]. A work permit A is issued for all paid activities and has an unlimited duration and is granted to the foreigner who demonstrate a continuos and lawful residence in the national territory of ten years preceding the request, and of having worked for four years with a B work permit[97]. A permit C is similarly issued for all paid activities, it has a limited duration of twelve months - and is renewable - and is granted to those categories of third-country nationals whose right to residence in the country is somehow limited in time: i.e. student, asylum seekers, victims of human trafficking, candidates for family reunification. As for the A permit, the employer is exempted to obtain the «autorisation d'occupation». The permit ceases to be valid if the persons loses its residence right.

The permit of the B type has to be considered by itself. Differently from the two previous typologies, it has to be demanded by the employer and it is issued simultaneously with the «autorisation d'occupation». The permit, which has a (initial) duration of twelve months is valid for the exercise of a work activity only for the employer who has required the permit and obtained the respective authorisation. The request shall be accompanied by a medical certificate, if it is the first time that the worker is employed in Belgium, by the work contract and, if the worker is already residing in the country for other reasons than work, by an information form. The permit and the authorisation are delivered only once the competent authority has verified that

[94] Cfr. Arrêté royal du 6 février 2003 modifiant l'arrêté royal du 9 juin 1999 portant exécution de la loi du 30 avril 1999 relative à l'occupation des travailleurs étrangers (M.B. 27.2.2003); Arrêté royal du 9 mars 2003 modifiant l'arrêté royal du 9 juin 1999 portant exécution de la loi du 30 avril 1999 relative à l'occupation des travailleurs étrangers (M.B. 1.4.2003).

[95] Aa. Vv., *Minorités ethniques en Belgique : migration et marché du travail: analyse démographique, statistique et des mesures juridiques et d'action en faveur des migrants sur le marché du travail*, Brussels, 2004, p. 84.

[96] G. AUSSEMSN, *La politique commune d'immigration économique au sein de l'Union européenne. Ètat des lieux et perspective à moyen terme*, in *Revue du droit des étrangers*, 2013, 172, p. 17.

[97] Arts. 3 and 12.

there is not another Belgian worker with the requested competences - or that can acquire them with a dedicated training - available on the regional labour market. Nevertheless, the authorisation and the permit are delivered without applying the preference clause in relation to certain categories of third-country nationals of states parties of a bilateral agreement concerning employment[98], or, e.g., *au pair* young workers, relatives and children of third-country nationals for the same duration of its work permit or residence permit, high qualified workers and researchers for a period non exceeding four years and third-country nationals who are long-term residents[99]. At last, the regional Minister of Labour can issue a work permit without applying the preference clause on individual basis for special social reasons.

On the basis of the authorisation and of the work permit the foreigner can request a Schengen-visa for a period longer than three months of the D type[100]. The request has to be accompanied by the presentation of a passport valid for a least one year, of a medical certificate and a certificate «de bonne vie et mœurs» valid for the previous five years. In the end, the authorisation and the permit are renewable for the same person and the activity but not necessarily for the same employer. The worker is not obliged to exercise the same activity on condition that it follows or has followed a training or a re-employment course[101].

Having outlined more in details the criteria and procedures to be followed by (employers and) third-country nationals labour migrants in Belgium, it is worth to come back to the difficulties which are being experimented in the transposition of the single permit directive described above since this is liable to modify, and not in a negligible way, the framework just described.

In relation to the third-country nationals already residing in the country, the single permit directive is applicable to those workers possessing an A and C permit. Although, since they are already authorised to reside in the country on the basis of other reasons than work, they are nonetheless granted a range of equal treatment rights and their residence rights is guarantee under certain conditions. Foreigners entered the country on the basis of a B permit are comprised in the personal ambit of application of the directive apart from the explicit excluded categories. Therefore, once the single permit directive will be transposed, it will be not necessary anymore to obtain for the foreigners entering the country for the exercise of an activity covered by the directive neither the «autorisation d'occupation» nor the permit B. Generally, the A permit will be

[98] Cfr. art. 10, Arrêté royal du 9 juin 1999 […] cit.
[99] Cfr. art. 9, ib.
[100] Apart from Union citizens, nationals of EFTA counties, Morocco and Switzerland are exempted from the visa obligation.
[101] Arts. 31 - 35.

absorbed completely by the single permit and the same will happen for a part of the B and C permits if requested by third-country nationals comprised within the personal ambit of application of the directive.

The main difficulty then, as partially said above, consist in determining the competent authority for the issue of the single permit, considered that residence permits are granted by the federal level and the conditions to be issued a labour permit, after the sixth reform, are determined by regional authorities (or by the German-speaking community). This mean that conditions to have access to the national labour market are passible to differ between federate units according to their interests and needs. It is probable that the competence to deliver the single permit will continue to be exercised by federal authorities for third-country nationals requiring the former A and C permit, since the work permit is secondary in relation to the residence permit. Differently, the authority which will issue the former B permit will have to consider the diverse regional laws applicable. Thus it has to be determined if the competence will remain totally attributed to federal authorities - the «Office des étrangers», in particular - or to regional authorities which will have to coordinate the exercise of their competences with the federal level, assuring that the demands are examined in conformity with the time limit of four months fixed by the directive[102] and that the federal law as the EU law are applied uniformly.

This is a further ground on which policies of Belgian federate units will possibly diverge as regards the government of immigration of third-country nationals in the near future. However, as mentioned above, federate units were already granted the competence on reception and integration of immigrants from 1974, although they have acquired the current aspect as regards the allocation of the competence lately, in 1993, when it was transferred from the French Community to the Walloon Region and to the French Community Commission of the Brussels Region. Federate policies in this matter, really, had started to depart from the mid-1980s yet, giving origin to two models of integration of non-nationals within the same country. This departure and differentiation at the sub-national level is relevant also since integration - or rather, to follow an integration path - is, in some cases, a criteria of access to rights, and it has been a significant aspect of the (federal) citizenship policy until the last reform of 2012, where naturalisation has been for long time considered as a means to achieve integration. Thus, these different views over integration in relation to citizenship acquisition has over time

[102] Cfr. art. 5, para. 2, Directive 2011/98/EU of the European Parliament and of the Council of 13 December 2011 on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State, OJ L 343, 23.12.2011.

conditioned the debates, position of political parties at the national level on citizenship policies[103].

3.3. Integration paths for third-country nationals at the sub-national level.

From 1993 onwards three different sub-national entities are competent for the reception and integration of non-nationals within Belgium: the Walloon Region, the French Community Commission (FCC) and the Flemish Community. Stated that to have a unique coherent migrant integration policy at the national level was never an objective, every sub-national entity has started to developed its own integration policy soon after the devolution process started. Nonetheless, (only) two main models seems to have been followed: the Flemish community policies seems to have been inspired by the Dutch multiculturalist model, instead similarities with the French republican assimilationist model can be found in the francophones entities policies. Sub-national integration policies are distinct also on the basis of the degree of intervention of regional authorities in their coordination: highly centralised in the case of Flemish Community, and for the major part delegated to local authorities with an absent regional address and coordination, on the contrary, for the FCC and Walloon Region. In the end, none of the initiatives aiming at providing paths for migrants to integrate are compulsory in the FCC and Walloon Region, while they have been obligatory from their institution for the selected categories of migrants residing in the Flemish Community.

The Walloon Region integration policy slightly differs from that implement by the FCC, however both are influenced by the French-speaking Community civic-political conception of the individual and focused on individual rather than on groups integration[104]. It was initially regulated by the decree on integration of foreigners and citizens of foreigner origin of 4 July 1996. This has established a series of regional integration centres which offer socio-cultural initiatives directed to migrants and support activities of local authorities and associations. These initiatives have to be added to those carry on by migrants' associations that are, although not generously, financed by the region, and are part of that «local dimension» of integration policies. These aim at fostering the social development of foreigners, and mark the Walloon approach. Furthermore, this was a feature already observable within integration policies of the

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[103] I. ADAM, D. JACOBS, *Divided on immigration, two models for integration. The multilevel governance of immigration and integration in Belgium,* cit., p. 109 - 110; I. ADAM, *Immigrant Integration Policies of the Belgian Regions: Sub-state Nationalism and Policy Divergence after Devolution*, cit., p. 549-550.

[104] M.-C. FOBLETS, Z. YANASMAYAN, *Language and Integration Requirements in Belgium: Discordance between the Flemish Policy of «Imburgering» and the Federal Legisators' View on the Integration of Newcomers and Migrants*, in R. VAN OERS, E. ERSBØOLL, T. KOSTAKOPOULOU, *A Re-definition of Belonging?: Language and Integration Tests in Europe*, Leiden, 2010, p. 280.

French Community before the competence was transferred. Language and civic courses are also provided to newcomers but as the other initiatives adopted their are not compulsory. At last, as pointed out above as regards the Brussels Capital Region, a coordinated and coherent framework addressing initiatives aiming at integrating migrants at the regional level is absent and any initiative is optional.

The development of an integration policy for migrants residing in the Brussels Capital Region was an issue that started to be considered around the end of the 1980s when its establishment was lastly finalised within the third reform of the Belgian state. The attention devoted to its framing was justified by the higher number of non-nationals living in the region, which, on the contrary, was not the case in the Walloon region. Furthermore, there was the necessity to overcome the institutionalised racial policy that had been followed since 1980 when it was not officially opposed the practice of mayors refusing to register foreigners living in their municipalities. These practices were progressively abandoned and a policy which aim was to finance general social policies in order to foster migrants economic and social integration had started to be implemented from the late 1980s. As stressed above, from 1993 the French Community has transferred its competence over immigration to the FCC, while the Flemish Community Commission has not been granted legislative power on the issue. It follows that the integration policy of the FCC has developed in a partially distinctive way in relation to the Walloon Region policy, whereas the policies implemented by the Flemish authorities resemble those in place in Flanders[105].

The former were defined as *laissez-faire* assimilationist integration policies, financing mainly private institutions and initiatives of municipalities not coordinate at the regional level, generally aiming at reducing differences and pursue migrants social integration. This policy was institutionalised in 2004 within the law on social cohesion which has confirmed that the main actors in realising integration policies are meant to be local authorities private institutions and association with activities addressed to all residents of the region mostly living in disadvantaged districts, regardless of their nationalities. None of the initiatives are compulsory as well as any coordination has been provided at the regional level so far to provide a regional coherent framework for the further development of all the local policies which are in course.

Instead, the integration policy of the Flemish Community Commission is based on the recognition of migrants differences and recognised migrants as ethnic groups. In parallel, Dutch language courses and civic courses resembling those offered in Flanders

[105] Flemish integration courses are compulsory, however, this is not the case in the Brussels bilingual Region where Flemish authorities are authorised to addresses its policies only to mono-community institutions. Therefore, it is prevented by constitutional provision to make integration paths compulsory. Cfr. art. 128, para. 2 Constitution.

are available, although they are just (and only can be) optional. The promotion, and recognition, thus founding, of migrants groups has been described as a practice of Flemish authorities to increase their influence in the Region of Brussels. Therefore, migrants can opt for different forms of integration within the same region, having at the one side the ethnic Flemish option, or policies aiming more to their (neutral) social integration of French authorities[106].

An embryonic form of the integration policy currently in place in Flanders started to be developed in the late 1980s - early 1990s following the electoral success of the extreme right party VLD (Vlaasm Blok) in 1988 and 1991 elections, which asked for the implementation of compulsory integration paths for non-nationals living in the region. On the basis of the multicultural Dutch model, and following the lines developed within the framework of the «Royal Commissariat for Immigrants Policy» instituted in 1989 at the federal level, a, defined as, interventionist multicultural policy started to be adopted providing for support of migrants organisations and facultative integration paths. The measures adopted in the course of the 1990s were addressed at migrants as members of ethnocultural minority groups. Therefore, migrants organisations were provided with founding for their activities aiming at preserving their cultures of origins and the Minorities Forum was created as a framework within which those groups could elaborate joint policy positions. Integration centres at the sub-regional and local level were established providing assistance and activities addressed to migrants, in addition to the Interdepartmental Commission for Ethnic Minorities to which was assigned the role to coordinate actions of public institutions which scope was to take into consideration cultural diversity and integration of migrants within other policy sectors.

More generally, and yet in its first phase of development, the Flemish minority policy distinguished between, and was directed to, three groups of non-nationals and had in relation to every group a different policy objective. If the scopes were emancipation and full participation of those polices directed to settled citizens of foreign origins - so called, «allochoon» citizens - and travellers, instead, integration was the objective of policies addressed to newcomers, and the satisfaction of minimum needs of those directed to illegal residents. These triple division as the diversification of policies in relation to the, so defined, minority group to which they were addressed was institutionalised within the decree on Ethnic-cultural Minorities of 28 April 1998[107].

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[106] D. JACOBS, *Alive and Kicking? Multiculturalism in Flanders*, in *International Journal on Multicultural Societies (IJMS)*, 2004, 2, p. 292.

[107] Décret relatif à la politique flamande à l'encontre des minorités ethnoculturelles du 28 avril 1998 (M.B. 19 juin 1998).

In the regional elections of 1999, the VLD extreme right party, that in the previous years had gained increasing electoral support but had remained at the opposition in the regional government, and which had always asked for the implementation of compulsory integration requirements for non-nationals, at last, entered in the government coalition. Therefore, with the turn of the new millennium, a renewed policy aiming at integrating non-nationals was proposed and in the end voted in 28 February 2003. The decree on civic integration entered into force, following the adoption of the related implementing regulation in March 2004[108]. These new legislation on integration seemed to have partially shifted the focus of the policy from groups to individuals and, instead of being addressed to minorities as before, it is now a «diversity» policy. Thus, it does not aim at assimilating migrants but rather to provide the means by design a path for them to become citizens, as signified by the term «inburgeringtrajecten» giving the name to the new policy.

It is composed by two complementary parts: the first aims at emancipation, it is the only to be mandatory and specifically targeted on migrants; access to the second part, which aim is full participation, is made conditional upon the completion of the first part, and is accessible to all those eligible regardless of their migrant background. In details, the first part is composed by three types of activities: a Dutch language course, a vocational course, and a civic course that provides an overview of persons rights and duties, on the functioning of the society and on its basic values[109]. This last course is provided in the mother tongue of the migrant or in the language of contact with institutions. The second part of the «inburgeringtrajecten» is aimed at providing the instruments to fully participate in society especially through access to the labour market.

The group of persons to which these trajectories were addressed in 2003 was judged to be too limited - only newcomers moving to Belgium for purpose of non-temporary residence - therefore, it has been further enlarged following the 2006 amendment. The updated group of potential beneficiaries of these course comprises established third-country nationals immigrants, including the, so called, «oudkomers», i.e. Belgian nationals born outside Belgium. Thus, non-Union citizens entering and staying in the country through family reunification with a Belgian citizen are also included in the renewed targeted group[110].

The first part of the becoming-citizens process and courses are directed to, and compulsory for, foreigners of majority age who have been registered in Belgium, for the

[108] «Decreet van 28 februari 2003 betreffende het Vlaamse inburgeringsbeleid (Décret du 28 février 2003 relatif à la politique flamande d'intégration civique)», M. B., 5 May 2003. The decree is entered into force 1 April 2004. These have been further amended in 2006 and 2008. Cfr. Decree of 14 July 2006 and its implementing decision of 15 December 2006, and decree of 1 February 2008.

[109] Cfr. art. 13, Decree of 28 February 2003, *supra* note above.

[110] It has been observed that the majority of third-country nationals benefiting from family reunification rights with a Belgian citizens, were joining a naturalised Belgian citizen.

first time, for less than twelve months - i.e. newcomers - refugees registered for less than twelve months in the country as well, and religious ministers. Obviously, they have to be resident in Flanders or in the Brussels Capital Region, but in this last case, as said before, the courses lose their mandatory nature. From 2006, courses are mandatory also for established third-country nationals immigrants and «oudkomers» who are receiving unemployment benefits or social assistance[111].

If the above mentioned categories are those judged, by the Flemish authorities, to be the firsts and principal addressees of the integration path, between the group of those exempted from such courses stays an intermediate group of persons to which authorities require only to follow determinate parts of it. Therefore, third-country nationals who have acquired the long-term resident status in another member state and to which have been required yet to fulfil integration requirements are just required to attend language courses. Instead, asylum-seekers, while their application is examined and evaluated, are asked to follow just the civic course[112]. In the end comes the categories of non-nationals that are exempted from the obligation to follow integration courses. These are Union citizens and EEA nationals and labour migrants and their family members[113].

Non-compliance with the above described obligations is not without consequences. Actually, those for which integration course are compulsory can be sanctioned with an administrative fine[114] if they failed to comply with such obligation[115], as this can also have consequences in future applications for social benefits.

Finally, in 2009 the Decree on Ethnic-cultural Minorities of 28 April 1998 has been amended[116]. It has adapted the language used in defining the previous policies and addressees of integration courses, abandoning the definition of migrants as «ethnic minorities» to call them as «new Flemmings», and has reconfirmed, the, defined as, multiculturalist interventionist policies that were already in place: sub-regional and local integration centres, promotion of diversity in a variety of policy sectors. Furthermore,

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[111] In addition, other categories of non-nationals are identified as voluntary participants to which priority is given - in relation to the available places - to follow integration courses: resident immigrants with school-age children, immigrants living in houses of the Community or on the waiting list, and third-country nationals family members of EU citizens benefiting of the right to move and reside. M.-C. FOBLETS, Z. YANASMAYAN, *Language and Integration Requirements in Belgium: Discordance between the Flemish Policy of «Imburgering» and the Federal Legisators' View on the Integration of Newcomers and Migrants*, cit., p. 288.

[112] Cfr. art. 5, paras. 6 and 7, Decree of 28 February 2003.

[113] Are also exempted persons with disability or serious illness, individuals over the age of 65 and persons who can prove to be already integrated presenting documents or certificates. Cfr. art. 5, para. 2, cit.

[114] Administrative fines have substituted pecuniary fines following the 2008 amendment. They can also be imposed if the individual refuses to cooperate with authorities as regards the integration process or, if a newcomer, to sign the, so called, «contract of civic integration» which reports the person's obligations to be fulfilled, which have been determined by authorities after an evaluation of its personal characteristics.

[115] However, the obligation is of attendance and not of result. The attendance is required in a measure of 80% of courses but exceptions are provided for workers, illiterate persons or with a low level of education.

[116] Decreet van 30 april 2009 tot wijziging van het decreet van 28 april 1998 inzake het Vlaamse beleid ten aanzien van etnisch-culturele minderheden, (B.S. 2/07/2009).

new policy guidelines has been spelled out in the « Policy Agreement 2009-2014» providing indications for a expansion and improving of the «inburgering» policies, e.g., making such courses available also in the country of origin of migrants and by improving the recognition of the «inburgering» certificate by public and private actors.

Belgian sub-national integration policies not only differ in their content and, thus, underlying visions and concepts, but also in the degree of coordination and coherence among local actors and policies involved by the regional level. Policies of migrants integration in Belgium were and are considered to have been shaped by the diverging political visions and political forces operating at the Community and Regional levels. In Flanders, a fundamental role was played by the rise of the far right political party, the politicisation of immigration and integration of foreigners issues, by the project of nation-building and the need of higher levels of legitimacy for public powers in order to justify demands for more autonomy[117]. On the basis of a lack of these elements and exigencies in the Walloon region, it has been explained the progressive divergencies among integration policies directed to non-nationals at the sub-national level.

The Flemish migrants' integration model, at least as regards its mandatory nature, coherency and coordination at the regional level, seems to have influenced the recent developments in the Walloon Region and francophone authorities in the Brussels Capital Region. The possibility to introduce integration paths, although not mandatory, has been the object of legislative proposals in both francophones sub-national units[118] in the last years, specifically addressed to newcomers aiming at providing language courses, information about rights and duties and socio-professional orientation. More precisely, the only obligatory part of this possible future integration path reserved to newcomers (so called, *Dispositif d'Accueil des Primo Arrivant* or DAPA) establishing their residence in the Walloon region or in the Brussels Capital Region for the part of competence of the FCC, will be the attendance at the first meeting where the courses and offers will be illustrated to eligible beneficiaries[119].

A not at all negligible driving force towards convergence of regional migrants integration policies could come from the last amendment of the Nationality Code of 4

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[117] I. ADAM, *Immigrant Integration Policies of the Belgian Regions: Sub-state Nationalism and Policy Divergence after Devolution*, cit., p. 562-563.

[118] A similar initiative had been already presented in the Brussels Capital Region in 2003. Cfr. Proposition de décret créant un parcours d'intégration individuel à l'intention des primo-arrivants adultes, Assemblée de la Commission communautaire française, Doc. 122 (2002-2003) n° 1.

[119] Cfr. «Décret remplaçant le livre II du Code wallon de l'Action sociale et de la Santé relatif à l'intégration des personnes étrangères ou d'origine étrangère» of 26 March 2014, M.B. of 18/04/2014, p. 33880.

December 2012, which entered into force in January 2013. In fact, it has been reintroduced among the requirements to acquire the Belgian nationality by naturalisation the applicant's «willingness to integrate» which had been previously repealed by the Nationality Act of 1 March 2000. Nonetheless, this is just the last episode of a much more longer story, as «integration» as a requisite for naturalise as Belgian has been present in the history of the Belgian nationality since 1922, under the appearance of the concept of « suitability».

This last amendment, in particular, has been justified by the exigency of making the Belgian nationality «neutral from the point of view of immigration»[120]. Therefore, modifying one time more the causal relation between integration and nationality acquisition within the Belgian legal system, it touches the question of integration as differently conceived and implemented by regional institutions. However, the relationship between immigration and nationality is also deeply concerned, since the reform was done also to reverse the relation with (the title granting) residence to non-nationals in the national territory: the aim is to avoid nationality acquisition to be a means to acquire a secure residence title or to consolidate the individual status. This consideration touches primarily federal and regional laws regulating different aspects of immigration, even more in light of the last amendments of the national labour immigration law which aimed precisely at connecting residence and conditions to be granted a work permit or to be exempted for the obligation to possess it. Moreover, it involves also directly EU law which, as showed above, condition Union citizens and EEA nationals (and their family members), and third-country nationals right of residence in the country. At last, the connection between immigration and nationality modes of acquisition in the Belgian system has been (critically) emphasised also in view of the numerous amendments to which the Belgian Nationality Code has undergone in the last decades, the federal legislator has been accused to have instrumentally used nationality acquisition as a tool to govern immigration and as a means to compensate the restrictive national immigration policy.

It is worth to retrace the development of the Belgian Nationality Code in the last decades in order to comprehend the reasons at the basis of this last amendment and the context within which its has been realised. Considered that our interest concerns the relation between immigration and nationality, attention will be focused almost totally on the modes of acquisition of Belgian nationality by means of naturalisation. In this regard, a previous outline of the evolution of the modes of acquisition by naturalisation of the Belgian nationality is useful since, as it will appear along the continuation of the

[120] Cfr. the title of the law of 4 December 2014: «Loi modifiant le Code de la nationalité belge afin de rendre l'acquisition de la nationalité belge neutre du point de vue de l’immigration », M.B. 14.12.2012.

paragraph, its basic elements as they were defined in origin have never substantially changed from the beginning of the twentieth-century, neither in the 2012 last reform.

4. Become a Belgian citizen. Towards the 2012 Nationality Code amendment.

4.1.1. From the Constitution to the Nationality Code.

«La qualité de Belge s'acquiert, se conserve et se perd d'après les règles déterminées par la loi civile». «La naturalisation est accordée par le pouvoir législatif fédéral»[121].

The very first law having as its object the modes of acquisition of the Belgian nationality dates back to 8 June 1909 when the law on acquisition and lost of nationality was adopted[122]. Accordingly to such law, two were the basis on which a person could acquire the Belgian nationality: the principal was *jus sanguinis,* thus legitimate and recognised natural children of a Belgian father - even if born outside the national territory - acquired the Belgian nationality[123]. Secondly, on the basis of the *jus soli* principle, the nationality was attributed to persons born on the national territory by parents of indeterminate nationality or of foreign nationality on reaching the twenty-two birthday if other two conditions were fulfilled: the first, to had been resident in the country in the year before the demand and to had not express the will to conserve the foreign nationality; the second, that one of its parents was, in turn, born in Belgium or had been resident in the country for the previous ten years. We find already within this first law the requirements that, even though with variable extensions, will mark one of the modes of acquisition of the Belgian nationality until today: these are age, length of residence and family relations.

In 1922 a new law regulating the nationality matter was adopted[124]. This legislative act is worth of notice as it would discipline the matter with no significant amendments until the adoption of the Nationality Code in 1985. The *jus sanguinis* mode of acquisition remained the principal way of becoming Belgian, nevertheless the possibility to opt for the Belgian nationality[125] or to naturalise were also regulated. Actually, a double type of naturalisation was possible: the «grand naturalisation», within

[121] Cfr. arts. 8 and 9, Belgian Constitution.
[122] Cfr. Loi du 8 juin 1909 sur l'acquisition et la perte de la nationalité, M. B. 17 juin 1909.
[123] A first form of *jus soli* mode of acquisition was already regulated by a previous law although only as regard
[124] Loi du 15 mai 1922 sur l'acquisition et la perte de la nationalité, M. B. 25 mai 1922.
[125] Could opt for the Belgian nationality the person who was born in Belgium or outside the national territory if at least one of its parents were Belgian, it had resided in the country the year previous the declaration and at least for nine months between the age of fourteen and eighteen years old, by declaration at reaching the age of twenty-two. Cfr. art. 8,

which all political rights were jointly attributed, and the «petite naturalisation»[126]. In order for the naturalisation demand to be receivable - since the acquisition was the result of the exercise of a discretionary and sovereign power and not a right of the applicant - the foreigner had to be of at least twenty-five years old and to had had its habitual residence in Belgium for a minimum of ten years for the «grand naturalisation», and to be of at least twenty-two years old and to had had its habitual residence in Belgium for a minimum of five years for the «petite naturalisation». These, as said, were just the conditions for the demand to be considered by competent authorities. A public investigation would, then, follow with the aim to determine the suitability of the candidate. The suitableness was a concept not defined by the law, though. It was presumed, however, to be possessed by the candidate, and it was in charge of the public institution in charge of the inquiry to demonstrate the contrary. The final act on the naturalisation demand was voted by the legislative chambers, thus - differently for the acquisition by option which was in charge of the judicial power with the respective procedural guarantees - no controls or recourses were provided in case of a negative outcome.

The law on naturalisation adopted in 1932 amended the requirements for naturalisation. If the 1922 law was concerned with protecting the country against enemies, conditioned by the post-WWI attitude, the 1932 amendments, by tightening the conditions to naturalise, was, instead, concerned with the great influx of non-nationals demanding equality of rights and treatment with nationals. The inquiry by the public authorities as regards the suitability of the candidate was maintained as a step of the procedure but similarly did not find a definition in the law, however it seemed to have acquired over time a meaning not far from, and to be interpreted as a request of, assimilation[127]. In addition, the conditions for demanding the «grand naturalisation» were increased to thirty years of age and fifteen of residence, and for the «petite naturalisation» equally thirty years of age and ten of residence. These conditions would be eased in the following decades to favour second generation migrants, nonetheless the general framework has not been modified until the 1984 with the adoption of the Belgian Nationality Code. This was necessary, considering the numerous but partial amendments introduced in the meanwhile, to update the former regime in relation to the changes in

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127 D. DE JONGHE, M. DOUTREPONT, *Obtention de la nationalité et volonté d'intégration*, in *Courrier hebdomadaire*, n° 2152-2153, 2012, p. 13-14.

the characteristics of immigration flows and to comply with the international instruments ratified as regards nationality and related matters[128].

The Nationality Code was adopted with the law of 28 June 1984 «relative à certains aspects de la condition des étrangers et instituant le Code de la Nationalité belge»[129] and entered (completely)[130] into force the 1 January 1985. The code distinguished between the attribution and the acquisition of nationality, where the former consisted in the above seen *jus sanguinis* and *jus soli* modes of acquisition for persons less than eighteen years old[131], instead, the latter needed the foreigner, of more than eighteen years old, to voluntary act in order to obtain it. In turn, the code has maintained the previous double way provided for nationality acquisition: by option and by naturalisation.

To become Belgian by option four modes were provided. The first and the second relied on ease form the, above seen, *jus sanguinis* and *jus soli* modes, and were addressed to foreigners aged between eighteen and twenty-two years old and with a length of residence between one and nine years. Thus, foreigners born outside the country but residing in Belgium from, at least, one year before the reach of the age of compulsory education - renamed, *jus educationis* - or having a parent who was Belgian at the day of introducing the demand or who was Belgian by birth when the foreigner was born could opt for the Belgian nationality. The same possibility was provided for foreigners relatives of Belgian nationals after six months of joint residence in the country and, at last, for those persons possessing the quality of Belgian nationals as a consequence of an administrative error or who did not know to possess the status, because based on an unknown filiation relationship[132]. The procedure to acquire the Belgian nationality by option was in charge of the judicial power. As highlighted above, this means that the foreigner could participate in the procedure and were granted the normal procedural guarantees, i.e. a motivated decision and the possibility of appeal against a negative outcome[133]. This was not the case for the naturalisation procedure which has remained in charge of the legislative power and to which the just mentioned procedural guarantee did not applied.

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[128] Cfr. Project de Loi relatif à certains aspects de la condition des étrangers et instituant le Code de la nationalité belge, Chambre des Représentants, Session 1983-1984, 17 Octobre1983, 756 (1983-1984) - N °1, p. 12, at http://www.dekamer.be/digidoc/OCR/K2036/K20361443/K20361443.PDF. See also, M. LIÉNABD-LIGNY, *A propos u Code de la Nationalité Belge*, in *Revue belde de droit International*, 2, 1984/1985, p. 656-657

[129] M. B. 12 juillet 1984.

[130] Arts. 1 to 12 had entered into force already from 12.12.1984.

[131] Cfr. arts. 8-12, Code de la nationalité belge, 28 Juin 1984.

[132] Cfr. arts. 13-17, ib.

[133] Cfr. art. 15, ib.

To naturalise as Belgian confirmed the former double requirement of age and length of residence in the national territory requirements in order for the demand (just) to be considered by authorities. Of the final decision was still responsible the legislative powers but the inquiry, aiming at verifying that there were not serious impediments based on personal severe actions and that it was absent an insufficient «volonté d'intégration» that followed the demand was to be done by the Royal Prosecutor. The Code, although it introduced this new concept of «integration will» in place of the suitability criterion, did not equally provided a definition of «volonté d'intégration». However, the preparatory work of the code highlighted that, e.g., the lack on any contact with Belgian nationals or with the societal environment, or, furthermore, it could be the incapacity to communicate in one of the three official languages. On the other hand, it was also underlined that this concept had not to be translated with assimilation, since the foreigner should not be forced to lose its proper personal characteristics. This said, as under the previous regime, the «volonté d'intégration» was presumed, firstly be the length of residence, demonstrating the foreigner's ties with the country, and was to public authorities to demonstrate its lack. The Code also maintained the distinction between «grand» and «petit» naturalisation - renamed «naturalisation ordinaire», and the latter - which requisites were to be, at least, eighteen years old and had resided for a minimum of five years in the country - was considered the previous stage to obtain the former, since this was accorder only to persons who had done important services to the Belgian state.

In the end, the relation between the suitability or integration will of the foreigner and the grant of naturalisation remained ambiguous: naturalisation was seen, at the same time, as a consequence of an already occurred *de facto* integration but also as a means of a complete integration, as it was demonstrated by the requirement not to show an already occurred integration but (just) of the absence of a lack of will to integrate.

4.1.2. The 1990s and 2000s amendments.

The practise of continuos amendments of the legislation regulating the modes of acquisition of Belgian nationality has been maintained without exceptions across the decade of the 1990s, during which three laws were adopted in the matter to overcome the defects of the Code. The law of 13 June 1991[134] has, significantly, repealed the distinction between the «grand» and «ordinaire» naturalisation, and, to encourage naturalisation among second and third generations of foreigners, it has introduced a third mode of acquisition beyond those by option and of «ordinaire» naturalisation»: the

[134] Loi du 13 juin 1991 modifiant le Code de la nationalité belge et les articles 569 et 628 du Code judiciaire, M. B. 3 septembre 1991, en viguer 1 janvier 1992.

nationality declaration. As for the acquisition by option, this is a right of the applicant once the requirements were fulfilled: a foreigner born in Belgium and which has always had it principal residence in the country, could acquire the Belgian nationality by simply declaring its will in this sense to a civil servant in its place of residence. To demonstrate the «volonté d'intégration» it was not required as it was indisputably presumed, thus the control would only concern the absence serious impediments based on personal severe actions.

The two other laws amending the Nationality code have both regarded procedural aspects of the naturalisation procedure. The law of 13 April 1995,[135] in view of accelerating the processing of naturalisation dossiers, had established that if a response from the judicial authority in charge of processing the dossier was not given in a delay of four months, then the response was considered to be in favour of the foreigner. However, the Chamber of Representatives[136], could ask to the competent judicial authorities to carry on an inquiry in relation to all the relevant aspects, but in case of no response in a three month time the procedure could continue.

At last, the law of 22 December 1998[137], only for the procedures of nationality acquisition by declaration or option, repealed the obligation for the tribunal to agree on the declaration in case of absence of a negative response by the Royal Procurator. Nevertheless, if such negative response was issued, the demand was automatically transformed in a demand of acquisition by naturalisation and, thus, consequently transmitted to the Representative Chamber, unless a request of transmission to the Tribunal was done by the applicant. Furthermore, a provisions was introduced within the Code as regards the «integration will» inquiry to harmonise the practices of its verification to avoid the use of too much diverse, thus, subjective modes.

This last modification as regards the «integration will» ascertainment did not produced the expected results. In fact, the followed amendment of the Code in 2000[138], in order to provide a solution for the excessive risks of an arbitrary application of a such a general notion, even more because a legal definition was never provided, repealed all the references to it. Therefore, it was not anymore a requirement to be fulfilled in all the procedures of acquisition which previously required it, i.e. acquisition by option and naturalisation. More precisely, it did not needed to be demonstrated in any way since it is

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[135] Loi du 13 avril 1995 modifiant la procédure de naturalisation et le Code de la nationalité belge, M.B. 10 juin 1995, en viguer 31 décember 1995.

[136] The Chambers of Representatives had become the responsible institution for naturalisation dossiers as a result of the Constitution amendment of 5 May 1993. Cfr. M. B., 8 mai 1993.

[137] Loi du 22 décembre 1998 modifiant le Code de la nationalité belge en ce qui concerne la la procédure de naturalisation, M.B. 3 mars 1998, en viguer 1 septembre 1999.

[138] Loi du 1 mars 2000 modifiant certain disposition relatives a la nationalité belge, M. B. 5 avril 2000, en viguer 1 mai 2000.

completely presumed through the fulfilment of the remaining requirements. Moreover, the repeal of the references to the «integration will» of the candidate has the effect of eliminate the difference between the other two modes of non-automatic acquisition. Actually, the acquisition by declaration did not included its integration while the acquisition by option, instead, required it. Therefore, it was sustained that the tripartition, which had the function to graduate the requirements on the degree of the ties established by the applicant and the state, were in this way transformed in a *de facto* bipartition[139].

An attempt was also made to clarify the casual relation between integration and the acquisition of nationality by explicitly stating that naturalisation was considered to be a means of integration. Moreover, a Constitutional amendment adopted in 1998 of art. 8, had attributed to the Parliament the power to extend the right to vote to third-country nationals residing in Belgium and to determine the modes of its exercise from 2001[140]. However, there was not an agreement on this issues among political forces. Consequently, naturalisation was also seen as an instrument to overcome this exclusion of third-country nationals from those allowed to vote. Thus, the ease of the conditions to naturalise was instrumentally use also to this aim.

Precisely, the 2000 amendment made the procedure free of charge. Moreover, the minimum age to start the procedure was maintained at eighteen years old, but the minimum years of (main) residence required has been diminished from five to three, and to two years for refugees and stateless persons having their status as such recognised by Belgium. Thus, from this moment onwards, once the conditions of age and residence were fulfilled only the existence of important facts pertaining to the individual applicant, as criminal convictions, could justify the rejection of the application. This changed the nature of nationality acquisition by naturalisation from an exercise of sovereign power to, as it was for the other modes of non-automatic acquisition of the Belgian nationality - by option or by declaration - a right of the applicant.

As just said, one of the main criticism on the 2000 amendment has been to have take advantage of nationality acquisition to grant political rights to third-country nationals circumventing their exclusion. This was remarked even more in consideration of the fact that, following the 1998 amendment of the Constitution[141], Union citizens had been granted the right to vote and to be elected in municipal elections (and of the

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[139] D. DE JONGHE, M. DOUTREPONT, *Obtention de la nationalité et volonté d'intégration*, cit., p. 34.

[140] Cfr. Modification à la Constitution, 11 décembre 1998, M. B. 15.12.1998.

[141] The amendment followed a ruling of the Court of Justice of the European Union in 1998 in which it was ascertained that Belgium had failed to comply with its obligations under EU law since no law, regulation and administrative provisions were adopted to transpose the Council Directive 94/80/EC of 19 December 1994 in the prescribed period in order to grant Union citizens the right to vote and to be elected in municipal elections of their Member State of residence. ECJ, C-323/97, Commission of the European Communities v. Kingdom of Belgium, 9 July 1998, [1998] ECR I-04281.

European Union Parliament already in 1994[142]) in 1999 yet[143], and although the possibility for the Parliament to provide for their extension also to third-country nationals was equally inserted at para. 4 of art. 8 by the same amendment no provisions in this sense were subsequently adopted. Nevertheless, in 2004 a law modifying the municipal electoral law of 1932 has been amended to grant (just) the right to vote in municipal elections to third-country nationals as well[144], to be exercised for the first time at the local elections of 2006. This right is granted following a request to this aim, at the condition that the principal residence of third-country national has been established in Belgium in the five years before the demand. Within the demand presented by the foreigner at the municipality where its principal residence is established, it is required to insert a declaration in which the person engages itself in the respect of the Constitution, of the Belgian laws and of the Convention for the Protection of Human Rights and Fundamental Freedoms[145]. Despite the enlargement of the electorate to non-nationals, it has to be highlighted that third-country nationals are not granted the eligibility right at the local level and, especially recalling the decentralised character of the Belgian federation, it is noteworthy that no voting rights are attributed to non-nationals in the elections of federate units elective organs.

The relevant issues during the 2000s around which the 2006 amendment and practices as regards nationality acquisition will concern and that will lead the Nationality Code to the 2012 amendment are the definition, among other matters, of the concept of (main) residence and the *de facto* survival of the «integration will» requirement in the assessments of public institutions in charge of evaluate the dossiers for nationality acquisition despite its formal repeal.

The law of 27 December 2006[146] which, as the previous, has tried to solve some of the deficiencies of the Nationality Code has (re)affirmed the relation between residence and nationality acquisition, thus between the 1980 law on entry, residence and expulsion of foreigners and the Nationality Code. The relation is one of derivation of the latter from the former or, more precisely, nationality acquisition could not be instrumentally used by the individual to assure to itself a title of residence or to acquire a more secure status. Therefore, the requirement of (having a previous main) residence in

[142] Loi du 11 avril 1994 modifiant la loi du 23 mars 1989 relative à l'élection du Parlement européen et portant exécution de la directive du Conseil des Communautés européennes no 93/109/C.E. du 6 décembre 1993, M.B., 16 avril 1994.
[143] Loi du 27 janvier 1999 modifiant la loi du 19 octobre 1921 organique des élections provinciales, la nouvelle loi communale et la loi électorale communale, et portant exécution de la directive du Conseil de l'Union européenne no 94/80/CE du 19 décembre 1994, M.B., 30 janvier 1999.
[144] Loi du 19 mars 2004 visant à octroyer le droit de vote aux élections communales à des étrangers, M.B., 23 mars 2004.
[145] Cfr. art. 2, paras. 1-2, ib.
[146] Loi portant des dispositions diverses, 27 décembre 2006, M. B. 28 décembre 2006, en viguer 7.1.2007.

the territory has been defined as such: at the time of the application the foreigner has to have a long-term residence permit and only the years of lawful residence can be counted in order to fulfil the length of residence requirement[147].

As regards the «integration will» requirement, it formal repeal, nevertheless, did not prevent institutions in charge of examining applicants' dossiers to evaluate the degree of integration of the applicant by assimilating to a important serious fact pertaining the the applicant its (judged as) completely absence. The lack of integration was considered by relying on the same elements which were taken in consideration when, on the contrary, integration was an official requirement: long residence which was not accompanied by the exercise of a work activity or by a job research, the incapacity to communicate in one of the three official languages.

4.2. The 2012 reform of the Nationality Code.

The last amendment of the Nationality Code was issued by the law of 4 December 2012[148], entered into force 1 January 2013, and was followed by the related regulations[149]. This reform can be place on the wake of that process of making nationality - thus, its modes of acquisition - neutral from the point of immigration which has started in the early 2000s and had been made explicit within the 2006 amendment yet. However, that the way towards the realisation of this object was not clear, or rather, that there is not an agreement among the actors involved on the various possible ways in which it could have been achieved was demonstrated by the high-number of reform projects which were presented on this same object, eleven. Apart from the declared object of the reform, the Code was also simplified - through the repeal of many provisions - and updated in view of the *de facto* modifications that have taken place over time through the various previous amendments. Actually, only two modes of non-automatic acquisition of the Belgian nationality are kept: acquisition by declaration and by naturalisation. The 2012 reform is also marked by the return of the official «integration will» requirement, and now some elements to its more objective definition has been provided. Finally, the categories of foreigners having access to the acquisition

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[147] The necessity for the residence to be lawful was already stated by a judgement of the Court of Cassation in 2004 and subsequently confirmed by the legislator. Cfr. Court of Cassation, judgement 16 January 2004; Loi-programme du 27 décembre 2004, M. B. 31 décembre 2004.

[148] Loi du 4 décembre 2012 modifiant le Code de la nationalité belge afin de rendre l'acquisition de la nationalité belge neutre du point de vue de l'immigration, M.B. 14 décembre 2012. This law has been made object already of two further amendments. Cfr. loi du 31 décembre 2012 portant des dispositions diverses, spécialement en matière de justice (1), M.B. 31 décembre 2012.

[149] Arrêté royal du 14 janvier 2013 portant exécution de la loi du 4 décembre 2012 modifiant le Code de la nationalité belge afin de rendre l'acquisition de la nationalité belge neutre du point de vue de l'immigration, M.B., 21 janvier 2013; l'arrêté royal du 17 janvier 2013 portant la liste des pays où l'obtention d'actes de naissance est impossible ou pose des difficultés sérieuses, M.B., 30 janvier 2013.

by declaration or naturalisation has been enlarged. We will, then, focus on the changes introduced as regards these two modes of non-automatic acquisition of the Belgian nationality.

The acquisition of the Belgian nationality by means of naturalisation has been made by the 2012 reform residual[150]. Actually, this mode is now reserved only to those foreigners of majority age, lawful resident in Belgium, which demonstrate to have had or to be able to have «exceptional merits» in the scientific, sports or cultural fields, and to contribute in such a way to the international prestige of Belgium, and finally, to be choosing this mode of acquisition because it will be otherwise almost impossible to acquire the nationality by declaration[151]. The procedure, as it was previously, continues to be in charge of the Chamber of Representatives and to be an exercise of its discretionary power. Thus, the acquisition by declaration became, after the 2012 reform, the principal mode of acquisition of the Belgian nationality.

This mode now comprises, in terms of the categories allowed to apply and of the requirements to be fulfilled, also the former mode of acquisition by option. The shift towards acquisition by declaration, i.e. its being now the principal mode towards which nationality can be acquired, despite the tightening of some requirements, is a change in favour of a great procedural protection of applicants rights. The Public Prosecutor has remained in charge of conducting the necessary investigations after the declaration has been made in order to verify if an impediment «on account of important facts pertaining to the individual applicant» is present. Furthermore, it is also responsible to attest that the applicant possesses the other requirements of residence, age and integration, if it is not part of the categories exempted. In case of a negative response by the Prosecutor, the applicant can challenge the decision before the Court of first instance. This will then review the application again in all its elements.

To the categories of foreigners allowed to apply for the Belgian nationality by means of declaration are required the fulfilment, even though with different degrees, of the (always present) three requisites: age, birth or residence of a determinate length in the country, and to be duly integrated - although certain categories are exempted - by proving the knowledge of one of the three official languages, its social integration, economic participation, or, in just once case, the participation at the social and economic

[150] A drop in the number of naturalisations has been reported at the end of 2013, in relation to the previous years as a consequence of the 2012 amendment of the Nationality Code in this respect. Precisely, in November 2013 only 508 dossiers to acquire the Belgian nationality by naturalisation have been presented, and only 4838 applications have been granted in 2013 of the around 18000 that have been made in the previous year. Cfr. A. CLEVERS, *Pas une seule naturalisation en 2013 sous la nouvelle loi*, 7 décembre 2013, La libre.be, available at http://www.lalibre.be/actu/belgique/pas-une-seule-naturalisation-en-2013-sous-la-nouvelle-loi-52afd5ad3570105ef7d5dd30.

[151] Cfr. art. 19, paras. 1-4, Code de la nationalité belge.

life of its reception community. It is worth to notice that one of the critics advanced as regard the proof of linguistic knowledge, is based on the fact that the applicant can choose among the three official languages regardless of its place of residence. Therefore, if the objective was, for example, to ascertain the capacity of the foreigner to communicate with the other members of the community or, most importantly, with the public administration, this requirement framed as such seems not to provide the means to achieve it.

The age requirement is common to all categories: acquisition is possible only for those foreigners who have reached the age of eighteen. This said, the categories of foreigners who could acquire the nationality by declaration are made by, firstly, a foreigner born in Belgium and which have lawfully resided in the country since birth. This category is one of those exempted from the necessity to prove its duly integration[152].

The second category is composed by a foreigner born abroad who have lawfully resided in the country for at least five years and proves its knowledge of one of the three official languages, its social integration and its economic participation. The law lists a series of documents or facts that are considered to be proofs of social integration and economic participation. The applicants' social integration can be demonstrated by the presentation of an education certificate, by a document proving the attendance of a vocational course of a fixed minimum number of hours, by the certificate of attendance of an integration course provided by the authorities of the place of residence or, eventually, by having been a paid worker, self-employed or employed in the public administration for a uninterrupted period of five years. Instead, the economic participation is proved by showing to have worked for a minimum number of days in the last five years exercised as paid work activity or as an employed in the public administration or as a self-employed person[153].

The third category is that of a foreigner married to a Belgian citizen, or is the parent or have adopted a Belgian child who is a minor or, if of majority age, has not emancipated itself yet[154], have been living with the spouse for at least three years in Belgium and has resided in Belgium lawfully for at least five years, proves its knowledge of one of the three official languages and its social integration. The latter can be proved in the same modes seen above with the exemption of those related to the exercised of work and assimilated activities, i.e. by presenting a n education certificate,

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[152] Cfr. art. 12bis, para. 1, no. 1.
[153] Ib., no. 2.
[154] Cfr. art. 199, Loi portant des dispositions diverses en matière de Justice, 25 avril 2014, M. B. 14.05.2014, en viguer 24.05.2014.

by a document proving the attendance of a vocational course of a fixed minimum number of hours, by the certificate of attendance of an integration course[155].

Fourthly, a foreigner who has been residing lawfully in Belgium for at least five years and proved that it has a disability or an handicap that impede the pursue of an economic activity or the exercise of a work activity or has attained the pension age, can equally declare the will to acquire the Belgian nationality without having to demonstrate the fulfilment of any other (integration and economic) requirement[156].

Fifthly, the last category requires to have resided in Belgium lawfully for at least five years and to prove the knowledge of one of the three official languages. Furthermore, the applicants have also to prove its participation in the life of its reception community with all the admitted and lawful means in order to demonstrated that it takes part to its social and economic life[157].

In the end, the same mode of acquisition is made available also to those Belgians who lost their nationality and wish to re-acquire it - as long as it was not lost by forfeiture - if they fulfil the age requirement, have their main residence in Belgium, determined on the basis of a uninterrupted residence of at least one year, and they hold a residence permit of an unlimited duration[158].

5. Conclusive considerations.

5.1. On the reformed Nationality Code.

Since the declared object of the 2012 amendment was to made nationality acquisition neutral from the point of view of immigration, apart from the officially return of the integration requirement, the other relevant point of the reform as regarded residence - to avoid the circumvention of the 1980 federal law regulating the matter -and, more precisely, the type of residence of the applicant before the demand and in the moment of the application. Therefore, from the 1 January 2013 the possibility to start a procedure to acquire or recover the Belgian nationality abroad, i.e. in Belgian consulars, and to count certain periods of residence abroad as counting for fulfil the residence requirement are not provided any more. For the provisions of the Nationality Code to be applied, the applicant is required to have its principal residence in Belgium[159], proved by the inscription in the foreigners, population or waiting registers. Moreover, the same

[155] Cfr. art. 12bis, para. 1, no. 3.
[156] Ib., no. 4.
[157] Ib., no. 5.
[158] Cfr. arts. 23 and 24, ib.
[159] Cfr. art. 7bis, para. 1, ib.

requirement has to be fulfilled also in case of an application made on the behalf of a non-national minor whose parents have acquired or recovered the Belgian nationality[160].

In addition to the condition to have the «principal residence» in the country, it is required for the length of residence to be based on a lawful stay. The reform has, therefore, confirmed the previous provisions on this regard established in the law amending the code in 2006. Specifically, at the moment of introducing the demand, the foreigner is required to have a residence permit of unlimited duration or to benefit from the right of establishment. In this way, there is not the possibility that the possible future acquisition of nationality will modify the residence status of the applicant. Moreover, it is also required to the foreigner to demonstrate that the period of residence that precedes the introduction of the demand have been accumulated on the basis of an authorisation or admission to reside in the country for more than three months, or to benefit from the establishment[161]. If as regards foreigners this provision seems to have added notting significant since the object at its basis could be achieved already by the provision just mentioned above - to have a residence permit of unlimited duration or to benefit from the right of establishment once the demand is done - it is passible to have unfavourable consequences for refugees as the period of residence accumulated while their asylum demand was examined cannot be taken in consideration any more[162].

The second relevant consideration that has to been made on the 2012 reform changes of the previous regime certainly regards its influence of the causal relation between nationality and integration. Since it is not possible anymore to (non-automatically) acquire the Belgian nationality without having demonstrating an already occurred integration - except for the cases in which this is deducible from the length of residence in the country or it is not demonstrable or acquirable due to personal circumstances - it can be affirmed that the relation has been reversed in comparison to the early 2000s, and now a *de facto* and by right integration has to precede the grant of nationality. Obviously, this cannot but reflect on federate units competence as regards reception and integration of migrants and, precisely, on the differences seen on this issues between the Flemish and Francophones federate entities, not only on the content of integration paths but also in their coherence at the regional level and level of centralisation. In this sense has to be welcomed and is explicable the recent convergence trend observed, or more precisely, a progressive approach, at least in the projects and with already visible results as regards newcomers, of the Francophones federate entities

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[160] Cfr. art. 12.
[161] Cfr. art. 7bis, para. 2, no. 2.
[162] B. RENAULD, *Le Code de la Nationalité, version 2013*, in *Revue du droit des étrangers*, 2012, n. 170, p. 555.

towards the Flemish model, with the important distinction for what concern the mandatory character of integration paths.

5.2. Residence, labour, nationality, integration.

An overview of the last developments on immigration and nationality matters - the 2012-2014 reform of the State, that has attributed to regions competences on foreigners labour migrants, the 2012 amendment of the Nationality Code and the 2003 federal reform of labour migration - shows how much they are interrelated in the Belgian legal system and how much they also undergo at the same forces of centralisation and decentralisation which are so common in the dynamics affecting the evolution of the Belgian federation since the beginning.

Migrants residence, work, integration and nationality acquisition are even more deeply related concepts, as well as they are more touched by the just mentioned centrifugal and centripetal dynamics, than in they were in the past as a result of the last reforms. Actually, the 2003 reform of labour migration has aimed at connecting residence to the grant and type of a work permit, the sixth reform of the State has attributed competences on migrants labour to regions, and the 2012 amendment of the Nationality Code has renewed the centrality of integration and residence to became Belgian citizens. To this forces operating at the national level we should add those coming from the EU level, which has a deeply influence on, in particular, on the content of provision regulating migrants' residence and work, but also, more generally, on the direction and force of the centrifugal and centripetal dynamics, pressing for convergence at the federal level.

FOURTH CHAPTER
FOCUS ON THE NORDIC COUNTRIES AND SWEDEN.

Summary: 1. Introduction. - 2. The Nordic cooperation: contents of a differentiated integration. - 2.1 From the Nordic cooperation to EU membership. - 2.2. The Nordic cooperation contextualised. - 2.3. The composite picture of persons free movement rules in the Nordic context. - 3. Sweden between the EU and the Nordic cooperation. - 3.1. The Common Nordic Labour Market and the Nordic Welfare State. - 3.1.1. The Nordic Welfare State-immigration relation. - 3.2. The Swedish immigration policy: from the post-WWII period to nowadays. - 3.3. Become a Swedish citizen. - 3.3.1. The 2001 Citizenship Act. - 3.3.2. The 2002 Nordic Agreement on the Implementation of Certain Provisions Concerning Nationality. - 4. Final remarks.

1. Introduction.

To this point the interplay between immigration and citizenship has been observed from an internal point of view, or as a top-down process. The starting point was the larger circle of the concentric image presented in the introduction that is represented by the EU legal system: the content and the relations between the European Union (EU) immigration labour policy and free movement of EU workers before, and EU citizens after, have been studied. Subsequently, an in-dept analysis of the same contents and relations within the Kingdom of Belgium has followed, where, due to its constitutional features, the above mentioned relations reach a further level of complexity, and significant sub-national variants are observable in immigration and citizenship policies. The aim of the following chapter is to shift again the point of observation of the dynamics between immigration and citizenship to an external - supranational - point of view, in order to investigate how the interaction among immigration and citizenship has developed in a similar way to the EU supranational setting, and how it has related when at a certain point in time these supranational forms of co-operation have, in part, overlapped.

The EU as a legal system operating at a supranational level and having competencies on matters as free movement of persons, immigration and (Union) citizenship is not the only actor on the scene. In fact, other forms of regional cooperation which historically precede the birth of the EU, have conditioned the relations between the just mentioned fields for nation states which are parties of these as, e.g., the Benelux

regional cooperation and the Nordic cooperation. As previously highlighted in relation to Benelux, the development of these forms of supranational cooperation resemble in more than one relevant aspect what we consider today to be the fundamental basis of the EU architecture, namely the four fundamental freedoms, and among these free movement of persons. i.e. mainly economically active persons, within the territories taking part in the cooperation. But if nation states parties of the Benelux region are nowadays all EU members, the same cannot be said for the states parties of the Nordic cooperation. In fact, formed by five countries, three of them joined the EU in different points in time, while two of them are still non-EU Members. However, because of the geographical proximity and, more importantly, the long-standing economic relations between Nordic countries and Europe, and to the EU in particular in all the various steps of the EU integration process, a broad range of agreements have been signed in order to allow all actors involved to make the most of their relation.

This is a valid assumption not only for the countries that have decided not to become EU members, but also for the countries that actually are part of the EU, since only one out of three EU Nordic member states are fully participating in all aspects of the EU, namely Finland. Therefore, the architecture of the EU-Nordic countries relations is one of the best examples of what has been called «differentiated integration»[1]. Moreover, further elements contribute to complicate even more this already composite picture, since two of the Nordic countries[2] - Norway and Iceland - are current members of the European Free Trade Association (EFTA), an intergovernmental organisation that promotes free trade and economic integration among its members established already in 1960[3]. Moreover, three out of four EFTA members in addition to EU member states form the European Economic Area (EEA), and the «internal market» so formed is regulated by the Agreement on the European Economic Area, which entered into force in 1994[4]. Account for the meaning and the consequences of that this «differentiated integration», interrelations and overlaps has on the modes in which movement of persons across intra-

[1] Following Stubb's categorisations, Denmark's protocol and Swedish accession are, in more specific terms, examples of «à la carte» integration, according to which member states can choose the policy area in which they would or would not participate, and, despite maintaining shared common objectives, it has a more intergovernamental nuance. Cfr. A. C.-G. STUBB, *A categorization of differentiated integration*, in *Journal of Common Market Studies*, 2, 1996, p. 288, 292. S. S. ANDERSEN. N. SITTER, *Differentiated integration: What Is It and How Much Can the EU Accommodate?*, in *Journal of European Integration*, 4, 2006, p. 45.

[2] Originally, in 1960, were EFTA members also the Kingdom of Denmark and the Kingdom of Sweden. In 1986 the Republic of Finland also became a full member, having been an EFTA associate member since 1961. All the three countries left EFTA to join the EC. In 1972 Denmark, in 1995, Finland and Sweden.

[3] Convention establishing the European Free Trade Association (consolidated version 1 July 2013). The EFTA convention was revised in 2001 - known as the Vaduz Convention - and entered into force in 2002, in parallel with the signature of the EU-Swiss Bilateral agreements - Switzerland is one of the founding members of EFTA - amending the EFTA convention accordingly to the contents of the latter, at http://www.efta.int/sites/default/files/documents/legal-texts/efta-convention/Vaduz%20Convention%20Agreement.pdf.

[4] Agreement on the European Economic Area, OJ L 1, 3.1.1994, p. 3.

Nordic and EU borders, labour immigration management and citizenship acquisitions are regulated within the Nordic countries and in relation to their EU membership is the aim of this chapter.

The interest that should be paid to the Nordic countries when dealing with the movement-immigration-citizenship relation within the EU does not stay only in exploring the current functioning of the variable geometry structure above outlined. It is worth also, and firstly, to look at the development over time of the Nordic cooperation itself, and at the role that movement across borders, i.e intra-Nordic migration, and national citizenship regimes have played within it. This means to shift the point of observation from which the evolution of immigration and citizenship regimes in the EU have been observed until now, and to place it externally in relation to the EU integration process. More precisely, instead to look only at EU norms as a body of rules to which nation states have had to adapt their national regimes, i.e. a top-down or vertical process, we consider also how an EU external form of supranational cooperation has dealt with these matters and how, subsequently, these two forms of supranational cooperation have merged, or partially overlapped, in what can be described as an horizontal dynamic of gradual approximation.

A further aspect of interest stays in the similarities between the EU integration process and the Nordic cooperation as regards, in particular, intra-border movement of workers, which was a focal point of the Nordic cooperation from the very beginning. Nevertheless, it is also relevant to highlight the reasons why this cooperation was not able to evolve beyond a certain level, or rather, why Nordic countries have failed to expand their cooperation in determinate fields, e.g. defence, and in creating their own economic union[5]. These reasonings need to be done taking into account the (although contested[6]) claim of the existence of a recognisable Nordic model, which is based on a supposed Nordic homogeneity, at least, under certain aspects, more notable the characteristics and aims of Nordic welfare states[7].

As it is intuitively understandable, the contents and meanings attached to welfare state is a basic feature of the Nordic understanding of being a citizen and of the relation between the state and the individual. Therefore, it cannot but inform and shape immigration policies and national notions of integration. Nonetheless, if for a certain time it was possible to advance explanations generally valid for the Nordic countries

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[5] T. H. ALAISTAIR, *The Nordic region and the Nordic cooperation*, in L. MILES (ED.), *The European Union and the Nordic Countries*, London, 1996, p. 16, 20-21.

[6] M. KAUTO (ET AL.) (EDS.), *Nordic Social Policy. Changing Welfare State*, London, 1999, p. 67.

[7] O. KANGANS, J. PALME, *Social Policy and Economic development in the Nordic Countries: An Introduction*, in O. KANGANS, J. PALME (EDS.), *Social Policy and Economic Development in the Nordic Countries*, Basingstoke, 2005, p. 2-3.

considered as an homogeneous unit, and even more when referring to Scandinavian countries[8], as regards immigration and citizenship policies a divergent trend is observable in the last decades. This does not mean, though, that a persistent circulation of ideas and policies is not present any more among those countries, but only that national dynamics, conditioned also by their differentiated forms of EU membership, have lastly prevailed among the search of common solutions for what concern the management of immigration of non-Nordic citizens and foreigners integration.

Despite the Nordic exceptionality, the analysis of the development of immigration and citizenship regimens within the Nordic countries is significant since they share with the previous and the following case studies, namely Belgium and Switzerland, similar past features and current trends. Firstly, alike post Second World War (WWII) developments in the management of immigration are observable, as all three countries put in place in that period, and accordingly shape, at least initially, national immigration policies aiming at regulating the entrance and residence of labour migrants coming from neighbouring countries through bilateral agreements. However, post WWII immigration policies of Nordic countries are not qualifiable as «guest-workers» regimes as, on the contrary, have been the Belgian and Swiss regimes in the same period. Secondly, national citizenship laws pursue, in general term, a similar aim: i.e. to instrumentally use citizenship acquisition by naturalisation of third-country nationals as a tool of their immigration policy. Thus, immigration and citizenship regimes convergence has progressively increased, and similarly have efforts focused on regulating foreigners integration. Not surprisingly, notwithstanding the sharing of an akin objective, the results were deeply conditioned by national characteristics.

Among the Nordic countries, particularly attention will be paid to the Swedish immigration and citizenship policies. The relevance of this country as a case study among the Nordic countries resides in its being in-between the EU and the Nordic cooperation. Although it is not the oldest EU member state among the states which are part of the Nordic cooperation, and it is neither the one among Nordic countries that fully participate in the EU process, it was the first in becoming an immigration country, experiencing the greatest flows of foreigners from the aftermath of the WWII, mainly coming from other Nordic countries, namely Finland, but also from other current EU member states and third-countries. Consequently, it has developed over time a rather liberal and coherent immigration and integration policy. This has ascribed to Sweden the leading role in the development of immigration policies within the Nordic countries, and

[8] Scandinavian countries is a term used to identify only Denmark, Sweden and Finland, while Nordic countries identifies those countries that are part of the Nordic cooperation: in addition to the three Scandinavian countries Iceland, Finland, and the three autonomous regions of Faroe Islands, Greenland and Åland Islands.

it has attributed to such country, until the last decades, a power to condition, by being looking as a forerunner and a model, the development of the same policies especially in the remaining Scandinavian countries, Denmark and Norway[9]. Therefore, it is a privileged point to observe both the forming of a national immigration policy within the framework of the common Nordic labour market, and the effects on the development of a national immigration regime, if any, of the implementation of the EU laws on immigration after its membership in 1995. Finally, in Sweden, since immigration and citizenship started to be have jointly considered, naturalisation has became a fundamental part of the process of integration of foreigners. Therefore, in the light of the above mentioned dynamic of progressive divergence from a common Nordic approach as regards immigration and citizenship, it is significant that among the other Scandinavian countries Sweden is the only one that have resisted the recent restrictive shift of national citizenship laws, e.g. not amending the residence requirement for naturalisation and avoiding the introduction of integration compulsory requirements as language or civic tests.

The first part of the chapter is devoted to outline the historical evolution of the Nordic cooperation and the role played by the other collateral agreements in giving shape to the EU «differentiated integration» of the Nordic countries, namely EFTA and EEA. Particular attention will be payed to the common Nordic labour market and, within this framework, to the contents of the Nordic Passport Convention of 1957 and to the agreement concerning certain provisions on Nationality of 2002. A specific sub-section cannot but be focused on the Nordic welfare state model, since it has a fundamental role in shaping both immigration and citizenship policies. As anticipated, the second part of the chapter will concern Sweden immigration and citizenship regime, both for its guiding role in these fields within the Nordic countries, and in order to study the outcome of the overlapping of the legal regimes governing immigration within the framework of the common Nordic labour market and Passport Convention, and EU laws on free movement of persons and immigration of third-country nationals.

[9] G. BROCHMANN, A. HAGELUNG, *Comparison: A Model with Three Exceptions*, in G. BROCHMANN, A. HAGELUNG (EDS.), *Immigration Policy and the Scandinavian Welfare State 1945-2010*, London, 2012, p. 236, 243.

2. The Nordic Cooperation: contents of a differentiated integration.

2.1. From the Nordic cooperation to EU membership.

The outlining of the development over time of the Nordic cooperation is done for a double aim. Firstly, to highlight that the current differentiated integration of Nordic countries within the EU is a path-dependency process, the result of actions and reactions, failures and successes of numerous initiatives, attempts of cooperation, and of the overlap of diverse institutions and agreements which found a way to keep together their parties around common grounds and not the outcome of a tailored drawing. Secondly, the description of the various steps allows to better perceive the differences, but above all how many points of contact and similarities the Nordic cooperation and the EU have shared along their parallel development. This is significant in order to comprehend the present functioning of the differentiated integration, where a number of alike institutions operate simultaneously and in relation to partially overlapping territories.

The history of the Nordic cooperation formally starts in the aftermath of the WWII, precisely in 1952 when the Nordic Council was established between Denmark, Norway, Sweden and Iceland[10]. However, the Nordic countries[11] were related firstly, and before they all become independent nation states, by their common history, and in the pre-WWII period by a non-formalised but advanced, so called, «micro-integration»[12]. Therefore, in the building process of this informal set of relations, in the first place, it is relevant that until the twentieth century all Nordic territories were under the domain of the Danish and Swedish crowns. Norway moved from the Danish to the Swedish dominion along the ninetieth century (1814), despite having been granted already a high degree of autonomy, before becoming independent in 1905; Iceland, although having benefited from a certain degree of autonomy since the second half of 1800, became a sovereign state in 1918, but completely released from the Danish crown sovereignty only in 1944 by declaring itself an independent republic. Eventually, Finland, part of the Swedish territory until 1809, was conquered by Russia, and hold the status of Grand Duchy of the Imperial Russia until reaching independence in 1917. Nevertheless, the

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[10] Finland, because of its strict relation with the Soviet Union, joined the Nordic cooperation only in 1955.

[11] To the «traditional» five Nordic countries should be added the three autonomous areas of Åland, the Færoes and Greenland. These territories have a special status respectively in relation to Finland from 1991, Denmark in 1948 for the Færoes, and from 1979 for Greenland. As a further element of complexity as regards the EU membership of the Nordic countries, it is noteworthy that the Færoes did not joined the EU when Denmark became a member in 1973, and Greenland decided to leave the EU in 1982 by referendum. On the contrary, Åland agreed with EU membership by referendum in 1994, and joined the EU in 1995 simultaneously with Finland's membership.

[12] E. SOLEM, *The Nordic council and Scandinavian integration*, New York, 1977, p. 165.

Fenno-Russian relations lasted for a longer period, and were market by Finland's invasion in 1939 by the Soviet Union ended with the 1944 armistice. Subsequently, their relations were regulated through the 1947 commercial agreement and by the 1948 Treaty of Friendship, Cooperation and Mutual Assistance. This is meaningful as it has conditioned the degree and the timing of Finland's participation both in the Nordic cooperation and in the process of approximation of the Nordic countries to the EU.

Attempts to formalise the Nordic cooperation were done since the end of the ninetieth century mainly as regards the economic and defence fields. In 1873 a currency union was established between, firstly, Denmark and Sweden, and was joined by Finland two years later. Although this first effort to coordinate Nordic economies ended due to the divergent development and strategies adopted by the nations involved in the First World War (WWI) and inter-war period, in 1912 the same agreed to have, and were able to succeed in maintain, a neutral position as regards the first world conflict. Here formally begins the neutral attitude characterising Nordic countries which will be, until the nineties of the last century, one of the main obstacles on the path towards EU membership for Sweden and Finland[13].

Despite the neutrality choice did not preserve them from the consequences of the First World War[14], the same position was maintained during the 1930s and presented as unique Nordic position in international organisations as the League of Nations. Moreover, foreign affairs ministers started to meet in 1932 and did it on regularly basis from 1934 to 1940. Nonetheless, the different WWII experiences of the Nordic countries - only Sweden was able to maintain its neutrality, while Finland was obliged to be neutral by its bilateral agreements with the Soviet Union, Norway and Denmark were occupied by the German army, and Iceland by Britain and the USA.

The consequences and the reactions to this diverse scenario led to different and incompatible choices as regards defence and security among Nordic countries. In 1948 a Swedish proposal in these sense failed and, in the end, prevented the creation of a common Nordic defence policy[15]. Subsequently, Norway Denmark and Iceland joined NATO in 1949, while Sweden and Finland did not, the latter as a consequence of its

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[13] A distinction should be made on this point as regards the Færoes and Greenland, which did not joined and left the EU mainly for not having to take part in the EU Common Fisheries Policy. L. MILES (ED.), op. cit., p. 9.

[14] Initially, the neutrality position of Nordic countries led to a period of economic growth in the first two years of conflict. But already in the mid-1916 the situation started to deteriorate and the consequences of the war were felt also by the population of the Nordic countries, leading to strong demands of political and economic reforms. If this climate resulted in a one-year civil war in Finland (1917-1918), in the remaining Nordic countries there were not such consequences and the required reforms were made as regards political rights and workers rights. Interestingly in the view of the development of the Common Nordic Labour Market in the 1950s, in 1919 in all the Norden was introduced a norm establishing a eight-hour work day for industrial workers. B. J. NORDSTROM, *Scandinavia since 1500*, Minneapolis, 2000, p. 265-267.

[15] T. H. ALAISTAIR, op. cit., p. 19-20;

strict relations with the Soviet Union. This composite situation was defined as the «Nordic Balance» since, despite the different formal memberships of Nordic countries, a moderate attitude was a shared feature of Nordic security decisions.

As regards the post-WWII period, this was market by a shared rapid recovery and high levels of economic growth. It was within this favourable context where began the development of what would be subsequently called the «Nordic model» and where started the building of the «Nordic Welfare State»[16].

This state of affairs is relevant, firstly, as it exemplifies the manner in which Nordic cooperation was built over time, that is reacting to the failure of more ambitious projects, at least as regards attempts to formalise cooperation. Secondly, it is noteworthy that, in the same years, a number of similar initiatives in the fields of defence and economic cooperation were taking place among certain European states, and these projects would, somehow, cross the path of the Nordic Countries in the future and influence their approximation towards the EU.

The reference is clearly, in the first place, to the Benelux Custom Union between Belgium, Luxembourg and the Netherlands that become operative in 1948, which provided a common external customs tariff, eliminated customs duties on trade, and was followed in 1953 by two protocols aiming at coordinating economic, social and trade policies. Of extremely significance was also the signature and enter into force of the statute of the Council of Europe in 1949, and the attempt to create a European Community of Defence by Belgium, France, Germany, Italy, Luxembourg and the Netherlands in 1952, to be declared failed in 1954 because of the French rejection. Thirdly, the European Coal and Steel Community (ECSC) was established in 1951 with the signature of the Treaty of Paris by France, Germany, Italy and the Benelux countries. Finally, we should not forget that in 1948 Scandinavian countries were among the first eighteen members that participate in the Organisation for European Economic Co-operation (OEEC). Although its first aim was to promote the reconstruction of Europe by coordinating national efforts and programmes, it was within that framework where both future EU members and Nordic countries have, for the first time, engaged in discussions and where initiatives aiming at freeing trade were adopted. In the meanwhile, the development of these and other similar initiatives would act as a catalysing force approximating more and more the EU and Nordic countries over time.

The institutionalisation of the Nordic cooperation and the emerging of the an embryonic form of EU began in the same years. Their paths would gradually

[16] B. J. NORDSTROM, op cit., p. 322, 330. On the Nordic Welfare State cfr. paragraph 2.2.1 of this chapter.

approximate but, only decades later, they, although differentially, overlapped. In fact, Nordic countries, similarly to Britain, were unwillingness to be part of the process in the initial phase of EU integration, since their preferences were directed towards forms of intergovernmental cooperation rather that economic integration[17]. The British-Scandinavian similar attitudes concerning the EU project, but even more their deep economic relations since 1930s and alike approaches in questions of economic policies, led to the involvement of the Scandinavian countries in 1950 in the Uniscam initiative[18]. This was an Anglo-Scandinavian Economic Committee within which members discussed trying to integrate their economic policies and attempted to coordinate their attitudes towards the newly born ECSC. Although the initial efforts to realise a deeper economic and financial integration among its partners came to nothing, and the biannual meetings of Uniscam officially ended in 1960, this first attempt of cooperation paved the way to the establishment of EFTA that same year. As will be better explained later on, this British-Scandinavia initiative is, firstly, relevant as a first stage of approximation of Nordic countries towards the EU, and, secondly, it outlines the origins of one of the elements of complexity of the current Nordic-EU relations, as two of the Nordic countries, Norway and Iceland, are still EFTA members. Finally, it helps to comprehend what have been the reasons that make the Nordic countries to approximate to the EU despite their initial reluctance and their participation in a number of concurrent initiatives.

In parallel with their participation in broader forms of economic cooperation, the Nordic countries started to provide a formal structure also to their (restricted) Nordic cooperation. It is important in this regard to recall that the foundation of the Nordic Council in 1952 has followed not only the failure of the setting up of a common Nordic defence policy as mentioned before, but also the unsuccessful effort to integrate Scandinavian countries in an economic custom union in 1947[19]. Both failures led to the «externalisation» of the economic integration and security concerns through the membership of the Nordic countries into much broader, in the first place in geographical terms, forms of cooperation.

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[17] J. AUNEUSLUOMA, *An Elusive Partnership: Europe, Economic Co-operation and British Policy towards Scandinavia 1949-1951*, in *Journal of European Integration History*, 8(1), 2008, p. 103.

[18] commitment to regional economic groups

[19] V. SØRENSEN, Nordic cooperation – A Social Democratic Alternative to Europe?, in: T. B. OLESEN (ed.), Interdependence Versus Integration. Denmark, Scandinavia and Western Europe, 1945-1960, Odense University Press, Odense, 1995, pp.40-61; I. SOGNER, The European Idea: The Scandinavian Answer. Norwegian Attitudes Towards a Closer Scandinavian Economic Cooperation 1947-1959, in: SJH, 4/18(1993), pp.307-327.

The Nordic Council was founded by Denmark, Sweden, Norway and Iceland in 1952[20]. It is a inter-parliamentary consultative body that meet on regular basis annually from 1953, and from 1993 twice per year in its plenary composition. It is formed by eighty-seven elected members of Nordic national Parliaments, and national delegations are made up mirroring the party division within them. The main task of the Nordic Council consist in the adoption of recommendations directed to Nordic national governments which are, then, in charge of implementing them within national legal systems. It is run by an eleven-member Presidium, which is the body responsible of the decision-making process, and the sole allowed to adopt decisions concerning foreign and security policies and the budget of the body itself and of the Council of Ministers. The Presidium works close to five specialist committees[21], that consider members' proposals and, in case, decide to submit them to the Presidium or to the plenary assemblies, which are the sole bodies that can, on the basis of a recommendation, suggest the adoption of Nordic cooperation measures on a specific issue.

Surely, among those that can be considered some of the most significant achievements of the Nordic cooperation until today, within the framework of the Nordic Council, were attained in the following decades. The vast majority of the provisions adopted in mid-1950s and 1960s aimed at providing the necessary instruments and legal framework for the functioning of the common Nordic labour market. Yet in the same year of establishment of the Nordic Council, a passport-free travel among Nordic countries was introduced. No visa was anymore required to cross Nordic borders by Nordic citizens, although the concerning convention, establishing the so called Nordic Passport Union, was adopted later on, in 1958. This convention plays a significant role in shaping the differentiated integration of Nordic countries within the EU architecture. Firstly, for its historical meaning, it can be considered a forerunner of the Schengen Convention signed in 1985 among Benelux countries, France and Germany. Secondly, because by being still in place, and considered that all Nordic countries are now members of the Schengen Area, it has required a specific arrangement resulted in an EU Council decision adopted in 1999, after the association of Norway and Iceland in 1996,

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[20] Finland joined in 1955, in 1970 Åland and the Færoes islands, in 1984 Greenland. The Home Rule Governments' members of the Færoes islands and Greenland, in addition to the members of the Regional government of the Åland participate in the Nordic council as separate members from those of the Nordic states of which they are part. However, differently from the other member which are nation states the number of members representing these autonomous areas are not fixed by the Helsinki Treaty, generally, they are not allowed to vote, except when are under discussion issues comprise within specific agreements of which they are part. Cfr. arts. 44, 47 and 49, Helsinki Treaty (consolidated version 2 January 1996).

[21] The five committees are the culture, education and training; citizen's and consumers rights; environmental and natural resources, business and industry; welfare committees.

following the integration of the Schengen *acquis* within the EU legal framework by the Amsterdam Treaty[22].

The common Nordic Labour Market came into force in 1954[23], even though Sweden had already eliminated the necessity of having a visa and a work permit for Nordic citizens in 1940s. Denmark had done the same for Swedish citizens in 1946, and in 1952 for Norwegian and Icelandic citizens. Nevertheless, within the framework of the common Nordic labour market no work permit is necessary to any Nordic citizens to work in another Nordic country[24]. Nonetheless, this did not mean that mobility was completely free, at least initially, since public sector jobs and specific occupations that required a long complementing education, as those in the health sector, were still reserved to nationals[25]. In 1955 a further step was taken with the adoption of the Nordic Social Security convention, that has entered into force in 1957[26]. Therefore, as regards social security and assistance rights (pensions, unemployment benefits, child and health care) Nordic citizens were treated almost equally within the Nordic countries regardless of their nationality. That same year the Treaties of Rome was signed among the so called «Six», and the next year with their enter into force the European Economic Community (EEC) and the European Atomic Energy Community (Euratom) came into being.

Simultaneously with the first developments of the Common Nordic Labour Market, Nordic countries' attempts of establishing further forms of economic cooperation with some of their more relevant economic partners, at the time, carried on. As previously said, Nordic countries were more concerned with trade, economic and intergovernmental cooperation rather than political integration. Moreover, being the Nordic countries economies at the time mostly reliant upon exports towards non-EEC members, mainly the United Kingdom, the appeal of the EEC was initially relative low. To these reasons should be added the reluctance in participating in cooperations that would imply a transfer of national sovereignty due to the recent experiences in the two World War conflicts. Finally, the foreign policies of the Nordic countries adopted in the

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[22] Cfr. Council Decision of 17 May 1999 on the conclusion of the Agreement with the Republic of Iceland and the Kingdom of Norway concerning the latters' association with the implementation, application and development of the Schengen *acquis*, 1999/439/EC, OJ L 176, 10/07/1999, p. 35.

[23] The 1954 agreement has been replaced by a new Agreement concerning a Common Nordic Labour Market in 1982 (the same year in which Iceland joined), which entered into force the next year.

[24] Iceland joined the common Nordic labour market only in 1982, and in the same year the 1954 agreement was replaced.

[25] During the 1960s a series of conventions were adopted in order to regulate the intra-Nordic movement of doctors (1960), dentists (1964) and nurses (1968). P. J. PEDERSEN, M. RØED, E. WADENSJÖ, *The Common Nordic Labour Market at 50*, Copenhagen, 2008, p. 49.

[26] This convention was renewed in 1981. Currently the matter is regulated by the Nordic Convention of 14 June 1994 on Social Assistance and Social Services, and by the Nordic Convention of 18 August 2003 on Social Security, concerning coverage of extra travel expenses in case of sickness during stay in another Nordic country increasing the cost of return travel to the country of residence.

aftermath of the WWII constitute a further obstacle, especially as regards the neutral position of Finland and Sweden[27].

All this considered, in 1959 the three Scandinavian countries signed the Economic Free Trade Area Agreement (EFTA)[28]. Finland, because of its relations with the Soviet Union, did not become a member until 1986, but in 1961 a separate association agreement (FINEFTA) was signed. Its intergovernmental structure and the removal of tariffs and quantitive restrictions in the first place on the trade of industrial goods met the expectations of the Nordic countries. Therefore, the relevance of EFTA, despite its mere economic nature and scope[29], stays in its being, firstly, the first formal form of cooperation not just limited to the Nordic countries, thus the first «bridge» that have been built with the, at time, EEC members. Despite having among its objectives also the progressive liberalisation of movement of persons[30], the EFTA Convention became relevant in this regard only in 2001, when the same was updated with the signature of the Vaduz Convention, adding measures on the entry, residence and access to work without being discriminated on the basis of nationality of nationals of the state parties both economically and non-economically active[31]. This point is significant as Norway, Iceland and Switzerland are still EFTA members, therefore their citizens when moving and residing in one of the member states' territories can benefit from the rights therein established: they have a different personal status as nationals of EFTA member states. As it will be highlighted further on, this is particularly relevant and visible within the Swiss immigration policy.

How much the choices and needs of EFTA members were able to condition the evolution of this new born association become immediately evident, manifesting the necessity to incentive the approximation with the EEC, although they were - initially born as - competing and alternative economic forms of cooperation. In fact, when the United Kingdom (and Ireland) applied for EEC membership in 1961, both Denmark and Norway followed soon after. The former for the importance for its national economy of agricultural products exportations, a field not covered by the EFTA agreement, and consequently for not being excluded from of the Common Agricultural Policy of the

[27] D. PHINNEMORE, *The Nordic countries, the EC and EFTA, 1958-84*, in L. MILES (ED.), cit., p. 33-34.

[28] The other EFTA founding members were Austria, Portugal, Switzerland and the United Kingdom. Iceland joined EFTA in 1970. Countries progressively left EFTA as they became members of the, at time, EEC. Denmark and the United Kingdom in 1972, Portugal in 1986. Finland became a full member in 1986, but left in 1995 with Austria and Sweden. In the meanwhile in 1991 Liechtenstein became a full EFTA member. Current EFTA Member States are Iceland, Liechtenstein, Norway and Switzerland.

[29] D. W. URWIN, *The Community of Europe. A History of European Integration since 1945,* Harlow, 1995, p. 56.

[30] Cfr. art. 2, lett. c, Convention establishing the European Free Trade Association (consolidated version 1 July 2013).

[31] Cfr. Annex K, and Appendixes 1, 2 and 3, to the Convention establishing the European Free Trade Association (consolidated version 1 July 2013).

EEC. As for the latter, for the dependence of almost half of its national trade volume from United Kingdom and Denmark national markets. That same year, Sweden, with Austria and Switzerland applied for the EC association status[32].

Meanwhile, the Nordic cooperation, pushed by these last developments, was not left aside, and in 1962 the Helsinki Treaty, known as the Nordic «Constitution», was signed[33]. This made permanent the Nordic cooperation within the framework of the Nordic Council[34], fixed its guiding principles and the functioning of its basic institutions. For our purposes, some points are particularly telling, since the contracting parties committed themselves to treat equally Nordic citizens, to facilitate citizenship acquisition in another Nordic country, to coordinate or render uniform their legislation in determinate fields, to enhance workers' freedom of movement and social rights' equal treatment. Finally, they engaged in promoting economic cooperation, although they would not be able in agreeing on a common Nordic economic union in the future.

Precisely on this last issue, the French rejection in 1963 of the United Kingdom EEC membership request, and consequently of the countries that had applied with it, renewed the interest in enhancing cooperation within the EFTA framework, and was followed by the 1966 free full trade agreement among its members. This also urged Sweden to search for the development of broader relations with EEC members[35]. Nevertheless, the next year the United Kingdom, Ireland, Denmark and Norway applied again for EEC membership, and were again rejected by a renewed de Gaulle's veto. But this time, this new failed attempt brought Nordic countries to try once more to establish a Nordic cooperation on economic and trade policies, Nordek, an initiative promoted *in primis* by the Danes in the last 1960s. At the same time, it was made clear that this new Nordic attempt had not to be considered an obstacle to Nordic countries to pursue the type of relation with the EEC that fit better their national interests[36].

That the nature of this new effort to create a framework for the economic cooperation and integration of the sole Nordic countries was a temporary solution and a palliative for the momentary block of EEC membership applications became clear straight after, when a change in the French Presidency in 1969 modified the course of the EEC development and enlargement options, and parted anew the paths of Nordic countries as regards a possible economic cooperation among them only. Therefore, in early 1970s, the situation rapidly changed. As the joining of the EEC became possible

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[32] Cfr. art. 237, EEC treaty.

[33] The Helsinki Treaty signed the 3 March 1962, and entered into force 1 July 1962, was amended several times, lastly on 2 January 1996.

[34] Cfr. arts. 39 and 40, Helsinki Treaty (consolidated version 2 January 1996).

[35] L. MILES, *Sweden and the European Integration*, Aldershot, 1997, p. 67. *

[36] F. WENDT, *Cooperation in the Nordic Countries*, Uppsala, 1981, p. 125.

again, and Finland left Nordek negotiations[37], the desirability as long as the utility for Nordic countries of having their own custom union decreased. In 1970, Iceland joined EFTA, and, at the same time, with Finland and Sweden, requested, and then concluded the following year, free trade agreements with the EEC. If for Iceland this move was justified by mainly economic concerns - i.e. to have access to national markets of EEC member states - Sweden and Finland choice not to go for membership, and to confine their relations with the EEC to economic cooperation, was (also) justified by the incompatibility of their neutral position with the EC foreign policy. This was marked in its development by the adoption that same year of the, so called, «Davignon Report» by the Foreign ministers of the «Six», where great emphasis was put on the need for EEC members states to enhance political integration and the harmonisation of their international policies[38]. Although all the agreements among the EEC and Nordic countries had almost the same content, Sweden expressly ask for the expansion of the fields of cooperation to non-economic areas[39], but it had to be satisfied with an agreement covering the sole free trade of industrial goods[40].

Finally, membership applications of the United Kingdom, Ireland, Denmark and Norway were successful and in 1972 the related accession treaties were signed. However, if in Denmark both the Parliament and the People through referendum approved the EEC membership, making this the first Nordic country to become an EEC member state in 1973, this was not the case in Norway, where the majority of the population rejected it. Therefore, the necessity for Norway not to loose the access to EEC national markets led to the conclusion, in alternative, of a free trade agreement along the lines of that signed by Sweden the previous year.

In spite of all the progresses in external relations of the Nordic cooperation framework, its development also proceed once more (also) as a reaction to the failure of the Nordek negotiations, and in 1971 a new permanent institution of inter-governmental cooperation alongside the Nordic Council was established, the Nordic Council of

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[37] Finland justified its abandonment of Nordek negotiations precisely on the basis that the renew negotiations in the view of a possible EEC membership of other Nordic countries would made the future survival of Nordek uncertain, although it stressed at the same time that Nordic economic cooperation should continued on a sectorial basis. IB. p. 136-137.

[38] Cfr. points 7, 8 and 10, «Davignon Report», Report by the Foreign Ministers of the Member States on the Problems of Political Unification, Luxembourg 27 October 1970, Bulletin of the European Communities, November 1970, no. 11, p. 9-14.

[39] These desire was exemplify by the inclusion within the agreements of «evolutionary clauses», i.e. a list of further areas of cooperation beyond the fields touched by the agreement. The same type of clauses would be inserted within the cooperation agreement that Norway signed after its rejection of the EC membership by referendum in 1973. D. PHINNEMORE, op. cit., p. 41.

[40] F. WENDT, op. cit., p. 156.

Ministers[41]. Nevertheless, as it was for the Nordic Council, informal meetings and cooperation among members of Nordic countries governments had started from a long time before its institutionalisation. More precisely, this forum for cooperation among Nordic governments consists of several committee of ministers, divided accordingly to the matter that is discussed, and meet generally twice per year. These committees are formed by members of national governments[42] and, in addition, all Nordic countries have a minister for Nordic cooperation, even if are Prime Ministers that have the overall responsibility for coordinate matters on which the Nordic cooperation is established. Within this intergovernmental body every country has one vote, and decisions, which are binding, are taken by unanimity.

Notwithstanding the establishment of this further body to enhance Nordic cooperation and coordinate in a set of fields Nordic countries policies, their relations with their neighbours, EEC and non-EEC members, continued on different tracks, and their attitude towards the EU since the 1970s has earned them the label of «reluctant Europeans»[43]. On the one side there was Denmark, the earliest EC member, which was awaited to be a *trait d'union* with the other Nordic countries. A task it did not performed as expected[44], having adopted a timid approach towards European integration, probably due both to the decreasing internal support for the recent EEC membership, and as a (foreseeable) side effect of the reasons that had motivated its early membership which were mainly economic. On the other side there were non EC Nordic countries that had all their own bilateral agreements. The mid-1970s were then characterised by a renewed reliance on the EFTA framework as a valuable channel to cooperate with the EEC[45] - even if negotiations and agreements were mainly bilateral, i.e. EFTA itself was not a negotiating party or a signatory of the agreements - and by EFTA members' will to enhance the cooperation beyond the industrial goods trade. In this field, tariffs between EEC and EFTA countries had been eliminated in 1977, the same year in which the

[41] The Helsinki Treaty was amended for the first time in 1971 in order to include the provisions regulating the functioning, composition and competences of the Nordic Council of Ministers. Cfr. arts. 60-67, Helsinki Treaty (consolidated version 2 January 1996).

[42] The members of the Home Rule Governments of the Færoes islands and Greenland, and those of the Regional government of the Åland are involved in the work of the Council, however the decisions adopted are binding to these autonomous areas within the limits of their self-government statutes. In 2007, the Åland Document was adopted, defining more precisely the terms of participation of their members within the ministers committees and, in general, aiming at improving their participation in the Nordic cooperation, and their influence in the definition of objectives and policies. Cfr. arts. 60 and 63, Helsinki Treaty (consolidated version); Åland Document, Mariehamn 5 September 2007, at http://www.norden.org/en/nordic-council-of-ministers/ministers-for-co-operation-mr-sam/aalandsdokumentet

[43] The expression was firstly used by Toivo Miljan in 1977 to describe Nordic countries attitude towards the, at time, EEC and, at the same time, their inevitable approximation over time drive by economic reasons. Cfr. MILJAN T., *The Reluctant Europeans: The Attitudes of the Nordic Countries Towards European Integration*, London, 1977.

[44] S. GSTÖHL, T*he Nordic countries and the European Economic Area (EEA),* in L. MILES (ed.), cit., p. 49.

[45] D. PHINNEMORE, cit., p. 45.

Common Custom Tariff (CTT) was extended to the new members: the United Kingdom, Ireland and Denmark.

Notwithstanding the intent of expanding the cooperation beyond the sole trade field, and the presence of «evolutionary clauses» within all the bilateral agreements previously signed, the EC-Nordic cooperation did not expanded further in the following years[46], and neither did the Nordic cooperation as regards economic matters[47]. Moreover, Greenland which had became part of the EC as Denmark autonomous region, decided, by referendum, to withdrawal the community in 1981.

On the other side, the development of the EC integration process carried on. In 1979 the European Monetary System has entered into force, and the applications for membership of Greece, Portugal and Spain were under consideration. Therefore, when EFTA and EC members met in 1984, year in which the very last tariff barriers in industrial goods trade were eliminated, was expressed, in the, so called, Luxembourg Declaration, the necessity to enhance EC-EFTA cooperation beyond the sole industrial goods trade and to create a joint economic space. But this time a multilateral approach was preferred over a bilateral one carried on by EFTA countries separately, and in 1987 multilateral agreements on transports and uniform trade administrative documents were signed. However, the Luxembourg process did not proved to be sufficient to move forward the EC-EFTA but, especially, the EC-Nordic cooperation, especially for the lack of an institutional and legal framework, and of a clear time table. In addition, the development of the Single Market made more and more vital for Nordic economies to provide themselves an access to the EC market. In this regards, it is remarkable the publication of the Commission's White Paper on the Single Market in 1985[48], leading the way to the completion of the Single Market by the early 1990s, and the enter into force in 1987 of the Single European Act (SEA)[49], revising the EEC Treaty. The following year, regardless of the continuation of the EEC-EFTA dialogue, Norway and Sweden independently decided that all their new laws relevant for the Single Market would have to take into account voluntary harmonisation with the Community law[50].

In 1990, on the basis of 1989 Jack Delors' proposal, the, at time, EU Commission president, negotiations to create an European Economic Area started, and represented for

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[46] In 1978, a series of cooperation agreements were also concluded with the Magreb countries (Algeria, Morocco, Tunisia) and with the Mashreq countries (Egypt, Syria, Jordan, Lebanon).

[47] However, in 1975 Denmark, Norway, Sweden, Finland and Iceland set up the Nordic Investment Bank (NIB). Finland signed a Host Country Agreement in 1999, that was replaced in 2010. The NIB was also joined by the Baltic countries, Estonia, Latvia and Lithuania, in 2005. The bank is an international financial institution, which aim is to provide long-term loans for the development of the Nordic-Baltic region.

[48] Cfr. Completing the Internal Market, White Paper from the Commission to the European Council, COM(85)310 final, Brussels 14 June 1985.

[49] OJ L 169, 29.6.1987.

[50] S. GSTÖHL, op. cit, p. 56.

EFTA members an attempt not to be excluded from the economic advantages brought by the participation in the Single Market, being the EC member states their main trade partners and *vice versa*. Several obstacles marked the EEA negotiations, and was reflected in the parallel submission of applications for EU membership by five out of seven EFTA members while EEA negotiations were still on going. Worth of consideration were the demand of the EU to put the *acquis communitaire* as the basis of negotiations, the request to EFTA members to speak with one voice with the EU institutions, and the concession of the possibility to opt-out from specific provisions of the agreement only all together. Moreover, a further point of disagreement was the attempt to set an EEA Court - formed by EFTA and European Court of Justice (ECJ) judges - to guarantee the uniform interpretation and application of the EEA agreement. However, the ECJ ruled in an opinion on the issue in 1991 that such a court would be against EU Law since it would undermine the exclusive competence of the ECJ[51]. Consequently, EFTA members agreed to set their one independent supervision mechanism, but left to the ECJ the last word in case of contrast between EU and EFTA provisions[52]. Therefore, even if an agreement was reached in the end of 1992, the rejection of Switzerland required new negotiations, and the EEA agreement, at last, entered into force on 1 January 1994.

The EEA Agreement[53] extended to the, at time, EFTA members the EEC legislation on four freedoms, but it did not include the common agriculture and fisheries policies, Justice and Home Affairs measures, the Common Trade Policy, the Custom and Monetary Union[54]. It is worth to notice that among the series of Association Agreements signed among the EU and third-countries, the EEA Agreement grants rights of free movement almost equal to those of EU citizens[55]: EEA workers are entitled to move within member states' territories to pursue an economic activity, to exercise their right of establishment or to provide services. They equally benefit from the right not to be discriminated on the basis of nationality, and from the mutual recognition of qualifications as well as social security rights[56]. Furthermore, the consonant

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[51] Cfr. European Court of Justice, Opinion of the Court of 14 December 1991, Opinion delivered pursuant to the second subparagraph of Article 228 (1) of the Treaty. Draft agreement between the Community, on the one hand, and the countries of the European Free Trade Association, on the other, relating to the creation of the European Economic Area, Opinion 1/91, European Court reports 1991, p. I-06079.

[52] C. PRESTON, *EFTA, the EU and the EEA*, in J. REDMOND, cit., p. 26.

[53] The EEA Oporto Treaty signed on 2 May 1992 was amended soon after to introduce the necessary adjustments necessary to accommodate the rejection by referendum of EEA membership in 1992 of Switzerland. Cfr. Protocol Adjusting the Agreement on the European Economic Area of 17 March 1993, OJ L 1, 3.1.1994, p. 572.

[54] Cfr. art. 78, EEA Agreement where a list of the fields of cooperation besides those regarding the four freedoms is provided.

[55] A. WIESBROCK, *Legal Migration to the European Union,* Leiden, 2010, p. 116-117.

[56] Cfr. arts. 28, 31 and 36, EEA Agreement.

interpretation of those rights with their evolution through the ECJ case-law was assured by the commitment of signatory parties' courts to interpreted them consistently with, precisely, the ECJ case-law[57].

However, if from the one side, the EEA Agreement required the development of an almost identical legislation in the fields covered by it[58], it was insufficient from the institutional side. Notwithstanding the establishment of a set of bodies, giving origin to the, so called, «two pillars» EEA structure[59], EEA members did not have more than consultative powers, being unable to really influence the development of the Single Market and to condition the decisions of EC institutions in that ambit[60]. So, the final agreement did not met EFTA members' ambitions, or rather, it did not met mainly and only the ambitions of its Nordic members. Actually, while Austria had already applied for EC membership in 1989, Switzerland has been adopting a minimalist approach in this regard, and in 1992 not only rejected by referendum the EEA agreement but also EU membership[61]. Nevertheless, for the would-be EU member states which were EFTA members the EEA negotiations and requirements worked quite well as a pre-EU accession instrument, particularly as regards the necessary reforms and harmonisation of national legal systems with EU Law[62].

In addiction to the above mentioned reasons of dissatisfaction of Nordic EFTA members with the EEA negotiations and, after, with the EEA agreement, in the late eighties and early nineties a further set of events completed the picture and explain the rapid approach of Nordic countries towards the EU in this period. The first event to mention was the end of the Cold War and the collapse of the Soviet Union. This has,

[57] On this latter point see paragraph 2.3. of this chapter.

[58] «Acts referred to or contained in the Annexes to this Agreement or in decisions of the EEA Joint Committee shall be binding upon the Contracting Parties and be, or be made, part of their internal legal order as follows: (a) an act corresponding to an EEC regulation shall as such be made part of the internal legal order of the Contracting Parties; (b) an act corresponding to an EEC directive shall leave to the authorities of the Contracting Parties the choice of form and method of implementation. Cfr. art. 7, EEA Agreement (consolidated version 12.4.2014).

[59] The «two pillars» EEA structure is formed, on the EFTA side, by the EFTA Standing Committee, the EFTA Court, the EFTA Surveillance Authority and the EFTA Consultative Committee, in addition to the Committee of MPs of the EFTA members states. As regards the bodies in the framework of the EEA agreement, they are the EEA Council, the EEA Joint Committee, the EEA Joint Parliamentary Committee and the EEA Consultative Committee. The EEA Council, formed by members of the European Council and of EFTA states Governments, takes the political decisions necessary to the implementation and amendments of the agreement, whereas is the EEA Joint Committee the institution in charge of the implementation and functioning of the agreements. Both can take decisions by agreement with the EU and EFTA member states. Cfr. arts. 89-96 EEA Agreement (consolidated version 12.4.2014).

[60] L. MILES, *The Nordic countries and the fourth EU enlargement*, in L. MILES (ED.), ul. op. cit., p. 64; see also J. REDMOND, *Introduction*, in J. REDMOND, (ED.), *The 1995 Enlargement of the European Union*, Aldershot, 1997, p. 9.

[61] M. VAHL, N. GROLIMUND, *Integration without Membership. Switzerland's Bilateral Agreements with the European Union*, CEPS, Brussels, 2006, p. 6.

[62] C. PRESTON, cit., p. 31.

obviously, impacted on the reasons that, previously, had made the Nordic countries to consider their neutral foreign policy as an obstacle to EU membership[63], even though the approximation of the Nordic countries towards the EU was driven more by economic concerns more than from possible changes in their foreign policies[64]. This is understandable even more if we consider the non-favourable economic situation of, particularly, Sweden and Finland in the beginning of the nineties[65].

In relation to the EU, fundamental was the completion, in 1992, of the Single Market, and the come into being of the Treaty on European Union which gave rise to the EU «three pillars» structure. This treaty, in the ambits that were relevant for the EEA-EFTA members, boosted the coordination of EU member states' economies, and had laid down the basis for the creation of a single currency and of an economic and monetary union. But, first and foremost, the enter into force of the Maastricht Treaty in the same years was significant since it has constituted the basis of the EU enlargement process towards EFTA countries[66]. If from the one side, negotiations regarding the accession of the four Nordic countries applicants were fast in relation to the previous enlargements, thanks also to the possibility to rely on the previous EEA negotiations on some issues[67], on the other side, sensitive matters as agriculture and fishery still needed to be settled, as they were only partially covered by EEA negotiations. Moreover, in relation to the previous enlargement of the mid-80s, there were the new areas introduced by the Maastricht Treaty to be considered, as the common foreign and security policy (CFSP) and the cooperation in the matters falling under cooperation in Justice and Home Affairs (JHA) issues. A further factor of uncertainty of the final success of the EU enlargement towards north was the commitment of all Nordic governments to submit the final

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[63] M. J. DEDMAN, *The Origins and Development of the European Union 1945-95. A history of European Integration*, London, 1996, p. 128

[64] L. KARVONEN, B. SUNDELIUS, *The Nordic neutrals. Facing the European Union*, in L. MILES (ED.), ul. op. cit., p. 247, 249.

[65] M. EGEBERG, *The Nordic Countries and the EU: How European Integration Integrates and Disintegrates States Domestically*, in S. BULMER, C. LEQUESNE (EDS.), *Member States and the European Union*, Oxford, 2012,

[66] Cfr. point 8, *Conclusions of the Presidency,* European Council in Edinburgh, 12 December 1992, SN 456/1/92 REV 1, p. 5. The conclusions of the negotiations with Austria, Sweden and Finland were made conditional on the entry into force of the Treaty on the European Union, after its ratification by all, at time, EC member states. Therefore, it is notable that Denmark, the first of the Nordic countries to become an EU member state in 1973, rejected the Treaty by referendum the 2nd June 1992. This, from one side, led to the adoption at the Edinburgh European Council of an overall approach on the subsidiarity principle and of the text of article 3b of the Maastricht Treaty. From the other side, specific provisions have been introduced within the Maastricht Treaty in order to meet the Danish concerns in relation to the EU citizenship, its no participation to the third stage of the Economic and Monetary union, i.e. to the single currency, of the Defence Policy and to the Justice and Home Affairs only on the basis of the title VI of the Treaty. Cfr. Annex 1, Decision of the Head of the State and Government, meeting within the European Council, concerning certain problems raised by Denmark on the Treaty on European Union, *Conclusions of the Presidency,* European Council in Edinburgh, cit., p. 52.

[67] Cfr. Chapters from 1 to 11 of the negotiations framework - including the four freedoms, transport and competition policies, consumers and health protection, research and information technologies, education, statistic and company law - had been already negotiated for the purpose of the EEA Treaty. F. GRANELL, *The first enlargement negotiations of the European Union*, in J. REDMOND, (ED.), cit., p. 41-42.

approval of EU membership to domestic referenda. This is relevant as the approximation towards the EU was a process mainly driven by governments without a parallel growth of populations' support for EU membership[68]. Finally, the end of access negotiations were submitted to a strict deadline as well[69], being necessary the approval by the European Parliament of the accession agreements before its dissolution for elections that same year.

As previously said, Nordic countries, excluded Iceland, following Sweden application for membership in 1991, all applied for full EU membership while the EEA negotiations were not concluded yet. Then, it is noteworthy that the decisive step of Nordic countries towards the EU was made precisely in the very moment of development and transformation of the EU integration process, that is when the basis for the creation of a monetary union and a renewal of the political integration project were laid down. This means that, despite Nordic countries' will to join the EU being justified mainly by economic reasons, or more precisely, by the fear of be isolated and excluded from the Single market, their membership would required them to engage in a broader project than prevented[70]. The forth EU enlargement process, in fact, was the first based on the open clause of the Maastricht Treaty[71], and, more importantly, on the framework outlined at the Lisbon European Council held in June 1992. This put great emphasis on the new context within which this fourth enlargement would take place, i.e. considering the completion of the Single Market, the attainment of the economic and monetary union, of which the last stage was still waiting to be completed, the new common foreign and security policy, and the requirement to fully accept the *acquis communitaire* by the would-be EU member states[72].

The accession negotiations with EFTA members were able to start only in spring 1993, once the issues regarding the ratification of the Treaty on European Union, after

[68] C. ARCHER, *Euroscepticism in the Nordic Region*, in *Journal of European Integration*, 1, 2000, p.

[69] As the accession date was determined to be on 1st January 1995, negotiations had to be ended by March 1994. Cfr. European Council in Copenhagen, 21-22 June 1993, Conclusions of the Presidency, European Council - DOC/93/3, 22/06/1993, p.t 4.

[70] J. REDMOND, cit., p. 5.

[71] Cfr. article «O», Treaty on European Union, Maastricht 1992: «Any European State may apply to become a Member of the Union». OJ C 191, 29.7.92. In that same years were under consideration the applications for membership also of Turkey, Cyprus and Malta. The application of Norway was the last to be submitted in November 1992.

[72] Cfr. *Europe and the Challenge of Enlargement*, Commission of the European Communities Report, Brussels 24 June 1992, Annexed to Conclusions of the Presidency, Lisbon European Council, 26-27 June 1992, p.ts 10-13.

Denmark's first rejection by referendum[73], and the acceptance of the finance package, so called, Delors II, were solved at the Edinburgh European Council of December 1992[74]. The *ad hoc* provisions, designed on the basis of the concerns expressed by Denmark in the memorandum «Denmark in Europe» that followed the negative referendum, converged within the relative protocol attached to the Maastricht Treaty[75], determining Denmark's position in relation to the third stage of the Economic and Monetary Union (EMU), the European citizenship and EU provisions that could have defence implications[76]. Denmark, as it did with the, at time, EC membership, i.e. being the first of the Nordic countries to join the EEC in the seventies, seems to pave the way also for the Nordic-EU «differentiated integration» that would take part in the following decades with this first protocol and negative popular vote. Although with some national differences, the Nordic way of participation in the EU project would continue to insist, somehow rejecting further integration, in relation to the same or similar matters, namely the EMU and measures asking for a further surrender of national sovereignty, as was the case for AFJS matters[77].

Despite their common membership to EFTA and the expectation that all would be parties of the EEA agreement, negotiations were conducted on bilateral basis among the twelve EU members states and each EFTA applicant. The main issues discussed during the negotiations with the Nordic applicants were agricultural policies[78], state monopolies, especially alcohol and tobacco, the maintenance of the hight Nordic environmental standards, fisheries, that was a significant matter for Norway in particular, and, finally, budgetary contributions. By June 1994 the Treaty of Accession was

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[73] According to the Danish Constitution, whenever a Bill delegating powers to «international authorities set up by mutual agreement with other states for the promotion of international rules of law and co-operation» is not approved by the *Folketing* with a majority of five-sixths of its members, it shall be submitted to the vote of the electorate. Cfr. arts. 20.1 and 2, and art. 42, Danish Constitution, 5 June 1953, available at http://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---ilo_aids/documents/legaldocument/wcms_127469.pdf

[74] Cfr. Conclusions of the Presidency, Edinburgh European Council, 11-12 December 1992, SN 456/1/92 REV 1.

[75] Protocol on certain provisions relating to Denmark, Treaty on European Union, OJ EC C 224, 31.8.92, p. 125.

[76] Cfr. Unilateral declaration of Denmark to be associated to the Danish act of ratification of the Treaty on European Union and of which the eleven other member states will take cognisance, Annex 3 to the Conclusions of the Presidency, Edinburgh European Council, 11-12 December 1992, SN 456/92 part B, p. 61-63. Cfr. also, Decision of the head of the States and Government meeting within the European Council concerning certain problems raised by Denmark on the Treaty on European Union, Annex 1 to the Conclusions of the Presidency, Edinburgh European Council, 11-12 December 1992, SN 456/92 part B, p. 56-58.

[77] R. A. NISSEN, *Opting Out of an Ever Closer Union: The Integration* Doxa *and the Management of Sovereignty*, in *West European Politics*, 5, 2011, pg.

[78] Their national levels of incentives especially towards isolated northern regions were higher than the levels of contribution foreseen by the EU common agricultural policy.

signed[79], and the ratification processes were able to start in the twelve EU member states while the acceding countries held their domestic referenda. In all but Norway's referendum the popular vote was in favour of EC membership, therefore the Accession Treaty had to be adjusted to take into account the sole non-accession of Norway. Nevertheless, considering the come into being of the EEA agreement in January 1994, the relation between the EU and Norway, despite the second unsuccessful attempt of EU membership, can be defined as a «quasi-membership» status[80]. Eventually, from 1 January 1995, Finland, Sweden and Austria joined the EU. Their EU membership implied their simultaneously withdrawal from EFTA, however besides the Nordic cooperation, the Nordic countries in economic matters remained linked by their being all part of the EEA agreement[81]. In this regard, the EEA agreement includes a specific provision on Nordic cooperation, establishing that the latter is not precluded as long as it does not hamper the «good functioning» of the former[82].

2.2. The Nordic cooperation contextualised.

The existence of a common labour market and free movement of persons among the Nordic countries has been a reality since the late fifties, but during the accession negotiations to the EU of Nordic applicants it was not a matter of debate. However, when Denmark[83], Sweden, Finland, Norway and Iceland advanced the request of joining the Schengen area - at that point an unavoidable step after the EU membership of the

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[79] After the positive opinion of the Commission of 19 April 1994, the legislative resolutions of the European Parliament on each applicant of 4 May 1994, and the decision of the Council of the European Union of May 1994. Cfr. OJ C 241, 29.08.1994. p. 3-9; cfr. also, Act concerning the conditions of accession of the Kingdom of Norway, the Republic of Austria, the Republic of Finland and the Kingdom of Sweden and the adjustments to the Treaties on which the European Union is founded, OJ C 241, 29.8.1994, p. 9-404.

[80] In this regard we should also consider that Norway has also joined Schengen in 1995, and by being an EEA member it has to implement all EU relevant legislation related to the Single Market. Moreover, it participates in other, so called, «horizontal» policy areas included into the EEA agreement - but, in some areas, already in the 1980s, a way of participating in the EU project that was defined as «buy-ins», in contrast to the «opt-outs» of other countries. The «horizontal» policy areas are environment policy, social policy, consumer protection, company law, research and technological development, education, small- and medium-size enterprises and the audiovisual field. All this considered, the position of Norway in relation to the EU and the way in which this has developed over time has been defined as the «Norwegian method of European Integration». Cfr. art. 78, EEA agreement; cfr. also K. A. ELIASSEN, N. SITTER, *Ever Closer Cooperation? The Limits of the 'Norwegian Method' of European Integration*, in *Scandinavian Political Studies*, 2, 2003, p. 127, 130-132.

[81] According to the EEA agreement, every new EU member state shall also apply also to become party of the EEA. Cfr. art. 128, EEA agreement (as modified by the Protocol Adjusting the Agreement on the European Economic Area of 17 March 1993) OJ No L 1, 3.1.1994, p. 572.

[82] Cfr. art. 121, lett. a, EEA Agreement. It is worth of notice that a similar provision exists as regards the relations between Belgium and Luxembourg, or between Belgium, Luxembourg and the Netherlands, and the EU establishing that regional cooperation is not precluded as long as it does not hamper the application of the EC Treaty. Cfr. art. 306 EC Treaty (formerly art. 233).

[83] Denmark, despite being an EC member since 1973, had advanced its request of joining Schengen simultaneously with the start of the negotiations for EU membership of the remaining Nordic countries (excluded Iceland).

Sweden and Finland - it was then necessary to consider how much some aspects of the Nordic cooperation were compatible with the Schengen *acquis*, and how it would be possible to overcome the limitation of the possibility of becoming part of Schengen for non-EC members[84].

In 1995, Nordic countries jointly advanced the request of joining Schengen provided that Nordic citizens' freedom of movement was maintained and, without knowing how would be the result of this request, Nordic-EU members asked also to be granted the Schengen observer status. Nonetheless, it was implicit that the final outcome of negotiations would have been dependent on considering the Nordic countries as a unique subject, and from the capacity of EC institutions to find a solution capable of accommodating their request as a whole[85]. *Vice versa* the same kind of consideration had to be done particularly by Norway and Iceland, as non EU members, since only their participation in the Schengen *acquis* would permit to maintain the Nordic Passport Union as well.

When finally the Nordic countries acceded to Schengen in December 1996, a specific institutional adjustment was necessary in order to allow the maintenance of the Nordic Passport Union, which was a fundamental corollary of the Nordic common labour market and, more generally, of the freedom of movement of Nordic citizens within the Nordic countries. In particular, with Norway and Iceland was signed an association agreement - so called Schengen I - implying their implementation and application of the Schengen *acquis* but without providing them voting rights within the Schengen Executive Committee[86]. This means that, as associated members, they were part of the agreement, bearing the costs and advantages of the membership - linked, the latter, with the advantages of being part of the internal market via the EEA agreement - but they had not decision-making powers of the development of the Schengen *acquis*.

In 1999, the Schengen *acquis* was incorporated within the EU framework by the Treaty of Amsterdam. This step was of a major importance for the development of the cooperation in the field of Justice and Home affairs, renamed «area of Freedom, Security

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[84] The accession to Schengen of Norway and Iceland posed some problems to the EU and already Schengen parties as art. 140 of the Implementing Convention did foreseen the further enlargement of the agreement only of EC members. Cfr. art. 140, Convention Implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, OJ L 239, 22.9.2000.

[85] R. ZAIOTTI, *Cultures of border control*, Chicago, 2011, p. 108-109.

[86] Cfr., in particular, arts. 1, 4 and 8, Agreement concluded by the Council of the European Union and the Republic of Iceland and the Kingdom of Norway concerning the latters' association with the implementation, application and development of the Schengen acquis - Final Act, OJ L 176, 10.7.1999, p. 36–62.

and Justice»[87] (AFSJ), since it regarded an area «in which the free movement of persons is assured in conjunction with appropriate measures with respect to external border controls, asylum, immigration […]»[88]. Furthermore, it marked a further stage in the process of EU differentiated integration[89], included that of Nordic countries. A new act on the implementation and application of Schengen occurred[90] - Schengen II - in order to take into account the changes and «not to hinder [their] cooperation within the Nordic Passport Union»[91]. In addition, a forum outside the EU institutional framework - a mixed committee - where non-EU member states which were Schengen parties were able to be consulted, informed and raise their concerns on the development of Schengen needed to be provided[92]. As a confirmation of the «quasi-membership» status of the non-EU Nordic countries, the consequence of non-accepting the relevant measures of the EU and EC law implementing Schengen would led to the termination of the agreement[93].

Another relevant alteration in the Nordic-EU differential integration occurred with the entrance into force of the Amsterdam Treaty in relation, specifically, and after the already provided *ad hoc* protocol within the Maastricht Treaty, to Denmark's position. The latter decided not to participate in all measures of Title IV of the, at time, Treaty establishing the European Community (TEC)[94]. Therefore, in accordance with, what is now, protocol no. 22 of the Lisbon Treaty[95], Denmark is not taking part in any of the measures that are included in the AFSJ, but it shall decide, within a period of six months, to implement in its national law provisions (only) to build upon the Schengen *acquis*. Moreover, acts of police and justice cooperation in criminal matters, formerly

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[87] That same year, in Tampere, the first European Council all devoted to the JHA cooperation took place, showing that area of cooperation was becoming of more and more relevant within the EU framework and political agenda. Cfr. Presidency Conclusions, Tampere European Council, 15 and 16 October 1999, 16.10.1999, nr. 200/1/99.

[88] Cfr. arts B and 73i, Treaty of Amsterdam, OJ C 340, 10.11.1997. The flexible arrangements that were provided in relation to the area of Freedom, Security and Justice, in order to accommodate the specific requests of certain EU member states - namely the United Kingdom, Ireland and Denmark - can be seen as direct consequence of the incorporation within the EU framework of the «flexible method of integration» which has characterised Schengen's development. R. ZAIOTTI, op. cit., p. 154.

[89] On the EU differentiated integration implications and development see N. WALKER, *Sovereignty and Differentiated Integration in the European Union'*, in *European Law Journal*, 4, 1998, p. 355-388.

[90] Cfr. art. 6.1, Protocol integrating the Schengen acquis into the framework of the European Union, Treaty of Amsterdam, OJ 340. 10.11.1997.

[91] Council Decision of 1 December 2000 on the application of the Schengen acquis in Denmark, Finland and Sweden, and in Iceland and Norway - Declarations, 2000/777/EC.

[92] Council Decision of 17 May 1999 on the conclusion of the Agreement with the Republic of Iceland and the Kingdom of Norway concerning the latters' association with the implementation, application and development of the Schengen acquis, 1999/439/EC.

[93] Cfr. art. 8.4, Agreement concluded by the Council of the European Union and the Republic of Iceland and the Kingdom of Norway concerning the latters' association with the implementation, application and development of the Schengen acquis - Final Act, OJ L 176, 10.07.1999. See also G. PAPAGIANNI, *Institutional and Policy Dynamics of the EU Migration Law*, Leiden, 2006, p. 59-60.

[94] Ex Title IIIa on visa, asylum, immigration and other policies related to free movement of persons of the Treaty of Amsterdam, now Title V, Part three of the Treaty on the Functioning of the European Union.

[95] Cfr. Protocol (No 22) on the position of Denmark, Treaty on European Union (consolidated version), OJ C 326, 26.10.2012.

third pillar acts, continue to be applicable to Denmark in their pre-Lisbon version, even if they have been subsequently amended, on the basis of international law[96].

Differently from the United Kingdom and Ireland's «opts-out»[97], Denmark has the only option to waive the protocol, and from that moment onwards it has to apply and implement all the respective EU legislation. The opt-out mechanism has significant consequences for the overall coherence of the matters involved[98], since it not only excludes the application to, in this case, Denmark of any provision of Title V or pursuant that Title, but also any related international agreement and decision of the Court of Justice interpreting or amending that measures[99]. Furthermore, Title V provisions shall not affect EU law applicable to Denmark.

2.3. The composite picture of persons free movement rules in the Nordic context.

It goes without saying that the measures shaped by these highly differentiated Nordics set-ups in relation to Title V matters condition and have consequences on the exercise of free movement of persons across the EU and associated countries. Once again a helpful image to explain how these different regimes relate to each other is a

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[96] Cfr. arts. 1, 2 and 4, Protocol No. 22 on the position of Denmark, cit.

[97] The United Kingdom and Ireland may *ex ante* or *ex post* the adoption by the Council of a measure pursuant Title V TFUE manifest their intention to apply or accept that measure. In relation to the Schengen acquis, they are not bound by it, however they may «at any time request to take part in some or all of the provisions». Cfr. arts. 3 and 4, Protocol No. 21 on the United Kingdom and Ireland in relation to the Area of Freedom, Security and Justice and art. 4, Protocol No. 19 the Schengen acquis to the Framework of the European Union, Treaty on the Functioning of the European Union, cit.; M. FLETCHER, *Schengen, the European Court of Justice and Flexibility under the Lisbon Treaty: Balancing the United Kingdom's 'Ins' and 'Outs'*, in *EuConst*, 5, 2009, p. 75-76 and 80-83. The, so called, «Danish solution» is under study by the UK in the view of possibly exercising the opt-out from the cooperation in police matters and judicial cooperation in criminal matters in their post-Lisbon version after the expiration of the transitional period in December 2014. Cfr. art. 10, Protocol No 36, Treaty on European Union, cit.; see extensively on the subject, A. HINAREJOS, J. R. SPENCER, S. PEERS, *Opting out of EU Criminal law: What is actually involved?*, CELS Working Paper, New Series, No.1, September 2012, at http://www.cels.law.cam.ac.uk http://www.cels.law.cam.ac.uk/publications/working_papers.php

[98] A telling example in this respect is the agreement that was concluded between the EU Commission and Denmark, Norway and Iceland in order to determine the conditions under which the readmission agreements would be applicable to them, i.e. by concluding an international agreement. Therefore, interestingly, despite their different membership status, their status was the same. See G. PAPAGIANNI, op. cit., p. 62; B. DE WITTE, *Old-fashioned Flexibility: international Agreements between Member States of the European Union*, in G. DE BÚRCA, J. SCOTT (EDS.), *Constitutional Change in the EU – From Uniformity to Flexibility?*, Oxford, 2000, p. 31-58.

[99] It is noteworthy to recall that under the Lisbon Treaty, the Court of Justice has acquired a general jurisdiction to give preliminary rulings in the AFSJ. In particular, as regards police and judicial cooperation in criminal matters, it is no longer necessary a declaration of the member states accepting the Court's jurisdiction and determining what national courts could request a preliminary ruling. Moreover, for the matters of the formerly title IV of the EC Treaty, any national court or tribunal can now request a preliminary ruling, and also measures taken on the grounds of public policy linked with cross-border controls are now subjected to the Court's jurisdiction. Nevertheless, the jurisdiction of the Court is still limited when it comes to the CFSP, with a few exceptions. Cfr. art. 10, Protocol No. 36 on transitional provisions and art. 19, TUE; art. 275, TFUE, OJ C 326, 26.10.2012.

shape formed by circles[100], where every circle represents the regime regulated by a specific agreement or convention on persons' movement across national borders, which partially overlap. To recall, all Nordic countries are members of the Nordic Passport Union, thus all Nordic citizens can freely enter and reside within the Nordic countries' territories without having to hold a residence permit and for whatever reason. Simultaneously, all Nordic countries are also part of the Schengen area, although Norway and Iceland as associated members, and Denmark accordingly to the *ad hoc* conditions set out in the above mentioned protocol. In addition, Norway and Iceland (with Liechtenstein and Switzerland), as EFTA members, have secured free movement of persons among their territories and (a minimum of) coordination of their social security systems[101]. Finally, Norway and Iceland (and Liechtenstein, but not Switzerland[102]) as parties of the EEA agreement, guarantee to their citizens who are workers or self-employed the right of free movement and of non-discrimination on the basis of nationality as regards working conditions, as well as the right of establishment in all EU and EFTA members states territories and vice versa for EU citizens[103]. Therefore, in order to determine the content of the status of an individual within the above mentioned areas of free movement as the conditions of entry and residence of the non-national within the territories of states parties, it should consider, firstly, its nationality. In general terms, we should consider the status hold by all those persons who hold the nationality of a State that has established with other States a specific regime concerning movement across national borders for their citizens: Nordic countries, members of the Schengen area, EEA and EFTA members states.

Within the Nordic countries, as follows from the Nordic Passport Union, assumes relevance the status of «Nordic citizen», the unique category of persons that can benefit from the right of free movement within Nordic countries and, but only if they are not «naturalised» Nordics, of the advantages provided by the coordination of Nordic citizenship laws. What we can consider to be a general no discrimination clause opens

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[100] An image that has been used already many times in order to describe the situation within the EU consequent to its differentiated integration. B. DE WITTE, *International Agreements between Member States of the EU*, in G. DE BURCA, J. SCOTT, *Constitutional Change in the EU: from Uniformity to Flexibility*, Oxford, 2000, p. 35.

[101] Cfr. arts. 20, 21, and annex K, appendixes 1 and 2 to the EFTA Conventions (consolidated version 1 July 2013).

[102] The conditions of entry and residence of EFTA citizens within the Swiss Confederation is regulated by the Federal Act on Foreign Nationals, as long as the EFTA Conventions as amended in 2001 does not provide differently. Cfr. art. 2, Federal Act on Foreign Nationals, SR 142.02. See, on the Swiss immigration regime, the following chapter of the present work.

[103] Cfr. arts. 28 and 31, and annexes V on the Free Movement of Workers and VII on the Right of Establishment, EEA Agreement. P. G. ANDRADE, *Privileged Third-Country Nationals and Their Right of Free Movement and Residence to and in the EU: Questions of Status and Competence*, in E. GUILD, D. KOSTAKOPOULOU, C. G. ROTAECHE, *The Reconceptualization of European Union Citizenship*, 2013, Leiden, p. 113.

the devoted part of the Treaty of Helsinki, stating that with all the areas of cooperation Nordic citizens shall not be discriminated on the basis of their nationality (2.1). However, as discrimination on the basis of nationality is allowed in relation to other Nordic citizens when set by the Constitution or by international obligations (2.2), it follows, as a compensative provision, the commitment of facilitating the acquisition of citizenship of Nordic countries for citizens of other Nordic countries (3). Made on measure Nordic definitions of border and alien are also given, being, the former, «a land frontier between a Nordic State and a non-Nordic State», and, the latter, by process of elimination, «any person who is not a citizen of Denmark, Finland, Norway or Sweden».

The interest on Nordic definitions emerges in relation to the circumstance that all Nordic countries are also, although with different status, part of the Schengen area, which, in turn, has its own definition of (internal and external) border, the «common land borders of the Contracting Parties», and alien: «any person other than a national of a Member State of the European Communities». In respect of the definition of borders, it is interesting to notice that, despite the expectable differences, both are detached from the, so called, Westphalian definition, within which the function played by the border was fundamental to preserve national sovereignty and territorial integrity. This is even more relevant if we recall how much border contestations and their integrity has been relevant in the last century of the European history. With reference to this, is then significant that Nordic countries already in the fifties went beyond this strict national definition, being a forerunner of the post-national move of national borders, that some EU states would experience in the middle of the eighties with the Schengen agreement.

Despite the Nordic and communitarian move of borders and their «internal» detachment from the exclusive national dimension, their function as a filter and exclusionary feature in relation to the external dimension were not and could not be abandoned. Indeed, as just seen, a certain definition of border inevitably entails a coherent and consequent definition of who is considered to be an alien within a certain territory or group of states. It follows that immigration regimes have to be, in turn, coherently adapted. However, even though a common regime in relation to persons freedom of movement exists among Nordic countries for only Nordic citizens, this has not implied that Nordic countries have established also a common Nordic immigration policy in relation to non-Nordic citizens, even if they have reciprocally influenced the development over time of their national immigration regimes which have remained, precisely, national regimes though. Furthermore - and this aspect marks a relevant difference between the Benelux regional cooperation and the Nordic cooperation - no common policy on visas neither a unique Nordic visa has ever been provided to Nordic citizens, being the main effect of the Nordic Passport Union (just) the abolition of passport controls at Nordic borders. Some form of cooperation has been established in

the related fields of police and judicial cooperation, i.e. mutual trust and recognition of criminal law enforcement systems. In particular, uniform legislation has been adopted on, e.g., extradition and mutual legal assistance even though, as above, systems have remained mainly national[104].

Considering the influence exercised by the EU on the development of EU and non-EU members states legal regimes on free movement of persons, expectedly, the above mentioned provisions on the matter are quite alike, as they are the result of a model circulation[105]. In this regard, it is worth to mention that the EEA Agreement provides for diverse instruments in order to have a development of the EEA law in relation to EU law simultaneous and identical as possible. In particular, the aim of attaining a uniform interpretation of those provisions of EU law reproduced by the Agreement - within which are comprised persons free movement provisions[106] - is pursed by combining the joint action of the EEA Joint Committee[107], which constantly monitor the case-law of the Court of Justice of the European Union, and by the EFTA Court, which has jurisdiction only on acts of EFTA member states. The Court, in turn, is competent as regards actions concerning possible infringements brought by the EFTA Surveillance Authority, an *ad hoc* surveillance authority, that is competent to investigate on such cases. Moreover, it is competent in setting the disputes among EFTA states and it provides advisory opinions on the interpretation of EEA Law[108]. More importantly, the EEA Agreement is conceived to be a *dynamic* agreement in relation to EU law, i.e. it adapts to the development of EU law on decisions adopted in this sense by the EEA Joint Committee that include each time EU primary and secondary law as amendments to current EU legislation which fall under the scope of EEA Agreement, which main part is made up by provisions on the four fundamental freedoms[109].

From the above described dynamic of progressive adaptation of EEA law to EU law and to the CJEU case-law derives, specifically as regards persons free movement, that a similar evolution and expansion of the scope of persons' free movement provisions to that described in the second chapter, addressed and guided by the CJEU case-law has

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[104] H. BEVERS, C. JOUBERT, *Schengen Investigated: A Comparative Interpretation of the Schengen Provisions on International Police Cooperation in the Light of the European Convention on Human Rights*, Leiden, 1996, p. 31.

[105] Cfr. U. MATTEI, *Circolazione dei modelli giuridici*, in *Enciclopedia del diritto*, Annali I, 2007.

[106] Cfr. in particular art. 1, lett. b, 28-39 on right of free movement of workers, self-employed, right of establishment and to provide services, EEA Agreement; Annex V on free movement of workers, Annex VI on social security, Annex VII on mutual recognition of professional qualifications and Annex VIII on the right of establishment.

[107] See *supra* notes 55 and 56.

[108] Cfr. arts 96 and 97, Rules of procedure EFTA Court (lastly amended 10 November 2010).

[109] Cfr. art. 6, EEA Agreement; P. MÜLLER-GRAFF, *The European Economic Area Enlarged,* Berlin, 2000, p. 60.

been observable also in relation to the EEA area[110]. Relevant on this specific point is the 2007 amendment of the Annexes V and VII governing workers' free movement and Social security which were necessary to take into consideration the changes brought to the discipline by the 2004/38/EC Directive on the right of Union citizens and their family members to move and reside freely in the EU territory[111]. However, it is of fundamental importance to remark that EU law is reflect and considered by EFTA countries as long as they fall under the scope of the EEA Agreement. Therefore, all those provisions on persons free movement and the related CJEU case-law, as are those specifically regarding Union citizens, which have no links with persons' free movement as contained in the EEA Agreement, i.e. only as regards those categories of EFTA citizens that can benefit from such fundamental freedom: economically active - do not come into consideration for EFTA and Swiss citizens.

In any case, the extensions of residence and movement rights provided in this way to EFTA-Nordic citizens have earned them the appellative of «privileged» third-country nationals together with Swiss citizens[112], since the content of the rights just mentioned that are granted them is the same of those from which EU citizens can benefit from. Therefore, the status of EFTA citizens when exercising their rights to move and reside in the EEA area, and thus those of the Nordic countries non EU member states, is a further status to be added to the groups of those in-between (Union) citizens and the *others*.

The above described situation has concerned the effects on Nordic citizens rights of the EEA Agreement, the membership to the Schengen Area and of the Nordic Passport Union. In the following sub-paragraph, after having outlined the general framework and functioning of the Nordic Labour Market and of its corollaries[113], the focus will turn in order to consider the effects on a national legal system - precisely, the Swedish legal system as regards immigration and citizenship legislation and policies - of the Nordic cooperation.

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[110] H. P. GRAVER, *Mission Impossible: Supranationality and National Legal Autonomy in the EEA Agreement*, in *European Foreign Affairs Review*, 1, 2002, pp. 73–90.

[111] Decision of the EEA Joint Committee no 158/2007 of 7 December 2007 amending Annex V and Annex VIII of the EEA Agreement, OJ L 124, 8.5.2008.

[112] On the status of Swiss citizens in the EU see the fifth chapter of the present work.

[113] Cfr., in particular, Nordic Convention on Social Assistance and Social Services, 14 June 1994; Nordic Convention on Social Security, 1 May 2004; Convention for the coordination of national pension systems, 1 March 2002; Agreement Between Denmark, Finland, Iceland, Norway and Sweden on the Implementation of Certain Provisions Concerning Nationality, cit..

3. Sweden between the EU and the Nordic cooperation.

The common Nordic Labour Market, the built of the Nordic welfare state model, immigration, integration and citizenship policies of Sweden have been and are deeply entrenched elements and they share a simultaneous start. Actually, as a further ground of justification can be noted that Sweden has turned into an immigration country in the years of the WWII conflict simultaneously with the emergence of the framework of the Nordic Welfare State and a decade before the come into being of the common Nordic Labour Market, allowing for a continuous influence and reciprocal adaptation among this three related ambits.

More specifically, three main reasons can be brought in order to justify the choice of Sweden as the country, among those participating in the Nordic cooperation, to be used as a lens through which observe how and how much this regional cooperation has affected over time the relation between immigration and citizenship legislation.

The first relies on its primarily role as a country of origin and destination of the most relevant intra-Nordic immigration flows since the establishment of the common Nordic labour market in 1954 until the 1990s. The intra-Nordic labour market that has been in place since 1954 - jointly with the Nordic Passport Union since 1958 - has conditioned the dimension and composition of migration flows towards Sweden since the first decades of the post-WWII period. Although its relevance in determining immigration flows composition progressively decreases already in the following decade, it has certainly been a fundamental element in the development of the Swedish immigration policy in the 1960s and 1970s, contributing in attribute the leading role played by Sweden in immigration government among other Nordic countries[114]. We suppose, therefore, that its national legislation aiming at regulating labour migration, until the decades in which international labour migration and for humanitarian reasons would overcome intra-nordic flows, has been, at least partially, conditioned in its evolution by this state of affairs. In the same way, we assume as well that the followed development which has to consider the changed immigration context, composition and dimension of flows has been, similarly, conditioned by this early mainly Nordic-targeted evolution. In relation to this, relevant is the role as a model that it has played for the other Nordic countries as regards immigration government, thus conditioning for a certain time the evolution of immigration legislation especially of the remaining Scandinavian countries, Norway and Denmark in this field. However, in this last decades, contrary to a general Nordic restrictive trend as regards immigration and the related field of citizenship acquisition, Sweden has maintained its fairly liberal

[114] G. BROCHMANN, A. HAGELUND, *Comparison: A Model with Three Exceptions?*, in G. BROCHMANN, A. HAGELUND, *Immigration Policy and the Scandinavian Welfare State 1945-2010*, London, 2012, p. 226.

integration policy and citizenship policy. Although it is undeniable that some restrictive measures have been adopted especially in order to govern the considerable arrivals of asylum-seekers, these measures cannot be said to have modified the liberal characterisation of the Swedish policies and attitude as regards immigration and citizenship fields.

Secondly, as a Nordic country, but even more as a Scandinavian country, Sweden shares and has contributed in drawing over time the, so called, Nordic Welfare state model, although exceptions and differences are observable at the national level. This second basic element - the welfare state - never ceased to play a fundamental role in shaping the country's immigration policy, although in recent times, and particularly after the economic crisis suffered by Sweden in 1990s, its sustainability in face of the changed composition of the population has undergone to a rethinking process. Nevertheless, its universalistic nature - access extended to the whole population regardless of the nationality possessed - was never put into question. The profile on which governments of Nordic countries in general has, then, acted were and are the criteria on which basis individuals have access to the potentially all benefits provided to nationals. More generally, if equality is one of the basis of the Swedish conception of citizenship and being a citizen, it goes without saying that include non-nationals among the beneficiaries of the welfare state is fundamental and a means of integration, consequently, it cannot but be one of the cornerstones of the national immigration and integration policy[115].

This is relevant since the Nordic welfare state is a basic feature of the relation between the State and citizens in Nordic countries. This relation in its original features has been challenged, obliging national institutions to reshape it and redraw its limits as the basis and content of the Nordic welfare state had been built in a context where immigration, especially made by non-Nordic flows, was far from been a defining feature of national Nordic societies. Furthermore, because of its specific characteristics - universality, *in primis* - welfare and access to welfare rights has always been a defining feature of Swedish immigration policies - since, as said above, (access to) the welfare state is, firstly, a basic characteristic of the relation between individuals and the state in Nordic countries - and has been used as an integration instrument of national immigration policies. Therefore, to effectively understand the evolution of immigration legislation it is unavoidable to consider the role that the Nordic welfare states has played.

Eventually, the role of citizenship acquisition in relation to the government of immigration is the third and last reason to be mentioned. Within the Swedish citizenship policy, the acquisition of nationality - we can say outside the framework of Nordic cooperation - has never ceased to be used as a tool for further integrate migrants into the

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[115] K. BOREVI, *Sweden: The Flagship of Multiculturalism*, in G. BROCHMANN, A. HAGELUND, *Immigration Policy and the Scandinavia Welfare State 1945-2010,* cit., p. 25.

Swedish society and, as above already mentioned, despite the challenges brought by the changing patterns of immigration and the necessity to rethink some aspects of the immigration policy over time, the liberal character and the meaning attached to citizenship acquisition has resisted restrictive forces maintaining its liberal character. This is something that cannot be equally affirmed for all Nordic countries, e.g. Denmark, which in some cases has responded to the pressure of immigration and its challenges with restrictive turns in access to rights and naturalisation policies. Therefore, relevant is to notice that the pressure of non-Nordic immigration has been the element responsible in the ending of convergence of Nordic countries citizenship policies.

In the following sub-paragraphs attention will be paid to the common Nordic labour market and to the Nordic welfare state before move on and consider the Swedish immigration and citizenship legislation, in order to allow to better comprehend the influences of the former on the development and contents of the latter.

3.1. The Common Nordic Labour Market and the Nordic Welfare State.

The process that would led to the came into being of the common Nordic labour market in 1954 started more than a decade before and see Sweden anticipating its effects, thus playing a forerunner role among Nordic countries in its establishment. Furthermore, immigration, of non-Nordic citizens at least, would not be an issue in other Nordic countries until the end of 1960s[116].

This Nordic state was an emigration country for the whole course of the nineteenth and the first half of the twentieth century, to turn into an immigration country just in the years of the WWII conflict. Before, generally, Nordic citizens mainly emigrated to overseas countries - USA, Canada and Australia - and, within the European continent, mostly to Germany. Swedish citizens, in particular, emigrated in high numbers to Denmark[117].

The emigration-immigration turn took place during the years of the WWII conflict, even if immigration had already surpassed in numbers emigration in the 1930s, although the flows were mostly made up of returning emigrants from North American countries, thus of people (still) possessing, supposedly, the Swedish nationality or will t

[116] G. BROCHMANN, A. HAGELUND, *Comparison: A Model with Three Exceptions?*, cit., p. 234.

[117] P. J. PEDERSEN, M. RØED, E. WADENSJÖ, *The extension of mobility*, in P. J. PEDERSEN, M. RØED, E. WADENSJÖ, *The Common Nordic Labour Market at 50*, Copenhagen, 2008, p. 44.

recover it[118]. Actually, in relation to immigration of non-returning emigrants the policy was rather restrictive, in part for the fears of having to deal with a surplus of foreign labour force - thus, to protect the national labour market - in case of a recession as that faced in the 1920s, and the restrictiveness was not mitigate in a first moment neither at the advantage of those foreigners seeking refugee during the first years of the second word conflict. Nonetheless, from 1941 the restrictive attitude started to be abandoned and with more liberal policy in relation to refugees, the first considerable flows of foreigners which were admitted in the country were mainly formed of Nordic citizens - Norwegian and Danes - and, in a second moment, Baltic citizens, seeking asylum and moving to Sweden since this was the only Nordic country not involved in the war. Although in the period soon after the end of the war an higher percentage of those foreigners went back to their home countries, especially Nordic citizens, a considerable number of foreigners also remained - Finnish and Baltic citizens - relevantly increasing the percentage of non-nationals leaving in the country and transforming it in an immigration country.

The first steps that would lead to the establishment a decade later of the common Nordic labour market were taken in those same years. In 1943 the necessity to posses a work permit to be authorised to work in Sweden was abolished for all Nordic citizens, and, by 1945, citizens of Norway, Denmark and Iceland did not need any more a visa to enter the country[119]. The relevance of these provisions is completely perceivable if we consider the situation of the country in those post-war years and its attitude, at least, initially, in relation to non-Nordic labour migrants. As above said, Sweden was the only Nordic country not involved in the war. Nevertheless, although its infrastructures had not been damaged by the conflict, thus were utilisable to respond to the increased industrial demand in the aftermath of the war, the problem soon became the lack of the necessary labour force. If in the very first years after the conflict, national authorities and employers attempted to respond to the increased demand for labour only with the manpower available at the national level, keeping in place a restrictive legislation as

[118] This clarification is necessary since dual citizenship in Sweden is become fully accepted only after the 2001 amendment of the Citizenship Act. Although exceptions were provided, before the acquisition by marriage with a foreigner or in other modes of a foreign citizenship, a residence period outside the country for a period longer than ten years without having declared the will to retain the citizenship provoked the loss of the Swedish citizenship. Only in the latter case, citizenship could be recovered by resuming residence in the country. Furthermore, the return to reside permanently in Sweden had the effect of provoking the loss of the foreign citizenship acquired in the meanwhile if this was acquired in a country with which Sweden had signed a bilateral agreement in this regard. This was the case, e.g., with the USA with which an agreement was signed in 1869. Cfr. Naturalisation Convention between the USA and Sweden and Norway, signed in June 1869 and entered into force in June 1871.

[119] This same provisions would be also taken at the advantage of Finnish citizens starting from December 1949. Moreover, in 1946, Denmark had also abolished the obligation to hold a work permit for Swedish citizens to work in Denmark.

regards admission of labour migrants - fearing an economic turn down as in the aftermath of WWI, in an incapacity to absorb in the national labour market the refugee population in case of a non manageable increase of the same and willing first to utilise national supply of labour, e.g., as that could be potentially provided by women - the national work force proved to be insufficient. Thus, as happened to other Western European countries in the years of reconstruction which put in place the well-known guest-workers programmes, programmes of recruitment and bilateral agreements were signed in 1947 with countries having a surplus of manpower - Italy, Hungary and Austria - in order to provide to national industries[120] the needed workforce. Furthermore, this situation of necessity of workers has as a first result the absorption in the national labour market of those refugees which had chosen not to come back to their home countries at the end of the war.

In the 1950s a more structured framework for the recruitment of foreign labour force was established as the demand of manpower - and the consequent authorisation to recruit labour abroad - was still high and involved all national industries[121]. The process of labour recruitment was then took into charge by a national authority, the National Labour Market Board, which provided for the process of recruitment to be finalised putting into contact the employer in need of labour and the employment office of the foreign country. Although the national labour market has been opened in such a way to foreign labour force, the just described process of recruitment was authorised to be carried out only after having verify that no national labour force was available for the same job.

In parallel to this institutional way of labour recruitment, this process was also eased by the abolition of the necessity to hold a visa to enter the country for nationals of a number of Western countries and by the, so called, «tourist immigration» system or *laissez-faire* system. This attitude towards labour migration allow to identify the period that goes from the 1950s to the 1960s a *non-policy* period or free-immigration period[122]. This consisted in allowing foreigns to enter the country lawfully with a tourist visa valid for three months and in the meanwhile to look for a job. In case of of to the foreign was actually offered a job, it could asked for the conversion of the tourist permit into a work

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[120] However, the import of foreign labour force in this first phase of ease of the previous restrictive attitude was allowed to key industries only.

[121] Agreements were then signed in 1950s with West Germany, Italy, Hungary and Austria and in 1960s also with Greece, Yugoslavia and Turkey in order to provide skilled workers for a wider range of industries, as those, e.g., of the service sectors. Cfr. *Jobs for Immigrants (Vol. 1) Labour Market Integration in Australia, Denmark, Germany and Sweden: Labour Market Integration in Australia, Denmark, Germany and Sweden*, OECD Publishing, 2007, p. 253.

[122] M. QUIRICO, *Labour migration governance in contemporary Europe. The case of Sweden*, Fieri Working Papers LAB-MIG-GOV Project, April 2012, p. 4, at http://www.labmiggov.eu/wp-content/uploads/2012/04/CASE-STUDY-SWEDEN-FINAL-REPORT1.pdf

permit to the National Labour Market Board which, after having carried on the usual control on the non availability of national labour force for the same employment, would grant the foreign a work permit and the attached resident permit. However, both permits were granted only for the job on which the application for the conversion was based. In any case the foreign worker was also obliged to join trade unions and to maintain its membership for all the work and residence period. Precisely relying on the practice of grant a work and residence permit as a consequence, the inclusion among beneficiaries of welfare state benefits - as unemployment benefits - of foreign workers after one year, the possibility of bringing in also family members and to acquire a permanent residence permit, as provided in the Aliens Act in 1954[123], allows to differentiate the Swedish policy as regards foreign labour migration from guest-workers programmes of Western European countries which were equally importing foreign labour in that same period.

This was the context within which the common Nordic labour market has entered into force in 1954, abolishing the obligation for all Nordic citizens to posses a work permit to take up employment in a Nordic country of which they were not nationals[124]. Concretely, in comparison with the previous situation, the agreement was relevant only as regard for Finnish citizens aiming at migrating to Denmark, since it ratified what was already provided by the similar bilateral agreements which were already been signed. among Nordic countries. Nonetheless, the significant difference stays in being this agreement inserted within the framework of Nordic cooperation and not on a bilateral basis. It should be recalled that the institutional framework of the Nordic cooperation was still in its initial period of development. The Nordic Council has been established just in 1953, but this forum, formed by parliamentarians elected in Nordic national parliaments, had only a power of making proposal to Nordic national governments and, lately, to the Nordic Council of Ministers, that was established only in 1971 though. Moreover, on the basis of a protocol signed in 1954 and entered into force in December 1955, Nordic nationals were also exempted from the obligation to have a passport when crossing a(n internal) Nordic Border or a residence permit while residing in another Nordic country. Therefore, Nordic citizens were not only allowed to move freely for the purpose of labour within Nordic countries but also to reside regardless of the reasons at the basis of their movement. This means that, and from the beginning of the establishment of freedom of movement among Nordic countries, also non economically active Nordic citizens were immediately included among the beneficiaries of such provisions.

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[123] That same year Sweden signed the UN Geneva Convention of 1951 relating to the Status of Refugees.

[124] Cfr. Agreement concerning a common Nordic labour market, signed at Copenhagen on 6 March 1982, and came into force on 1 August 1983, replacing the agreement from 22 May 1954.

The movement of Nordic workers are regulated by employment national offices which were in charge of matching job offer with the available Nordic labour force. Nonetheless, some specific sectors of national labour markets of Nordic countries were not included in the scope of application of provisions on the common Nordic labour market, such as jobs in the public sector or those jobs which required a specific long complementing education as the health sector[125], and has remained reserved to nationals. The agreement provided also for the exchange of information among national authorities on employment, vacancies and unemployment. This exchange as questions regarding the application of the agreement were and are to be dealt with by the Nordic Labour Market Committee[126]. Subsequently, in 1955, the Nordic Social Security Convention was signed, and entered into force in 1957, providing for equality of treatment with nationals as regards social security coverage for all Nordic citizens in the Nordic country where they had decided to work and reside. The other fundamental element for the full functioning of the Nordic labour market, the above mentioned Nordic Passport Union, was signed in 1957 and entered into force in 1958. On its basis to Nordic citizens was neither required to hold a passport any more to cross Nordic borders, i.e. control at internal borders of Nordic countries were abolished and Nordic citizens were allowed to travel and reside in another Nordic country freely.

During the period in which the common Nordic labour market has coexisted with the free-migration system from other countries - mid-1950s to the 1960s - the difference of treatment among Nordic and non-Nordic citizens are less perceivable in comparison with the following periods when a more restrictive policy as regards labour migration would be adopted first of all in Sweden. Even more if we consider that from the beginning trade unions especially insisted for (and control) the grant of equal rights as regard work conditions, employment and wages for foreign workers regardless of their nationality. However, two differences are worth to be highlighted. The first regards the necessity to posses a work permit which means that the procedure of granting the permit would be carried out by the National Labour Market Board which would verify the compliance of the national preference clause before granting the permit, which would be given only in relation to a specific labour market sector - that estimated to be in need of non-national labour force - on that basis a residence permit would be granted too. The second is the consequence of this latter point, i.e. the inextricable link between work and residence. Neither the first nor the second statements just did as regards non-Nordic citizens were not valid and applicable to Nordic citizens to which, precisely, were not

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[125] Nevertheless, provisions were adopted in relation to the health sector in order to include it in the common Nordic labour market. In 1960, 1964 and 1968 conventions on, respectively, doctors, dentists and nurses were signed and the restrictions repealed.

[126] Cfr. arts. 8 and 9, Agreement concerning a common Nordic labour market.

required the possession of either of them. Thus, the connection between exercise of an economic activity and residence is not relevant in relation to them. Alongside this last statement, however, it should be recalled that Sweden envisaged, already in 1954 in the Aliens Act, the possibility for foreigners who wished to permanently settle in the country to obtain a permanent residence permit which would, consequently, not made dependent their security of residence on their performance in the labour market.

Noteworthy, and differently from the European Union integration process, the common Nordic labour market - freedom of movement and residence for nationals of those countries party of the agreement - was not established and developed within the framework of a broader integration project of economic cooperation - although, as saw above, numerous (failed) attempts were made in this sense - and, to use the same terms utilised to describe the early steps of the European Union, it was the only factor of production which movement was liberalised among Nordic countries. Cooperation on economic matters among Nordic countries has been achieved outside the Nordic cooperation. E. g., tariffs on trade in industrial goods has been eliminated on the basis of the EFTA agreement which was signed in 1960 by Denmark, Norway and Sweden, in 1961 by Finland, and finally Iceland in 1970. Alongside, in the 1970s, bilateral agreements were signed with EC member states by Nordic countries, except from Denmark which joined the EC. Eventually, a comprehensive common market among them has not been achieved until today within the framework of Nordic cooperation, but only as a result of their membership in the EEA area finalised in 1994 as a consequence of the (still) EFTA membership of Norway and Iceland and of the EU membership of Denmark, Sweden and Finland[127].

When in the mid-1950s the common Nordic labour market was established significant flows of labour migration were only those directed to Sweden from other Nordic countries, whose citizens represented more than a half of the total foreign population, with Finnish citizens as the most numerous group[128]. However, this situation started to change in the mid-1960s when migrants from non-Nordic countries started to be more numerous of Nordic citizens in Sweden, although until the 1970 the dominating pattern would remained that of Nordic migration. In this same period also the other

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[127] P. A. FISCHER, T. STRAUBHAAR, *Migration and economic integration in the Nordic Common Labour Market*, Copenhagen, 1996, p. 56.

[128] The Finnish migration towards Sweden has reached its peak in 1970s to constantly decline in the following decades. The reasons explaining this considerable flow are the differences in the levels of wages and unemployment benefits between Finland and Sweden. The availability of unemployment benefits in the country of origin, in this case Denmark, seems to explain also the low rates of migration towards Sweden of Danes during the period in which Denmark experienced high levels of unemployment. P. LUNDBORG, *Determinants of Migration in the Nordic Labour Market*, in *Scandinavian Journal of Economics*, 3, 1991, p. 373-374.

Nordic countries before not touched by labour migration, such as Denmark and Norway, started to become themselves too labour immigration countries. Therefore, non-Nordic labour migrants and their presence stopped to be dealt with as it was only a labour market issue, and while approaching the mid-1970s recession period followed to the 1973 oil crisis, stricter provisions were adopted in order to regulate labour migration of non-Nordics. If more restrictive measures as regards immigration, and particularly non-Nordic labour migration - could be justifiable as a reaction to the economic turndown provoked by the oil and economic crisis of mid-seventies, the same could not be said for the restrictive turn that Nordic immigration policies had already before. Actually, this observation lead to pay attention to a fundamental but until now not considered element deeply influenced by increasing labour migration, that is the impact of non-Nordic migration on Nordic welfare states. Therefore, at the basis of the first restrictive turn of Nordic immigration policies we find the reactions to the consequences on Nordic societies of immigration, and the related growing social concern as regards the, at the one side, the difficulties of integrate migrants within Nordic societies also *via* the welfare state - an instrument that, before, had been used and functioned as a vehicle to promote cohesion and social equality - and, in the second place the sustainability over time of a universal welfare state based and build in the previous decade having as its addressees an rather homogeneous society.

In Sweden, the, defined as, «tourism migration system» - to be allow to entry the country with just a tourist visa, to be converted in a work permit in case of founding a job offer during the three months of the visa validity - was abandoned in 1967, and stricter rules were applied when evaluating applications for work permit made by foreigners. This restrictive trend in relation to labour migration would end with a rather completely stop of entries of labour migrants in 1972, which was followed by Denmark in 1973 and Norway 1975.

By looking at this changed scenario, then, it is easier to perceive the privileged treatment of which Nordic citizens could benefit from in comparison with other foreigners. Actually, exceptions to the restrictive provisions on foreign labour migrants of the 1970s were, precisely, provided for Nordic citizens, high skilled migrants, refugees, family members and, relevantly, although only as regards Denmark, citizens of the European Union, since this Nordic country has become an EU member state in 1973.

In this same period, it was also observable the conditioning (and side) effects on the Nordic labour market of national labour migration policies. Precisely, this was observable in the consequences that the restrictive legislation adopted by Sweden limiting foreign labour migration in the mid-1960s has on the Finnish labour market when the demand for labour force in the Nordic countries still has not decreased. Actually, as a reaction of the restriction on non-Nordic labour force in the early 1970

immigration of Finnish citizens to Sweden has an considerable increase. This, from the one side, has brought to the inclusion of Finnish citizens among the group of migrants to which employers were obliged to provide for a certain amount of hours of paid education from 1971 - migrants which have as their mother tongue Danish, Swedish or Norwegian were exempted. In addition, in 1973, an agreement was signed between the two countries on which basis recruitment of labour of Finnish worker to Swedish labour market was only permitted to be done through employment offices and labour administration and not any more, as happened before, also by employers[129].

To fully comprehend how and to what extend considerations on the impact of immigration on Nordic welfare states has conditioned the evolution of immigration policies in Nordic countries from the mid-1960s onwards, attention has to be first paid to that characteristics on which basis it is possible to identify a Nordic model.

3.1.1. The Nordic Welfare State-immigration relation.

The basic and main concern when it comes to the relation between welfare and immigration - the (extent of the) inclusion among the beneficiaries of welfare state benefits and services of non-nationals - regards the criteria on which basis a fair allocation of resources should be found, i.e. who should be the addressees of the benefits and to what extent. These questions, with which every national government has always and constantly to confront with, become even more relevant in relation to a welfare state as framed in the Nordic countries[130]. However, if the Nordic basics of the welfare are similar enough to allow their grouping in a unique model as are the patterns of immigration flows experienced, the same cannot be said for the welfare-immigration relation. Without denying the leading role of Sweden in shaping Nordic neighbour immigration policies, and the presence of *de facto* multicultural elements in all of them, at least, Scandinavian countries policies are placeable along a spectrum that goes from the liberal Swedish policy to the far more restrictive Danish policy, with the Norwegian approach including elements of both, thus in the middle[131]. It remains true, nonetheless, that despite the differences as regards the immigration-welfare relation, concerns were and are almost the same: its economic sustainability in diverse conditions compared to those on which the welfare state was build and, because of the strict connection among

[129] P. J. PEDERSEN, M. RØED, E. WADENSJÖ, *The extension of mobility*, in P. J. PEDERSEN, M. RØED, E. WADENSJÖ, *The Common Nordic Labour Market at 50,* cit., p. 50.

[130] Although it is used the term «Nordic», presupposing the inclusion of all Nordic countries as those having this model of welfare, the precise object of study of the literature is almost always the sole Scandinavian countries: Sweden, Denmark and Norway.

[131] G. BROCHMANN, A. HAGELUND, *Migrants in the Scandinavian Welfare State. The emergence of a social policy problem*, in *Nordic Journal of Migration Research*, 2011, 1, p. 13.

solidarity, national identity and legitimacy, the potential challenge that immigration poses to (the high needed levels of) popular support of highly demanding, in terms of taxation levels, welfare state systems[132]. These questions assume a particular significance once related with the specific characteristics of Nordic welfare states.

Nordic welfare states are a post-WWII phenomenon and has been developing along the 1950s and 1960s assuming its current, with the necessary adjustments, basic characteristics: solidaristic, universal and institutionalised[133]. This means that (potentially) everyone is presumed to contribute to economically sustain the welfare according to its own capacities, as (potentially) everyone, in a variable measure, can benefit from it. Furthermore, the parameter of the amount of benefits has been fixed in order to provide for a, so called, standard guarantee: that is not to limit its action to the satisfaction of basic needs but at the maintenance of a determined standard of living. However, the universal characteristic of the model has not to be intended, obviously, as if selective criteria among both contributors and beneficiaries do not exist, but in the sense that welfare benefits are not addressed to targeted and needy groups - by which we intend all legal residents regardless of their nationality - by the whole population as long as qualifying criteria are fulfilled. The system is based on a progressive taxation system and reciprocity, and its sustainability implies high rates of employment, a vast range of public services at disposal and allocation of care services outside the traditional family locations which permit to have also high rates of women employment. Thus, for such a system to function and to maintain over time its generous levels of benefits all actors involved have to cooperate. In this view, then, is better understandable the for long time fundamental role played by trade unions and employers associations in determining alongside the state labour relations and provisions[134].

A welfare state conceived as such was supposed to eliminate social inequalities and, by granting equality, to promote integration. Moreover, it presumes also - and was build on - an homogeneous, uniform society which ensure the necessary level of legitimacy and support of measures financing the welfare on the basis of a shared sense

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[132] On the problematic relation between inclusive welfare states and international migration economic impact cfr. G. FREEMAN, *Migration and the Political Economy of the Welfare State*, in *Annals of the American Academy of Political and Social Sciences*, 485, p. 62; R. KOOPMANS, *Trade-Offs between Equality and Difference: Immigrant Integration, Multiculturalism and Welfare State*, in *Journal of Ethnic and Migration Studies*, 1, p. 3.

[133] It is worth to mention that from the 1950s the Swedish macroeconomic policy was based on the, so called, Rehn-Meidner model which was based on a restrictive fiscal policy, indirect taxes, active and selective employment policy, high unemployment benefits and equalisation of wages between men and women. L. ERIXON, *The Rehn-Meidner Model in Sweden: Its Rise, Challenges and Survival*, in *Journal of Economic Issues*, 3, 2010, p. 679-680.

[134] J. HOFF, J. G. ANDERSON, *Democracy and Citizenship in Scandinavia,* New York, 2001, p. 93-94.

of belonging and identification with the state and its institutions. Nevertheless, what has began to emerge in mid-1960s in Sweden, as the first country of destination of non-Nordic immigration flows, but soon after also in the remaining Scandinavian states, was that the above described expected outcomes of such a system were, on the contrary, only poorly observable among the population with an immigrant background. From the one side, the Nordic labour market, which require mainly high skilled workers, became over time less capable of absorbing a low-skilled workforce as was that provided by the mayor part of labour migrants arrived in the country. From the other side, the universal character of the system failed to consider and address the special needs that immigrants as a distinctive group could have, not only as regards labour integration but also concerning language, education and the impact on behaviours of different family structures. Thus, even if migrants were included among the beneficiaries of welfare benefits after a relative short period of legal residence the expected elimination of social inequalities did not happened for this part of the population putting into question the capacity of the whole system. Staying more easily outside national labour markets this part of population were not able to contribute though their work activity to the maintenance of the welfare state and, at the same time, it became the portion that more asked for benefits in order to face the difficulties deriving from situations in which they were not able to provide for their own needs. Eventually, even if the system was framed precisely to avoid social stigmatisation of recipients of social benefits by making everyone a (potential) recipient, it became necessary to provide for special measures addressed to the most vulnerable part of the population.

Considering this state of affairs it becomes, thus, more comprehensible the adoption of restrictive measures to limit low-skilled labour migration already before the 1970s crisis to, firstly, reduce the dimension of the problem: in order not to reduce rights nor their standards it should act on the potential extension of the number of beneficiaries. Subsequently, attempts were made to insert targeted measures directed only to the population with an immigrant background. Both types of measures were taken with the aim to deal with the problem while maintain the general framework of the welfare state mostly unaltered. However, Scandinavian countries despite having maintained a certain degree of similarity in their policies on the basis of the commonalities of their welfare systems and immigration flows as above said, have adopted from this moment onwards different policies to confront with this new dimension and problems posed by immigration. For all the reasons spelled out above, our attention will focus on the Swedish response to this changed state of affairs.

3.2. The Swedish immigration policy from mid-1960s to nowadays.

As foreseen, the first measures to limit labour migration from non-Nordic countries were taken by the Swedish government in the late 1960s while the internal demand of manpower had not (still) declined. Nonetheless, trade unions abandoned their favourable attitude towards the recruitment of foreign labour force somehow returning to the position of early 1950s, which, for example, preferred to mobilise female national work force. In addition, concerns among the native population were increasing as regards the lower levels of integration of foreigners in the general framework designed by the relation between participation in the labour market and the possibility of benefit of the generous welfare state. Although, in 1968, it was officially decided to adopt a stricter regulation of foreign labour migration and to parameter it not only in relation to the needs of the labour market, since the objective was to continue to grant migrants equal access to rights and work conditions, also considering the capacity of the national welfare state to provide for social rights also to migrants, really labour migration effectively decreased only as a consequence of the 1970s economic recession. Precisely labour migration of non-Nordic countries was stopped in 1972, and priority was given to natives, Nordic citizens and foreigners already residing in the country. Despite the official «stop» of labour migration, which indeed reduces the numbers of new entries, immigration of other sources continued and flows were formed by asylum seekers and family members of migrants already lawfully residing in Sweden, which would become - to become the main source of immigration to Sweden in the following decades.

As said above, 1968 provisions has codified those restrictive measures that had been already adopted in 1966 and 1967 to limit labour migration, requiring from that moment on for labour permits to be obtained before entry. This «official stop» to labour migration will not be eased before 2008. In the meanwhile, thus, those authorised to entry the country for labour purposes have been limited to the categories of Nordic labour migrants, high skilled and short-term workers, and - significantly, from 1994, citizens from the member states of the EEA area, i.e. EU and EFTA citizens.

Within the same 1968 Government bill on immigration which limited labour migration were contained also the foundations of the first integration policy that would be, at last, adopted in 1975. The parliamentary Commission that was set up in that occasion had to consider, on the one hand, measured to be adopted in order to provide migrants for the means to maintain their language and culture of origin, if they wish so; from the other hand, measures has to be laid down to put at disposal the necessary instruments for migrants to adapt, and to better include them in the Swedish society, especially considering their needs as newly arrived - lack of knowledge of the Swedish

language and of the functioning of the society as of the welfare system. The issue of adaptation, and its translation into practical measures, had to consider the specificities of groups and the length of their residence in the country[135].

Finally, also their participation should be increased, an object that could be pursue through, e.g., the grant of rights to political participation. Thus, the main principles inspiring the immigration policy which was on the way were: inclusion and equal access to universal welfare state rights, minority rights as regards language and culture of origin on the basis of a demand coming directly from migrants groups and not imposed by the state[136] - and in this regard migrants were not seen as individuals but as a distinct group from nationals - and, eventually, voting rights. The latter were aimed not only to include migrants in the host society but also to provide for a channel for migrants themselves to make public authorities acquainted with their specific needs and to, consequently, frame future immigration policies more effectively[137].

In the previous post-war decades, immigration has been dealt with as it was mainly (and only) an issue related with the labour market, work conditions and rights, with the consequent delegation to governmental authorities and other actors participating in the management of the national labour market of the decisions to be taken. Following the new phase inaugurated in 1968 with the Government Immigration bill, in 1969 the State Immigration Board was established[138]. It was responsible for both the aspects of control of immigration and integration policies. Therefore, the two dimensions of the immigration phenomenon - conditions of entry and stay connected to the needs of the national labour market, and consequences for migrants and their family members as for the receiving society of migration - are, in the end, considered together in their reciprocal implications and influences.

The new «immigrant and minority policy» was officially adopted in 1975[139], and translated in three main principles the previously emerged orientations and positions: equality, freedom of choice and participation. The first two expressed the necessity to jointly consider, at the one side, the will to include migrants within the Swedish society -

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[135] M. SOININEN, *The 'Swedish model' as an institutional framework for immigrant membership rights*, in *Journal of Ethnic and Migration Studies*, 1999, 4, p. 687-688.

[136] The consideration of this aspect among those regarding rights to be granted to migrants was conditioned by the high presence of Finnish citizens among the foreign Swedish population, and by the related pressures of the Finnish government for the grant of the possibilities, especially for Finnish children being educated in Sweden, to be granted the means to maintain their mother tongue.

[137] D. SAINSBURY, *Welfare States and Immigrant Rights: The Politics of Inclusion and Exclusion*, Oxford, 2012, p. 218.

[138] Similar offices would be established in Denmark and Norway only decades later, in 1983 and 1988 respectively. Before a sectorial approach prevailed, and immigrants needs were taken into consideration within general policies and structures.

[139] In 1970s Sweden would also develop its first (old) minority policy in relation to the Sami population.

as regards not only welfare rights but also cultural rights - on an equal basis in relation to nationals and, on the other side, to consider also migrants' special needs not imposing homogenisation and assimilation. On the contrary, it was for the state to actively promote and provide them with the means to retain their own language and culture. The choice was, then, between the Swedish culture and the own culture of origin of migrants groups. In 1976, the Swedish Constitution was, accordingly, amended and the obligation for the state to promote as the right of minorities to preserve and develop their own language and culture was enshrined into the Constitution[140]. Eventually, the participation principle calls for cooperation and solidarity between migrants and nationals. The inclusion of this principle framed as such is linked to the characteristic of the Swedish society to channel requests of individuals via interest groups.

These principles were put into effect by providing newly arrived adult migrants with language courses, information about the functioning of the society, and to migrants children were granted the right to be educated in their mother tongue during the nine years of compulsory education. In addition, the aim of including migrants among the beneficiaries of welfare state benefits on an equal basis continued, as it was from the beginning, to characterise policies in this field. It was made clear, however, it would not be set put a separate welfare to satisfied immigrants' specific needs but, on the contrary, that they had to fit in the general welfare set up for the majority of the population. In this sense the access to welfare rights for migrants was based on the same basics on which it was initially build upon for natives, i.e. in strict connection with the inclusion and participation in the labour market. This was referred to as the principle of *workline* in combination with the loss-of-income principle, i.e. to link benefits with the performance of the individual in the labour market, principles which were, in turn, could not be detached from the objectives of full employment and to privilege active policies as regards the labour market to favour the re-qualification of the workforce in case of unemployment and the return into the labour market rather than its reliance on social benefits[141]. It is, then, even more understandable the relevance of making immigration policy - conditions of entry and stay of migrants - depended on the capacity of the labour market to absorb them as labour force, and it does not come as a surprise the conception of immigration policy mostly and still as a labour market policy.

As regards participation, state support was provided in order to migrants to set up their own organisations. This would permit them to be able to influence processes and outcomes of policy making. In addition, and in order to add a further channel of influence on policy formation through political parties actions, in 1975 migrants were granted active voting rights for local and regional elections after thirty-six months of

[140] Cfr. art. 2, chapter 1, The Instrument of the Government, Swedish Constitution.
[141] K. BOREVI, *Sweden: The Flagship of Multiculturalism,* cit., p. 30.

lawful residence in the country. Therefore, the immigration and minority policy of mid-1970s comprised two, at a first glance, contrasting concepts: at the one side, the aim of the welfare to be an instrument to achieve social equality among individuals, regardless of their nationality, precisely pursuing equal access to rights; on the other side, the provision to migrants of specific rights as a distinctive groups in order for them to be able to make authorities acquainted of their interests and needs by constituting, in their turn, their own interest groups.

To these efforts aiming at integrating migrants in the hosting society as much as possible by granting them (formally) equal formal rights and participation rights, it has to be added the further mean of integration constituted by naturalisation, i.e. incorporation though the acquisition of citizens. To this aspect in particular, will be devoted the following paragraph.

Just a decade later, however, the above described immigration policy has to be reframed to cope with the changed patterns of international migration and a retreating from the previous multicultural policy framework took place. But already before, from the mid-seventies, Sweden started to receive consistent flows of refugees from non European countries and family members of previously arrived refugees, and of labour migrants already residing in the country on a permanent basis. The country refugee policy which, until that moment, was based on the criteria laid down by the 1951 Geneva Convention, added, within the 1975 Aliens Act, two supplement categories of individuals to which protection would be granted on similar basis: these were the, so called, *de facto* refugees - those who were, precisely, in similar circumstances in comparison to refugees as defined by the Geneva Convention - and war refugees - those individuals who escaped from war zones or from the obligation to serve the army. Residence permits were then granted to these categories of refugees and on the basis of humanitarian reasons. However, in this first phase of change of migration patterns, refugees arrived mainly through the, so called, quota refugees. Nevertheless, despite the different considerations that stay at the basis of granting and stay of refugees in comparison with those who enter the country as labour migrants, these could not equally be touched by similar considerations on the welcoming capacities of the receiving country, first of all and once again as regards the grant of welfare rights on equal basis. Therefore, the 1975 Aliens Act contained a safeguard clause - so called, emergency paragraph - to allow the

government to limit the grant of residence permits counterbalancing humanitarian reasons with the reception capacities of the welfare state[142].

In parallel, immigration from Nordic countries continued to decline as well as increased return migration rates of Nordic citizens towards their country of origin[143]. Consequently, the immigrant population of Sweden not only rapidly increased but also became made up by foreigners with highly diverse origins and distant from the majority and dominant culture.

In 1985 a new refugee policy reception was implemented aiming at, firstly, solving the problems related to concentration of high numbers of refugees only in certain urban areas with the related - to mention one - problems as regards housing availability. Thus, the allocation of refugees - which was decided by government authorities - should be done considering the reception capacities of municipalities and actively involving local authorities in the process, trying to consider jointly labour market opportunities and individual choices. Local authorities would then be the level in charge of providing the courses on language and introduction to the basics of the receiving society, for which they received subsidies from the central level on the basis of the number of refugees settled in the municipality territory. Refugees were requested to comply with individually tailored social programme and work plan in order to (continue) to receive social allowances. At the national level, refugees' reception policy stopped to be a responsibility in charge of the Labour Board to be assigned to the Immigration Board.

Nonetheless, the application of the new strategy has to be soon after changed again, since its implementation corresponded to a not foreseen consistent increase in arrivals of out of quotas asylum seekers. The previous policy, which objective was to select those municipalities where refugees would had more opportunities to enter the labour market and where the availability of reception infrastructures were higher, has to be transformed into the, so called, «All Sweden Strategy» in 1987 to cope with the new situation. The policy, on the one hand, was criticised for having excessively limited the freedom of choice of refugees on the place they would live, and, in any case, it proved not to be effective, due to secondary moves. On the other hand, it was also ineffective from the point of view of inclusions in the labour market, since it adopted a care attitude leading to an increasing reliance on social assistance and to very low percentage of participation in the labour market.

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[142] The emergency clause was used for the first time to limit the arrivals of Christian Turkish Assyrians asylum seekers escaping from the north of Iraq in 1976-1977, and which, in the end, settled almost all in the same Swedish municipality giving rise to the concern of local authorities. Concretely, a visa regime was imposed but to all those already in the country and waiting for a final decision on the recognition of the refugee status a residence permit was granted.

[143] P. J. PEDERSEN, M. RØED, E. WADENSJÖ, *The extension of mobility*, cit., p. 53.

The mid-1970 policy has been revised through the 1986 decision on immigration, as seen above, to handle the consequences of the different composition and extension of migration flows in relation to those considered during its formulation. However, the retreat from the multicultural approach on rights of migrants to retain their own language and culture, as well as on the obligation of the state to promote the related activities, was based on the observation that a policy framed as such has failed in achieve the aim of integration of foreigns. It was, actually, considered that it was not possible to grant foreigners to retain their own language and culture on a long-term basis and, secondly, even though assimilation was not required, that the retain of migrants culture should be permitted as long as they did not put into danger and went against the fundamentals on which were found the Swedish society. Therefore, the freedom of choice principle ambit was reinterpreted and restricted, the minority rights' orientation of the policy was abandoned and the label of the same was reframed in just «immigration» policy. Consequently, migrants stopped to be considered as a (minority) group to be regarded as individuals. Eventually, in the same period, the whole structure of the welfare state was undergoing criticisms that would reflect on the new route corrections of the Swedish immigration policy that would take place in the 1990s. Eventually, in 1989 the, so called, emergency clause of the Aliens Act was used for the second time[144], and residence permits to refugees were not granted anymore to those qualifying as *de facto* or war refugees unless in exceptional cases, leading to a strict application of the criteria laid down in the (sole) 1951 Geneva Convention.

Sweden was hardly hit by the economic recession of the early 1990s which lead to a rapidly increase of unemployment rates. This deterioration of the economy put into question one of the basis of the welfare state system: (the objective of) full employment necessary to maintain the generous welfare benefits and the related high levels of public spending. Therefore, this was a period of cuts on the public spending and attempts to reduce costs and the state budget. It goes without saying that foreigners - refugees in particular - which were already the category with lower rates of participation in the labour market and which more have relied on social assistance were deeply affected by the restriction of the welfare. In addition, this period of economic downturn corresponded also to a new wave of refugees arrivals, reaching the higher level since post-WWII, for the most part due to the conflict in the former Yugoslavia and the collapse of the Soviet Union. Under the new government that was elected in 1991

[144] Cfr. so called «Lucia Decision» of 13 December 1989, named as such because adopted in the Swedish holiday day of St. Lucia.

elections[145], the restrictive «Lucia decision» of 1989 was repealed and the majority of application for the recognition of the refugee status were accepted. Nevertheless, in 1993 the refugees' reception policy was made (again) more restrictive under the pressure on the welfare and the lack of sufficient infrastructure to effectively receive such a considerable number of refugees. Specifically, a visa requirement was imposed on all those willing to entry the country that were coming from the Balkans, even if to somehow counterbalance this decision, permanent residence permits were granted to all those asylum seekers already residing in the country without proceeding to the examination of their dossiers.

The following year a comprehensive reform of the refugees' reception policy was agreed by the Parliament. Considering the situation of the labour market and the pressure on welfare, the reform pursued the objective of prove refugees with the necessary instruments and knowledge to participate as soon as possible to the labour market, and simultaneously stressed the principle of individual self-sufficiency. This aimed, at the one side, to bring into refugee policy the, above mentioned, *work-line* principle. Accordingly, the participation in the introductory programme - of which local authorities remained in charge - could be made compulsory and in case of non participation it was foreseen the possibility to withdraw the, so called, introductory allowance. The guiding principle of the new policy was to provide incentives and the necessary education and training for refugees be able to provide for themselves in the first place and not the rely on the social assistance. Municipalities were granted founding accordingly to the percentage of success of their policies of inclusion of refugees in the labour market. Moreover, this new self-sufficiency paradigm was applied also to the question of housing and allocation of refugees across the country. Thus, to asylum seekers were granted the right to arrange for their own accommodation while waiting for the examination of their application for the refugees status, possibly outside asylum centres. Nevertheless, the policy reframed as such suffered from similar defects compared to the former, i.e. its facultative character for municipalities to implement them and for migrants to take part in the programmes were provided. This led to low levels of enactment and to great variations among the country in the content of the measures since the policy elaborated at the central level has remained vague on the practical content of the measures to be taken.

In 1996 the immigration policy underwent a reform process as well, and was characterised by an increased emphasis on the (entries) control aspect. The reasoning underlining the new measures adopted pursued not different aims in substance than the

[145] During this electoral turn, for the first time in Swedish election an anti-immigrant and populist party, New Democracy, gained 6.7% and was able to gain sits in the national Parliament.

previous policies. In other words, the unchanged aims had to consider the deteriorated economic situation and the demanding economic performances that the sustainability of a welfare system such as those of the Nordic countries request. Therefore, to maintain the universal character of the welfare and to not discriminate migrants in relation to access to benefits a stricter control on those admitted to enter and reside in the country was necessary. The 1996 reform was remarkable for the restrictions introduced on the conditions on which basis family reunification was allowed, which was from that moment on restricted only to those who were part of the nuclear family of the migrant already lawfully residing in the country.

More generally, if in the mid-eighties reform the minority perspective to deal with specific need of migrants was abandoned, in the mid-nighties reform it was the integration aspect (and objective) - meant as active participation in the receiving society - that took advantage over immigration. A ministry specifically devoted to integration issues was established followed by the institution of a National Integration Office. Moreover, the departure from the original multicultural perspective has signed also this later reform as that of mid-1980s, since the consideration of migrants as a distinctive group was, in the end, abandoned - blamed to have been a vehicle for their marginalisation - in favour of an individualistic approach. From the one hand, it was still obviously acknowledged that migrants have special needs compared to the rest of the population. Therefore, targeted measures were kept but limited in time, i.e. addressed to newcomers during their first two years of residence. The newcomers programme is that already implemented in 1994. Although it was above described considering their (unique) addresses to be refugees - since they were the category of which migrations flows were constituted for the most part in those years - they were meant to be addressed to the whole foreign population. Eventually, the multicultural character of the Swedish society was not disowned in the reform, nonetheless it was simultaneously recognised that it was necessary for the whole population to converge around a common core of values and rights.

In the second half of 1990s Sweden economic situation started to recover and during the early 2000s - particularly throughout the 2002 election campaign - alongside the never abandoned debate on integration policies, the question of labour migration from third-countries returned to be a matter of discussion. As usually happen in Sweden when the adoption of a new legislation is under consideration, a Parliamentary

Committee on Labour Immigration (KAKI) was set up in 2004 and released its report in 2006[146].

It should be considered in this regard that Sweden was a member of the EU since 1995. Thus, even though Sweden has not reformed its labour migration legislation until 2008, from that time on Union citizens who enter the country to pursue an economic activity could rely on EU legislation on free movement of persons. This in substance means that their entry did not have to be submitted to the labour market test and to the control of trade unions and employee organisations either. With respect to the effects of EU membership in the field of immigration of third-country nationals this was found not to have had a relevant influence on the content of national policies[147] - if not for Schengen related measures, but not on asylum or labour migration of third-country nationals. However, the 2004 EU enlargement and the fact that Sweden - with just the United Kingdom and Ireland - has decided not to adopt transitional measures in relation to EU citizens of new EU member states[148], has raised attention on the issue of import of foreign labour again after a long time. Precisely the issues under consideration were if for the country was really necessary to import foreign labour to fill in labour shortages and could not, on the contrary, rely on the national (unemployed) labour force that was available, as pointed out by trade unions which, once time more, insisted to mobilise, firstly, women labor force. As said above, these were not at all new contrary arguments to import of foreign labour, as they resembled those already asserted in the post-WWII period. In the meanwhile, two reports in 2001 and 2006 were released on the welfare state situation in relation to migration. From both emerged that because of the poor participation of non-nationals in the labour market, being the national (and the Nordic) welfare state for the most part made by income-related allowances, this proved not to be able to realise its primary aim: i.e. being an instrument for the elimination of social inequalities. Discrimination on the basis of race and gender were, actually, deeply conditioning non-nationals access to, and performances in, the labour market.

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[146] Committees are a rather common instrument in the process that lead to the adoption of new legislation in the Swedish legal system, and reflect the importance attributed, generally, in the conception of citizenship in Scandinavian countries to an active and participatory role of citizens in the relation to the content of state policies. In details, Committees have a mixed political and technical composition and its final aim is to produce a report to be sent to the government. This will, in turn, forward it to all possible institutional subjects interested - so called «remiss system» - which have the chance to comment the report. Moreover, the repost is also made public, thus every citizen can sent a comment as well. On the basis of the responses and considering the comments, the government proposes a bill to the Parliament which discuss the draft and, in case, at last, adopt it. M. QUIRICO, *Labour migration governance in contemporary Europe. The case of Sweden,* cit., p. 12; H. M. HERNES, *Scandinavian Citizenship,* in *Acta Sociologica*, 1988, 3, p. 200.

[147] It was, on the contrary, found that the EU membership has influenced the way policies were agreed among the actors involved in the process of policy making. M. SPÅNG, *Sweden: Europeanization of Policy, but not of Politics?*, in T. FAIST, A. ETTE (ED.), *The Europeanization of National Policies and Politics of Immigration. Between Autonomy and the European Union*, New York, 2007, p. 125, 131.

[148] Among Scandinavia countries, Sweden was the only one which has not imposed transitional measures.

It is worth to notice that so far, i.e. since the (labour) migration stop of late 1960s, migration flows towards Sweden had been mainly constituted by asylum seekers but even more by family members of migrants already admitted to reside in the country. This, over time, has made the previous labour immigration legislation unable to provide the country the necessary amount of labour force but, more importantly, the kind of skilled labour force that national companies and industries needed. As a proof of this mismatch can also be taken the (apparent) contrast between the still high unemployment rates in the early 2010s and the simultaneously labour shortages of which companied said to be affected. Therefore, at the end of 2000s, a series of measures were adopted to address the above emerged issues.

The 2006 report on Labour Immigration was released just before a new government took office, and in December 2008 the reform of labour immigration entered into force. Under the former regime, third-country nationals had to hold a work permit to enter the country in order to purse a work activity and had to apply for it from the country of origin or residence. If the activity would last more than three months, the third-country national had also to apply for a residence permit. Only students, a person who had enter in order to visit an employee and asylum seekers could apply for a work permit while already present into the country's territory.

The new rules on labour migration has marked a significant difference in relation to the former system since the procedure is become demand-driven. The employer is the (new) subject in charge of evaluate its own needs of foreign labour force and to start the procedure by making public the job offer on the appropriate channels. Furthermore, unlike the previous legislation, the limits concerning the nationality of the possible future employees have been repealed. Thus, once the other conditions are fulfilled, the employer is free to recruit anyone. This means that under the new legislation is not carried out any kind of labour market test by the Labour Market Administration, which before was the authority in charge of verifying that there were labour shortages in the occupational sector in which the foreign worker was required. In case of a negative outcome and of a negative response from the union of the labour market sector involved the permit was refused. The, so defined, change of paradigm that has occurred assumes even more relevance in a system like the Swedish one, where paternalistic role of the state and its control over the labour market and the welfare was and has to be high and spread in order to assure the functioning of the structure[149].

However, the change is less profound that it may appear since the state is still responsible for significant aspects of the procedure. Specifically, a unique government

[149] K. BOREVI, cit., p. 27.

department has been made responsible for the release of both work and residence permits: the Swedish Migration Board adopts the final decision, after having forwarded the application to the related labour union which is responsible of verifying that work and wage conditions are not discriminatory in comparison with those of nationals, i.e. are in line with the collective agreements of the related labour market sector. Moreover, before adopting a positive decision in respect with a third-country it has to apply the, so called, Community preference clause, i.e. verify that no EU/EEA or Swiss job applicants are available.

For reasons of labour, the grant of only temporary permits are foreseen, even if their length has been extended in comparison with the former regime. A work permit is now granted for the same duration of the employment contract, and in any case for a maximum of two years. If necessary the permit validity can be extended but cannot exceed four years. Unlike the previous regime, the application for the extension of the permit can now be done within Sweden without having to leave the country. A permanent residence permit is granted after five years of (lawful) residence of which four have been for employment reasons.

Besides the control on the general work conditions and compliance with collective agreements, to granted the permit it also required to demonstrate that the persons is capable of supporting itself on the basis of that contract, i.e. that its wage can potentially reach the threshold fixed by the Migration Board. During the first two years, however, the permit is valid only for one named employer and particular profession. This condition makes immediately visible that the new legislation is, certainly, more liberal if compared to the former but, in any case, has not abandoned the former logic underlying Swedish labour migration regime, i.e. to allow the import of foreign labour only to match it with the shortages of that particular sector of the national labour market. This is further confirmed by the fact that to change employer is permitted for the further possible two years of extension of the work and residence permit which, nonetheless, remains restricted to a particular profession. What is relevant to notice in comparison with the former regime is that the process of recruitment it is now started by the employer through the (compulsory) publishing of the job offer. Secondly, although numerous conditions have still to be fulfilled in order for a third-country national to be granted a work permit, the previous labour market test has been eliminated, or rather, it is now carried out by the single company or industry, with the (sole) further verification of the compliance with the Community preference by the Migration board.

In the following years, the release of work and residence permits for work reasons has gradually increased, more visibly for the category of seasonal workers

employed in the berry-picking sector[150]. The 2008 demand and employers-driven recruitment procedure of foreign labour regime has been criticised for the misuse of the system and the consequent exploitation of foreigners labour force that it has not been able to contrast. Therefore, in order to prevent exploitation practices especially in certain sectors of the labour market, in January 2012 the Swedish Migration Board has adopted stricter rules and carried out controls. These are particularly focused on controlling the real correspondence between the salary declared on the request of the work and residence permit with that actually paired to the foreign worker during the employment period. This is significant if considering that the most numerous group of foreigners workers are seasonal workers employed in the berry-picking sector, on which stricter regulation by the Swedish Migration Board had already been adopted in 2011 in order to avoid exploitation[151].

In 2013 a further amendment to the Swedish Aliens act and other related legislation were made - and entered into force in August 2013 - in order to finalise the implementation the EU Blue Card Directive[152]. This is a main novelty for the Swedish system which until that moment had not set up any special track or permit reserved to high skilled workers. Since the implementation of the EU directive for high qualified workers, a targeted work and residence permit - named EU Blue Card - is now granted to this specific category. Nevertheless, it has been observed that although the country had not a recruitment scheme directed only at high skilled workers before the implementation of the directive, it is easier to obtain a residence permit for work reasons following the general national procedure also because the Blue card - apart, probably, for the right to move to other EU member states - does not offer significant advantages in comparison to the general situation of labour migrants[153].

As above said many times, migration flows towards Sweden were made up by asylum-seekers and family members reunited. Concerning this it is worth of notice that under the new labour migration regime, apart from third-country nationals labour

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[150] The increase in the number of permits granted for labour reasons observed in 2012 was mainly based on the relevant increase of seasonal workers and, specifically, of those employed on the berry-picking sector. *EMN Policy Report 2012: Sweden*, Migrationsverket (Swedish Migration Board), 2013, p. 14, at http://ec.europa.eu/dgs/home-affairs/what-we-do/networks/european_migration_network/reports/docs/annual-policy/2012/26.sweden_annual_policy_report_2012_final_august2013_en.pdf.

[151] Precisely, guarantees are required to employers as regard salaries conditions, work organisation and conditions. Furthermore, it is required to provide workers with information on work conditions and the effective terms of their employment. Cfr. *EMN Policy Report 2011 Sweden*, p. 15, at http://ec.europa.eu/dgs/home-affairs/what-we-do/networks/european_migration_network/reports/docs/annual-policy/2011/se_20120502_apr2011_final_en.pdf.

[152] Council Directive 2009/50/EC of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purpose of highly qualified employment, OJ OJ L 155, 18.6.2009.

[153] *EMN Policy Report 2013*: Sweden, Migrationsverket (Swedish Migration Board), 2014, p. 2, at http://ec.europa.eu/dgs/home-affairs/what-we-do/networks/european_migration_network/reports/docs/annual-policy/2013/27.sweden_national_policy_report_migration_asylum_2013_final_en_version.pdf.

migrants and international student already residing in the country, has added among those categories of non nationals allowed to ask for a work permit asylum seekers whose application to the recognition of the status of refugees has been refused with a final decision, to apply for a residence permit for work reasons. In order to profit from this possibility it is required to the applicant to have already worked for at least six months, to have a permanent position or a work permit of one-year (minimum) when the application is made, and that is in compliance with the general work conditions. The residence permit granted on these basis are passible to be extended also to the applicant's family members.

This last aspect has to be looked at also by considering that in 2010 family reunification rules have been (restrictively) amended. On the subject the debate had been on going from the early 2000s and has concerned the possibility of repeal the stricter rules that had been introduced in the 1996 reform and, simultaneously, to consider the, always present, impact on the welfare state and state expenditures of migrants which had entered the country on the basis of family reunification reasons. Concerning this, it should be reminded that, if we exclude entries of persons seeking asylum, family members have constituted the most consistent part of migration flows towards Sweden.

The 2010 amended has consisted in the (re)insertion of a financial and housing requirement among the conditions for a residence permit be granted for family reunification reasons. A financial requirement was not a complete novelty in the Swedish legislation on family reunification, as it was introduced in 1970s and repealed in 1979. It stated that the migrant had to demonstrate to be able to financially support the reunified (nuclear) members of its family. The 2010 requirement, nevertheless, has a slightly different content. In this respect, it has also to be taken into account that, differently from the 1970s, now Sweden is also required to comply with EU law on family reunification, in particular with the 2003/86/EC Council Directive on the right to family reunification. The directive, actually, foresees the possibility for member states to require the third-country national who ask for family reunification to provide evidence of having sufficient resources to support himself and its family members[154]. Nonetheless, the Swedish financial requirement is more favourable, in the sense that it is required to the, so called, «sponsor» just to demonstrate to have the means to support himself/herself but not its family members, while, and it is easily comprehensible, as regard accommodation, this is asked to be «adequate» for the whole family in relation to which a residence permit is required. These last changes are in line with the shift impressed to migration and integration policies in mid-1990s already, attempting to promote self-support of foreigners, their rapidly inclusion in the labour market and decrease their

[154] Cfr. art. 7.1, lett c, Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification, OJ L 251, 3.10.2003.

reliance on social assistance, i.e. to develop more in relation to the past the aspect of obligations to be performed by foreigners in order to access to (equal) rights.

3.2.1. The reformed Integration policy.

Concerning integration, in 2008 an integration strategy was launched and was focused on several strategic fields: faster introduction for newcomers, employment, education, language skills, anti-discrimination measures, urban development, and basic civic common values. On its basis, in 2010 the integration policy was amended and it can say to be similarly focused on individual obligations and, more generally, on those same principle that has informed since its origins the Swedish attitude towards integration of non-nationals: «ensure equal rights, obligations and opportunities for all, irrespective of their ethnic and cultural background»[155].

The reform, particularly concerning newcomers introductory programme - «Law on the establishment of certain newly incoming immigrants» - has entered into force in December 2010, and aimed, in particular, to speed up the introduction of migrants into the labour market. The labour market focus of the new policy is reflected in the transfer of the coordination and responsibility of such activities to the Swedish Public Employment Service.

The target group of this new integration policy is made of those non-nationals that over time have been found to have more difficulties in entering the labour market and actively participate in society. These are refugees or those holding a residence permit for humanitarian reasons and their (nuclear) family members aged between twenty and sixty-four that have required a residence permit within a two-year period since their arrival. In addition, foreigners aged between eighteen and nineteen without any relative living in Sweden can also have access to the programme[156]. On the contrary, those who have a gainful full-time employment, are attending upper secondary education or cannot attend the course for health reasons are exempted.

Deferring from the previous structuring which characterise by a high level of decentralisation, this fundamental part of the integration policy has been re-centralised. Although municipalities have remained responsible for a number of relevant matters, one of the main drivers of the reform was to overcome the high levels of divergence in the

[155] Cfr. Ministry of Integration and Gender Equality, December 2009, at http://www.regeringen.se/sb/d/116/a/19443.

[156] To these categories have to be added persons waiting for resettlement, those who cannot be expelled on the basis of international law, or in particular distressing situations for which they cannot be expelled, those who are testifying in trials in front of international courts or tribunals. Cfr. Chapter 5, Sections 1, 2, 4 and 6, Chapter 12, Section 18 and Chapters 21 and 22 of the Swedish Immigration Act (2005:716).

implementation of introductory programmes[157]. Under the former regime, they were autonomous in deciding whether to pay introductory benefits to newcomers in exchange of their participation in the programme and on their amount. On the contrary, all aspects regarding the «introduction benefit» established by the reform are decided by the Swedish Public Employment Service, and it is of the same amount regardless of the municipality in which the beneficiary has established its residence.

Similarly to the former regime, on the basis of an agreement between the central agency and municipalities, it is determined the number of newcomers that each municipality should receive considering their reception capacity. In turn, the newcomer will be addressed to the municipality that could better match with its individual characteristic after a initial assessment of those have been carried out after its arrival. In addition, municipalities - which are still responsible for the reception of refugees - are charge of significant parts of the introductory programme which are, language courses - so called, Swedish for immigrants - housing provision and civic orientation courses. The latter have become a compulsory component of introductory programmes and consist of, at least, sixty hours of teaching, provided in the mother tongue of the beneficiary or in another language of in which the foreigner is proficient, on the foundations, functioning - individuals' rights and obligations, and basic common values of the Swedish society.

It should be noted that the voluntary character of the Swedish integration policy has remained unchanged, however, once the foreigner has decided to engage in the programme, in order not to lose the attached benefit, it has to take part in the activities contained therein. Specifically, for every individual a personal introductory plan is designed considering its specific characteristic: education, family background, labour experience, health conditions. The programme can last for maximum twenty-four months and its full-time. Despite its content being variable, it always comprises a language course, a civic integration course and activities aimed at inserting the migrant into the labour market. As regard the latter, and once more confirming the employment-oriented nature of the new policy - a series of collateral initiatives have been established. These are the, so called, «step-in-jobs», a subsidised employment to be combined with language courses for a faster entry into the labour market; the provision of an «introductory guide», that the migrant itself chose, and which final aim is to insert the person in the labour market; resettlement incentives towards municipalities where there are more and better job and education opportunities, even if the basic principle remains that of freedom of choice as regards where to fix one residence; financial support and

[157] A. WIESBROCK, *The Integration of Immigrants in Sweden: a Model for the European Union?*, in *International Migration*, 4, 2011, p. 55.

mentoring are provided to non-nationals entrepreneurs; finally, increase in the offer of vocational training courses for adults[158].

By making the benefit strictly related to the sole individual concerned by the programme, and its amount independent from the total income of the family, the aim is also to incentive women engagement in the programme as well. Generally, all persons participating in the programme are encourage to work while attending - to enter in the labour market as soon as they are ready - without seeing reduced the amount of the benefit.

Although the 2010 reform of the integration policy just described was the last wider amendment introduced, significant changes were brought or attempts to further improve the already available instruments were carried on in the following years. Firstly, coherently with the employment-focus of the integration policy, in 2011 the Ministry of Integration and Gender Equality has been dissolved, and integration policy is now a responsibility of the Ministry of Employment which has a devoted Integration minister. Secondly, the 2014 Budget funds are provided to adult training programmes and to further support municipalities where there are higher percentages of newcomers have fixed their residence[159].

The outcomes of the attempts of improve the labour migration legislation and integration policy have emphasised over time an inner tension within the Swedish system. Actually, Swedish integration and labour market introduction policies allows Sweden to score the higher marks in indexes measuring the normative framework[160], on the contrary, we did not find reflected these excellent results also in substantial outcomes, i.e. participation rates of foreigners in the labour market compared to nationals are relatively low, at least in the last decades[161].

The reasons partially explaining this mismatch are, at the one hand, to be found in the composition of migration flows in the last decades, and in the simultaneous arrival of consistent number of foreigners in periods of economic downturns. Concerning the former, as said many times, the main source of migration towards Sweden was formed,

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[158] Some of these measures have been the object of a series of pilot programmes launched in the period 2003-2005 by the Swedish Labour Market Board as it was, e.g., the «Work Place Introduction»: an instructor had the task to assess job-seekers' qualifications and wishes and to, subsequently, match them with employers requests. Both were supported for a six-month period during which the worker was introduced into the workplace and provided with training.

[159] R. ANDERSSON, *Integration Policies Sweden country report*, INTERACT Research Report 2014/14, p. 8, at http://cadmus.eui.eu/bitstream/handle/1814/32656/INTERACT-RR-2014%20-%2014.pdf?sequence=1.

[160] Cfr. e.g. MIPEX index where Sweden scores first in the general index including the whole range of policies considered by the index: Labour Market Mobility, Family Reunion, Education, Political Participation, Long Term Residence,Access to Nationality, Anti-discrimination.

[161] Cfr. OECD, *International Migration Outlook 2007*, Paris, 2007, p. 68-72, at http://www.keepeek.com/Digital-Asset-Management/oecd/social-issues-migration-health/international-migration-outlook-2007_migr_outlook-2007-en

for a long time, by, so called, humanitarian migrants and family members, i.e. types of migration which can be only in minimum part measured and prevented on the basis of an evaluation of the economic situation of the receiving country. Moreover, there are not previous mechanisms of either self-selection nor possible selection by the receiving country available in order to better match migrants characteristics and skills with the necessities of the national labour market. Secondly, labour performances of migrants has been deeply affected by the 1990s economic crisis by which Sweden was particularly affected. For newcomers in those years it become both more difficult to enter the labour market - having also to compete with the national unemployed labour force - as well as they have been more hardly affected by unemployment. Therefore, a partial explanation of the poor results of foreign-born persons in the Swedish labour market is given by the combination between flows composition and the economic situation at the moment of arrival[162].

Although the economic situation has improved since mid-1990s when the national economy started to recover, other factors were and are relevant it understanding the (still) not optimum results of labour and integration policies. At the one side, there are the long-term adverse effects of previous policies which has not paid sufficient attention to providing migrants with the necessary education and skills to rapidly enter the labour market but was more care-oriented. This has made expected initial difficulties into long-term ones. Concerning this, although a positive relation is generally observed between the length of residence and labour market outcomes, in Sweden the differences with natives appeared not to have significantly decrease over time[163]. These persistent poor performances are significant even more in light of the fact that a prolonged unemployed period is one of the elements that more seems to impact on future changes to be employed again, as it is, on the contrary, positively valued, more than any previous qualification or work experience, an early contact with the labour market where linguistic as well as civic competences can be acquired on the work place.

Among other elements, the organisation of Swedish language instruction has been criticised, although language is one of the main obstacles for foreigners and one of the basis of introductory programmes, for being, at the one side, too long, prolonging the time of exclusion from the labour market and, due to the programme voluntary

[162] G. LEMAÎTRE, *The Integration of Immigrants into the Labour Market: The Case of Sweden*, OECD Social, Employment and Migration Working Papers, No. 48, 2007, OECD Publishing, p. 19-22, at http://dx.doi.org/10.1787/235635254863.

[163] M. ENGDAHL, *The Impact of Naturalisation on Labour Market Outcomes in Sweden*, in OECD, *Naturalisation: A Passport for the Better Integration of Immigrants?*, OECD Publishing, Paris, 2011, p. 100.

character[164], of registering low rates of participation and not providing substantial results in labour market performances to those who have attended them[165]. Thus, all considered, it is not at all surprising the insistence on the employment-orientation character of the new integration policy.

Another fundamental element which has not been mentioned so far but that is another relevant factor when considering the influence of integration and labour policies on labour market performances of migrants is citizenship[166]. Actually, since the last 2001 amendment of the Citizenship Act, citizenship acquisition has been further liberalised and has been given a basic role in the Swedish integration policy, within which, rather of being a reward of an already occurred integration, it is considered to be a further instrument beyond those above described to enhance the progressive integration of the non-Swedish born persons within the Swedish society. Therefore, having described the development over time of Swedish labour migration and integration policies, the following sub-paragraph is devoted to the evolution of Swedish citizenship legislation over time and to its role in relation to migration.

3.3. Become a Swedish citizen.

The Swedish attitude on citizenship, naturalisation in particular, as its evolution has to be considered firstly within the framework of Nordic cooperation since, particularly as regards Scandinavian countries, it has conditioned the content of legislation on the matter since the 1880s until the late 1970s. However, from that moment on, their legislation have started to partially defer and the amendments of the single national law on citizenship acquisition were not agreed within the framework of the Nordic cooperation anymore. These diverging paths were conditioned by the different attitudes that Nordic countries has assumed in dealing with immigration[167]. Precisely, those were the years in which the phenomenon stopped to be almost an solely made by Nordic citizens, and flows become more and more formed by non-Western

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[164] Although the voluntary character of participation has remained unchanged, in 2009 a nation wide final test of language proficiency has been introduced. A successful result after a twelve month course has been connected with the grant of financial incentives. A. WIESBROCK, cit., p. 52.

[165] IB., p. 58-59.

[166] On the positive correlation between labour market performances and naturalisation in terms of employment opportunities and in earnings for non-Swedish born citizens see P. BEVELANDER, R. PENDAKUR, *Citizenship, enclaves and earnings: comparing two cool countries,* in *Citizenship Studies*, 3-4, 2014, p. 384-407; IB., *Citizenship, Co-ethnic Populations and Employment Probabilities of Immigrants in Sweden*, in *Journal of International Migration and Integration*, 2, 2012, p. 203-222; M. ENGDAHL, *The Impact of Naturalisation on Labour Market Outcomes in Sweden*, in OECD, *Naturalisation: A Passport for the Better Integration of Immigrants?*, OECD Publishing, Paris, 2011.

[167] G. BROCHMANN, I. SELAND, *Citizenship policies and ideas of nationhood in Scandinavia*, in *Citizenship Studies*, 4, 2010, p. 440.

migrants. That was the point in time in which the relation between citizenship and foreigns integration started to become a matter of concern.

Sweden has nowadays one of the most liberal naturalisation policies among European countries[168] as one of the higher shares in citizenship acquisition[169]. A governmental inquiry on the Swedish citizenship carried out in order to consider further amendments to the Citizenship act has defined citizenship as: «[…] the most important legal relationship between the citizen and the state. Citizenship involves freedoms, rights and obligations. It is a basis for Swedish democracy and represents a significant link with Sweden»[170]. Nevertheless, in terms of rights, the hold of citizenship if compared to the status of permanent residents seems to add nothing relevant. This is more than comprehensible if observed within the framework of the Nordic welfare model and, more specifically, by considering the commitment of Sweden since its early days as an immigration country to assure non-nationals with the wider as possible equality of treatment in access to rights once residing in the country.

This said, the few rights reserved to Swedish citizens are the right to vote in national elections and to be elected in Parliament, the right to enter the country and to benefit from the higher as possible protection against expulsion, the access to a very limited range of jobs in the public sector and the possibility to do the military service, which is voluntary since 2010. In addition, since Sweden has become an EU member in 1995, Union citizens rights have to be included in the list of rights reserved to Swedish citizens. Therefore, the liberalisation trend rather than being explainable in terms of will to approximate the status of foreigners to that of citizens is much more explicable if connected with the remaining objectives pursued by the Swedish integration policies, beyond equal access to rights, since the very beginning, i.e. participation in society and inclusion, and, eventually, social cohesion. In this light, thus, is understandable the effort of the government to invest in the symbolic meaning of citizenship through the set up of official ceremonies. Funds were provided in the 2014 Budget for ceremonies to take place in all municipalities - before it was up to municipalities to decide if the ceremony would take place at the act of conferring the citizenship - from January 2015. However, the successful applicant can participate on a voluntary basis.

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[168] In MIPEX 2010 Sweden is in second place, beyond Portugal, in the «access to nationality» ranking. Cfr. http://www.mipex.eu/access-to-nationality

[169] R. BAUBÖCK, I. HONOHAN, T. HUDDLESTON, D. HUTCHESON, J. SHAW, M. P. VINK, *Access to Citizenship and Its Impact on Immigrants Integration. Europan Summary and Standards*, EUDO Citizenship, EUI, Fiesole, p. 22, at http://cadmus.eui.eu/bitstream/handle/1814/29828/AccesstoCitizenshipanditsImpactonImmigrantIntegration.pdf?sequence=1

[170] *The citizenship inquiry*, Swedish Government Official Report, Ministry of Employment, 29 April 2013, SOU 2013:29, p. 42, at http://www.government.se/content/1/c6/21/57/28/270b4587.pdf

Nordic cooperation has been taken in consideration above particularly in relation to its influence and role as regards labour migration and movement of persons across Nordic countries borders as it has developed in the post-WWII period when it was formally resumed. However, as described in the beginning of this chapter, the Nordic cooperation was already ongoing since the late 1870s, and from this moment on the cooperation has impacted on the content of Nordic countries' citizenship laws. Actually, before the turn of the twentieth century, Norway, Denmark and Sweden would all adopt their first Citizenship acts. Despite the numerous amendments that would occur in the meanwhile, a definite departure from the Nordic cooperation in citizenship matters would only take place at the beginning of the twentieth-first century, whereas before Scandinavian citizenship laws until 1980 would be adopted on the basis of a identical draft among the three countries. Eventually, not only the Nordic formal cooperation on the citizenship issue has been in place for over a century, but it should be also added to the picture the privileged treatment as regard citizenship acquisition of which Nordic citizens would benefit from more favourable conditions, in terms of a reduced residence requirement, to naturalise in another Nordic country.

Although the most relevant act for the analysis is the most recent Citizenship act adopted in 2001, an outline of the basis of the previous acts is useful in order to comprehend the origin of the principles that still inform the Swedish attitude towards the grant of citizenship. It is worth of to be recalled before going into detailed of the single acts that Sweden, until the 1930s but especially until the post-WWII period, when the Nordic Labour market entered into force and refugees started to arrive in the country, has been an emigration country, thus the amendments of the Swedish Citizenship laws adopted over time should be looked at always considering this aspect. Thus, it is possible to affirm, in general term, that citizenship and migration have always developed one alongside the other within the Swedish legal systems even though over time immigration mostly from non-Western countries has taken the place of emigration of Swedes abroad and of flows made by returning emigrants.

The first formal act adopted to regulate the acquisition of the Swedish citizenship dated back to 1894, it was a product of Nordic cooperation in the matter and a ratification of the developments already fixed in the practice[171]. Although *jus sanguinis*

[171] Nationality was for the first time regulated within the 1809 Constitution that, however, only established the grant and protection of civil rights to those holding the Swedish citizenship. The King was the authority that had the power to confer the Swedish citizenship to a foreigner by naturalisation. This power would be fixed in the Instrument of Government of 1856-1957 and in the followed royal ordinance of 1858. I. BELLANDER, *Suède*, in B. NASCIMBENE, *Nationality Laws in the European Union. Le Droit de la Nationalitè dans l'Union Européenne*, Milano, 1996, p. 639-640.

is the principle on which the acquisition of the Swedish citizenship has been based since the very beginning and was fixed in the 1894 Citizenship act - the Swedish citizenship was acquired by birth if the child's father was Swedish and it was born in wedlock - already within that piece of legislation the principles of *jus soli* and *jus domicilis* emerged as relevant. At the one side, a further mode of acquisition was provided combining the two latter principles: citizenship was automatically acquired at the age of twenty-two, if the person was born in the country and has always resided there. In case, the acquisition extended also to the wife and children. In general, women and children under the majority age acquired citizenship as a consequence of the husband and father acquisition of it. On the other side, a Swedish citizen that had been residing abroad for more than ten years, without declaring the will to retain its Swedish citizenship - and renewing it every ten years - lost it. Nevertheless, the resume of residence in the country, would led also to the recovery of the citizenship.

Both modes of acquisition and recovery just described has to consider that dual nationality won't not be accepted in Sweden until the 2001 amendment. Therefore, the acquisition as the recovery were not possible if the person had acquired in the meanwhile a foreign citizenship and has not renounced to it.

A new Citizenship act was adopted in 1924[172], *jus sanguinis* remaining the unchanged basic principle but alongside the *jus domicilis* was gaining momentum for both the acquisition and loss of citizenship. Precisely, five years of residence in the country, a good conduct and the possession of sufficient financial means to maintain family members were the sole requirements to be fulfilled by the foreigner who had reached the age of twenty-one, and did not hold another citizenship, to be naturalised. Similarly, a persons who had acquired the Swedish citizenship by birth but had never resided in the country lost the citizenship automatically reaching the age of twenty-two. Furthermore, the acquisition of a foreign citizenship would not have led to the automatically loss of the Swedish citizenship unless the person had not taken up residence in the foreign country. The prominent role of the *jus sanguinis* principle was, however, reaffirmed by stating that only those who were citizens by birth could have recovered their lost citizenship by resuming residence in the country. Therefore, the two principles in this case seems to be mutually reinforcing each other.

The consequences of WWII and the resume of Nordic cooperation led to the adoption of a new Citizenship Law in 1950. Similarly to the former Citizenship acts, although this would be the last time, also the 1950 act was based on a common draft

[172] Norway has adopted a new Citizenship Act that same year followed by Denmark in 1925.

among Nordic Countries. The act conformed to the international trend of the period which was of an equal treatment between women and men in the matter of citizenship acquisition. Thus, the marriage of a Swedish woman with a foreigner did not led to the loss of her Swedish citizenship anymore, and the foreign woman who married a Swedish man did not acquired automatically the Swedish citizenship but could benefit from more favourable requirements if it wished to acquire it by naturalisation. Likewise the former reform, the importance of the requirement of residence in the country increased. The years of residence required to foreigners to naturalised was elevated from five to seven. For those who had lost the Swedish citizenship and wished to recover it, the automatic recover by resuming residence was substituted by acquisition by notification. Between the age of twenty-one and twenty-three, those who had not a foreign citizenship, was born in, and has uninterruptedly resided in the country, has a right to acquire the Swedish citizenship by notification.

No other Citizenship acts were adopted before 2001, however, the 1950 act was amended several times in 1969 and during the 1970s to advance further in the already initiated process of adaptation to international developments - especially as regards gender equality and family law - in the citizenship field. In 1969 the conditions for recovering citizenship were eased: it was not required anymore to be born in the country. In 1972, an amendment made the status of adopted children equal to those of other children as regard citizenship acquisition. In 1979 a further amendment stated that a children which was under custody of a Swedish citizen, and had not otherwise acquired the Swedish citizenship, acquired it by notification. Moreover, from this moment onwards, the acquisition of citizenship by birth was based on the mother's citizenship regardless of the child being born within or without wedlock.

On acquisition by naturalisation, a 1976 amendment brought back to five the required years of residence, and provided a favourable treatment to Nordic citizens under this aspect, since the requirement for them was further reduced to two years. Furthermore, the support requirement was abolished as was that of demonstrating language proficiency. Finally, two years before, in 1974, with the entry into force of the Instrument of the Government - one of the fundamental laws of which is made the Swedish Constitution - the prohibition of deprive a Swedish citizen of this status was stated, precisely, at the constitutional level. Furthermore, it also stated that provisions on citizenship were to be laid down by the law[173].

[173] Cfr. Chapter 8, art. 2, Instrument of the Government, Swedish Constitution.

3.3.1. The 2001 Citizenship Act.

Currently, the modes of acquisition and loss of the Swedish citizenship are regulated by the 2001 Citizenship Act. Its adoption, judged necessary to modernise the law in the matter and to adjust it to the changed characters of the Swedish population - not foreseen characteristics in the 1950s as the high percentage of non-nationals and the transformation in a country of immigration - was not anticipated by wide debates at the national level on the content of the reform. This is explicable by recalling the almost equality of status between permanent residents and citizens, thus attentions and criticism were focused more on the former rather that on the conditions of grant of the latter. Moreover, the 2001, although it has brought some importance changes to the previous regime, it has, at the same time, confirmed former trends and principles. Eventually, the focus was more on the possible symbolic meanings of citizenship acquisition and of its role in the integration process of migrants at this point in time and less on the modes of acquisition[174].

It made an exception to this no-debate situation preceding the adoption of the 2001 act, the final acceptance of dual nationality by Sweden[175] which is surely one of the major novelties of the 2001 reform. Actually, the avoidance of double nationalities was actually one of the objectives of the 1950 Citizenship Act[176] and, as it was in general for the citizenship matter, it was shared aim among Nordic Countries which had all ratified the 1963 EC Convention on the Reduction of Cases of Multiple Nationalities[177]. However, one of the other relevant aspect and points of departure from the previous attitude of the 2001 Citizenship Act is the eventual abandonment by Sweden of the Nordic cooperation in the citizenship matter. Precisely, this departure is confirmed by comparing the current Norwegian and Danish Citizenship acts which still requires the denunciation of the former citizenship by naturalised Norwegian and Danish citizens[178]. The leading factors of the Swedish change of attitude were immigration, the development concerning this issue at the international level and the role of Swedes expatriates. Consequently, Sweden has denounced the 1963 EC Convention on the

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[174] H. LOKRANTZ BERNITZ, *Country Report: Sweden*, Robert Schuman Centre for Advanced Studies, EUDO Citizenship Observatory, European University Institute, Florence, 2012, p. 8.

[175] H. LOKRANTZ BERNITZ, H. BERNITZ, *Sweden*, IN R. BAUBOCK, E. ERSBOLL, K. GROENNENDIJK, H. WALDRAUCH (EDS.), *Acquisition and Loss of Nationality. Volume 2: Country Analyses*, Amsterdam, 2006, p. 526.

[176] Nevertheless a series of exceptions provided for in applying the provisions of the 1950 Citizenship Act had made dual citizenship already a not uncommon situation in Sweden before the 2001 act, therefore being one of the elements that has made easier its acceptance. IB.

[177] Convention on the Reduction of Cases of Multiple Nationality and on Military Obligations in Cases of Multiple Nationality, Council of Europe, Strasbourg, 6.5.1963.

[178] G. BROCHMANN, I. SELAND, *Citizenship policies and ideas of nationhood in Scandinavia*, cit., p. 434.

Reduction of Cases of Multiple Nationalities and has ratified the 1997 European Convention on Nationality[179] which is neutral in respect to dual nationality.

The basic principle of acquisition of the Swedish citizenship remained untouched by the 2001 act, thus *jus sanguinis*, primarily based on the mother's citizenship as it was since the 1950 act, it is still the rule among the modes of citizenship acquisition. However, this principle was completed by a *jus soli* element in cases when the Swedish citizenship cannot be acquired by following a matrilineal line, and the citizenship can be equally automatically acquired at birth if the child is born in Sweden and the father is a Swedish citizen. Similarly a child having a Swedish father and an non-Swedish mother, thus not acquiring citizenship at birth, can automatically acquire it once the parents get married, and the child is unmarried and has not reached the majority age yet[180].

The third principle which has been acquiring significance within those informing the citizenship modes of acquisition is *jus domicilis*, i.e. residence in the country. It is maybe surprisingly, but not in the Swedish context considered the evolution of the matter, observing that precisely the increasing importance over time of domicile - as representing a *de facto* connection between persons and the state in which it is residing in - over the legal status of citizenship has contributed in depreciating the the latter, at least, in term of rights differential. Therefore, if alongside this observation are also take in account the high naturalisation rate that Sweden scores, an argument can be brought in favour of the non-irrelevance of being a citizenship at least, if not in terms of access to rights, in other relevant aspects of foreigners' integration as security of the status[181] left aside its symbolic meaning.

This *de facto* link between the person and the state represented by residence in the country is reflected in the further mode in which the Swedish citizenship can be acquired, i.e. by notification. This mode leaves no discretion to the government as required attribution of citizenship, that is to say that those included among the categories that can benefit from this mode of acquisition are entitled to a right of acquisition once the requirements are fulfilled. The notification procedure are available to children who has not acquired citizenship automatically at birth but whom father is Swedish since birth. Relevant for persons with an immigration background are the possibility to take advantage of this procedure for children who hold a permanent residence permit and have been domiciled in Sweden for a minimum of five years. Foreigners between the age

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[179] European Convention on Nationality, Council of Europe, Strasbourg, 6.11.1997.

[180] Modes of automatic acquisition are also provided to foundlings and adopted children if the adoption has taken place in Sweden or in another Nordic country or is otherwise legally recognise in Sweden.

[181] A further set of data which can be brought in favour of such reasoning is that the higher percentage of naturalisation within EU countries are observable among foreigners of non-Western low-income countries. Cfr. *Report. Naturalisation and the Labour Market Integration of Immigrants*, International Migration Outlook, SOPEMI, OECD, 2010, p. 161.

of eighteen and before reaching the age of twenty can also make use of the procedure if they hold a permanent residence permit and have been residing in the country since the age of thirteen.

That this mode of acquisition is considered to be a more advantageous procedure in comparison to naturalisation - in addition to the fact that those admitted to take advantage of it have a legal entitlement to acquire the citizenship if they fulfil the requirements - is that the same it is also one of the modes in which Nordic citizens, which are the only category of citizens in relation to which an exception to the equality principle is made, can acquire the Swedish citizenship. To them are required five years of residence in the country, the respect of the good conduct clause but only limited to not having been sentenced to imprisonment during its residence in Sweden and, eventually, to have acquired it (Nordic) citizenship of origin not by application.

The last category admitted among the beneficiaries of this procedure are stateless children, if they have been stateless and resident from birth in the country and hold a residence permit. Persons who have become stateless afterwards, can still acquire citizenship by notification, if they have at least eighteen years old and before reaching the age of twenty, hold a permanent residence permit and have been residing in the country since the age of fifteen.

This mode of acquisition has far reaching consequences for, but not only, persons with an immigration background because children under the age of eighteen, unmarried, residing in Sweden acquired citizenship by derivation from its parents acquisition by notification if the parent has the custody of the child, or the join custody if the other parent is a Swedish citizen as well, or when the parents become Swedish citizens at the same time.

Finally, having a residual character in relation to the above described modes, there is acquisition by naturalisation. If the rule is *jus sanguinis*, in certain circumstances eased by elements of *jus soli,* and acquisition by notification for persons with an immigration background clearly goes at the advantage of migrants' second generation, the acquisition by naturalisation is the principal mode for foreigners residing in Sweden - which are mainly composed by family members of migrants and refugees - to acquire the Swedish citizenship. Contrary to notification, state authorities retain a discretionary power in deciding on the grant of citizenship to those who fulfil all the requirements. In this regard, it is worth to notice that decisions on naturalisation could not be submitted to judicial review before 2006[182], with the exception of cases of substantial defects which could be examined by the Supreme Administrative Court. Currently, decisions of the

[182] Before, the person directly affected by a decision of the Swedish Migration Board could appeal to the Aliens Appeals Board which decision was final. These have ceased to exist and their competences ha been transferred to *ad hoc* Migration Courts.

Swedish Migration Board - that is the authority in charge of deciding on acquisition by naturalisation or notification, with exception of those decisions regarding Nordic citizens of which the county administrative board is responsible - can be appealed to Migration courts and further appealed to the Migration Court of Appeal[183].

The five requirements that has to be fulfilled in order for citizenship to be acquired by naturalisation are established in the eleventh section of the Citizenship act. For the procedure to be started the payment of a (modest) fee is required, even if refugees, stateless persons and those who hold a Swedish travel document are exempted.

Firstly is required to the applicant to be able to prove its identity. Apart from presenting a valid identity document or a travel document properly issued and in a state that is good enough to serve the purpose, alternatives are provided in case of impossibility to obtain such a document. If a residence period of at least eight years are proved as the information about the person's identity are credible the requirement is considered to have been fulfilled. Similarly, the foreigner identity can be proved by the spouse or by a closer relative which has become a Swedish citizen and has proved its identity on the basis of a valid document. In any case, the personal relation between the applicant and the spouse has to be longer enough to made the information provided by the latter credible. The importance of this requirement - represented also by the few exceptions that are made to it and by the alternatives modes provided to its fulfilment - are understandable once again in light of the fact that an important part of the foreign population residing in Sweden is made of refugees which not rarely could find difficulties in easily fulfil it considering the situation of their countries of origin especially in the moment in which they left them to seek asylum.

Secondly, the applicant has to have reached the age of eighteen at least in order to ask for citizenship through naturalisation. Exceptions are provided in case of children included in the parents' application, or for children arrived in Sweden seeking asylum.

The third and fourth requirements are deeply connected since it is required to the applicant to hold a permanent residence permit which is granted after five years of continuos and legal residence in the country. This means that during this time the person has to fulfil the requirements to be granted residence in the country according the juridical institute of *hemvist*. Thus, being physically present in the territory is not sufficient since it is also required to have set a permanent home and to regularly seek employment if the person is unemployed[184]. Furthermore, it is also required to have been domiciled in Sweden for the same amount of time. However, various exceptions are foreseen as regards the domicile period, or rather, the requirement is eased for certain categories of foreigners because of their more privileged position, relation with a

[183] H. LOKRANTZ BERNITZ, H. BERNITZ, *Sweden*, cit., p. 543-544.

[184] See *supra* note 175.

Swedish citizen or vulnerability. Precisely, for Nordic citizens the requirement is reduced to two years, and to four for stateless persons and refugees. Three years of domiciled are required to spouses, registered partners or persons cohabiting with a Swedish citizen for the last two years at least. If the Swedish citizen has or has had another foreign citizenship, at the moment of application it should have been a Swedish citizens for already two years at least[185].

The last requirement is that of good conduct, and it was present already in the 1894 law on citizenship, meaning that to the applicant is required «to lead and have led a respectable life»[186]. In comparison to the previous requirements exceptions are very few - humanitarian reasons or if the applicant has resided for a very long time in the country - but the commission of a crime does not definitely precluded its fulfilment. On the basis of the type of crime committed and of the following sentence a, so called, qualifying period is imposed, i.e. the applicant will have to wait for its elapse before the application can be successful.

Eventually, the modes in which the Swedish citizenship can be lost reflect once time more the importance attributed to the domicile principle and of its representativeness of a relationship between the state and the individual. A Swedish citizen born abroad, who has never been domiciled in the country, and who has never been in the country in such a way that prove that it has ties with it, reaching the age of twenty-two (involuntary) lose the Swedish citizenship. The lost applies also to the children who have acquired citizenship by deriving it from citizenship. This event is avoidable if the person applies and are granted a permission to retain the citizenship, or if the loss of the Swedish citizenship make the persons stateless. A mode of voluntary loss, i.e. release from the Swedish citizenship is also provided as a positive outcome of an application make by a Swedish citizen to this scope. Nevertheless, the principle of avoid statelessness limits this possibility uniquely to those cases in which another citizenship has been already acquired by the person who has made the application.

These are the only modes in which the Swedish citizenship can be lost since within the Swedish legal system a positive decision on the grant of citizenship cannot be annulled for any reason. Therefore, it is understandable that denaturalisation is a pretty common matter of debate when discussing possible future amendments to the Citizenship act, as no means are currently provided neither to withdraw citizenship in case of evident wrong decisions or of acquisition on the basis of false allegations, documents or fraud.

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[185] Within practice a further cases of exception to these requirement are provided on individual basis, e.g., for humanitarian reasons or in favour of expatriates who had reestablished their residence in Sweden, or to persons that have been married for, at least, ten years to a Swedish citizen abroad and does not live in its country of origin.

[186] A. WIESBROCK, cit., p. 56.

3.3.2. The 2002 Nordic Agreement on the Implementation of Certain Provisions Concerning Nationality.

In the end, the 2002 Agreement Between Denmark, Finland, Iceland, Norway and Sweden on the Implementation of Certain Provisions Concerning Nationality[187] has to be mentioned. At its enter int force the agreement concluded at Copenhagen on 23 October 1998 between Denmark, Finland, Iceland, Norway and Sweden on the implementation of certain provisions concerning nationality ceased to have effect. Therefore, despite in the early 2000s Nordic cooperation was abandoned in citizenship matters - i.e. reforms of Nordic countries acts regulating modes of acquisition and loss of citizenship were not based anymore on a (Nordic) common draft - this agreement provides for further grounds on the basis of which Nordic citizens receive a privileged treatment compared to other non-nationals residing in Nordic countries.

The years of residence in a Nordic country shall be counted as years of residence spent in the Nordic country of which the applicant wished to acquire the citizenship in case of applicants make by adopted children who have not already attained the age of sixteen and have resided in a Nordic country for the previous five years, and children under the age of twelve[188]. Also as regard the statutory limitation after which the Swedish citizenship is involuntary lost, Nordic citizens who have resided in a Nordic country for a minimum of seven years shall not to be considered as having born abroad, i.e. one of the three conditions that lead to the loss of citizenship is considered to have not been fulfilled.

More favourable conditions to acquire a Nordic citizenship are also provided by means of application. If the Nordic citizens has reached the age of eighteen, has been resident in another Nordic country for seven years at least, has not been sentenced to imprisonment during residence, and has not acquired the citizenship of the Nordic country by naturalisation, it is entitled to acquired the citizenship of its Nordic country of residence by application. In case of loss of a Nordic citizenship, if the applicant was a former citizen of another Nordic country, it can regain the lost citizenship by reestablishing its residence in the latter. This provision is of mayor importance for those Nordic citizens as a consequence of the application of national provisions aiming at avoiding dual nationality which is still the case in Denmark and Norway. For these two latter cases of acquisition and regain of a Nordic citizenship a further provision of the agreement stated that the unmarried children of the applicant under the age of eighteen

[187] Agreement Between Denmark, Finland, Iceland, Norway and Sweden on the Implementation of Certain Provisions Concerning Nationality, Copenhagen, 14 January 2002, entered into force 18 October 2003.

[188] Cfr. arts. 1 and 2, ib.

shall similarly acquire the nationality of the parent. The agreement has a final provision not to overcome the principle of avoidance of dual nationality still in force in some Nordic countries as just said. Thus, the acquisition of another Nordic citizen by application or its regain is admissible only if the applicant declare that this will lead to the loss of its other Nordic citizenship[189].

Despite the formal cease of Nordic cooperation on citizenship matters, the effect of the 2002 agreement seems, on the contrary, to have resumed it although on partially different basis than before. Actually, if after the 2000s Nordic countries have differently transposed in their Citizenship Acts their interpretations and reactions in relation to their respective transformation in immigration countries and multinational societies - considering also that their immigration and integration policies have started to diverge since 1980s - the principles informing those acts have remained the same in their content although not in details[190]: *jus sanguinis* in the first place, eased by elements of *jus soli* and a recent emphasis on *jus domicilis*. The 2002 agreement then appears to mutually reinforce commonalities among Nordic countries in the matter of citizenship, further enhancing their cooperation in this field to the extent to which they can go at the advantage of Nordic citizens and, at the same time, it leaves room for manoeuvre requirements in conformity with national preferences.

It can certainly be affirmed that the current mode deeply differs from the previous consuetude of amending citizenship laws on the basis of a Nordic common draft. Nevertheless, the detachment among Nordic citizenship acquisition legislation has taken place first and foremost in relation to non-Nordic citizens, whereas cooperation, and the consequent privileged treatment of Nordic citizens, has being preserved as much as possible. The more problematic point of disagreement being tolerance towards dual nationality of which the consequences has clearly conditioned the content of the agreement. On the other hand, concerning non-Nordic citizens, it is on the symbolic meaning to be given to the citizen status and the role to be played by it in the process of integration of migrants the points of which Nordic citizenship acts has differed more, Sweden considering the possibility of become a citizenship as an ex-ante instrument of integration, Norway and Denmark as an ex-post recognition of an already occurred integration[191]. Thus, the commitment towards integration *via* citizenship acquisition is shared, the divergence staying in the instruments to attain it.

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[189] Cfr. art. 7.

[190] G. BROCHMANN, I. SELAND, *Citizenship policies and ideas of nationhood in Scandinavia*, cit., p. 438.

[191] Until 1980s Scandinavian integration policies have advanced alongside with Sweden as the leading country. However, even if afterwards they have partially diverge a common recent emphasis on the duty side of foreigners' rights is observable as a common element, although more pronounced in Denmark. G. BROCHMANN, *Scandinavia*, in J. F. HOLLIFIELD (ET AL) (EDS.), *Controlling Immigration*, Standford, 2014, p. 293-294.

The relevance of language proficiency in order to acquire citizenship is a rather significant indicator of the different attitudes. Such requirement was present in the 1950 Nordic common draft, and was required by all the Scandinavian countries as mandatory in order to acquire citizenship. However, while Sweden abandoned it in the 1970s[192], Denmark made a successful language and civic test as one of the compulsory requirements that foreigners has to fulfil to acquire the Danish citizenship in 2006. Norway has adopted an half-way position: would-be Norwegian citizens, from 2005, are compelled to follow a language course but the exam is voluntary, thus, a positive outcome of the same is not required in order to apply for citizenship. More generally, and without altering the traditional framework of their citizenship laws, recent reforms of Nordic citizenship laws share the attempt to provide modes to instrumentally use citizenship for foreigners' integration. The difference is made by placing citizenship acquisition at the end of the integration path or, on the contrary, to consider it as a step of an integration process that has to continue and goes beyond its acquisition.

4. Final remarks.

The always quoted characteristic of Swedish legislation and policies concerning foreigners is its liberal character alongside the rather generous and open family and refugee policies. However, a more careful look highlights that although the liberal character has been confirmed by the latter reforms of the citizenship act, the labour immigration policy and the integration policy, particularly as regard newcomers, at the other side of the coin, we cannot but note that has corresponded a tightening of family reunification requirements and refugee policy. Although the increase restrictiveness of those policies is far from come into question the overall liberal attitude of Sweden policies towards foreigners, it is significant since these have been until recently the major component of immigration flows towards this Nordic country. Therefore, it appears that the country is constantly attempting to improve its integration and citizenship policies in order to further include resident immigrants in the system - which essentially means in the labour market and the welfare system - to fill the gap frequently

[192] The possible reintroduction of a language proficiency test as a requirement for citizenship acquisition was largely discuss in Sweden during the 2002 electoral campaign on the basis of the report of the committee set in 1997 to discuss measure to increase the significance of citizenship in the integration process. Since citizenship is view as a stage of the integration process of a foreigners and not as a reward to be given at the end of a successful integration path, the introduction of such a requirement has been judged as counterproductive for integration. This does not meant that the learning of the Swedish language is not considered a fundamental part of the integration process, but that the final position on the subject is that it is up to the state to provide foreigners with the means to learn the national language, and this is done within the policy for newcomers integration - although their attendance is voluntary - i.e. from the moment in which they enter the country. To require it as necessary for acquiring the citizenship would conflict with the neutral character of the welfare state and not to consider the disparity of opportunities that migrants have in accessing language courses. K. BOREVI, *Sweden: The Flagship of Multiculturalism*, cit., p. 81-84

highlighted between the high scores of its labour and integration policies on papers with the poor actual results. On the other side, however, the results of the debates around the impact of immigration, or rather, of a certain type of immigration on the sustainability in the long-term of the (welfare) system seems to have led to a more selective attitude in relation to migration in comparison to the past and to an attempt to favour, or at least to provide less strict conditions to an immigration that can better contribute to the maintenance of the system. Eventually, numerous reforms have signed immigration, integration and citizenship legislation and policies but the underlying motivation and line of though seems not to have changed: if a universal welfare is aimed at promoting equality among its beneficiaries and requires the contribution of the higher percentage as possible of the population to contribute to its sustenance through labour, so a controlled labour market, a controlled inflow of new potential beneficiaries and workers and an effective integration policy cannot but followed.

Finally, movement of persons - intended as inflows and outflows of non-citizens - across Swedish borders has led to a multilayer picture because of its membership in the Nordic cooperation and to the European Union. In respect to labour migration, the Nordic layer can be said to have been absorbed by the EU/EEA layer, completely in relation to EU and EEA citizens but also, even if to a less extent, in relation to third-country nationals. Actually, if it can certainly be affirmed that the EU membership has made EU member states' immigration policies reciprocally influenced by other EU members policies and to a less modifiable according to the sole national preferences in comparison to the past, it seems also that on Nordic attitudes and policies it has had a relative low impact, at least on labour immigration of non-EU/EEA citizens if not on family reunification and asylum policies. Instead, if we consider citizenship acquisition and integration the picture is rather different. To some extent this affirmation is quite obvious considering the deep connection among these matters, their being sensitive issues, a jealously preserved national sovereignty domain and, eventually, the lack of competence of the EU in respect of both. However, although integration policies has progressively lost over time their Nordic character, on the contrary, the, so called, Nordic layer is a significant feature of Nordic countries modes of acquisition of citizenship. This is not intended in terms of convergence among Nordic citizenship policies which, to some extent, as saw above, have taken different directions in the last decade. Instead, it aims at highlighting the privileged treatment that Nordic citizens (still and increasingly) benefit from once they wish to acquire another Nordic citizenship, apart from the obstacles pose by the disparities on dual nationality. The EU dimension in this regard is completely absent, and EU/EEA citizens are in the same position of third-country nationals. Nevertheless, it can be argued that for EU/EEA citizens it is easier to fulfil

those requirements related to a continuos and lawful residence the country. To conclude, if with regard to migration the Nordic connotation of polices has been ousted by the EU dimension, instead citizenship modes of acquisition have still - even though less prominent than in the past - a significant Nordic character.

FIFTH CHAPTER

SWITZERLAND.

Multiple levels of government for multiple status.

Summary: 1. Introduction. - 2. The Swiss Federation: main features and historical background - 3. Swiss Uniqueness in Immigration policies. - 3.1. Swiss immigration policy - 3.1.1. The EU/Swiss attempts of approximation: the «unequal inclusion» - 3.2. The current immigration policy: the 2008 «Federal Act on Foreign Nationals». - 3.2.1. The foreseen reforms of the Swiss immigration policy: focus on labour migration and integration. - 4. Swiss Naturalisation procedure: the three-level citizenship. - 4.1. The current regime. - 4.2. The New Swiss Citizenship Act. An halfway reform, a half solution. - 5. Conclusions.

1. Introduction.

Uniqueness is the most common adjective used by scholars to describe the Swiss Federation. Precisely, uniqueness of the Swiss federal state, supposedly, lies in the institutional architecture that was provided and adapted over time in order to keep together and make the most of the peaceful coexistence under the same roof of diverse national communities distinguished along linguistic, religious and cultural lines, elements that have often played the role of potential centrifugal forces. In other words, the interest seems to reside on exploring how the constant and always present tensions amongst its different units were channeled through the provision of an *ad hoc* institutional structure, thus, on what are the modes in which equilibrium among all its federal units is (attempted to be) maintained and adjusted over time, and addressed in a way that continue to result in a long-lasting political stability and, despite the wavering of the last fifty years, healthy economy[1].

This uniqueness, at any rate, does not preclude to apply to the Helvetic Federation the labels traditionally used to classify federal states. In fact, starting from the assumption that Switzerland is composed of diverse nations[2], here, as in other cases - e.g. Belgium and Canada - federalism was used as a tool to accommodate national communities' demands[3]. Consequently, Switzerland has been defined as a classic

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[1] J. E. LANE, *The Swiss Labyrinth. Introduction: Switzerland - key institutions and behavioural outcomes*, in *West European Politics*, 2, 2001, p. 2.

[2] The question of if Switzerland can or cannot be considered a nation or a multi nation state was largely debated among scholars, and has resulted in the attribution of the most diverse labels to the Swiss federation. For a up to date picture of the various voices and models that have informed this, probable never ending debate, see M. HELBLING, N. STOJANOVIC (EDS.), *Switzerland. A Nation-State or a Multi-National State?*, in *Nations and Nationalism*, 17, 2011.

[3] W. KYMLICKA, *Multicultural citizenship within multination states,* in *Ethnicities*, 3, 2011, p. 282.

federation, historically, a case of non-centralisation[4], a decentralised federalism and, in its more recent development, a co-operative federalism[5]. However, considering the historical events that have given origin to the Swiss Federation, the high degree of autonomy that its sub-nationals units have kept until the present time is an historical legacy of their past as independent units, more than a tailored feature of the federation itself. This could serve as a partial explanation for the strong defence of Cantons and Municipalities of their autonomy till today, and of the instrumental use they make of the sub-national and federal institutions in order to defend and achieve their own particular aims[6].

However, this uniqueness needs to be contextualised by including in the picture the relations established over time among the federation and its EU member states neighbouring countries. In respect to that assumes relevance the well-known the state neutral attitude at the international level. Moreover, the attempt not to be (mostly economically) discriminated as an outsider to the common market has led to the EFTA membership, the failed attempt to be part of the EEA and, lately, to the signature of a series of bilateral agreements with the European Union (EU) entered into force in June 2002 and December 2008. Particularly, in the negotiations of the latter, free movement of persons has played a great part being a high contested field for its potential implications for the restrictive immigration policy pursued until that moment.

Finally, another specific feature of the Swiss federation needs to be mentioned in order to dispose of a complete outline: i.e. its being an «active referendum democracy»[7] where a large use of the direct democracy instrument *par preference*, referendum, is observable both at the federal and at the sub-national levels. However, it should distinguish two types of referendum: a referendum is mandatory, among other reasons, when an amendment to the federal constitution or the accession to a supranational organisation is under discussion[8]. On the contrary, on enumerated acts - as federal laws or certain international treaties - a group of 50.000 voters or eight Cantons are enabled to propose a referendum[9]. This instrument has had a great impact on the development of the Swiss federalism if we consider, firstly, that all proposals which have attempted to modify the established division of competences in favour of the federal level have required a constitutional amendment. Secondly, while in the optional referendum are counted solely the votes of Peoples - that is how the Federal Constitution calls national

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[4] W. LINDER, A.VATTER, *The Swiss Labyrinth. Institutions and Outcomes of Swiss Federalism: The Role of Cantons in Swiss Politics*, in *West European Politics*, 2, 2001, p. 95.
[5] J. E. LANE, ibid.
[6] W. LINDER, A.VATTER, cit., p. 101.
[7] J. E. LANE, cit., p. 4.
[8] Cfr. art. 140, Federal Constitution of the Swiss Federation of 18 April 1999.
[9] Cfr. art. 141, ibid.

communities - the mandatory referendum requires both the vote of Peoples and of the Cantons, i.e. the, so called, double-majority principle. Briefly, a proposition in order to be approved has to be voted by the majority of the Peoples and of the Cantons, where the result of the vote in the Canton determines the vote of the Canton as a whole[10]. According to scholars' analysis, the extensive use of this instrument, in combination with the action of the double-majority principle, explains the maintenance over time of the high level of decentralisation of competences in favour of sub-national units. Moreover, the increasing imbalance of the population amongst different Cantons has favoured the smallest and rural Cantons - assuming that in the majority of cases the maintenance of the *status quo* will be preferred, transforming the double-majority rule in «an effective veto-power» instrument[11]. That is to say that this direct democracy instrument has been used by sub-national entities in a way that have allowed them to prevent major changes in the system and to largely maintain the *status quo*[12].

As expected, the above mentioned features - federalism, consociationalism, direct democracy, high degree of autonomy of sub-national units - all have a significant impact on the modes in which immigration and citizenship are governed within the Swiss Federation[13]. At the same time, and put aside the uniqueness, trends and challenges in immigration and citizenship fields experienced by this country are alike those of other European states with comparable immigration patterns from the post-WWII period onwards[14], just as western democracies' growing concerns related to the identity aspect of citizenship as a vehicle to build social cohesion within increasing diverse national societies[15]. Therefore, the current content of Swiss immigration and citizenship policies can be considered to be a product of the combination of its uniqueness with the unavoidable necessity to cope with the evolving international context as with the changing patterns of migration flows towards and within Europe. Nevertheless, despite numbers leave no room for a definition of Switzerland other than

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[10] Cfr. art. 142, 1 and 2.

[11] W. LINDER, A.VATTER, cit., p. 99; J. E. LANE, cit., p. 6.

[12] W. LINDER, A.VATTER, cit., p. 98.

[13] G. D'AMATO, *Switzerland*, in L. F. SEIDEL, C. JOPPKE, *Immigrant Integration in Federal countries*, Montreal, 2012, p. 162.

[14] E.g., Belgium, Sweden and Switzerland, among other Western European countries, are grouped together because countries of destination of mass immigration flows in the post-WWII years which were necessary to overcome labour shortages. In addition, a similar restrictive turn is observable as a consequence of the 1970s economic crisis which led to the, so called, «immigration stop». G. FREEMAN, *Immigration Politics in Liberal Democratic States*, in *International Migration Review*, 4, 1995, p. 889-893.

[15] C. JOPPKE, *Immigration and the identity of citizenship: the paradox of universalism*, in *Citizenship studies*, 6, 2008, 533; W. KYMLICKA, cit., p. 281.

as an immigration country already since the nineteenth century[16], this does not correspond to the self-perception of the country on the issue, which, actually, does not define itself as such[17].

Before going into details of immigration and citizenship legislation, it is worth to delineate the main features of the Swiss federation and of the functioning of its most relevant institutions. Particular attention will be paid to the role of, and to the instruments at the disposal of sub-nationals units to interact with the federal level, since these are essential elements to comprehend the actual content and functioning the Swiss citizenship and immigration regimes.

2. The Swiss Federation.

The Swiss Federation birth dates back to 1848, the year in which the first Federal Constitution was adopted. However, its origins can be traced back until 1291, when the very first agreement was signed among the founder Cantons. Contrary to what could be expected, this five-century process was not linear over time, and was marked by the overlapping of different alliance pacts, which had mainly pursued the aim of reciprocal military assistance among the members and the maintenance of peace in a delimited geographical area, despite the disagreements due to different religious affiliations.

The constitutional history of the Swiss state truly starts in 1798 with the creation of the Helvetic Republic by the Napoleonic troops, an (imposed) centralised state that has tried to unify those that were before autonomous and sovereign entities. Though, the Swiss republican experience suddenly ended in 1803, substituted by the first confederal pact among the Cantons that gave back the previously lost autonomy. This was firstly amended in 1815, but was only the second amendment process that, finally, led to the approval of the 1848 Federal Constitution. This established the bicameral Parliament - composed by the National Council and the Council of States - and the Federal Council, i.e. the seven headed government. A minor amendment was soon brought in 1866, and a complete revision took place in 1874. This has introduced significant reforms the double-majority rule[18] for further constitutional amendments, the optional referendum, it has made permanent the Federal Court and considerably enlarged federal competences[19].

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[16] In 2013, 34.8% of the Swiss population had an immigration background, among which 27.8% were first generation migrants, of which 19.8 with a foreign citizenship, 6.9% were second generation migrants, of which 2.7% with a foreign citizenship. Cfr. Swiss Federal Statistical Office, Population, Migration and integration, Population by migration status, at http://www.bfs.admin.ch/bfs/portal/en/index/themen/01/07/blank/key/06.html.

[17] G. D'AMATO, *Switzerland*, cit., p. 163-164.

[18] The double-majority rule requires for a constitutional amendment to be passed the approval by the majority of the citizens and of the Cantons. On the consequences of this rule on the results of votes see J. E. LANE,*The Swiss Labyrinth: Institutions, Outcomes and Redesign*, London, 2013, p. 97-99.

[19] S. GEROTTO, *Svizzera*, Bologna, 2011, p. 25 ff.

Nevertheless, the Federal Constitution currently in force is the text approved in 1999 after a new total revision process which has aimed at updating the federal system according to the major changes occurred from 1874, and, to date, it has already been subjected to sixty minor amendments. It is worth of notice in this respect that the constant amendments of the constitutional texts adopted over time suggest to look at this phenomenon as a continuum process of adaptation of the legal system in which the Peoples of Switzerland, from the very beginning, were always been involved both as individuals and, since 1874, as cantonal citizens.

The strong autonomy accorded to sub-national units is a defining feature of the Swiss federalisms from the very beginning, and it is explained as an historical path-dependency[20]. The necessity to accommodate the interests of such diverse entities in terms of language, religion and ethnicity[21] led to the adoption of federalism as a structural power-sharing instrument and as a minority protection device, lastly resulting in the creation of one of the - defined as - most decentralised federal systems[22]. On this characteristic has lived on the never ending debate on the *to be or not to be* question of Switzerland being or not a nation[23], which has casted doubts on the validity of the thesis that considers the Swiss nation as based on the principle of the, so called, *Willesnation*, i.e. «nation by will»[24]. The first argument that is advanced to contradict this thesis is the heterogeneity that characterised sub-national units, i.e. the level of mixture of the elements on which basis Swiss Peoples are distinguished, since linguistic and religious differences are not geographically reflected neither by Cantons' nor by municipalities' borders. Secondly, none of the units have ever claimed independence or reunification with a supposed kin-state with which it shares, for example, language[25]. Thirdly, heterogeneity characterises Cantons also politically. This has led to the development of horizontal dynamics of power-sharing, in addition to the vertical ones among different

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[20] J. E. LANE, cit., p. 3.

[21] A. WIMMER, *A Swiss anomaly? A relational account of national boundary-making*, in *Nations and Nationalism,* 4, 2011, p. 719.

[22] W. LINDER, A.VATTER, cit., p. 109.

[23] «If we define nationalism as a political project – an attempt to achieve political independence or at least autonomy – then nations are best conceived as (imagined) communities of individuals within which this political project is widely shared. Correspondingly, nation-states can be defined as politically sovereign entities governed in the name of such a nation, rather than God's grace, dynastic succession, or one kind of imperial universalism or another», A. WIMMER, *A Swiss anomaly? A relational account of national boundary-making*, in *Nations and Nationalism,*17 (4), 2011, pp. 718-719. A. CHOLLET, *Swiss as a 'fractured nation'*, in *Nations and Nationalism*, 4 2011, p. 752.

[24] See in particular the fist criterion which, in Renan's theory, should be the basis of a nation: i.e. the community of interest, or said in different terms, the so called «civic nation», E. RENAN, *Qu'est-ce qu'une nation?*, 1947 (1882), Paris, p. 28. T. FLEINER, A. MISIC, N. TÖPPERWIEN, *Constitutional Law in Switzerland*, Alphen aan den Rijn, 2012, p. 190; O. ZIMMER, *Coping with deviance: Swiss nationhood in the long nineteenth century*, in *Nations and Nationalism*, 4, 2011, p. 760; P. DARDANELLI,, N. STOJANOVIĆ, cit., p. 367.

[25] A. WIMMER, cit., p. 719.

levels of government, and was realised through a system of proportional representation[26]. These elements account for the dynamism of the Swiss federalism, where the roles as majority and minority change in relation to the issue under discussion, requiring continuous negotiations and compromises[27].

The nature of the Swiss federalism has been variably defined, however, some definitions are fundamental to its comprehension: dualistic or decentralised, participatory, co-operative, executive and compromise. The dualistic nature is related to the division of competences amongst the central and the sub-national level: Cantons are entitled to all competences, apart from those which are specifically attributed to the Federation (3 and 47). The cantonal autonomy is guaranteed by the Federal Constitution but internally regulated by cantonal Constitutions themselves, of which the respect of the federal law is checked by the federal level[28]. In turn, the extent of municipalities' autonomy is delegated to Cantons to determine (50).

The participatory character derives from the means through which Cantons participate and influence the legislative process at the federal level, i.e. another institutional way to defend, and sometimes impose, their own particular interests. Moreover, Cantons are also part of the group of actors that participate in the consultative process, a phase of consultations that precede the presentation of «important legislation or other projects of substantial impact» to the Parliament (45 and 147)[29]. This pre-consultatory phase aims at creating the necessary consensus on the proposal in order to avoid the subsequent annulment of the legislative act by means of referendum. On this basis, it could appear that, formally at least, the role of Cantons is of a great relevance, nevertheless, the real measure of the contractual power of the actors involved in this process of consultation is determined by their ability to subsequently promote a successful referendum[30].

Finally, the cooperative and executive characterisation of the Swiss federalism is highly marked not only by the formal and substantial manifestation of Cantons' autonomy and influence over federal policies, but also by a great degree of cooperation amongst all levels of government. Guided by the principle that all units should consider the interest of the others (44), the implementation of federal policies is left to Cantons, that decide the modalities and procedures to run federal programmes with their own administrations. In this respect, we should recall three connected elements: firstly,

[26] W. LINDER, A.VATTER, cit., p. 96.
[27] Ibid., p. 110; S. GEROTTO, cit., p. 42.
[28] The Federation, in turn, guarantees the non-contrariety of Cantons' Constitutions with the federal law. Cfr. art. 51, cit.
[29] The Federal Constitution provides for the participation of Cantons to the legislative process both ordinary and constitutional, and even in the elaboration of foreign policy decisions.
[30] W. LINDER, A.VATTER, cit., p. 103.

Cantons differ in terms of geographical extension, population size, by being rural or urban, and in their economic performances. Secondly, whereas the federal government disposes of one third of the public revenue and expenditure, the remaining two thirds are controlled by sub-national units. Thirdly, we have different fiscal systems for every Canton. As a result, a great diversity and dynamics of fiscal competition amongst the latter are observable.

From this a series of consequences derives. First, a minimum level of tax harmonisation is guaranteed by the federal Constitution (129), and a complex system of financial equalisation, largely amended in 2004, is in place to compensate the structural differences among Cantons. Secondly, if autonomy in the implementation process entails the possibility to adapt federal policies to the specificities and local needs of sub-national units, on the other hand, it deprives the federal level of an effective power to coordinate and harmonise certain policies in order to avoid inefficiencies. Thirdly, this has also unavoidable discriminatory outcomes because, as studies has demonstrated, Cantons' size and the consequent amount of resources and human capacities they have at their disposal, are the elements that concretely influence the quality and efficiency of policies implementation[31].

The weakness of the federal level in this respect results in inconsistent policy outcomes, due, in certain cases, to the incapacity of certain Cantons to perform the tasks of which they are in charge, since they do not dispose of the necessary institutional structures[32]. In other cases, the poor results are ascribable to the lack of coincidence among the interests of the federal level with those of Cantons in the pursue of a specific policy[33]. In parallel to the negative consequences of a deficient vertical system of coordination, a series of, so called, horizontal instruments of co-operation among sub-national units partially mitigates the above-mentioned unfavourable consequences, and, unsurprisingly they enhance even more Cantons' autonomy. Doubtlessly, the most relevant are intercantonal agreements (48), through which Cantons autonomously regulate their tasks, and that allow, especially to small Cantons, to share the burden that complex administrative tasks and services entail. In addition, intercantonal organisations can be created, and act as consultative bodies and forums for the co-ordination of cantonal policies and the solution of common problems. These are further instruments that allow sub-national units to adapt policies to their needs, and have been used to

[31] Ibid., p. 113.

[32] This dynamic is particularly visible in relation to welfare state policies. The competencies in this ambit that were, initially, cantonal, were progressively but slowly, due to the application of the double majority rule to constitutional amendments needed to change the division of competencies, transferred to the Federation. However, there was not a federal comprehensive social policy, thus the private sector has compensated the lacks of the public sector. Finally, since the limited federal budget, no federal long-lasting and effective welfare programmes were funded. U. OBINGER, *Federalism, Direct Democracy and Welfare State Development in Switzerland*, in *Journal of Public Policy*, 3, 1998, p. 257.

[33] Ibid., p. 108, 114.

prevent the future allocation of the related competences at the federal level. However, it has not to be taken for granted that all Cantons always participate in, and agree with, the outcomes of these co-operational forms. Actually, there are cases in which these instruments end to increase differentiation amongst sub-national units, but without, at the same time, achieving the objective of increasing the efficiency of the results.

Finally, the constant research of a compromise, and the predisposition of a series of institutional instruments to achieve this aim, explains the political stability of the federation over time. The seven-(rotating)-headed presidency of the Federal Council (175 and 176), the directorial form of government and the grand coalition are considered to be institutional products of this compromise nature of Swiss federalism. This is reflected also in the principle on which basis the government is organised, the, so called, Swiss *formule magique*[34]. They function as a brake against the misuse of direct democracy instruments by minorities trying to impose their exigencies on the whole population[35].

Concerning the institutions that make possible this stability, the Federal Council is the «supreme governing and executive authority» (174), and its role is particularly significant in relation to foreign policy acts (184), and in the predisposition of legislative proposal to be discussed during the pre-phase of consultations (181). But, according to the Constitution, is the Parliament, i.e. the Federal Assembly, «the supreme authority of the Confederation» (148). Composed by the National Council, in representation of the Peoples, and by the Council of States, in representation of the Cantons, it is a model of perfect bicameralism. It is worth of notice that the Federal Council and the Assembly are not linked by a confidence relation, i.e. the Federal Assembly cannot dispose of a vote of confidence in relation to the Federal Council.

The stability created by this system of institutional interactions is more and more threatened by the growing population imbalance among Cantons, due to internal migrations from rural to urban areas. Whereas the number of members of the National Council are determined in proportion to the cantonal population size and according to a proportional rule, every (full) Canton elects two representatives within the Council of States following a majoritarian rule. Therefore, small and rural Cantons are overrepresented within this organ. This, considering the Federal Assembly perfect

[34] With this expression is named the proportional distribution of the seven seats of the Federal government to the four major parties in proportion to their electoral support. Although this is an informal arrangement, which can potentially be abandoned at any time and has been challenged several times, it has, on the contrary, found application without being changed from 1959 to 2003, becoming a defining feature of the Swiss legal system. It constant application has brought to a freezing of political forces and to a consequent equilibrium. However, the distribution of seats has been changed as a consequence of 2003 elections' results: the Swiss People's Party has received an extra seat in addition to the one it already had at the expenses of the Christian Democrats.

[35] J. E. LANE, cit., p. 11.

bicameralism, cannot but attribute a veto power to a number of Cantons that do not represent the majority of the Swiss population though[36]. Therefore, if on the one hand the joint action of these elements have certainly and positively contributed to the above-mentioned stability and consensual nature of the Swiss democracy, on the other hand it has also led to, in the majority of cases, the, sometimes not advantageous, maintenance of the *status quo ante*[37].

The last distinguishing feature worth of notice of the Swiss Federation are direct democracy instruments, namely the optional and mandatory referenda and the popular initiative, present and used in all the three levels of government. For their large and constant employment, and sometimes controversial outcomes, Switzerland is well known, and has been defined a «quasi-direct democracy»[38]. As briefly said in the introduction, both at the federal and at the cantonal level, the mandatory referendum regards mainly proposals for constitutional amendment (140), the optional referendum regards laws, decrees, certain international treaties (141) and, at the cantonal level, also intercantonal agreements. On the contrary, through a popular initiative a proposal can be submitted to the vote of the national or cantonal electoral bodies. While at the federal level it could only regards the total or partial amendment of the Constitution - i.e. the only way through which voters can concretely modify the legal system - at the cantonal level it could concern equally the constitution or legislation. In addition to the concrete influence of these instruments in the functioning of the institutions that have been partially described above, some further elements are worth of attention.

It derives that be entitled to the right to propose as to vote in popular initiatives and in referenda within the Swiss federation truly signifies to be able to influence, when not to completely overturn, political decisions and legislation. Second, recalled the heterogeneity of the Swiss society, the decision-making power of which Swiss electors are entitled stays at the basis of their shared idea of democracy, it is an identity element, and one of the foundations of Switzerland as (multi) national community[39]. Thirdly, the above-mentioned instruments are most frequently used at the cantonal level. In this respect, then, it is relevant to recall that Cantons can autonomously decide to attribute political rights also to foreigners. The only condition in order to be able to vote in cantonal issues is to have been domiciled within the cantonal territory for a fixed period[40].

To end, two currently major trends are worth to be highlighted in the most recent

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36 J. E. LANE, cit., p. 8.
37 W. LINDER, A.VATTER, cit., p. 102.
38 S. GEROTTO, cit., p. 81.
39 J. E. LANE, cit., p. 16; P. DARDANELLI,, N. STOJANOVIĆ, cit., p. 372.
40 Cfr. supra note 9.

developments of Swiss federalism. Firstly, there was an increase in the decision-making power and resources of the federal level, especially in relation to social policies as regarding the development of the welfare state. This, however, has been counterbalanced by the parallel growth of the executive competencies of sub-national units. Secondly, the relevant role of the Swiss Federal Court judgements in citizenship matters has contributed to partially mitigate some discriminatory outcomes of the joint action of sub-national units autonomy, and to ameliorate the protection of individuals rights of those foreigners who wish to naturalise Swiss[41]. This latter point will be further developed later on.

From here onwards, the aim is to provide an overview of the development and of the current contents of immigration and citizenship regimes as regulated within the Swiss Federation. However, rather than solely outline the contents of the policies in the above-mentioned fields, the further object is lay down the basis to discuss the last reform proposal of the Swiss Nationality law, advanced by the Federal government in 2013, and recently approved. The reform was mainly driven by the shared objective of correcting the defects of the previous regime. Nevertheless, on what are these defects and how they should be corrected, there was not a common view among the various institutions involved.

3. Swiss Uniqueness in Immigration policies.

«That immigration is a challenge to the nation-state seems to be obvious», a double challenge actually: of the nation-state as a sovereign territorial organisation and as a community kept together by the sharing of common elements[42].

In the effort to apply to Switzerland some general considerations borrowed from two of the most dominant studies on the influence of immigration on citizenship conceptions and regimes[43], we could say that Swiss policies in these two fields clearly reflect its specific characters and that its structure and variations over time are historical legacies[44]. Nevertheless, Switzerland, at the same time, is not at all immune from the tensions that inform the relation between immigration and citizenship within Western European states, even though, as expected, it has managed them accordingly to its specificities.

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[41] The increasingly involvement of the judiciary in defining and protecting more and more immigrants rights is not at all a Swiss specificity but rather a general trend observable within Western European states starting from the post oil crisis of the 1970s. C. JOPPKE, *Immigration Challenge to the Nation-State*, Oxford, 1998, p. 19.

[42] C. JOPPKE, cit., p. 6-7.

[43] R. BRUBAKER, *Citizenship and Nationhood in France and Germany*, Cambridge, 1992; Y. SOYSAL, *The Limits of Citizenship*, Chicago, 1994.

[44] G. FREEMAN, *Modes of Immigration Politics in Liberal Democratic States*, cit., p. 881.

3.1. Swiss immigration policy[45].

According to the Constitution, immigration is a federal competence, i.e. conditions of entry, exit, residence and permanent settlement of foreigners within the national territory are regulated at the federal level[46]. As a general trend, we observe over time an increase in the selectivity of the Swiss immigration policy to the detriment of low-skilled immigrants from non-EU or EFTA countries, and a parallel growth in relevance of «integration» within the national policy on foreign nationals[47]. Nevertheless, Swiss sub-nationals units as well have significant competences that impact on the government of immigration[48]: municipalities are competent as regard social welfare of lawful foreigners residing on their territories, whereas Cantons played a prominent role in labour market policies, particularly in the determination of quotas of non-nationals to be admitted to the exercise of a paid work activity. Furthermore, Cantons are responsible for the implementation of integration policies. Concerning this, a federal framework has been evolving from 1970s and with more impetus since the 1990s, riding the wave of initiatives taken on the issue by the largest Swiss cities, which ended with the adoption of federal outlines on the matter in 1996. However, in the Swiss case, integration cannot but find a strong anchorage at the sub-national level[49], considered the diversity that characterise the Helvetic Federation, and the wide margin of discretion left to Cantons in the implementation and interpretation of federal policies. At last, recalling the impact of the direct democracy instruments in the development of the Swiss legal system, it is worth of notice that the Federal Constitution leaves to Cantons the power to decide if foreigners can benefit from active and passive voting rights regarding cantonal and municipal affairs (39.1)[50].

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[45] The analysis is limited to regular migration for economic purposes and family reunification as they currently represent, quantitatively, the most relevant percentage of foreigners within the Swiss Federation. Therefore, are not taken into account asylum seekers, refugees and irregular migrants situations.

[46] Cfr. art. 121, Federal Constitution of the Swiss Federation of 18 April 1999. All further references between brackets in this subsection are to this legal act unless otherwise indicated.

[47] Cfr. Federal Act on Foreign Nationals (Foreign Nationals Act, FNA)1 of 16 December 2005 (consolidated version 1 February 2014), 142.20 which replaced the «Swiss Federal Law on Temporary and Permanent Residence of Foreign Nationals» (Bundesgesetz über Aufenthalt und Niederlassung Ausländer, ANAG) of 26 March 1931 which have remained into force until 2006.

[48] The allocation of competences as regard immigration is not a Swiss peculiarity, as the Belgian and the US case, among others, demonstrate. Cfr. P. SPIRO, *Federalism and Immigration: models and trend*, in *International Journal of Social Science*, 167, 2001, p. 67.

[49] A. MANATCHAL, *Path-dependent or dynamic? Cantonal integration policies between regional citizenship traditions and right populist party politics*, in *Ethnic and Racial Studies*, 2, 2012, p. 284.

[50] Until 2010, only two Cantons (Jura and Neuchâtel) have accorded to foreigners the right to vote on cantonal matters but not the right to be elected, which, on the contrary, has been accorded as regards municipal matters. In general, five Cantons attribute to foreigners the right to vote in municipal matters. Moreover, Swiss Cantons can adopt different policies also regarding the possibility of foreigners to work for the public administration. See *Se responsabiliser et s'engager: participation structurelle dans les Cantons*, Commission Fédéral pour les Question de Migration (CFM), Décembre 2010, 9-11, at http://www.ekm.admin.ch/content/dam/data/ekm/themen/stud_partizipation.pdf.

The self-perception of Switzerland is not that of an immigration country, although a, fluctuating, increase of the foreign population is observable since the end of the 19th century mainly composed of foreigners coming from neighbouring countries[51]. Until the First World War (WWI), immigration was regulated through bilateral agreements, which granted freedom of movement to citizens of the contracting parties on the basis of the reciprocity principle[52]. The competence on immigration as the police tasks connected to the entry and stay of foreigners were, at time, attributed to Cantons which, however, in their exercise had to comply with the above mentioned agreements. In any case, in the pre-WWI period the - as we would define today - Swiss immigration policy could be considered to be rather liberal as regard the admission of foreigners[53], not only for reasons connected to the reciprocity principle but also - anticipating a reasoning that would permeate Europe in the aftermath of the WWII - for the positive effects on national economies that the circulation of manpower could bring. Nevertheless, the side effects of workers' free movement - competition for labour with nationals and in the access to the connected rights - would not delay in appear, leading to a worsening of the attitude towards foreigners and to the emergence for the first time of the question of their integration. Interesting enough, at time, assimilation was seen as the main solution of the problem and foreigners' naturalisation was, in turn, seen as the means for its realisation[54]. The question of how to avoid and prevent the adverse effects of an excessive presence of foreigners will be from this moment onwards a constant feature of the following Swiss immigration policies.

Soon after the end of WWI and during the interwar period, the regulation of immigration was taken up by the federal level and a series of acts were adopted where before the matter was regulated by the joint application of international agreements and cantonal practices. However, the previous main distinction among foreigners just admitted to stay for a limited period of time, and which had to leave the country after its expiration, from the right of establishment granted on a permanent basis was maintained, requiring for the grant of the latter the fulfilment of more strict requirements.

A first comprehensive federal law aiming at regulating, firstly, border controls

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[51] G. D'AMATO, *Immigration and Integration in Switzerland: Shifting Evolutions in a Multicultural Republic*, in J. HOLLIFIELD, P. L. MARTIN, P. M. ORRENIUS, *Controlling Immigration. A Global Perspective* (3rd. ed,), Standford, 2014, p. 309-310.

[52] This principle contained in a proposition of the Federal Council dated 1906 would be accepted by the People by referendum in 1912, after another referendum held in 1900 in which it had not approved a federal law which aimed at extending to foreigners the insurance against diseases and accidents. J. M. NIEDERBERGER, *Le développement d'une politique d'intégration suisse*, in H. MAHNIG (ED.), *Histoire de la politique de migration, d'asile et d'intégration en Suisse depuis 1948*, 2005, Zurich, p. 258-259.

[53] The proportion of foreigners in relation of the total population would pass from 7,9% in 1888 to the 14,7% of 1910.

[54] J. M. NIEDERBERGER, cit., p. 259-260.

was adopted in 1917. In 1924, a new article was inserted in the Federal Constitution (art. 69), and approved by means of referendum the following year, establishing the Federation's competence over migration. This led to the adoption of the «Swiss Federal Law on the Temporary and Permanent Resident of Foreign Nationals» which, after having been approved by the Parliament in 1928, entered into force 26 March 1931. Consequently, the conditions for the entry and stay of foreigners for the purpose of work were allowed on the basis of three different permits: a nine-month seasonal permit, a one-year permit, a long-stay permit. The nationals' preferential clause, i.e. a foreigner was allowed to entry and reside in Switzerland for work purposes only if no domestic workers were available for the same position[55], was also established. As the main distinction between the right to stay and the right of establishment was kept, while the latter became a federal competence, the release of permits authorising the stay of foreigners remained in charge of cantonal authorities. The 1931 law, however, was mainly aimed, more than on regulating entry and stay of foreigners and the related ambits, at protecting the country from the potential adverse effects on the preservation of the national identity by the presence of, judged to be, too much foreigners. It is worth of notice that the 1931 law would be replaced solely in 2008. However, on the matter special provisions were adopted during the WWII interwar period, limiting the entry uniquely to foreigners in possession of a visa. In 1942 Swiss borders were definitely closed, with few exceptions for specific categories of persons as refugees or holders of a transit permit.

Although similar fears as those manifested in other countries as regards the consequences of importing foreign labour force if an alike situation as that of the aftermath of WWI - economic crisis and high rates of unemployment - happened in the post-WWII period, in addition to negative effects on work conditions of nationals, Switzerland started to massively recruit foreign workers to sustain the rapid economic recover of the country. The first attempts to obtain such foreign labour force were addressed to Austria and Germany, countries that had previously provided Switzerland with the needed foreign manpower. However, since Austria was occupied by the Allied Forces and the German neighbouring regions were, in turn, occupied by France which refused the import of labour force by Switzerland, the country firstly recurred to the Italian labour force.

Differently from other European countries which has as well implemented guest-workers systems, e.g. Belgium, Switzerland did not set up a system of agencies for the

[55] The same clause was present within one of the first regulation on the free movement of workers within the European Union. Cfr. art. 1, Règlement n° 15 relatif aux première mesures pour la réalisation de la libre circulation des travailleurs à l'intérieur de la Communauté, OJ 57, 26.08.1961, p. 1073–1084.

recruitment of the needed labour force. On the contrary, this was carried out by the employers themselves according to the necessities of their companies[56]. Nevertheless, for this purpose, a recruiting agreement was signed with Italy in 1948[57], to be followed by Spain in 1961[58] - and the, so called, «rotation model» was implemented: i.e. limited-in-time work and resident permits were issued on the assumption that immigration has to be mainly transitional and not led to permanent settlement. Therefore, the period after which a permanent residence permit could be granted was increased from five years to ten years, and family reunification conditions were restricted. In 1953, the guidelines released from the federation to cantonal authorities in charge of releasing permanent permits stated that these had to be granted solely to those foreigners that fulfil professional and character requirements or with a specific qualification.

Despite the formal constrains, Swiss immigration policy was rather liberal until the mid-sixties concerning its quantitative dimension: i.e. the number of migrants admitted was not established in advance but determined in relation to the necessity of the national economy (*rectius*: of cantonal economies, since this aspect was still mainly controlled by Cantons). On the other side, this does not mean that immigration was not controlled otherwise: foreign workers had their mobility highly restricted since they were not allowed to change employment without authorisation.

The following initiatives adopted by the federal level were driven by the necessity to reconcile the not decreased need of labour force with the contrariety of the population towards the growing numbers of foreigners, whose concerns were expressed in a set of popular initiatives in the late sixties and early seventies «against the excessive penetration of foreigners»[59]. Thus a series of governmental measures were taken in order to limit the increasing number of foreigners in the country[60], and were somehow counterbalances by those adopted in order to cope with the growing external international pressures on the country to ease its immigration policy[61] especially

[56] M. CERUTTI, *La politique migratoire Suisse1945-1970*, in H. MAHNIG (ED.), cit., p. 91.

[57] The Italo-Swiss bilateral agreement would be revised in 1964 in more favourable terms: workers who had a seasonal permit for five consecutive years could be granted a one-year permit and were allowed to be joined by their family members.

[58] In the early sixties, the origin of foreign workers in Switzerland started to include, beyond Italians, Germans and Austrian citizens, also citizens of Southern European countries as Greece, Turkey, Portugal, Yugoslavia. The initial arrival of those citizens in Switzerland is considered to be a consequence of the German migration policy of those same years.

[59] E. PIGUET, H. HAHNING, *Quotas d'Immigration: l'Expérience Suisse*, Cahiers de Migration Internationales, no. 37, Service des migrations internationales, Bureau International du Travail, 2011, p. 11.

[60] In 1963 federal authorities had adopted a decree on criteria to be followed by employers as regard the admission of foreign labour force which had not to exceed the total amount fixed the previous years. Nevertheless, exceptions were provided for significant sectors of the labour market - as agriculture - and also due to Cantons' insufficient transposition, this restrictions had not the desired effect of reducing the number of foreign workers entering the country. Consequently, the proportion of foreign workers to be admitted was constantly reduced in the following years.

[61] In 1948 Switzerland has become a member of the Organisation for European Economic Cooperation (OEEC) which has adopted in the early 1950s a series of resolutions asking, in particular, to fix in five years of continuos residence the requirement for foreign workers to be granted a right of establishment.

concerning family reunification conditions and in order to improve the situation of already present migrants[62]. In 1960 more favourable conditions for family reunification were adopted: family members of the foreign worker were allowed to enter the country after a three year uninterrupted residence of the latter.

A turing point in the post-WWII history of the Swiss immigration policy was represented by the popular initiatives, so called, «Schwarzenbach»[63] which from the late 1960s to the mid-1970s constantly asked for initiatives to be taken against the «foreign overpopulation» in the country[64]. Particularly after the popular vote of 7 June 1970, although the negative outcome of the first initiative, rejected by the 54% of voters, the Federal Council decided to introduce by decree an annual quota system was implemented - so called «stabilisation policy» - that has remained largely in place until the early 2000s. The policy mainly aimed at maintaining the percentage of foreigners stable, in order to assure an equilibrated relation between the Swiss population and foreigners residing in the country. The quota mechanism was controlled by the federal administration which established an annual quota of new seasonal and one-year permits to be released, on the basis of the number of foreigners already present and the needs of the national labour market. More precisely, quotas were determined as a result of negotiations with cantonal administrations, social partners and companies. Actually, permits were geographically distributed among Cantons, accordingly both to specific companies' requests and in proportion to the cantonal population. Alongside the introduction of the quota system foreigners (mobility) rights were further restricted: they were authorised to change employment or to take up employment in another Canton only after three years.

In this decade the number of foreigners has effectively decreased but, really, it has been more a consequence of the 1973 oil crisis which heavily impacted also on the Swiss economy especially from 1975, than the expected outcome of the government policy[65]. Actually, since the unemployment rate had a rather negligible increase, it has been affirmed that the flexible labour immigration policy had permitted an «exportation» of unemployment to migrants' countries of origin. In this regard, it was also observed that the decrease of the foreign population was also a result of the return of a number of long-term resident migrants to their home countries, because, among other reasons, that they were not covered by an unemployment insurance which, at time, has not been made

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[62] N. CARREL, *Focus Migration. Country Profile: Switzerland*, No. 22, Institute for Migration Research and Intercultural Studies (IMIS), University of Osnabrück, Germany, 2012, p. 3.
[63] James Schwarzenbach was the name of one of the leading figures of the «Action nationale», the political party which had promoted the above mentioned initiatives.
[64] Precisely, the initiative asked for the foreign population to be reduced and to amount only for the 10% of the total Swiss population.
[65] D. M. GROSS, cit., p. 16.

compulsory still[66].

As the economy recovered in the 1980s, the foreign population has restarted to grow consequently, but its composition was by then changed and became mainly composed by out-quota migrants as were permanent residents and family members of the latter. However, the changed composition of the foreign population residing in the country was already recognised in the mid-seventies when, as above mentioned, an integration policy started to be developed at the federal level. Actually, it was acknowledged that this was necessary not only for reasons connected to the needs of manpower of the national economy since the need to import foreign labour force would continued, but also because an important part of those foreigners had permanently settled in Switzerland with their family members.

In the late sixties the seasonal permit was still meant to be the main instrument to control the (temporary) amount of foreigners in the country, nevertheless, it was similarly acknowledged that provisions had to be adopted in order to ameliorate the legal status of those present on a permanent basis, which has numerically overcome the former category of foreigners, particularly in relation to their right to reside and the security over time of the same. Particular attention was paid to the (at time called) «assimilation» of foreigners, view as a necessary step for their integration, especially concerning young foreigners in relation to which eased modes of naturalisation were discussed[67]. In the end, at the basis of this new phase of federal initiatives for foreigners' integration it seems that economic considerations connected to the labour market needs were partially substituted by concerns on the protection of individual rights of foreigners[68].

That the general framework of the country's policies on (labour) immigration and means of foreigners integration was been reconsidered was demonstrated by the proposition in 1978 to the Chambers of a new law aiming at regulating foreigners' legal status. After the discussion, it was decided to conserve the seasonal permit and to fix in thirty-two months the duration of a continuos residence in the country in order to ask for the transformation of the work permit in one more durable. However, the law adopted in 1981 by the Parliament was subsequently rejected by referendum. One year later the same destiny would be reserved to a further initiative this time aiming at amending the

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[66] On the contrary, the decrease of the foreign population in the early seventies as the unemployment rate remained nearly zero, is commonly described as a consequence of a practice of «exportation of (foreign) unemployment» allowed by the rotation model which had impeded in the previous years the settlement of guest workers. Therefore, as the residence permit was connect with the pursue of a work activity, when they lost their job they were automatically not authorised any more to reside in the national territory.

[67] A reform of the citizenship law in 1952 had double the residence requirement - from six to twelve years - in order to be naturalised. However, a report of the Federal Office of industry, arts and professions, and of labour released in 1964 titled «Le problème de la main-d'oeuvre étrangére» has highlighted that low rates of naturalisation were particularly due to restrictive conditions at the cantonal and municipal level.

[68] Switzerland has signed the Convention for the Protection of Human Rights and Fundamental Freedoms of the Council of Europe in 1972, and it has entered into force in 1974. On the contrary the European Social Charter of 1961 was signed in 1976 but until now it has not been ratified.

law regulating foreigners naturalisation. Despite the maintenance of the previous policy, the foreign population in the late 1980s continued to increase because of family reunification but also due to the admission of more foreign workers needed to sustain the favourable moment of the national economy.

To this framework it has to be added that, at time, the former guest-workers and their families account for only a part of the foreign population residing in Switzerland. Actually, to them has to be added the increasing number of refugees mainly from Eastern Europe from the mid-1950s - Hungarians and Czechoslovakians, mainly - and of Chileans and Vietnamese and Cambodians citizens in the late-1970 early 1980s. A new asylum policy adopted in 1981 codified the rather liberal policy pursed until that moment. However, since the number of applications sensitively increased leading to the parallel growth of the population concerns, a restrictive trend inaugurated from the early 1980s led to a decrease of the total number of asylum seekers admitted in the following decades.

In the early 1990s Switzerland as well has suffered the consequences of the economic crises. Differently from the situation of the mid-1907s, this time there was not the same decrease in the percentage of foreigners, i.e. of return to their country of origin, and the country experienced - never seen before - levels of unemployment since it has not been possible to «export» it as it was previously done. Simultaneously, significant provisions were adopted at the beginning of the decade by the federal government as regard labor immigration. In 1991 the «three circle model» was adopted and put at the basis of a new immigration policy. The main principle of the new scheme was the division of immigrants in relation to their country of origin. The first and most privileged «circle» was composed by EEA/EFTA citizens, in relation to which seasonal permits were abolished and free mobility was granted. The second circle was made by migrants from «culturally close» countries - that were the USA and Canada - and the last by migrants from the remaining countries which were admitted only exceptionally and if high skilled. It was acknowledged, however, that this model has just formalised the policy that had been established already in 1986 when the «Ordonnance sur la limtation des étrangers» was adopted. In fact, foreigners to be admitted for labour reasons were already distinguished on the basis of their citizenship: those from the EC and EEA were admitted with priority, to be followed by those foreigners from countries of traditional recruitment.

This policy was criticised, firstly, for its discriminatory character as it differentiate migrants on the basis of their, supposed, ethnic proximity with the Swiss. Secondly, it was judged to be insufficient also from the economic point of view since excessively restricted, thus, unable to provide the necessary number of high skilled

foreign workers that Swiss employers were in need of.

3.1.1. The EU/Swiss attempts of approximation: the «unequal inclusion»[69].

1990s were also marked as the decade during which the usefulness of a potential membership of Switzerland to the EU, first, and to the European Economic Area after became a matter of debate. In this respect, we should consider that almost two thirds of foreigners were from EEA Member States, and that in case of membership, lots of the provisions of the, at that time, in force immigration regime would had need to be amended. However, the process of approaching between Switzerland and the EU was a much longer history covering the whole second half of the twentieth century. During this process the main aim of the country has remained basically unaltered: provide access to national companies to the common market, or rather not to be discriminated for being an outsider. From time to time it has chosen different modes to conduct this process of approximation in the attempt to find a satisfactory balance among internal pressures - which corresponded to the unwillingness to give up national sovereignty on a number of significant matters, as foreign trade, fiscal policy, neutrality - and the developments of the various initiatives of economic cooperation among its European neighbouring countries.

After the failure of a first attempt of setting up a multilateral treaty with Britain and France within the OEEC framework in 1958, Switzerland opted for the creation an alternative free-trade zone with other OEEC member states which were not (still) EC members. Consequently, the country was among the founding members of EFTA in 1960[70]. Nevertheless, this policy line has to be soon reconsider since the impossibility to use EFTA as vehicle to provide the country the basis on which establish a relation with EC member states and provide access to the common market to national industries became evident when EFTA members started one after the other to apply for EC membership. Consequently, from the early 1960s the Swiss government started to consider the possibility to opt for membership or for the signature of an association agreement with the EC, despite the reasons which had led to the previous rejection of

[69] J. MONAR, *Justice and Home Affairs in a Wider Europe: The Dynamics of Inclusion and Exclusion*, ESRC One Europe or Several? Programme, Working Paper 07/00, Leicester, 2000, at http://www.mcrit.com/scenarios/visionsofeurope/documents/one%20Europe%20or%20Several/J%20Monar%20.pdf

[70] The EFTA convention was revised in 2001 - known as the Vaduz Convention - and entered into force in 2002, in parallel with the signature of the EU-Swiss Bilateral agreements - Switzerland is one of the founding members of EFTA - amending the EFTA convention accordingly to the contents of the latter. Cfr. Convention establishing the European Free Trade Association (consolidated version 1 July 2013), at http://www.efta.int/sites/default/files/documents/legal-texts/efta-convention/Vaduz%20Convention%20Agreement.pdf. M. VAHL, N. GROLIMUND, *Integration without Membership. Switzerland's Bilateral Agreements with the European Union*, CEPS, Brussels, 2006, p. 6.

these options was still present at the internal level[71].

When the United Kingdom, Denmark and Ireland joined the EC in 1967, this reconsider on a more open basis its relation with EFTA countries in 1969. Consequently, an agreement was signed in 1972 and it regulates Swiss-EU relations since the beginning of 1990s as regard free-trade of industrial goods, providing access to the common market to Swiss industries almost without requiring any adaptation of national institutions.

In 1986 with the entry into force of the Single European Act the process of creation of an EU common market made a fundamental step aside and this required Switzerland as EFTA countries to reconsider again their relation with the EU. Left aside possibility to set up a series of bilateral agreements with every country, steps were taken to establish a common EU-EFTA framework, providing access to the common market to EFTA countries and the establishing of related institutions. Thus, these were the first steps that would lead to the establishment of the European Economic Area (EEA). However, the negotiation process proved to be problematic of Switzerland as the EU opposed any tailored solution which could potentially prejudice the *acquis communitaries,* on the other side Switzerland, as before, had to consider still all the internal constraints that would have made its EU membership very demanding in terms of delegation of the national sovereignty in fundamental matters. Furthermore, it has also to be taken into account that a constitutional amendment in 1977 had included foreign policy matters in the list of those fields in which decisions could be submitted to the popular vote through direct democracy instruments. Actually, Swiss membership to the EEA[72] failed in 1992 because of voters' rejection through referendum.

The attainment of Switzerland objective - provide access to the common market to national industries - was severely prejudiced by the EEA membership rejection since the country at that point had remained the sole EFTA country to be excluded from the common market apart from the ambits covered by the 1972 agreement. Therefore, provisions were immediately taken to overcome this impasse, and Swiss-EU relations restarted in 1993, again on, the previously abandoned, bilateral basis[73]. Negotiations started in December 1994 and would end only in 1999, as transport and free movement of persons - two out of the seven total ambits on which negotiations were conducted - required more time to be settled in a satisfactory way for both parties. At last, the first group of agreements, so called, «Bilaterals I» was signed in 21 June 1999 and entered

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[71] C. DUPONT, P. SCIARINI, *Switzerland and the European integration process: Engagement without marriage*, in *West European Politics*, 2, 2001, p. 219.

[72] The EEA Oporto Treaty signed on 2 May 1992 was amended soon after to introduce the necessary adjustments necessary to accommodate the rejection by referendum of EEA membership in 1992 of Switzerland. Cfr. Protocol Adjusting the Agreement on the European Economic Area of 17 March 1993, OJ L 1, 3.1.1994, p. 572.

[73] S. KUX, *Switzerland: Adjustment Despite Deadlock*, in K. HANF, B. SOETENDORP, *Adapting to the European Union*, Harlow, 1998, p. 168.

into force in 2002[74], after have been approved by the electorate in 2001, and covers eight fields including free movement of persons[75]. To these agreements it has been subsequently added two protocols in 2006[76] and 2009[77] in order to include in extend their ambit of application to those countries that had joined the EU in the 2004 and 2007[78]. In the same referendum that has approved the, so called, Protocol II, extending free movement rules to Bulgarian and Romanian citizens, the Swiss has also confirmed their will to continue with the Free movement Agreement. Actually, it was foreseen by the agreement of 1999 that it would have been asked to confirm the popular approval of those agreements after a decade from their signature.

Recalling the above studied development of the Swiss immigration policy - often trying to find an adequate balance between the necessity of (certain sectors of) the labour market of import foreign labour force and, on the other side, the will of maintain an equilibrium between the presence of foreigners and the Swiss population as not to ignore the frequent requests of a certain part of the population which is against (an excessive) migration - it does not surprise that free movement of persons was one of those ambits which proved to be more problematic during the negotiations with the EU[79]. Even more because EU institutions were unwilling to allow an *à la carte* approach that, instead, would have been the best option for Switzerland in the view of maintaining unaltered the basic principles of the legal system. Precisely, the failed attempt to obtain a tailored EEA membership was recognised to be one of the reasons for the failure of the Swiss attempt of membership[80].

From the early 2000s, thus, persons freedom of movement was extended to the

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[74] Cfr. Ordonnance sur l'introduction progressive de la libre circulation des personnes entre, d'une part, la Confédération suisse et, d'autre part, l'Union européenne1 et ses Etats membres, ainsi qu'entre les Etats membres de l'Association européenne de libre-échange du 22 mai 2002, (Ordonnance sur l'introduction de la libre circulation des personnes, OLCP), 142. 203.

[75] Cfr. specifically, Agreement between the European Community and its Member States, of the one part, and the Swiss Federation, of the other, on the free movement of persons, OJ L 114, 30/04/2002.

[76] Protocol to the Agreement between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other, on the free movement of persons regarding the participation, as contracting parties, of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic pursuant to their accession to the European Union, OJ L 89 of 28.3.2006.

[77] Protocol to the Agreement between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other, on the free movement of persons, regarding the participation, as contracting parties of the Republic of Bulgaria and Romania pursuant to their accession to the European Union, OJ L 124 of 20.5.2009.

[78] The extension of the provisions on free movement of persons contained in the first group of bilateral agreements to the ten member states that had joined the EU in 2004 was approved by referendum 25 September 2005 when the bill titled «Extension of the Agreement on the Free Movement of Persons of the new EU States and the Revision of Accompanying Measures» receive the 56% of votes in favour. In February 2008, a positive referendum led to the further extension, with 59.6% votes in favour, of free movement provisions of Bulgaria and Romania.

[79] It is worth of notice that free movement of persons, with agriculture, has been added by EU institutions to the list of matters presented by Swiss authorities to be subjected of bilateral negotiations.

[80] C. DUPONT, P. SCIARINI, cit., p. 223-224.

Swiss territory as well[81]. Moreover, free movement provisions were completed by those concerning the coordination of social security systems[82] and mutual recognition of professional qualifications[83]. It is worth of notice that the same rules apply to EFTA citizens.

However, to comprehend the real meaning and effects of this extension this has to be observed in light of the reforms to which in the meanwhile the Swiss labour immigration policy was undergone in 1998 and 2005, and considering the transitional periods for the application of free movement measures that were in the end adopted in order for Switzerland to gradually adapt its regime to the changed legal context[84]. To the former it will be devoted the next paragraph.

Concerning transitional periods, firstly, a two-year transitional period was also established during which the national preference clause and the control of working and paying conditions would continued to be applied[85]. Secondly, it was established that short and long-term quotas would have ceased completely to be applied to EU-15 member state citizens, in addition to Maltese and Cypriot citizens, after a five year transitional period, to end in June 2007. However, as regard citizens of those EU member states that have joined the EU in 2004, access to the Swiss labour market was restricted until 2011. Restrictions applying to Bulgarian and Romanian citizens will be

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[81] Agreement between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other, on the free movement of persons - Final Act - Joint Declarations - Information relating to the entry into force of the seven Agreements with the Swiss Confederation in the sectors free movement of persons, air and land transport, public procurement, scientific and technological cooperation, mutual recognition in relation to conformity assessment, and trade in agricultural products, OJ L 114, 30/04/2002.

[82] Cfr. 2012/195/EU: Decision No 1/2012 of the Joint Committee established under the Agreement between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other, on the free movement of persons of 31 March 2012 replacing Annex II to that Agreement on the coordination of social security schemes, OJ L 103, 13.4.2012.

[83] Cfr. Annex III (Mutual recognition of professional qualifications) to the Agreement between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other, on the free movement of persons has been replaced by the Decision No 2/2011 of the EU-Swiss Joint Committee of 30 September 2011 in order to consider the entry into force of Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications (OJ L 255, 30.9.2005). Cfr. Decision No 2/2011 of 30 September 2011 replacing Annex III (Mutual recognition of professional qualifications), 2011/702/EU.

[84] It has been noted that the content of the 1998 agreements with the EU as regard free movement of persons was almost the same of the EEA agreement, which was rejected by the population, while, on the contrary, Bilaterals I received a strong popular support. This success has been explained in part by observing that, learning from the previous failure, the Swiss government has opened up to all actors which could have been potentially touched by the agreements the process of negotiation at the internal level. Moreover, it has attempted to provide compensating measures to those who could have been somehow damaged by their application in order to avoid their subsequent support of referendum contrary to ratification. A. FISCHER, S. NICOLET, P. SCIARINI, *Europeanisation of a Non-EU Country: The Case of Swiss Immigration Policy*, in *West European Politics*, 4, 2002, p. 163-164.

[85] P. RUSPINI, *Report from Switzerland*, in J. DOOMERNIK, M. JANDL (EDS), *Modes of Migration Regulation and Control in Europe*, Amsterdam, 2008, p. 175-176.

applicable until May 2016[86]. At last, until 2014 Switzerland still have the possibility to reintroduce quotas in case of an excessive flow of labour migrants using the, so called, safeguard clause.

A second group of agreements called «Bilaterals II» was signed in 2004, and covers nine additional fields. They include the, so called, Dublin association agreement that, after have been approved by referendum, has entered into force in 2008[87]. This enables Switzerland to participate in the Schengen *acquis* and to apply the rules regulating asylum requests among states which are members of the, so called, Dublin Area[88]. Although it was in the intentions of the Federation to participate in the EU borders control policy even before the 2000s this did not happened until the signature of the above-mentioned agreements. On the one side, the Schengen agreement itself did not foreseen the possibility for non-EU members to become parties of the agreement[89], on the other side, this did not happened because Swiss policy on borders control, in the first place, was not in line with Schengen basic principles. Thus, in the meanwhile, the country pursued a «subsidiary strategy» and signed a series of agreements on readmission, border and police cooperation with its neighbouring EU members[90].

A third protocol to «Bilateral I» agreement had to be added to extend to Croatian citizens free movement provisions since Croatia has, in the end, joined the EU in July 2013. Nevertheless, the process which would have led to its adoption has to be interrupted after the success of the popular initiative 9 February 2014 on «against mass immigration», that has received the 50.3% favourable votes of Swiss voters and of 14.5 out of 23 Cantons. Consequently, a new article was added to the Swiss Constitution: art. 121a titled «Control of Immigration» within section 9 on «Residence and Permanent Settlement of Foreign Nationals». The new article requires Switzerland to (return to) determine its immigration policy autonomously, and to (again return) to regulate the entry of foreigners on the basis of limits established annually and quotas, and to apply

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86 This was the result of a decision taken by the Federal Council in February 2014 in which it has decided to further extended restriction in acceding to the Swiss labour market to Bulgarian and Romanian paid workers and for provider of services of certain sectors of the labour market. e.g. building, cleaning and security sector.

87 Council Decision 2008/146/EC of 28 January 2008 on the conclusion, on behalf of the European Community, of the Agreement between the European Union, the European Community and the Swiss Confederation on the Swiss Confederation's association with the implementation, application and development of the Schengen acquis, OJ L 53, 27.2.2008.

88 S. PEERS, *EU Justice and Home Affairs*, Oxford, 2011, p. 92. Cfr. Agreement between the European Community and the Swiss Confederation concerning the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in a Member State or in Switzerland, OJ L 53, 27.2.2008.

89 Cfr. art. 140, Convention Implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, OJ L 239, 22.9.2000.

90 P. RUSPINI, *Report from Switzerland*, cit., p. 176.

these provisions to all permits including those granted to asylum seekers and to cross-border workers[91]. The principles that have to guide the determination of quantitative limits and quotas are, in the first place, the economic interest of the country and the application of the national preference clause. In the end, it is stated that no international agreement shall be concluded which could breach these provisions. The details of the new admission system are to be determined by legislation, more precisely, to the Federal Council and the Parliament has been given three years to implement the new system. Therefore, the reform of the current immigration regime and EU-Swiss relations have to be reviewed according in order to comply with the (amended) Constitution by February 2017.

The first consequence on EU-Swiss relations of this changed state of affairs was that since protocol III would be contrary to the newly added art. 121a, Croatian citizens who wish to enter Swiss labour market are submitted to quotas from July 2014 and their status is regulated by the Law on Foreigners. Secondly, and more importantly, the new system is contrary to a number of principles which stay at the basis of the agreement on free movement of persons, namely, the principle of non discrimination, the standstill clause and the right to exercise an economic activity and reside in the Swiss territory for EU citizens. Considering their fundamental character, the request of Switzerland to renegotiated the agreement was refused by EU institutions[92].

On 11 February 2015 the Federal Council approved a new mandate to (re)negotiate with the EU the terms of the agreement on persons free movement in order for it to be in line with the constitutional amendment. This statement was made alongside the adoption of the draft legislation on foreigners. The latter will be analysed in details in the closing part of the following paragraph, after the current regime has been considered. Nevertheless, the Federal Council has stated already that the dual-track admission scheme will be maintained, that is to say that EU and EFTA citizens will continue to be admitted on a more favourable basis in relation to third-country nationals[93].

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[91]Paragraph 11 - «Transitional provision to Art. 121a (Control of immigration)» - of art. 197 - «Transitional provisions following the adoption of the Federal Constitution of 18 April 1999» of the Federal Constitution has been adopted by popular vote of 9 February 2014, and has established a three-year period to re-negotiated and amend international agreements that contradict the content of the newly introduced art. 121a. The second sub-paragraph specifies, however, that if the above determined period is not respected for the implementation of art. 121a, the Federal Council shall issue temporary implementing provisions.

[92] Cfr. Response of the former EU High Representative and Vice President of the EU Commission, Ms. Catherine Ashton, in July 2014, at https://www.bfm.admin.ch/content/dam/data/bfm/eu/fza/personenfreizuegigkeit/umsetz-mei/20140725-schreiben-ashton.pdf

[93] One possible solution is to preserve the principle of free movement of persons between the EU and Switzerland but permit the unilateral use of a safeguard clause to restrict migration of EU citizens in case of economic imbalances due to excessive flows. A safeguard clause and the possibility for migration to be restricted in case of economic and social difficulties are already foreseen by the current agreement, and, as said above, the safeguard clause has been used for the first time in 2012 and quotas were introduced for the, so called, EU-8 citizens and, in 2013, for EU-17 citizens too. Those limitations expired in April and May 2014 respectively. M. AMBÜHL, S. ZÜRCHER, *Immigration and Swiss-EU Free Movement of Persons: Question of a Safeguard Clause*, in *Swiss Political Science Review*, 1, 2015.

Until the new legislation on immigration won't be definitely adopted, the current immigration law as the agreement on persons' free movement with the EU are the legislation applicable.

3.2. The current immigration policy: the 2008 «Federal Act on Foreign Nationals».

The same year in which negotiations with the EU were concluded, and before of the finally enter into force of the first group of bilateral agreements, the «three circle» model was abandoned, not just because immigration legislation had to be brought in line with the agreement on persons' free movement but also because the former system was judged discriminatory. Therefore, a dual admission system was adopted in substitution of the former regime, with the merge of the second and third category - third-country nationals and citizens of «culturally close» countries - into one. The effects of application of the principle of persons' free movement to EU and EFTA citizens and of the principle of non-discrimination on the basis of nationality has deeply shaped the 1998 legislation on immigration.

In the first place, the entry of first circle labour migrants - EU and EFTA citizens - was exempted from the application of quotas. On the contrary, these were not abandoned to regulate the entry of third-country citizens. Precisely, would be labour migrants from third-countries (in relation to the EEA) would be admitted only if in possession of the specific skills of which the country would have had an urgent need. Moreover, the national and EU/EFTA preference clause were applied, and before issuing a residence permit to a third-country labour migrant, their potential capacity of integrate within the Swiss society would have been evaluated: i.e. their capacity to adapt their professional qualification to the labour market, their age and language skills. Concerning this, it can be affirmed that the 1998 regime has not eliminate the discriminatory character criticised in the «three circle» model, since its appears that it is implicitly assumed that the question of integration as a predisposition and as an ex-post result to be obtained when already residing in the country arises only in relation to third-country nationals. It is not by chance that in the draft of the «three circle model» countries to be included in the third circle were defined «culturally distant».

Before the new legislation on immigration is adopted as a consequence of the constitutional amendment followed to 9 February 2014 vote, the entry, residence, family reunification and integration of foreigners are regulated by the Law on Foreigners of 16

December 2005 that as entered into force 1 January 2008[94], after voters approval through a successful referendum hold in 2006, and aims at defining a «coherent and comprehensive migration policy»[95].

The 2008 regime maintains the previous dual system of admission, up-to-dating it with the agreements signed with the EU until 2009, in which persons' freedom of movement of EU citizens were extended to citizens of the last two states that have joined the EU in 2007, namely Romania and Bulgaria. Although it applies to all foreigners, EU and EFTA citizens are included in its personal ambit of application solely to the extent that no other agreement establishes differently in that regard or is more favourable. Moreover, provisions regarding visa procedures and conditions of entry are residual in relation to what is established by Schengen agreements (2)[96], which governs the conditions of entry and exit (10). In this respect, as it is true for EU member states, sovereignty in the matter of border controls has been transferred from the State to the «Schengen group»[97].

In details, an EU/EFTA citizen who hold a long-term resident permit - that is accorded whenever the person has a work contract for a period of more than one year - enjoys the same treatment in relation to Swiss nationals, has full occupational and geographical mobility within Switzerland, and benefits from the coordination of social security systems. In addition, also non-economically active citizens, e.g. retired persons, students, recipients of services, are covered by the freedom of movement provisions. This is worth of notice if, on the contrary, we consider that when it comes to foreigners from third-countries Swiss immigration policy admits uniquely economically active and high skilled persons.

This state of affairs impacts on the relations between the central and the sub-national level as regards immigration policy, if we consider that Cantons are not given the possibility to adapt federal policies related to this category of foreigners according to their local needs[98], since entry of EU/EFTA citizens to exercise an economic activity is exempted from quotas. In relation to this part of Swiss labour migration policy, the

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[94] Cfr. Federal Act on Foreign Nationals (Foreign Nationals Act, FNA)1 of 16 December 2005 (consolidated version 1 February 2014), RS 142.20.

[95] The Swiss foreign population was 23.8% at the end of 2013. 85.1% of the permanent foreign population is composed by European migrants, with three quarters coming from EU member states. The percentage of non European migrants has constantly increased over the last thirty years, and today is the 14.8%. Source: Swiss Federal Statistic Office, Population, Migration and integration, Foreign population, Nationality, at http://www.bfs.admin.ch/bfs/portal/en/index/themen/01/07/blank/key/01/01.html.

[96] All further references between brackets in this subsection are to the Federal Act on Foreign Nationals unless otherwise indicated.

[97] P. SPIRO, cit., p. 72.

[98] Cfr. *Les marges de manoeuvre au sein du Fédéralisme: la politique dé migration dans les Cantons*, Commission Fédéral pour les Questions de Migration (CFM), Documentation sur la politique de migration, Décembre 2011, p.104.

situation of Cantons resembles more that of sub-national units of other federations, such as the USA, which are afforded still a limited power and discretion in the field of immigration, precisely because the matter has, for a long time, been strictly linked with the field of foreign relations. Moreover, especially for federations, immigration requires a non eliminable level of control by the central level in order to avoid unreasonable internal disparities[99] since, generally, once persons are admitted into the national territory they can also benefit from the right of freedom of movement inside it.

This favourable regime benefitting EU/EFTA citizens led to their important and constant growth in the last decade. In 2013, the 85% of the foreign population permanently residing in Switzerland was of European origin, and the three-quarters from EU/EFTA member states[100]. Thus, in order to cope with the growing dissatisfaction and concerns of nationals towards - what they perceive to be - an excessive flux of foreigners, and to consider the parallel incontrovertible statement that the Swiss economy cannot waive to the foreign labour force, in 2012, for the first time, the Swiss government has applied the, so called, safeguard clause. Therefore, it has gradually reintroduced, in relation to all EU citizens, a maximum number of allowed entries for a one-year period. Presumably, this provision was not deemed to be sufficient if looked at in the light of the 9 February 2014 vote. Moreover, these last developments, which have seen the regaining of decision-making power by voters and, indirectly, sub-national units, could be interpreted as a consequence of the very strict margins that were left them to influence this part of the immigration policy.

The reinforcement of state actors, precisely executives - because directly involved in negotiations at the international level - to the detriment of other domestic actors usually consulted during the process of policy-making, is a consequence of the process of Europeanisation of national policies[101], which is not restricted to EU member states[102]. In the case of Switzerland, where an ample phase of consultations generally takes place before an act is adopted usually to avoid the risk of a subsequent contrary referendum, the effects of Europeanisation could have been more strong than expected. In view of this the vote of 9 February 2014 may be considered to be the result not only of another anti-foreigner initiative, that have a long tradition in Switzerland, but also of the deprivation of decision-making power of significant actors at the national level.

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[99] P. SPIRO, cit., p. 67 and 72.

[100] Cfr. Foreign permanent resident population by nationality, Swiss Federal Statistical Office, at http://www.bfs.admin.ch/bfs/portal/en/index/themen/01/07/blank/key/01/01.html.

[101] A. FISCHER, S. NICOLET, P. SCIARINI, cit., p. 147-148.

[102] Cfr. the definition of Europeanisation as «an incremental process re-orienting the direction and shape of politics to the degree that EC political and economic dynamics become part of the organisational logic of national politics and policy-making», R. LADRECH, *Europeanization of Domestic Politics and Institutions: The Case of France*, in *Journal of Common Market Studies*, 1, 1994, p. 69.

Therefore, it seems that what has been thrown out from the door, re-enters through the window, in the Swiss style, i.e. using direct democracy instruments.

The remaining part of the dual system, that applies to third countries nationals, is, at least in part, a different story from the one tell until now. It is, in fact, a selective policy, thus general considerations condition the admission of (only) «gainfully employed» foreigners: the interest of the national economy, the social and demographic conditions and the chances of integrate in the labour market and in the social environment that migrants have according to their personal characteristics (i.e. professional and social adaptability, language skills and age) (3 and 23). Therefore, we may say that a certain instrumental view of migration (continues to) informs the national immigration policy (22 and 23). Accordingly, foreigners can be admitted for the pursue of salaried of self-employed activities if this is in the interest of the national economy, only if they are high-skilled or needed for their particular knowledge in specific fields (23), and provided that a proper accommodation is available (24). But, more importantly, their entry and stay is allowed only after it has been proved that no nationals, EU/EFTA citizens, permanent residents or residents allowed to work are available to that job position (21).

Short term permits for up to one year are granted, and they can be extended for one year more, but in order to ask for the renewal, the foreigner is required to first leave the country for an «appropriate» time frame (32). A resident permit is granted only for stays justified by specific purposes and longer than one year (33). To the foreigner who has accumulated over time ten years of residence - indifferently from the type of permit hold - and that has had a resident permit for the last five years without interruptions, a permanent resident permit may be granted. It is noteworthy that for EU/EFTA citizens this time is half reduced. However, to successfully integrated foreigners the waiting time may be reduced to five years as well, after an uninterrupted stay of five years holding a residence permit (34.4).

The permanent residence permit is not submitted to any condition or time limit; on the contrary, holders of short-stay and residence permits that desire to change their canton of residence have to apply before for the same permit in the new canton (37). Family reunification rights (where family members are considered to be the foreign spouse and the unmarried children under eighteen) are granted to foreigners regardless of the type of permit. However, to permanent residents' family members a resident permit is granted and can be renewed proved that they live with the holder of the permanent residence permit. A permanent residence permit can be granted after five years of uninterrupted residence to family members but only if they live with the permanent residence permit holder, within a proper house and are not dependent on social

assistance. The same conditions apply to the exercise of family reunification rights by holders of short-term permits (43 - 45).

It is of fundamental importance that, apart from determining conditions of entry, exit, residence and family reunification of non-nationals, the 2008 law «regulates, encouraging, their integration» (1)[103]. The explicit insert of «integration» within a legal act on foreigners for the first time in 2008, may be considered a sign of change in the paradigm of the Swiss immigration policy in relation to the previous regime, and an approximation of the country self-perception more to the reality of the last fifteen years that see Switzerland, undoubtedly, as an immigration country.

The conception of integration adopted seems to be the well-known definition of integration as a two-way process (summed up by the formula «encourager et exiger»), and requires the involvement and commitment of both the Swiss population and of foreigner nationals. The aim is co-existence, and participation for foreigners. To the latter are asked, in particular, to «familiarise with the social conditions and way of life» and learn a national language (4).

The task of «encouraging» integration is divided upon all the government levels, to which cooperation is asked (53). This said, premised that the federation coordinates sub-national units initiatives on this matter[104] but cannot impose to Cantons a unique national definition of integration nor determine once for all its content - there is not, in fact, a legal definition of the concept - it has anyway adopted a set of guidelines on the issue. These, despite not being legally binding, have, with different degrees, conditioned Cantons integration policies, since funds for initiatives on the matter come for a large extent from the federal government[105].

As above said, the implementation of federal policies is left to Cantons and Municipalities. Consequently, the criteria that were established at the federal level have been differently implemented and interpreted accordingly to the Cantons' preferences, objectives and political programmes. As it is also for naturalisation, this means that to a great degree of diversity amongst sub-national units corresponds, as the other side of the coin, a flexible approach. Cantonal authorities are, in fact, in charge of the release of the above-mentioned permits (40 and 98), however the federation remains responsible for the determination of quotas, for exceptional admissions (40.1) and for the adoption of preliminary decision based on the employment market (99). Nevertheless, in this respect,

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[103] Cfr. arts. 1 and 4, Federal Act on Foreign Nationals.

[104] Cfr. arts. 8-9, Ordonnance sur l'intégration des étrangers (OIE) du 24 octobre 2007, (consolidated version 1st January 2014), 142.205.

[105] Cfr. art. 55, *ibid*. and arts. 14-17, Ordonnance sur l'intégration des étrangers (OIE), cit.

it should be recalled that quotas are established considering Cantons' exigencies and population size.

In details, cantonal immigration authorities are the institutions in charge of decisions on the initial admission of a third-country national, family reunification and the grant of permanent residence permits. The organisational dimension and the resources at disposal of these authorities, as the quality of the service delivered, in terms, for example, of quantity and transparency of the information and procedures, varies accordingly to their dimension and to the size of their foreign population[106]. In case of an admission decision (i.e. the grant of a short-stay permit), cantonal authorities should consider federal quotas, verify the respect of the preference clause by the company that has required the foreign labour force[107] and the possession by the would-be worker of the necessary professional qualifications (23). The failure in demonstrating the possession of the latter is considered the first and determinant ground for refusal. On the contrary, although the law requires also a preliminary evaluation of the foreigner integration potentiality (54.1), by considering in addition its age and language skills, the fulfilment of these requirements have proved to be less relevant, since the integration capability is taken largely for granted, considering the high-skilled profile of the migrant.

Recalled that conditions of entry and stay differ according to the type of permit held by the foreigner (44 and 45), cantonal authorities have to verify a very high number of conditions benefitting from a wide margin of discretion. First, the cantonal authority verifies the suitability of the accommodation, which, more precisely, is a task delegated to Municipalities, since they posses a better knowledge of the local property market. Subsequently, it is checked the possession of adequate financial means, the non reliance on the social assistance system and, finally, the sharing of the same domicile between family members. In this ambit two tendencies are constantly opposing: from the one hand, the will to protect and guarantee the right to a private and family life to long-term foreigners, on the other the will to preserve the health of the national economy by avoiding to assume responsibility for individuals that will, potentially, become a burden for the cantonal finances. Accordingly, it does not surprise that the most common ground for refusals is the lack of the proper financial means, since authorities *use* this criterion to divide «desirable from undesirable» migrants.[108].

The renewal of short and long-term permits is based on the continuous fulfilment of admission conditions. These are the pursue of the work activity or, for family

[106] Cfr. *Les marges de manoeuvre au sein du Fédéralisme: la politique dé migration dans les Cantons*, cit. 74.

[107] The adequacy of the remuneration and work conditions is decided by the authorities in charge of the issuing of the preliminary decision based on the employment market.

[108] Cfr. *Les marges de manoeuvre au sein du Fédéralisme: la politique dé migration dans les Cantons*, cit., 82.

reunification, the prosecution of marriage. Nonetheless, their renewal may also be made dependent on the follow of a language or integration course. In this respect the notion of integration and, more importantly, its geographical variations across Cantons, plays the most relevant role, since the «task of integration» is, in practice, carried on by Cantons and Municipalities. Precisely, the latter are responsible for the obligations to inform and communicate to foreigners their rights, duties, national and local customs and opportunities available at the local level.

Generally, when assessing how foreigners contribute to their integration, Cantons should consider the respect of fundamental constitutional values, of the public order and security, the will to participate economically and to acquire an education, and finally the knowledge of one of the national languages.[109]. Interestingly, the renewal of the above mentioned permits may be made dependent on the accomplishment of an «integration agreement», an instrument that is left to Cantons to decide on its use. So far, only twelve German-speaking Cantons are using these agreements. These are addressed to foreigners who reside in the country thanks to a successful family reunification process, or to foreigners resident for a certain time who present an «integration deficit» and for the same risk to be removed. Among the signs of an «integration deficit» are considered, mainly, insufficient language skills and dependency on the social assistance system. Although, according to the law, the content of an integration agreement should be made only of integration and language courses, Cantons generally add other requirements, as the obligation to look for a job, to increase the «pressure» on persons, particularly if they have an «integration deficit»[110]. The fact that none of the French-speaking Cantons make use of these instruments and that, instead, almost all German-speaking Cantons used them, emphasise their utility as instruments of an equality of chances promotion, and reinforces the argument that, at least, two visions of integration are present within the country, and that a trans-border influence of citizenship understandings has conditioned the content of Swiss Cantons integration policies[111].

Finally, cantonal authorities are responsible also for the issue of permanent residence permits (34). This permit has an unlimited validity and is unconditional. It is released mainly on the basis of a continuous (and lawful) residence[112], but also considering the degree of integration of the candidate (54.2). Ten years of residence are

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[109] Cfr. art. 4, Ordonnance sur l'intégration des étrangers (OIE) du 24 octobre 2007.
[110] *Ibid.*, p. 69.
[111] A. MANATCHAL cit., p. 291; a contrario M. HELBLING, *Practicing Citizenship and Heterogeneous Nationhood: Naturalisations in Swiss Municipalities*, Amsterdam, 2008, p. 93.
[112] A further condition for the grant of a residence permit is the absence of grounds for revocation ex art. 62, Federal Law on Foreigners. It is noteworthy that, a part from the traditionally grounds for refusal such as threat to public policy or security, criminal convictions or fraudulent acquisition of the previous status, additional grounds on which a refusal can be based are the no longer fulfilment of the obligation linked to the decision (e.g. unemployment) and the dependence on social assistance.

required in total, and the last five of uninterrupted residence. However, citizens of EU/ EFTA countries and «successfully integrated» third-country nationals may obtain it after five years of residence with a residence permit, and the former also on the basis of short stay permits. With such permit a stable status is granted, unless grounds for revocation exist, e.g. a «permanently and to a large extent [dependency] on social assistance» (63.1, c). Permanent residents are granted (a quasi-) equal treatment in relation to nationals, the main difference in their rights remains the exercise of political rights, that is a domain on which Cantons are sovereign.

The considerations that have been made above in relation to the different modes in which integration is conceived among Cantons are valid also when a «successful integration» is assessed. In this particular case, the main grounds for refusal are the insufficiency of the linguistic knowledge and the non financial independence, that is considered to be a lack of will of participate actively to the economy of the country. While some Cantons consider the current dependence on social assistance, others made a prognostic evaluation of a possible future dependence on social assistance on the basis of the current situation of the individual.

Concluding, different conceptions of integration seem to inform cantonal integration policies and evaluations, and are reflected on the variety of instruments that are used to both «encourager et exiger» integration. The degree of ascertainment of the requirements' fulfilment appears to vary accordingly to the duration of the permit to be released, or in relation to the period of residence already accumulated. Noteworthy, even though the will of participate in the economic life, mainly intended as economic independence and not reliance on the social assistance system, is always ascertained, its relevance decreases over time and the social and cultural integration becomes, in parallel, more important.

As regard cantonal variations observed in this regard, a significant role seems to be played by political preferences of cantonal citizens on immigration matters and by cantonal politics, since both has an influence on the local administration. Thus, as in other cases, the flexibility obtained leaving to Cantons to implement federal policies in order to permit an adaptation to local needs and objectives lead to the emergence of discriminatory treatments in some cases, and to a lack of control on the overall coherence of the system by the federal level. At last, an incentive for Cantons to co-operate in order to have more harmonised polices and shared policy objectives could come from the increasing internal mobility of migrants, a right that is immediately granted to EU/EFTA citizens, but is also exercisable by third-country migrants for work purposes, provided they are not unemployed[113].

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[113] *Les marges de manoeuvre au sein du Fédéralisme: la politique dé migration dans les Cantons*, cit., 108.

3.2.1. The foreseen reforms of the Swiss immigration policy: focus on labour migration and integration.

The newly introduction of art. 121a in the Swiss Constitution, as a consequence of 9 February 2014 vote[114], requires, as above said, the Federal Council to revise in a three-year period the admission system of foreign labour force in the country, and to renegotiate the agreement on persons' free movement with the EU. 10 June 2014 the Federal Council has presented the framework and guideline on which basis the new regime will have to be designed, and 8 October 2014 the draft mandate to renegotiate the EU-Swiss agreement on persons' free movement has been approved and definitely 11 February 2015, after a first round of consultations. However, a reflection on the complementary side of the immigration policy - i.e. integration of migrants - started soon after the entry into force of the the 2008 Federal Law on Foreign Nationals as did the process to amend the former law in order to overcome the above mentioned main defects of Swiss integration policy and to fully realise the basic twofold principle of integration policy: *encourager et exiger.* Nevertheless, this early started amendment process has been modified as well to be made in line with the amendment of the Constitution of February 2014.

At the one side, it has been remarked that integration is a personal responsibility of the foreigner which has to demonstrate it will to integrate by respecting the Federal Constitution and the legal system, through its economic participation, by acquiring an education and learning a national language. On the other side, there is the necessity to improve cantonal integration measures and to formulate more clearly the demands on integration. Concerning this - and recalling what have been said above on the autonomy of sub-national units as regard integration - the Federation will assume a more active role, not only by increasing Cantons' funds to be destined to such activities and by controlling the overall quality of integration initiatives, but also by determining compulsory objectives as regard first information and measures of integration, work and education.

On these basis, at the end of 2011 the Federation and Cantons have agreed on a

[114] The popular vote of 9 February 2014 has been just one of a series of initiatives against migrants or demanding the amendment of immigration policy in a restrictive way in the last decade. In particular, are worth of notice the 2009 initiative to ban minarets from Switzerland - although, exactly, the initiative was on religious rights of minorities and not on immigration *per se* - and the 2010 initiative to return criminal migrants to their country of origin, which have received Swiss voters' support, even though the latter is still awaiting implementation. Cfr. «Initiative populaire fédérale 'contre la construction de minarets'», entered into force 29.11.2009; «Initiative populaire fédérale 'Pour le renvoi des étrangers criminels (initiative sur le renvoi)'» entered into force 28.11.2010.

common integration strategy to be developed in next years to be finally implemented and applied from January 2014. The common objectives of this joined strategy are increase social cohesion, participation and encourage respect ant tolerance, granting in parallel to these objective equality of chances to foreigners. Subsequently, the federal office for migration and cantonal administrations, on the basis of a proposal of the former, have worked alongside to elaborate Cantons' integration programmes within a federal general framework[115]. Cantons' as well as federal integration measures have to be taken in a set strategic ambits: first information at arrival and take into consideration of specific needs, assistance in relation to integration measures available, and fight against discrimination; language, education, with particular attention to children in preschool age, and employment; in the end, social integration and cultural mediation. Therefore, from January 2014 Cantons have their own integration programmes defining their specific integration measures to pursue the general objectives agreed with the Federation for the period 2014 to 2017.

Alongside the adoption of these measures on integration, as above mentioned, a process to partially amend the Federal Act on Foreign Nationals, and five related legal acts[116] was initiated as well. A first round of consultations took place in November 2011, and has lasted until March 2012. The draft legislation presented by the Federal Council, although the process is still on-going and will certainly undergo modifications, present novelties worth of notice especially in view of an harmonisation of integration policies at the federal level through a clarification of integration requirements, a clear statement as regard federal and cantonal competences on integration and by making the use of integration agreements compulsory in certain circumstances. However, the draft legislation dated December 2013 has had to consider the consequences of the 9 February 2014 vote. Hence, the National Council has sent again the draft to the Federal Council on 12 March 2014. The latter has adopted in June a programme in order for the draft to be made consistent with art. 121a of the Constitution. Therefore, to fully comprehend the content of the proposed amendments, it is necessary to account for both drafts. Nevertheless, the second draft leaves untouched propositions on integration criteria, promotion of integration and protection against discrimination as the proposed amendment of the other five related acts with the Law on Foreign Nationals. These latter are required to introduce the statement that promotion of integration has to be realised by

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[115] Cfr. Appel d'offres, Développement des programmes d'intégration cantonaux et des mesures d'accompagnement (DPIM), 20 May 2010, at https://www.bfm.admin.ch/dam/data/bfm/integration/ausschreibungen/2010-ekim/ausschreibung-f.pdf.

[116] Cfr. projet de modification du 8 mars 2013 de la loi fédérale sur les étrangers (Intégration), dans la version du Conseil des Etats du 11 décembre 2013, at http://www.parlament.ch/sites/doc/CuriaFolgeseite/2013/20130030/S11%20F.pdf.

providing equality of chances[117].

Firstly, and symbolically relevant, the draft changes the title of the law from «Law on Foreign Nationals» to «Law on Foreign Nationals and Integration», and after having listed the same above mentioned principles it includes that promotion of integration is a competence and task to be carried out jointly by all the actors involved at all levels of government, whether public or private, in the relating ambits of competence (53.4). Integration promotion activities have to be carried out in the first place inside the, so called, ordinary structures as schools, workplaces, sanitary structures, social security institutions, through the urban development of cities and districts and, at last, through sports, media and culture (53b). Nevertheless, if ordinary structures fail or can only partially respond to the needs of integration, specific programmes have to be provided. These could, for example, provide alternative means to acquire language competences, and employers have been made responsible in supporting integration of their employees and family members.

Differently from the law currently in force, the draft list the conditions which fulfilment are necessary and sufficient to consider a foreigner well integrated: respect of security and public order, of fundamental constitutional principles, capacity to communicate in a national language, will of participate economically or to acquire an education (58). The definition of integration at the federal level is even more relevant since in the last draft the lack of will to integrate has been introduced as a ground on which a permanent residence permit can be revoked and substituted with just a limited in time residence permit (63.3)[118]. Moreover, it is further stated that in this case a new permanent residence permit could be granted again after three years (34.6).

The usufructuaries of integration measures are holders of a residence permit, whether temporary or permanent, refugees and persons temporarily admitted (53a). Cantons are responsible to provide them with information at arrival and to address their potential specific integration needs (55). Furthermore, they receive federal funds to carry out measures aiming at developing foreigners professional and linguistic competences, their social integration, equality of chances, to provide information, advices and protection against discrimination. Specific integration requirements can be contained within an integration agreement which can concern the learning of a national language and of the legal system as of the Swiss use and costumes (58a). Recommendations on

117 Cfr. Loi fédérale du 13 décembre 2005 sur la formation professionnelle, RS 412.10; Loi du 22 juin 1979 sur l'aménagement du territoire, RS 700; Loi fédérale du 19 juin 1959 sur l'assurance-invalidité, RS 831.20; Loi du 25 juin 1982 sur l'assurance-chômage, RS 837.0.

118 Cfr. Propositions du Conseil fédéral concernant le projet de modification du 8 mars 2013 de la loi fédérale sur les étrangers (Intégration), dans la version du Conseil des Etats du 11 décembre 2013, https://www.bfm.admin.ch/dam/data/bfm/aktuell/gesetzgebung/teilrev_aug_integration/vorentw2-aug-f.pdf. All further references between brackets in this subsection are to this draft legislation unless otherwise indicated.

integration could be addressed by cantonal authorities to EU/EFTA citizens even if their fulfilment cannot be connected to any kind of sanction. At last, employers are explicitly included among the list of actors responsible in contributing to foreigners' integration (58b).

Although the conclusion of an integration agreement remains, in general, an option for cantonal authorities, and are currently concluded only if needed in cases of family reunification and with foreigners exercising a teaching or training activity. Interesting enough is its relation with the security of residence of foreigners, that is to say the grant or renewal of residence permits. Actually, a temporary residence permit is renewed and a permanent residence permit is granted only if the foreigner is well integrated. However, a permanent residence permit can be granted only after five years, instead of tens usually required, if there are not grounds for refusal and it can communicate in a national language. In connection, the grant or renewal of a residence permit, or of a temporary admission can be connected to the obligation to conclude an integration agreement (83a). In the latter case, the objective of professional integration could be added to its content, and the fulfilment of the objective fixed by the agreement is one of the grounds on which authorities will evaluated the request of a residence permit after five years of residence of foreigners initially admitted on temporary basis (84.5). Nevertheless, if the persons is dependent on social assistance or as seriously or repeatedly violated or represents a threat to public security and order in Switzerland or abroad or represents a threat to internal or external security the conclusion of an integration agreement is compulsory. It is compulsory as well in those cases in which the foreigner was unable to acquire the capacity to communicate in a national language because illiterate (49a.3).

The language requirement - the capacity to communicate in a national language - assumes particular relevance as regard family reunification: the foreign spouse and unmarried children under the age of eighteen of a Swiss citizen or of a third-country national authorised to reside temporarily or permanently in Switzerland is further required to fulfil the language requirement or to be enrol in a course in Switzerland to acquire such competence - in addition to the hold of an appropriate accommodation, not to be reliant on social assistance and do not receive social security benefits, to live with the permit holder - in order to be granted or renewed a residence permit (42.1, 43.1, 44). The grant o renewal of a residence permit only of the foreign spouse and unmarried children under the age of eighteen of a third-country authorised to reside in the country could be submitted to the conclusion of an integration agreement if special integration needs exist (44.3)[119]. Furthermore, the foreign spouse and unmarried children under the

[119] Cfr. Propositions du Conseil fédéral concernant le projet de modification du 8 mars 2013 de la loi fédérale sur les étrangers (Intégration), dans la version du Conseil des Etats du 11 décembre 2013.

age of eighteen could be granted a short-term permit only if they do not receive social security benefits[120]. Finally, the proposal reform adds to the requirements to be fulfilled by persons admitted only temporarily to exercise the right of family reunification among those seen above not be recipients of social security benefits (85.7, c bis).

As emerged, the proposed measures in part codify cantonal practices in the evaluation of foreigners integration. Nevertheless, the set of the criteria on which basis integration should be evaluated at the federal level is certainly one of the more relevant novelties of this draft legislation with the establishment of a dependency relation between the (lack of) will to integrate and the right to reside. These amendments will contribute to continue the process of harmonisation and convergence of cantonal criteria and practices in this field. As seen above, relevant steps have already been made by setting Cantons integration programmes and of the federal general framework fixing common objectives.

As already stated, the Federal Council has adopted a distinct draft legislation amending the Federal Law on Foreign Nationals to made it consistent with the newly inserted art. 121a of the Constitution in relation to the admission system. Granted that the final content of the draft depends on the results of the renegotiation process with the EU of the agreement on persons' free movement, after a first round of consultations, 11 February 2015 provisions modifying the criteria of admission of third-country nationals have been drafted by the Federal Council in the meanwhile. Although the main aim is to return to an autonomous limitation of immigration and privileged regard for national economic interests, alongside it was equally expressed the will to maintain the current dual system of admission, distinguishing among foreigners from EU/EFTA countries and third-country nationals at least as regard certain specific ambits as their exclusion from the exam of the professional qualification, the set of different quotas and priority of recruitment. These are all provisions already in force under the current agreement.

At the moment, just a limited number of ambits of the foreseen admission system which will concern also EU/EFTA citizens. Firstly, under the new regime the national preference clause will apply to EU/EFTA citizens as well, however it won't be applied on a case by case assessment - as it is and will remain the case of third-country nationals - but just in the determination of quotas and maximum quantitative limits. Controls of the respect of work and wage conditions as regard the specific profession are going to be carries out also in relation to EU/EFTA citizens on an individual basis as it is currently done for third-country nationals at the moment of admission. On the contrary, neither family reunification rights nor rules determining the right of residence of EU/EFTA

[120] Cfr. Loi fédérale sur les prestations complémentaires à l'AVS et à l'AI (Loi sur les prestations complémentaires, LPC du 6 octobre 2006, RS 831.30.

citizens are going to be concerned by the new regime[121].

The Federal Council will determine annually the maximum number of short-term permits for stays up to four months to exercise an economic or cross-border activity, of temporary and permanent residence permits, temporary admissions and as regard the grant of temporary protection. This determination, however, can be changed in any moment if necessary (17a.1, 2). The total amount can also be divided depending on the reasons justifying the stay of the foreigner or on the basis of its nationality, i.e. if he/she is an EU/EEA or third-country citizen. However, the Federal Council can decide to substitute the total amount determined at the federal level with cantonal quotas (17a.5). In this last case, the decision on the amount of quotas is left to Cantons accordingly (17, c). In determining annual quotas the Federal Council will consider, the remained untouched by the draft, admission principles - national economic interests and the integration capacity of the foreigner in the labour market - Swiss international obligations, the national preference clause, Cantons' needs and recommendations of the immigration commission (17b).

The determination of such quotas are significant since under the new regime not only foreigners admitted to pursue economic activities will be submitted to them but also non-economically active foreigners as students or those admitted to be submitted to a sanitary treatment, cross-border workers, family members asking for family reunification, refugees and persons admitted on temporary basis or accorder temporary protection[122]. Finally, for the purpose of mobilise the workforce already present in the country, and to improve employment possibilities of residents, the criteria on which basis a priority admission is granted have been modified. Therefore, a third-country nationals will be admitted to entry and stay in the country, fulfilled the above mentioned criteria, only if it is demonstrated that no worker in Switzerland is available for the same job position. Under the new regime are considered to be a worker in Switzerland, Swiss nationals, permanent residents, those holding a short-term permit or temporary residence permit or self-employed, foreigners admitted on temporary basis or to which temporary protection has been granted (21.2, lett. c-e). Only if the employer has made a request as regard a specific profession of which there is a verified lack of workforce, it is not required to prove the availability of the above mentioned categories of foreigners already

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[121] Rapport explicatif. Projet de modification de la loi fédérale sur les étrangers Mise en œuvre de l'art. 121a Cst., Département fédéral de justice et police DFJP, Département fédéral de l'économie, de la formation et de la recherche DEFR, Département fédéral des affaires étrangères DFAE, Février 2015, p. 10-12, at https://www.bfm.admin.ch/dam/data/bfm/aktuell/gesetzgebung/teilrev_aug_art-121a/vn-ber-f.pdf.

[122] Cfr. arts. 27.2, 28.2, 29,2, 42.2, 43.2, 44.2, 45.2, 48.1, Propositions du Conseil fédéral concernant le projet de modification du 8 mars 2013 de la loi fédérale sur les étrangers (Intégration); Proposal of amendment arts. 60.1 and 66.1, Federal Law on Asylum of 26 June 1998, at https://www.bfm.admin.ch/dam/data/bfm/aktuell/gesetzgebung/teilrev_aug_art-121a/vorentw-aug-f.pdf.

present in the country (21.2bis).

The introduction of the latter two categories - foreigners admitted on temporary basis or to which temporary protection has been granted - and of refugees among those to be considered as «workers in Switzerland» and benefiting from the application of the national preference clause reflects the effort to included persons without (still) a secure status in the labour market, since it has been observed that their stay last for numerous years or they end to set permanently with scarce result as regard integration in the labour market. To overcome these deficiencies, the necessity to obtain a previous authorisation in order to exercise an economic activity - as long as work conditions of that specific profession are respected - for persons admitted on temporary basis and refugees will be amended and substituted by a declaration to be made by the employer to the competent authorities in relation to the workplace (85a, 1-3). Under the current regime, asylum seekers and persons temporarily admitted as those admitted for reasons of protection who do not hold a residence permit are required to refund welfare and execution costs and the costs of the appeal proceedings. To these aim, their earning deriving from the exercise of an economic activity and their estate are taxed. For the purpose of reduce the administrative burden for employers who wish to employ a persons part of these categories and to improve their professional integration, it has been proposed to eliminate the tax of their profits deriving from the exercise of an economic activity. The potential better integration in the labour market and the supposedly improvement of their wages will reduce the recourse to social aid compensating for the income reduction for the Federation[123].

The end of these revision processes are uncertain and there is a high probability that their content won't remain the same until their last approval. However, considering that at the basis of the above illustrated amendments to the current immigration policy there is the newly introduced article 121a Const. it appears that the final result could even be different in details but the direction of the new immigration regime has been already given. Concerning the proposed new admission system, it seems to assist to a return of already seen attitudes and schemes on immigration control driven by the, never disappear, fear of an excessive presence of foreigners sharpen by the last economic crisis. Nothing fundamental seems to be changed for third-country nationals wish to exercise an economic activity, and an improve of conditions of asylum seekers and persons only temporarily admitted is foreseen. The true uncertainty remains the results of the renegotiation of the EU-Swiss agreement on persons' free movement, since it is

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[123] Cfr. Rapport explicatif, Adaptation du projet de modification de la loi fédérale sur les étrangers (Intégration ; 13.030) à l'art. 121a Cst. et à cinq initiatives parlementaires, Département fédéral de justice et police DFJP, Février 2015, p. 9-10, at https://www.bfm.admin.ch/dam/data/bfm/aktuell/gesetzgebung/teilrev_aug_art-121a/vn-ber-f.pdf.

difficult to predict what are the margins for a possible renegotiation of the same.

With respect to integration, relevant is the connection and the proportional relation established between the level of integration and the security of the status: to more strict and demanding criteria to consider the foreigner integrated correspond the possibility to be granted a more secure status if these are, eventually, fulfilled. This is further demonstrated by the introduction of the possibility to downgrade the security of the status - from a permanent to a temporary right to reside - of those foreigners which after a certain period refuse to integrate. At last, the renewed emphasis on integration as a personal responsibility of the foreigner is illustrated by the importance acquired by the language requirement as a ground on which integration is evaluated in relation to the current regime and by requiring not only not to be reliant on social assistance but also not to receive social security benefits.

4. Swiss Naturalisation procedure: the three-level citizenship.

The picture cannot be complete without having considered the «citizenship» side of the above described process of reform of immigration and integration. This, actually, has not escaped from the season of reforms, and a revised Federal Law on Citizenship has been adopted by the Federal Parliament 20 June 2014. Nevertheless, the overall framework and the context within which the reform took place, need to be outlined in advance since this further aspect of the Swiss federation uniqueness cannot be fully comprehended without considering the genesis and development of the Swiss three-level citizenship.

Swiss citizens are, firstly, citizens of the municipality in which they reside, secondly of the Canton in which that municipality is situated, and finally of the Federation (37.1 Constitution). Accordingly, procedures and requirements to acquire the Swiss citizenship(s) are determined, with different degrees, by all the correspondent levels. While the federal level is competent for the acquisition of citizenship by birth, marriage and adoption, for the loss and the recovery of it, when it comes to the (ordinary) naturalisation of foreigners, the federal level settles minimum standards only, and issues the, so called, federal licence during the naturalisation procedure. Every other aspect is left to be determined by Cantons and municipalities.

Although certain similarities in the modes of citizenship acquisition can be found in other legal systems, where «regional variations» of the national citizenship are present

(e.g. Germany)[124], what makes unique the Swiss citizenship regime is the high degree of autonomy accorded to municipalities and Cantons (also) in this field, and the consequent overturn of the traditional hierarchy between the central and sub-national level in citizenship attribution. It follows that a great differentiation in naturalisation criteria and procedures are noticeable, and this makes rather difficult to make statements on this issue with the pretension to be generally valid for the whole Federation[125]. This observed diversity, naturally, has played a fundamental role in the historical formation and development of the Swiss nationhood and national identity[126]. If, from the one hand, it has resulted in local understandings, forms and versions of citizenship[127], from the other hand it has led to a constant insistence on the necessity to defend the, supposed, homogeneity and sovereignty of the «Swiss Peoples» against the «Other(s)»[128].

The citizenship matter does not make exception from all that has been said previously as regard the Swiss legal system and those fundamental characters - federalism, direct democracy, consociationalism - that influence its functioning and evolution. On the contrary, if such a thing is possible, this is the ambit where every element finds full expression and, at the same time, is compelled by the unavoidable exigency to come to terms with all the others. In sum, it is a perfect ground where the permanent tension inside Swiss federalism between (federal) convergence and (local) autonomy can be analysed.

If Switzerland has «one of the most particular naturalisation systems in the world»[129], that obviously is an historical legacy and a reflection of the uniqueness of this federation. Simultaneously, this state of affairs is more and more subjected to internal and external influences, commonly present not only with other federations but, in general, in western democracies nowadays. Namely, the increasing role played by Courts[130], that in the Swiss case have made the naturalisation procedure more consistent with individual rights protection by eliminating its most evident unreasonable elements;

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[124] K. HAILBRONNER, *Germany,* in BAUBÖCK, R., ERSBØLL, E., GROENENDIJK, K., WALDRAUCH, H., *Acquisition and Loss of Nationality Policies and Trends in 15 European States. Volume 2: Country Analyses*, Amsterdam, 2006, p. 239; M. HELBLING, *Naturalisation policies in Switzerland: explaining rejection rates at the local level*, in CAPONIO, T., BORKET, M. (EDS.), *The Local Dimension of Migration Policy Making*, Amsterdam, 2010, p. 41.

[125] N. CARREL, M. WICHMANN, *Naturalisation procedures for Immigrants in Switzerland*, Robert Schuman Centre for Advanced Studies, EUDO Citizenship Observatory, European University Institute, Florence, Italy. 2013, p. 1.

[126] P. DARDANELLI,, N. STOJANOVIĆ, *The acid test? Competing theses on the nationality-democracy nexus and the case of Switzerland*, in *Nations and Nationalisms*, 2, 2011, p. 363.

[127] M. HELBLING, *Switzerland: Contentious Citizenship Attribution in a Federal State*, in *Journal of Ethnic and Migration Studies*, 5, 2010, p. 794.

[128] A. ACHERMAN (ET AL.), *Country Report: Switzerland*, Robert Schuman Centre for Advanced Studies, EUDO Citizenship Observatory, European University Institute, Florence, Italy. 2013, p. 3.

[129] M. HELBLING, *Naturalisation policies in Switzerland: explaining rejection rates at the local level,* cit., p. 793.

[130] C. JOPPKE, *Immigration and the identity of citizenship: the paradox of universalism*, cit., p. 533.

secondly, the pressure of right-wing parties which, under certain conditions, have been capable of giving policies concerning foreigners, especially at the local level, a more restrictive shape[131]. Thirdly, citizenship-as-identity and as a means to build social cohesion in multi-societies is a shared concern and fundamental topic in countries which have to deal with a constant growing of their foreign population[132]. Lastly, and in strict connection with the latter element, the numerous amendments of the Swiss citizenship regime over time can be seen as attempts to respond to the challenges of immigration, and to the need to find effective ways to integrate the high percentage of foreigners in a so diverse society[133]. These general trends, however, have found a specific Swiss declination as a result of an extensive use of direct democracy instruments combined with the high degree of autonomy of its sub-national units and not shared understandings of citizenship[134]. Since our interest stay in the relation among the govern of immigration, foreigners' integration and citizenship, rather than focusing on the whole citizenship regime, attention is paid only to naturalisation modes and procedures.

The Swiss three-level citizenship was established at the same time of the federation foundation in 1848. Before, Cantons decided based on their own cantonal laws, and the state membership derived consequently. However, the 1848 Constitution only determined that citizens of a Canton who were citizens of a Municipality were automatically citizens also of the Federation. It was only in 1874 that citizenship started to be regulated at all three levels, and in 1903 the first Federal Law on citizenship was adopted. Accordingly, a foreign child born in one Canton by a Swiss mother could be naturalised if their parents had lived in the country for a minimum of five years.

Since the foundation of the federation until the WWI, the country pursued a liberal admission policy on the basis of bilateral agreements which provided the same generous criteria of entry to Swiss citizens on the basis of the reciprocity principle. This led to a rapid increase in the percentage of foreigners - doubled in the first decades of the twentieth century in comparison to the percentages registered at the ending of the previous century. Therefore, a certain negative attitude towards the foreign population and the emergence of a «Foreigners question» can be dated back already to this period. Interesting enough, at that moment on of the possible solutions considered to solve the problem was naturalisation, seen as a necessary instrument to assimilate the foreign population, which was actually the real solution considered, and as a means to secure the

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131 M. HELBLING, cit., p. 49.

132 W. KYMLICKA, *Multicultural citizenship within multination states*, cit., p. 282.

133 A. ACHERMAN ET AL., Country Report: Switzerland, *cit*., p. 10.

134 G. D'AMATO, *Swiss Citizenship: A Municipal Approach to Participation,* in J. L. HOCHSCHILD, J. H. MOLLENKOPF, *Bringing Outsiders In: Transatlantic Perspectives on Immigrant Political Participation,* Ithaca 2009, p. 67-69.

needed workforce[135].

In the aftermath of WWI the approach changed, and citizenship attribution started to be used as a means to keep out undesirable would-be Swiss citizens. Naturalisation was still seen as a mode to assimilate the huge foreign population, and even forced naturalisation was proposed as a possible solution. Subsequently, a request to assimilation was directly addressed to foreigners and was made a condition of their stay. Pressures for a change of the citizenship regime have then derived from the rapid growth of foreigners in the country in the aftermath of WWII[136].

In 1952 the «Federal Act on the Acquisition and the Loss of Swiss Citizenship» was adopted and has remained in force until the first half of 2014, even if it was amended several times some elements have not being changed until the last reform. This law has introduced the twelve-year residence requirement and the necessity to pass an «aptitude test» in order to get the Swiss citizenship. This test, introduced already in 1941, allowed local authorities to evaluate the degree of adaptation and assimilation to the local and nationals uses and costumes of the foreigner, and to carry out a general evaluation of the candidate personality. In addition, a facilitated mode of acquisition was provided for children of Swiss women who had lost their nationality because of marriage with a foreigner, and a mode of citizenship re-acquisition was provided to the latter category in case of previous loss.

In 1984 and 1992 a two-stage citizenship reform took place. The initial patriarchal formulation of the citizenship law was modified. The unity of the family as well as the equality of treatment between men and women were put at its basis, making citizenship an individual status not subject to civil status changes. Furthermore, in 1992 the interdiction on dual citizenship was abolished. For these facilitated naturalisation procedures the federation was the level of government responsible.

In 2002 an attempt to further amend the citizenship regime was launched, aiming at reducing the residence requirement, provide an easier and fast track for naturalisation at the advantage of second generation migrants and an automatic mode of acquisition - introducing an element of *jus soli* in the legislation - to third-generation of young foreigners. In the meanwhile, the Federal Supreme Court, in 2003 and 2004[137], passed two significant judgements on the constitutionality of naturalisation procedure at the municipal level which increased the debate. In the first, it has declared the municipal

[135] J. M. NIEDERBERGER, *Le développement d'une politique d'integration suisse*, cit., p. 257.
[136] G. D'AMATO, *Swiss Citizenship: A Municipal Approach to Participation,* cit., p. 66.
[137] Swiss Federal Court, Judgment BGE 129 I 232, 9 July 2003; BGE 129 I 217,9 July 2003; BGE 130 I 140, 12 May 2004.

vote by ballot refusing naturalisation to a group of persons from the former Yugoslavia was unconstitutional because it has violated art. 8.2 - non discrimination on the basis of nationality - and art. 29.2 of the Constitution - access to Court. In the second judgment, it established that naturalisation decisions are to be made by open ballot. Since naturalisation procedures are administrative procedures, decisions have to be motivated and appealable. Accordingly, Cantons have progressively revised their laws. Finally, in September 2004, the proposal of revision of the Nationality Law was rejected by the People and the Cantons through referendum.

Since the 2014 revision, the Nationality Law has undergone to numerous amendments. Fees were reduced and have been anchored at the real administrative costs of the procedure since 2006[138]. This prevented sub-national units from «selling» their citizenships, or to discriminate applicants on the basis of their economic conditions. In 2008, a popular initiative aiming at overturning the Federal Supreme Court judgment, that is to say to retain the right of municipalities to decide on naturalisations by secret ballot, took place. It failed receiving a very low popular support, and the federal citizenship law was amended for the purpose of transposing within the law the outcomes of the above mentioned judgements[139]. Finally, after a three-year discussion, the latter and complete reform of the Federal Citizenship Law was adopted by the Federal Council the 20 June 2014.

4.1. The current regime.

In order to better comprehend the reasons and the content of the just adopted reform of the Swiss Citizenship Law, it is necessary to previously briefly outline the former regime which, despite its numerous amendments, was in force since 1952. Actually, the reform left unchanged various basic aspects of the previous regime, having mainly modified only the provisions concerning the acquisition of citizenship by naturalisation.

As premised, it should recall one time more that the Swiss citizenship is a three-level citizenship regardless of the acquisition mode, i.e. the person is simultaneously a citizen of the municipality in which he/she resides, of the Canton where the municipality is situated, and lastly of the Federation[140]. The Federal Act on the Acquisition and the

[138] Cfr. Art. 38, Federal Law on Nationality as amended by the Federal Law of 3 October 2003 (Acquisition de la nationalité par des personnes d'origine suisse et émoluments), in force from 1 January 2006.
[139] Cfr. arts. 15a, 15b, 15c Federal Law on Nationality as amended by the Federal Law of 21 December 2007 (Procédure cantonale/Recours devant un tribunal cantonal), in force from 1 January 2009 (RO 2008 5911).
[140] Cfr. art. 37, Federal Constitution of the Swiss Confederation.

Loss of Swiss Citizenship of 1952 provided two different modes of acquisition of the federal citizenship: one automatic-by law, the other non-automatic-by naturalisation. Whereas the first was totally ruled by the Federation, the second, composed by three internal modes - ordinary and facilitated naturalisation and reacquisition - sees one out of three modes, the ordinary one, regulated by all three levels of government: federal, cantonal and municipal. In the end, the loss of citizenship automatically-by law or by resolution is regulated by the sole federal level[141].

The acquisition by law is based on the *jus sanguinis* principle, thus citizenship is acquired at birth, whether one of the parents is Swiss, even if the child is born out of wedlock, was adopted or is born abroad. Specific provisions regard foundlings and children of unknown descent. On the contrary, citizenship is automatically lost when a paternity recognition from which has derived its acquisition is nullified, when a Swiss minor is adopted by a foreigner and there is not anymore a relation with a Swiss parent, and finally when a Swiss child born abroad is not registered to the Swiss authorities before the age of twenty-two. Nevertheless, the automatic loss may happened only if the person does not become stateless as a consequence. On the other hand, the loss by resolution can follow after a fraudulent citizenship acquisition by naturalisation for having provided false information or hidden relevant facts that would mislead authorities or affect the procedure. The loss is extended to all family members that have acquired the citizenship as a result the lost citizenship.

Citizenship can be lost also by renunciation if a request is made in this sense, when the person does not reside any more in Switzerland and statelessness does not follow and, whenever a citizen poses serious threats to the national security, interests or reputation, citizenship can be withdraw provided that statelessness does not follow.

As regards non-automatic modes of acquisition, a facilitated naturalisation procedure is established for foreign spouses of Swiss nationals, for children of naturalised persons or persons that lost their Swiss nationality, for stateless minors and persons who in good faith believed that they were Swiss. It is required to respect the legal order, not to pose a threat to national security and fulfil integration requirements. Finally, modes of citizenship reacquisition are provided for children born abroad that lost their citizenship, persons who have renounced to the Swiss citizenship or that lost it as a consequence of marriage with a foreigner or divorce. They are requested to demonstrate to have «simple ties» with Switzerland, respect the legal order and not to pose a threat to national security.

All these modes, apart for minor changes of which we will account for, have

[141] Cfr. art. 38. 1 and 2, Federal Constitution of the Swiss Confederation.

remained untouched by the 2014 reform which has mainly amended the criteria of ordinary naturalisation. Nevertheless, since the text approved on 20 June 2014 does not enter into force, ordinary naturalisation will continue to be regulated by the 1952 Citizenship Act in the last version entered into force 1 January 2013.

So, how it is currently regulated ordinary naturalisation and what are the main concerns that it has raised?

In the first place, there is not a right to citizenship acquisition, therefore a naturalisation decision is always a discretionary decision of local, cantonal and federal authorities. As said above, this mode, amongst all the others through which the Swiss citizenship can be acquired, is the only one regulated by all three levels of government. Concerning the procedure, although the Citizenship Act establishes a series of general requirements, it is the cantonal law that regulate it at the cantonal and municipal level (15a)[142].

Firstly the person is naturalised at the cantonal and municipal level, and only as a(n automatic) consequence at the federal level, notwithstanding federal authorities shall release a naturalisation licence in order for naturalisation at the sub-national level to be valid (12.2). Foreigners can ask for the federal licence from the moment in which they fulfil the twelve-year residence requirement, of which three of the previous five has to be antecedent to the application (15.1). The years of residence in the country from the age of ten to the age of twenty are counted double. To spouses or registered partners of applicants that accomplish with the previous conditions the residence requirement is reduced to five years in total. They are required to have resided in the country the previous year to the application and to demonstrate that the marriage or the registration of the partnership lasted at least three years (15.3-5).

In any case, before the licence is released, Federal authorities verify the «suitability» of the candidate (14): its integration into the Swiss society, its familiarity with habits, customs and practices - included the ability to communicate in one of the national languages - the respect of Swiss legal system, and that he/she does not pose a risk to national security.

Finally, the Federal Law obliged Cantons and municipalities to motivate decisions of rejection (15b) and to protect applicants' privacy (15c). In this context, the federal licence acts as an harmonisation element and works as a control mechanism, assuring that naturalisation procedures and requirements respect constitutional

[142] All further references between brackets in this subsection are to the Federal Act on the Acquisition and Loss of Swiss Citizenship (Swiss Citizenship Act, SCA)1 of 29 September 1952 (consolidated version 1 January 2013), RS 141.0 unless otherwise indicated.

principles[143].

Those listed above were only minimum standards, since Cantons and municipalities are give the power and autonomy to add their own requirements as regards the required time of residence, integration and the procedure. So, we can say that there were many naturalisation procedures and set of criteria as the number of Swiss Cantons and municipalities. Therefore, every Canton has its own law regulating ordinary naturalisation procedure and requirements. Municipalities adopt their own pieces of legislation to discipline the ambits on which they have discretion. If we add to this that candidates integration and familiarity with customs are mainly verified at the municipal level, we can perceive how relevant is the degree of autonomy left to municipalities[144], how elevated can be diversity in this ambit if geographically observed and, finally, how difficult is to effectively control the fairness and correctness of the decisions adopted.

In the first place, Cantons determine the order in which the various authorities involved in the procedure intervene: what is the authority to which the application have to be addressed, and at what point in the procedure the federal licence should be obtained. In the majority of Cantons the application is primarily addressed to the municipal naturalisation office. In addition, it is determined by the cantonal level also what is the authority that has the last word on a naturalisation procedure. This is a significant since, while the procedure and the decisions taken at federal level and cantonal level are administrative, municipalities' decisions are political. As above said, after the 2003 and 2004 Federal Supreme Court judgments found decisions taken at the ballot box by some municipalities to be discriminatory and not in compliance with procedural guarantees, thus unconstitutional, Cantons have progressively adapted their laws accordingly, and the authority to decide on naturalisation applications has been in most cases transferred to executives or specific institutions[145]. At the disposal of sub-national units' discretion there are also time limits within which the procedure has to end, and varies from eighteen months to three years. Depending on the authority that, accordingly to the cantonal law, has the last word on the outcome of the application, the complaint (to which applicants have been entitled after the above mentioned decisions of the Federal Court) has to be addressed to the Federal or, from 2009, to the Cantonal Administrative Court. Before, complaints at the cantonal level could be received also by political authorities, but this practice was found to be contrary to the non-discrimination principle. Moreover, from 2012[146], the Federal Court, as the last instance judge in cases

[143] A. ACHERMANN ET AL., cit., p. 19.
[144] M. HELBLING, *Naturalisation policies in Switzerland: explaining rejection rates at the local level*, cit., p. 795.
[145] A. ACHERMANN ET AL., cit., p. 21.
[146] Swiss Federal Court, Judgment ID_6/2011, BGE 138 I 305 S. 306, 12 June 2006.

regarding naturalisation, can decide on rejections not only in cases of (alleged) violation of the non-discrimination principle, of procedural guarantees or for insufficient motivation, but also when the applicant claim that the rejection was based on arbitrary grounds. Secondly, in addition to the twelve-year residence required at the federal level, Cantons and municipalities have their own requirement as regard the time of residence that varies from three to twelve years. Thirdly, and more importantly, other requirements can be added, or federal requirement can be specified, by Cantons.

It follows that a great variation at the local level is observable in relation to all the above mentioned requirements: the level of knowledge of a national language (only oral or also written skills); the evaluation of the economic conditions of the candidate (dependence or not on the social assistance system, how much, for involuntary reasons or not; have pending debts or being bankrupt); the criminal record (does minor infringements count, when they have been committed, how much and of what nature they are). And finally, the integration requirement, which is the ambit where the higher degree of discretion is exercisable[147]. The municipal authority is responsible for its assessment[148]. Furthermore, the control on its fulfilment is not carried out through a formalised - thus controllable - integration test, which would made it more transparent and accountable, but through interviews and investigations conducted by local authorities.

Despite the great differences in this regard noticed at the local level, in the last decades two common trends have been observed. First, a, so called, «professionalisation» of the decision-making as a the result of the progressive transfer of the power to decide on naturalisation more and more to executives[149]. Secondly, the relevant criteria to asses the «aptitude» of would-be Swiss citizens have been gradually fixed in legal acts or regulations, diminishing the discretionary power of authorities and making their decisions more accountable (so called, «formalisation»)[150].

4.2. The New Swiss Citizenship Act. An halfway reform, so an half solution.

Keeping in mind the specificities of the Swiss federalism identified so far, we can said that a certain degree of diversity is unavoidable and necessary to allow sub-national units to express their own identities and different understanding of

[147] N. CARREL, N. WICHMANN, *Naturalisation procedures for Immigrants in Switzerland*, cit., p. 8.
[148] Cfr. the Federal Court judgment where the practice of requiring social integration was justified (in the specific case considering that is was not a discriminatory practice based on religion or sex of the applicant). Swiss Federal Court, Judgment BGE 132 I 167 S. 167, 10 May 2006
[149] *Les marges de manoeuvre au sein du Fédéralisme: la politique dé migration dans les Cantons*, cit., 55.
[150] N. CARREL, N. WICHMANN, cit., p. 5.

citizenship[151]. However, concerns have grown over time in relation to the discriminatory side of this broad discretion, highlighted by the acute interventions of the Federal Court, and by the findings that discriminatory decisions were directed in some cases towards specific groups of migrants, namely applicants from the (former) Yugoslavia and Turkey[152]. In this regard, it should be also considered how much political factors, as local voter preferences and attitudes toward immigration and citizenship issues count in relation to the final results of procedures regarding the release of a permit or of a successful naturalisation application[153]. Furthermore, recent successful referendums on immigration matter with restrictive outcomes, the increase success of far rights parties and their connected power to mobilise the population on issues related to foreigners and control of immigration, are signs of a growing concern of Swiss towards the means at their disposal to «defend» the national culture and identity, and the power of citizenship, as it is structured, to be an effective means to build social cohesion and a sense of community[154]. Therefore, the questions raised by the debate which have preceded the reform were: how to counterbalance diversity in order to avoid the most discriminatory outcomes and unreasonable differences of the current regime? Subsequently, how to better protect individuals and immigrants' rights? In sum, how much convergence and how much autonomy there should be in the citizenship regime in order to achieve these aims?

In details, the main concerns that led to the proposal reform were the broad discrepancy among Cantons as regards the years of residence required in order to apply for naturalisation; secondly, the modes in which integration, particularly social integration, participation at the local level and economic conditions should be measured; how to reduce procedures' excessive complexity and bureaucracy; the long-lasting question if citizenship acquisition should be made easier for young foreigners born in Switzerland; finally, what legal status foreigners should hold when they apply, as cantonal practices differ greatly also on this point.

The reform proposal, which discussion started in 2011, had as its objectives: to approximate immigration and citizenship regimes as regards integration and language requirements, to harmonise Cantons and Municipalities residence requirements and

[151] Ibid., p. 7.

[152] J. HAINMUELLER, D. HANGARTNER, *Who Gets a Swiss Passport? A Natural Experiment in Immigrant Discrimination*, in *American Political Science Review,* 1, 2013, p. 170-171.

[153] M. HELBLING, *Switzerland: Contentious Citizenship Attribution in a Federal State*, cit., p. 794. Moreover, we should not forget that the majority of the Municipalities take the decisions on naturalisation procedure within municipal assemblies.

[154] Cfr. Weber's definition of the state as a territorial organisation and as a community of sentiment. M. WEBER, *From Max Weber: Essays in Sociology*, New York, 1946, p. 78. W. KYMLICKA, *Multicultural citizenship within multination states*, cit., p. 289.

procedures, and finally to improve decision-making procedures in order to guarantee that only «bien intégrés» migrants get the Swiss citizenship[155].

The three-year discussion that has followed, has seen the Federal Council, the National Council and the Council of States debating on three main issues: first, the residence requirement. Whereas the Federal Council had proposed to reduce it to eight years, the National Council counter proposed ten years. Moreover, as regard the double count of the years of residence in Switzerland of younger foreigners, while the National Council proposed to count double the years between the fifth and fifteenth, with an effective residence of at least six years - even if at the beginning it wanted to completely eliminate this provision - the Council of States proposed to maintain the double count of the years between the tenth and the twentieth. Secondly, the National Council demanded that the knowledge of a national language should be both oral and written, and that the residence years accumulated on the basis of a temporary permit should not be counted for the fulfilment of the residence requirement. However, in the following round of discussion, the Council of States has again proposed the reduction of the residence requirement to eight years and the double count of the years between the tenth and the twentieth, in addition to the count also of the years accumulated on the basis of a temporary permit. Then, to counterbalance these liberal proposals, it has proposed to allow Cantons to add further integration requirements. Finally, in the last session occurred in 2013, a compromise has been reached on the double count of the years between the fifth and fifteenth for the fulfilment of the residence requirement.

During the debate the *Commission fédérale pour les questions de migration* (CFM) had expressed its concerns on many aspects of the proposal. In particular, it has criticised the negative effects that some of proposed amendments would have on young foreigners, especially those who were born and have been fully educated in the country. In the second place, persons with a temporary permit would be negatively affected by the reform if their stay cannot be counted in order to integrate the residence requirement, as they are in the impossibility to return to their country of origin and are still in a vulnerable position. Finally, recalled the privileged treatment of EU/EFTA citizens under bilateral agreements, third-country nationals would be the most penalised by the reform as they are the category of foreigners more likely to acquire the Swiss citizenship in order to obtain a permanent and secure status. This result would be really frustrated if only holders of a permanent permit will be allowed to apply for citizenship, considered also that EU/EFTA citizens plus US and Canadian citizens obtain this permit after five

[155] Cfr. *Message concernant la révision totale de la loi fédérale sur l'acquisition et la perte de la nationalité suisse* (Loi sur la nationalité, LN) du 4 mars 2011, 11.022, available at http://www.admin.ch/opc/fr/federal-gazette/2011/2639.pdf; Cfr. also *Naturalisation. Propositions et recommandations pour un droit de cité contemporain,* Commission fédérale pour les questions de migration CFM, 2012, available at https://www.bfm.admin.ch/content/dam/data/ekm/dokumentation/empfehlungen/empf_einbuerg.pdf

years of residence (fulfilled the remained requirements), contrarily to third-country nationals, to whom ten years are required, unless they do not «successfully integrate» already after five years[156].

As stated in advance, the Federal Assembly has approved the new Swiss Citizenship Act 20 June 2014. As was pointed out by some members of the Assembly soon after the approval, this appears to be an half-way solution[157], and the novelties introduced are clearly fruit of the compromise between the positions of the two chambers.

Under the new law, the double count of years of residence of young foreigners should be referred to the period between the fifth and the eighteenth year of age (9.2)[158], and those spent on the basis of a temporary permit should be half counted (33.1, b). Moreover, in case of loss of citizenship by resolution, a new application can be presented after ten years (27). Next, the long criticised provision, concerning the type of permit that an applicant should possess in the moment he/she applies for the Swiss citizenship, was in the end adopted: only applicants which have a permanent permit (so called C permit) should be able to apply (9.1, a). However, in order to counterbalance this restrictive provision, the years of residence necessary to apply should be reduced from twelve to ten (even if the Federal Council had initially proposed to further reduce it to eight years) (9.1, b). Furthermore, residence requirements at the cantonal level should be harmonised, and just variations among two to a maximum of five years should be permitted (18.1). Currently, the spectrum goes from two to twelve years. Recalling the increasing internal mobility of foreigners above-mentioned, this provision goes at the detriment of foreigners who change their domicile during the stay.

Finally, one of the last major novelty regards integration. Actually, as stated in advance, one of the objectives of the reform was to approximate the immigration and the citizenship regime especially as regards the integration requirement. It is worth to recall that the explicit definition of the criteria on which foreigners' integration should be determined was already foreseen in the reform proposal the Federal Law on Foreign Nationals. Consequently, the followed reform of the Citizenship Act on this point has been done in view of aligning the definition of integration therein contain with that

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[156] Cfr. *Naturalisation. Propositions et recommandations pour un droit de cité contemporain*, cit. 16-18.

[157] 20 June 2014, *Parliament passes new Swiss citizenship law*, swissinfo.com, available at http://www.swissinfo.ch/eng/parliament-passes-new-swiss-citizenship-law/38821516

[158] All further references are to the «Loi sur la nationalité suisse (LN) du 20 juin 2014», at http://www.parlament.ch/sites/doc/CuriaFolgeseite/2011/20110022/Texte%20pour%20le%20vote%20final%20NS%20F.pdf. In particular, the measure regarding the double count of years of residence of young foreigners have been adopted with one hundred and twenty eight votes in favour versus fifty five against by the National Council and by twenty-six votes in favour versus nine against and seven abstentions by the Council of States.

already given in the former act[159]. Nevertheless, after further reform process started after the 9 February vote, it has been specify that, if needed, the necessary steps in order to maintain the reached alignment will be addressed to the Parliament.

The Citizenship Act states that a successful integration is demonstrated, in particular, by: the respect for the public order and security, of constitutional values, the will to participate in the economic life of the country or to acquire an education, the capacity to communicate, in a oral and written form, in one of the national languages and, finally, by encouraging and supporting the integration of family members on which the paternal authority is exercised (12.1, c and e). Except from the latter criterion, the remaining resemble those listed at art. 58 of the Federal Law on Foreign Nationals as resulting from the reform proposal of November 2011 and that has remained untouched by the further reform proposal recently adopted 11 February 2015. However, the comparison between art. 58, titled «Evaluation of Integration», of the Federal Law on Foreign Nationals and art. 12 «Integration Criteria» of the Citizenship Act leads to further comments. The first regards the language requirement which find a more precise formulation in the draft of the Citizenship Act as the capacity of communicate in one of the national languages is required in an oral and written form, while the Federal Law on Foreign Nationals has a more general formulation and just require the capacity to communicate without any further specification. The second comment aims at emphasising that on the basis of the literal formulation of the two articles it is arguable that the list of integration criteria of art. 58 is exhaustive while, on the contrary, that of art. 12 of the Citizenship Act is not. The last comment aims at emphasising that these articles differs since the citizenship act integration requirements further include a specific requirement tailored on cases of family reunification demanding the encouragement and support of the spouse or registered partner and of minor children integration. This requirement is not present in the list of art. 58. Nevertheless, it seems that more than consider it a further requirement it just demand the «encouragement and support» of family members in the fulfilment of those previously listed. Despite this difference, the Citizenship Act on this point seems to be in line with the restrictive attitude concerning family reunification that has been adopted in reforming the Federal Law on Foreign Nationals. This, as stated above, insist more on the fulfilment of the language requirement or, in substitution, in the following of a course in order to acquire such capacity of communicate in one of national languages. In any case the vague meaning of actions as «encouragement and support» - the absence of directions on how they should be assessed go at the detriment of the effort that has been made towards a higher formalisation of integration criteria in order to contribute to a more fair

[159] Cfr. Rapport explicatif. Adaptation du projet de modification de la loi fédérale sur les étrangers (Intégration ; 13.030) à l’art. 121a Cst. et à cinq initiatives parlementaires, Février 2015, p. 20.

assessment of their fulfilment.

Nevertheless, a restrictive turn is observable in the addition of the capacity to communicate also in written form in one of the national languages, which was a requirement asked to both migrants and would-be citizens by Cantons with the more restrictive integration and naturalisation policies. Moreover, the new explicit requirement of support and encourage integration in relation to family members on which the paternal authority is exercised seems to be mainly, although implicitly, addressed to migrants with Muslim origins, which is the largest immigration group in Switzerland[160], the one with the higher rejection rates in naturalisation procedures, and the most discriminated[161] especially when decisions are taken using direct democracy instruments[162].

The attempt to define and harmonise integration requirements between immigration and citizenship laws is appreciable in view of increasing the overall coherence of the legislation and to continue the above mentioned process of «formalisation» of naturalisation procedures and decisions. These should make the latter more predictable and reduce discriminatory uses that the current system, despite the significant changes in these regard, still permit. In the same direction seems to go the proposal of reducing cantonal variations as regard the length of residence requirement. However, not much seems to have been done by the proposed reform to improve coherence and reduce potential discriminatory outcomes that could derive from cantonal requirements. In fact, even the new regime foreseen the possibility for Cantons to add their own integration requirements to those established at the federal level (12.3). It is worth to underline that the criteria defining integration in the Citizenship Act are relevant in view of verifying that those requirement on which basis the federal licence can be released are fulfilled[163]. At last, the draft of the Swiss Citizenship Act seems a well-done exercise of balance among the contrasting positions of the various institutional actors involved. On the contrary, if naturalisation requirements are taken into consideration, it appears that the balance beam has remained more inclined towards restrictiveness. Even though the residence requirement has been eased, the supposed liberal effect has been counterbalanced and surpassed by the increased restrictiveness of the language requirement and by allowing only holders of a permanent residence permit to apply. These provisions, in fact, has to be looked at alongside those introduced by the proposed reform of the Federal law on Foreign Nationals that link to the language requirement and

[160] Cfr. Swiss Federal Statistical Office, Population, Migration and integration, Data, indicators, Foreign population, Nationality, at http://www.bfs.admin.ch/bfs/portal/en/index/themen/01/07/blank/key/01/01.html

[161] M. HELBLING, *Naturalisation policies in Switzerland,* cit., p. 50.

[162] J. HAINMUELLER, D. HANGARTNER, *Does Direct Democracy Hurt Immigrant Minorities? Evidence from Naturalisation Decisions in Switzerland*, MIT Political Science Department Research Paper No. 2013-1, 2012, p. 4.

[163] Cfr. art. 11 and 12.1, Loi sur la nationalité suisse (LN) du 20 juin 2014.

to integration the security of the foreigner status.

5. Conclusions.

Within a federal state such as Switzerland, the equilibrium of relations among the centre and the peripheries, that is among the federal level and its sub-national units, are characterised by a permanent tension and are constantly challenged. Hence, they are subjected to a continuous evolution and re-negotiation processes in the attempt to find solutions capable of accommodating the needs of all actors involved. The outcomes of this in the Swiss Federation are likely to result in differentiated solutions tailored on Cantons' characteristics. Even if a convergence trend and a higher level of uniformity among those policies affecting different dimensions of immigration are noticeable, it remain difficult to identify a common federal immigration policy[164]. At the same time, due to the non immunity of the country from general trends that, in the last decades, have informed the development of the relation among immigration regimes, integration of foreigners and citizenship modes of acquisition[165], the Swiss federation has had to consider and incorporate within national solutions external factors and (economic) pressures, and had to adapt its legal systems accordingly[166], especially from the moment in which the EU integration process and the establishment of the common market became reality.

A gradual process of convergence was initiated between Swiss legislation and EU laws on immigration and border controls even before the signature of bilateral agreements of the late 1990s and 2000s. Nevertheless, if the latter - i.e. the entrance into the Schengen area - appears until now not to have contrasted with the Swiss legal system, a different discourse has to be done as regards immigration. It seems from the current situation of impasse in the field of free movement of persons that even these trends of adaptation to external and internal pressures have, in the end, to come to terms with the never appeased critical internal voices constantly demanding the adoption of more restricting measures concerning immigration. In fact, at the end of the day, it seems that mainly national considerations and solutions continue to prevail. More generally, the characteristic elements of the Swiss legal system - federalism, direct democracy and consociationalism - often listed to indicate the basis of the long-lasting internal stability

[164] D. RUEDIN, C. ALBERTI, G. D'AMATO, *Immigration and Integration Policy in Switzerland, 1848 to 2014*, in *Swiss Political Science Review,* 1, 2015.
[165] A strong correlation
[166] In Switzerland, in fact, the immigration field was one of those where the, so called, «liberal paradox» can be observed: i.e. the drivers of the policy were the, contrasting, pro-migration predisposition of the market and anti-immigration positions of the population. Nevertheless, considering the most recent votes on immigration, the latter seems to have taken advantage on the former, thus excluding the still current validity of the «paradox» as an explanation for the content acquired by the Swiss immigration policy. S. LAVENEX, *Switzerland – Really Europe's Heart of Darkness?*, in *Swiss Political Science Review,* 1, 2015.

of the country, appear to be, on the other side, the causes of its instability at the international level if the whole process of approaching between the EU and Switzerland is taken into consideration.

Difficult is to predict how much of the current regime will be really distorted at the end of the renegotiation process with the EU since some aspect have remained untouched by the reform proposal as has the general framework, i.e. the dual system of admission still providing the EU/EFTA citizens an eased and preferential admission track. It remains to be seen if the EU attitude as regard a possible renegotiation of the agreement will changed now that a draft of the Law on Foreign Nationals has been adopted. In fact, when exploring the possible consequences of the proposed reform and popular vote, and in order to fully comprehend the impact on the whole admission system that the process of renegotiation will have, it has to be remembered that EU/EFTA citizens currently account for the 85% of the total permanent resident foreign population in Switzerland. It is then understandable, considering the whole foreign population, that more than half hold a permanent resident permit (60.8 %) and the remaining one third hold a residence permit or a short -term permit of one year or more (31.9%). Only a very low percentage is made of asylum seekers and persons with a sort-term permit of less that one year[167].

In any case, the whole situation concerning immigration and citizenship is fluid at the moment. However, the direction that authorities are attempting to impress to immigration and citizenship policies appears to have been made clear: in fact, it seems that the federal level is willing to compensate the lack of autonomy lead by higher degrees of formalisation and harmonisation of naturalisation and integration requirements at the federal level with restrictiveness.

[167] Cfr. Office fédéral de la Statisque, Population étrangère: autorisation de résidence, at http://www.bfs.admin.ch/bfs/portal/fr/index/themen/01/07/blank/key/01/02.html

CONCLUSIONS

Summary: 1. The plurality of status between immigration and citizenship. - 2. The citizenship-immigration relation at the EU level. - 3. The citizenship-immigration relation at the state level. - 3.1. The complementary view. - 4. The complementary *vs*. the alternative approach at the EU level. - 5. Citizenship matters.

1. The plurality of status between immigration and citizenship.

Citizenship is a legal status and expresses a relationship between the individual and the nation state, which is the authority responsible for the grant and withdrawal of the status. It entails specific rights and duties. The defining function and exclusionary effect are fundamental characteristics of this status even since different subjects from the nation state have been admitted to further define its content.

The aim of this research has been to explore the plurality of status that can be acquired by individuals at the supranational, national and sub-national level. The analysis has been based on the main basic distinction, although currently challenged, between the citizens and «the others». Therefore, in studying the plethora of status that «the others» can acquire it has firstly aimed at reconfirming the primary role of the citizen status.

The object of the research, however, has been conceived in a dialogic manner, by considering the citizen status within the dynamics that it entails with the whole range of status granted to non-citizens. In fact, in general terms, status granted to «the others» are all those which have something less, in terms of rights, of the citizenship status. This essentially means that in the framework of this work the attempt has been to understand and describe the current content of citizenship by looking at the dynamics that it establishes with immigration. At the same time, the modes in which immigration has been from time to time and at different levels governed have been studied considering its relation with citizenship.

The government of immigration and citizenship attribution within the boundaries of nation states have always been interconnected fields. Therefore, the dynamics and the interplay between these fields described above are observable, considering national specificities, in all nation states. Nevertheless, the coming on stage of the European Union, the establishment of the Union citizenship and the progressive acquisition of competences on immigration of third-country nationals seems to have challenged the dominion of nation states as the unique subject empowered to define and address over

time the relation between immigration and citizenship.

At this point a step backwards needs to be taken. To govern immigration means to determine who is allowed to enter and reside in a certain territory and under what conditions, and to what set of rights and duties the individual present in the territory is entitled. Thus, the status as a non-citizen is a legal status as well, and equally expresses a relationship between the individual and the authority responsible for the grant and withdrawal of the status itself. It entails specific rights and duties. Once this power is shared among plural subjects the immigration-citizenship relation is consequently and inevitably concerned and shaped. In this regard the principle of free movement of persons assumes relevance. In fact, before the establishment of the Union citizenship and the acquisition of competences in the field of immigration of third-country nationals, the European Union had challenged the immigration-citizenship relation by creating an area of persons' free movement when establishing the common market. In more general terms, this has meant partially depriving nation states of the power to autonomously decide conditions of entry and residence in their national territories, which implied partly depriving them of the power to decide who their would-be national citizens should be.

It is on the basis of the different relationship that certain nation states have established with the European Union as a persons' free movement area that they have been chosen as case studies. The aim was, in fact, to study the diverse modes in which national immigration and citizenship regimes have coped with the loss of hegemony in the determination of the immigration-citizenship relation. Therefore, the relation that every nation state considered in this research has with the European Union concerning movement of persons has been analysed. On this basis they have been arranged in a decreasing order, i.e. from the case in which the EU legal system has more profoundly influenced the immigration-citizenship relation at the national level, passing through an intermediated stage where there are a further external level to consider other than the EU level, and, eventually, the case in which the influence of the EU should be supposedly lower than in the other previous case since a non-EU member state is concerned.

There is a further level on which basis the analysis of the above-mentioned relations has not been mentioned so far. In fact, in two out of three of the case studies chosen, even though in different modes, sub-national levels of government plays a relevant role with the national level in the interplay between immigration and citizenship. More precisely, sub-nationals units are granted competencies that enable them to partially determine the immigration-citizenship relation.

2. *The citizenship-immigration relation at the EU level.*

Before considering the above-mentioned relations, however, attention has been

paid in this research to the immigration-citizenship relation within the legal system of the European Union. So far, we have referred to citizenship at the national level and at the EU level as almost identical status or, at least, as status responding to the same above-proposed definition without dwelling on describing the basic differences that exist. As well know, the European Union citizenship is a derivative status. Although, its content is established by EU law, its derivative nature implies that there is not a correspondence between the subject that defined the content of the status with that which has the power to grant and withdraw it.

The citizenship-immigration relation at the EU level, firstly, is not looked at in parallel and in comparison with the same relation at the national level, but rather as an element adding to the latter a further layer and factor of complexity. If the Union citizen status is read in backlighting what appears is a non-citizen status, i.e. Union citizens are privileged migrants, or non-citizens, if looked at from the national level. In fact, even if inevitably conditioned by the EU membership or bilateral relation in the Swiss case, rules governing access to national citizenship have remained a prerogative of nation states[1]. That is to say that when analysing the immigration-citizenship relation at the EU level, although the name is the same, the comparison is not made between homogeneous categories. Even though there have been cases in which the EU citizenship has assumed a fundamental relevance for non-mobile EU citizens, it emerges that this status is mainly and still relevant for mobile and economically active EU citizens.

In describing the evolution over time of the EU fundamental liberty of persons' free movement before, and of the Union citizenship after, through Treaties amendments and the leading role of the Court of Justice case-law, the effort of emancipating the Union citizen from its market characterisation is certainly perceivable, especially in a more recent set of cases. Nevertheless, the analysis carried out in the second chapter has attempted to demonstrate that this status has, in the end, maintained its original characterisation: i.e. the more the Union citizen is economically active the more the Union citizenship is valuable.

Granted that, the progressive gaining of competence by the EU on third-country nationals immigration for economic purposes has established an, although *sui generis*, immigration-citizenship relation also at the EU level. The comparison among the status granted by EU laws to third-country nationals entering the EU member states to pursue an economic activity show the attempt by the EU to parameter the conditions of entry and residence and the rights attached to every status with the same elements of the Union citizenship. Therefore, the attempt has been that of ordering the status provided to third-country nationals in a scale going from that which provides conditions of entry and stay

[1] M. VINK, *The Limited Europeanization of Domestic Citizenship Policy: Evidence from the Netherlands*, in *Journal of Common Market Studies*, 5, 2001, p. 877.

less favourable if compared with those provided to Union citizens, to end with the status that provide a set of rights as similar as possible to those from which Union citizens can benefit from.

If we consider the acquisition of the Union citizenship to correspond to «naturalisation» at the Union level for third-country nationals labour migrants, can we say the immigration-citizenship relation at the European Union level to be based on a a complementary view, i.e. citizenship acquisition conceived as a complementary strategy functional to extend non-EU migrants' rights?

The complementary-alternative views have been clearly developed considering national policies of immigration, integration in particular, and of naturalisation. Therefore, before answering the previous question, it is worth to provide an overview of how the immigration-citizenship relation has developed at the national level within nation states that has in englobe in different modes and for different reasons the principle of persons' free movement within their immigration-citizenship relations.

3. The citizenship-immigration relation at the state level.

As stressed above, the choice of the three cases studies here examined has been done, firstly, on the basis of the supposed different impact that their diverse relationships with the European Union has had on the relation between immigration and citizenship at the national level. However, their comparison is even more interesting if we consider that even their history as immigration countries share significant elements, especially if taken into consideration since the aftermath of the Second World War (WWII). In fact, Belgium, Sweden and Switzerland are part of that group of European states that has experienced large-scale labour migration flows in the post-WWII period[2]. During that period, they were all foreign labour importing countries since the national labour manpower was insufficient to sustain the reconstruction effort or the demands of national industries in the context of the rapid post-war economic recovery. While Belgium and Sweden set a system of national agencies to control the inflow of labour migrants, alongside side spontaneous flows, Switzerland set at that time, and has maintained till nowadays, an employer driven mechanism of foreign labour recruitment. Since the immediate aftermath of WWII, moreover, Belgium and Switzerland have signed bilateral agreements with Southern European countries having a surplus of manpower. Relevant were the first bilateral agreements signed to this aim with Italy in 1946 and 1948, respectively. Rather liberal labour immigration policies were in place until the economy was in need of foreign labour force in the following decades. However, already in late

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[2] G. FREEMAN, *Modes of Immigration Politics in Liberal Democratic State*, in *International Migration Review*, 4, 1995, p. 889-890.

1960s as economic conditions started to worsen, stricter regimes were progressively adopted in place of the previous liberal immigration policies. In the early 1970s all three countries officially stop entries of (mainly unskilled) labour migration.

In the meanwhile, Belgium and Switzerland had to start dealing with the presence of migrants who, initially, were not supposed to stay, both countries having, in fact, adopted in the previous years a, so called, «guest-worker system» or, in the Swiss case, a system known as «rotation model». Nevertheless, if Switzerland had also adopted strict rules as regard family reunification as a further instrument to prevent the permanent settlement of labour migrants, Belgium, on the other side, in the attempt to address not only labour shortages but also demographic concerns, granted rights to family reunification to labour migrants. Sweden, on the contrary, because of the universality of its Nordic welfare state, granted access to equal (welfare) rights only after a short period of residence in the country. The decision to limit labour migration, beyond the worse economic conditions of the late sixties and early seventies, had to address also the concerns on the sustainability over time of a so generous welfare state in the moment in which the objective of full employment became more difficult to be attained.

From this moment onwards, alternative paths of migration towards these countries developed: i.e. family reunification and asylum. In fact, all experienced high inflows of refugees since 1980s. This phenomenon influenced the development of national immigration and citizenship policies especially as regard the weight attributed to, and the efforts made in pursuing migrants' integration. This could be due to the circumstance that the countries of origin of foreigners, in comparison with that of labour migrants of the previous decades, were, so called, «culturally distant» countries, to use an expression adopted within the Swiss immigration policy in the early 1990s. Sweden and Switzerland, in particular, are well-known for their humanitarian tradition and generous asylum policies. Nevertheless, concerns on the growing refugee population, the difficulties experienced in their integration process and native's concerns on the possible abuse of the asylum and welfare systems led all three countries to adopt stricter rules on entry for asylum seekers and in their access to national welfare benefits in the following decades. As regard national policies on labour migration, since the official halt of 1970s all three countries have, in general, limited entries for the purpose of labour to high skilled workers and to those foreigners in possession of specific qualifications which national enterprises were in need of.

From this overall view, however, the influence exercised by the EU membership or bilateral relation on the matter of persons' free movement on the above-described policies is missing. Firstly, currently all three countries are part of the Schengen area. As well-known Belgium was among the first signatories of the Schengen Agreement in

1985, and Sweden became a party of it in 1996 with the other Nordic countries, once arrangements were adopted in order for the Schengen membership to be made compatible with the maintenance of the Nordic Passport Union. Eventually, even though Switzerland has been the latest country to became part of the Schengen area, when the second group of bilateral agreements have entered into force in 2008, since the 1990s it has pursued a «subsidiary strategy» through the establishment of cooperation on borders control, police and readmission with its Schengen neighbouring countries[3].

Similarly, the EU membership or the establishment of relations with the European Union of the three countries have happened in different moments of the EU integration process. This different timeline summed to their specific national characteristics explain the diverse influence that EU rules on persons' free movement and immigration policy have had on the relation between immigration and citizenship at the national level. In fact, the above-described modes in which these countries have dealt over time with labour migration - and asylum - has to be reconsidered in view of their being EU member states or otherwise related through bilateral agreements in the field of persons' free movement with the European Union.

Union citizens are in the EU member states of which they are not nationals privileged migrants, and considering the status of EU citizens and Swiss citizens under the bilateral agreement on persons' free movement, Switzerland can be included on an equal footing in this reasoning. Therefore, if considered from the state level, the EU membership and Swiss bilateral relation have challenged the post-1970s restrictiveness of national policies in regards to labour migration, or rather has moved the focus of these policies to labour migration from third-countries.

The effect of decoupling national labour migration policies at the national level is rather visible in the Swiss case where conditions of entry and residence of EU citizens are almost entirely regulated by the EU-Swiss bilateral agreement and related annexes, whereas labour migration policies as regard third-country nationals are left to be regulated by the Federal Law on Foreign Nationals. This duality, however, if EU member states are considered, turns into an overlap of layers or, to recall the expression largely used in these research, it turns into a multiplicity of status to be granted to non-citizens whether from an EU member state or from a third-country. In fact, as regard the latter, and differently from the Swiss case, the competence to determine conditions of entry and residence of third-country nationals has been progressively assumed by the European Union, leaving to member states the space of discretion in the transposition of directives and the keep, when permitted, of parallel tracks at the national level, as it is the case for high qualified third-country national workers.

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[3] P. RUSPINI, *Report from Switzerland*, in J. DOOMERNIK, M. JANDL (EDS), *Modes of Migration Regulation and Control in Europe*, Amsterdam, 2008, p. 175-176.

Furthermore, labour migration legislation of all three countries has been amended recently, in 2003, 2008 and 2015, in Belgium, Sweden and Switzerland respectively. The above-mentioned duality and multiplicity above briefly described has not been touched by the reforms which, in the case of Belgium and Sweden, have regarded almost only third-country nationals labour migrants, while in the Swiss case because the reform process is still on-going this cannot be said with certainty, although the current reform proposal maintains the present duplicity of the labour immigration legislation. Interestingly, all three reformed labour migration policies present a common characteristic: they are, at least in part, demand-driven. In the Swede case, the employer is the subject responsible for initiating the recruitment process of a third-country national labour migrant. In the Swiss case, for a foreigner to be admitted to exercised an economic salaried activity the employer has to have made a request in this sense. At last, in Belgium the release of a B permit, to be held by would-be third-country national workers not already residing in the country, has to be demanded by the employer. In general, the degree of restrictiveness of national labour migration policies are connected with the fluctuations and with the needs of the labour market and of the national economy. It appears that the amendments above described of national labour immigration policies are the result of an attempt of states to modify their policies to better meet the needs of national labour markets and national economies. Comprehensibly, this attempt can be made only as regard third-country nationals would-be labour migrants since the principle of free movement of persons in the EU and EEA area deprives national state of this competence in relation to EU/EFTA citizens.

3.1. The complementary view.

At last, the citizenship part of the immigration-citizenship relation has to be considered. Not only labour migration policies have been amended recently but also citizenship laws of all three countries have been reformed. Since the interest stays in the just mentioned relation, attention has been payed to access to nationality by naturalisation. Even though the comparison is made among, at the one side, two countries with rather liberal citizenship policies - Sweden and Belgium - and a country as Switzerland which has, on the contrary, a well-known restrictive access to nationality, a *fil rouge* can be traced among the three policies. In fact, all three countries seem to adopt a complementary approach: their naturalisation policies are complementary strategies for foreigners integration in the host country. This is a significant point on which the three countries seem to have converged through the recent reforms of both migration and citizenship legislation: i.e. on the role of integration and on the necessity to provide means for its attainment to migrants from the very first moment of their

arrival in the country. Moreover, in all three countries integration programmes are established.

Sweden can be considered to be a forerunner in this regard as since the late 1960s migrants' integration was a relevant aspects of the immigration policy. The 2010 amendment of the integration policy has aimed to ameliorate the instruments already in place to achieve the main objective of the policy: that is to provide equal rights, opportunities and obligations. Particular efforts have been made to improve foreigners' participation in the labour market. Although Swedish policies on paper scores high rates, these have not been reflected in similar good results. Therefore, the reform has tried to correct the main defects of the previous policies, attempting to provide the means to a faster inclusion of foreigners into the labour market. This is a particularly significant in the Swede context, since a higher participation of the population in the labour market is a necessary precondition of the sustainability of the universal welfare state. At last, and differently from the Belgian and Swiss conception, in order to be naturalised, foreigners are not required to have been previously integrated. The relation integration-citizenship in Sweden sees the latter to be an instrument to improve further the former.

On the contrary, foreigners' integration in Belgium and Switzerland is an *ex-ante* requirement, and its attainment has to be previously demonstrated in order to naturalise. Furthermore, the sub-national dimensions are rather relevant in both countries as to sub-national units are left room for manoeuvre in determining the content of foreigners integration path. However, precisely because integration is a requirement to be fulfilled to naturalise, a convergence is observable in both countries driven by the provision of a definition of integration at the federal level within the respective Citizenship Laws. Furthermore, in the Swiss case it was made explicit, in the latter reform proposals of provisions on integration within the Federal Law on Foreign Nationals and of the Citizenship Act, the attempt to harmonise and adopt the same definition of integration in both acts. In the Belgian case, although integration paths have different degrees of development between sub-nationals units despite the recent convergence, the basis of sub-national integration paths and the definition of integration established in the last amendment of the Nationality Code are almost equivalent. Finally, from an overall view on the integration requirement as conceived in the three countries, whatever its role and position in relation to naturalisation and despite the just described difference, emerges that language - the ability to communicate - and participation - in the economic and social life of the host country - are shared elements.

4. The complementary vs. *the alternative approach.*

At member state and EU level (access to) citizenship has been the driving force

behind the reforms of immigration regimes: i.e. citizenship has been instrumentally used to regulate the immigration phenomenon. Specifically, the EU has attempted to follow the same path of emancipation followed in relation to EU workers when regulating the status of economic migrants from third-countries. As an introductory remark, we observe that the same path towards emancipation from the economic paradigm has been followed for, before, EU migrants and, after, non-EU migrants: from sectorial (economic) status to a unique or summary status regardless, formally of it being or not economically active. At the one side the EU citizenship, at the other the status as long-term resident for third-country nationals.

The progressive growth in relevance of the content and meaning of the EU citizenship, and the parallel development of the EU common immigration policy is questioning the coherence of EU policies in relation to both third-country nationals and EU citizens, though. This derives from the presence within EU policies of contrasting objectives, that can be resumed in the contraposition between, on the one hand, the figure of the mobile-citizen, regardless of its nationality, that contributes with its personal (economic) activity to the achievement of the EU (economic) objectives, and, on the other hand, the citizens conceives as they are within nation states: i.e a sedentary citizen that is not necessarily economically active. The above mentioned contradiction, which gives origin to incoherencies within EU policies governing movement of third-county nationals and EU citizens, derives from the attempt to make mobile and sedentary elements coexist, namely two different types and conceptions of the individual.

The growing scale composed by the status which are available to Third-country nationals who enter and reside in one of the EU Member States starts and ends with the two more general status available, the single permit status and the long-term resident status. From the differences but, even more, from the various degree of similarities between the status analysed, gradually emerge the proper characteristics of the EU migration policy, but also its inner contradictions and deficiencies. Some of them are inherent of the immigration matter, for its being a crossroad of complex and constantly evolving subjects, as are the economic development, growth, labour market, integration, and last but not least human rights, where the research of an equilibrium between internal and common necessities of Member States and of the EU is a never ending process. Furthermore, like citizenship, immigration is somehow trapped between strict national visions coming from far-off times and the unavoidable research of a common framework encompassing the high number of actors which are involved in the management of immigration.

In the effort to solve this contradiction, the distinction between the complementary and alternative view, as it emerges from the analysis of naturalisation policies of Member States and their relation with nationals integration policies, has been

applied to EU laws on labour migration of third-country nationals and to those governing Union citizens free movement. On the basis of the analysis of the status composing the above-mentioned scale it seems possible to affirm that the EU, particularly within its labour migration policy, and in connecting the status acquirable by third-country nationals to the citizen status, formally adopts a complementary approach, i.e. better rights are granted through the progressive acquisition of more and more privileged status, and by presuming that the citizen status is, by definition, the most privileged one.

Tensions and contradictions cannot but arise from the adoption of this approach by the EU, since it originates and is based in relation on a conception of citizenship that is made on measures of nation-states and not of a legal system, such is the EU, which has as one of its basic features the movements of elements, such as capital, goods, services and persons, capable of generating an economic value for the single market. Consequently, it is not capable to sufficiently considering and accommodating the specificities of the EU legal system and, firstly and above all, the objectives that have informed the EU integration from its origins. In particular, we affirm that the function that citizenship has and historically has had within modern nation-states, namely a status that renders individuals formally equal, cannot be replicated at the EU level. This is due to the nature of the EU integration project, which has been and still is driven by economic objectives mainly, that are consequently reflected in the model of individual that the EU has put at the basis of its construction from the very first moment[4].

This EU characteristic emerges clearly also from a comprehensive analysis of EU laws governing labour migration and the right to move and reside of Union citizens, all unbalanced in favour of an economically active and mobile person, differently said a market (EU or non-EU, indifferently) citizen[5]. Precisely, it is not a coincidence that the above-mentioned inverse proportional relation between the qualification of the individual and the time of legal residence is almost identical for both EU (mobile) citizens and Third-country nationals labour migrants. Considering the value attributed by the EU to free movement in the construction of the internal market, and the vision of labour, and so of workers, as a factor of production, it becomes clearer the reason why the right to move and carry on an economic activity within an EU Member State is considered to be one of the added values of some privileged status that the EU provides to Third-country nationals workers, namely blue-card holders, researchers and long-term residents.

In particular, a double tension arises from the adoption of an approach which was not thought and framed for a legal system such as the EU. The first tension derives from

[4] N. N. SHUIBHNE, *The Resilience of EU Market Citizenship*, in *CMLR*, 47, 2010, p. 1599.

[5] M. EVERSON, *The legacy of the market citizen*, in J. SHAW AND G. MORE (EDS.), *New legal dynamics of European Union*, Oxford, 1995, p. 73.

the relevance that is assigned to a certain time of legal residence in a territory. This resembles the value that nation-states attribute to the same element: that is of a proof of integration and of a will to permanently settle, and it is exemplifies by its role as a basic requirement that has to be fulfilled in order to naturalise in a member state. As regards the meaning that the EU attributes to a legal and continuous residence, it "show(s) that the person has put down roots in the country"[6]. This conception of residence and, thus, of a sedentary citizen, cannot but be in contrast with one of the cornerstones of the EU, i.e. free movement and the relevance that it has for the enhancement and achievement of EU objectives.

A further element of complication is the lack of a shared view between Member States on the moment in time when integration of foreigners should happen, or prove to have been achieved. In other words, integration is seen either as a result that can be achieved through the acquisition of citizenship - so, the attribution of the citizen status is used as an *ex-ante* instrument - or as a process that should lead to citizenship acquisition, where the acquisition of the status plays the role of recognising an already occurred integration[7].

The second tension originates from the wide margins of discretion that are left to Member States by the group of relevant directives constituting the EU labour migration policy. This feature reflects the difficulties to find an agreement capable of going further minimum standards and general common definitions, and could be also seen as the outcome of the adoption of the complementary approach by the EU and the Member States which, however, cannot work properly in both legal systems. Partly, this is also an unavoidable consequence of the shared nature of the competence, and an outcome of the difficult negotiations that for a long time have characterised this field. A turning point in this regard may be the new rules which now govern the adoption of EU legislation in the area of freedom, security and justice (79.2, TFEU), that is the ordinary procedure in which the EU Parliament acts as a co-legislator with the Council[8], and the now unrestricted jurisdiction of the European Court of Justice on this issues (276, TFEU).

In the end, a further element that reveals one of the main weaknesses of the complementary approach when adopted at the EU level is the derivative nature of the

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[6] Cfr. Recital 6, Council Directive 2003/109/EC cit.

[7] K. GROENENDIJK, *Legal Concepts of Integration in EU Migration Law*, in *European Journal of Migration and Law*, 6, 2004, p. 113.

[8] However, it was noted that the new role assumed by the EU Parliament will increase procedures and discussion time even more, an could in some cases complicate even further the reach of an agreement. The single permit directive adoption process could be a good example in this sense. See Y. PASCOAU, S. MCLOUGHIN, *EU Single Permit Directive: a small step forward in EU migration policy,* EPC, 24 January 2012, at http://www.epc.eu/documents/uploads/pub_1398_eu_single_permit_directive.pdf; E. COLLETT, *Future EU policy development on immigration and asylum: Understanding the challenge*, Issue no. 4, Policy Brief Series, Migration Policy Institute, May 2014, 4, at http://www.mpieurope.org.

Union citizenship, and the lack of will of Member States to share with the EU even only a part of their sovereignty and competence as regards nationality law[9],or to agree on a minimum level of coordination at the EU level on this issue. Therefore, having the EU no competence in the matter, no legislative or non-legislative act can be adopted in order to approximate Member States' laws in this field[10]. It follows that when it comes to national citizenships' modes of acquisition, that is the only way through which third-country nationals can proceed in the path of progressive integration and permanent settlement in the EU, it has to completely rely on national laws and requirements, in relation to which the status acquired at the EU level are almost useless.

The differences between national legal systems in regulating migration and citizenship, despite being an obstacle to an effective common migration policy at the EU level, cannot be eliminated and, to a certain extent, are necessary, as recognised by the EU in the opening articles of title V of TFEU where it is stated that, in constituting the AFSJ, the Union will respect «the different legal systems and traditions of the Member States». However, if we assume that harmonisation of rules between legal systems is one of the fundamental elements that influence the exercise of the right to move, the question is how much commonality and how much difference is needed in order to accommodate either EU and Member States' objectives and visions in the management of labour migration and third-country nationals rights and status.

Granted that, the relevant question is: is it the complementary approach consistent with the EU legal system and with EU policies, especially considered the modes in which EU laws on labour migration of third-country nationals are structured, and the relation between the status provided to third-country nationals and with the citizen status? We will argue that it is not. A different, and somehow opposed, approach could describe better the functions and relations between these status, could attempt to partially solve the above-mentioned tensions and be more coherent with the specificities

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[9] Declaration no. 2, Treaty on European Union (Maastricht, 1993), OJ C 191, 29. 7.92. We should also note that from the Micheletti's judgement onwards Member States has to exercise their exclusive competence on nationality laws having due regard to EU law. Cfr. Mario Vicente Micheletti and Others v. Delegación del Gobierno en Cantabria, C-369/90, judgement 7 July 1992, p.t 10, I-4258.

[10] However, the Union citizenship is acting as an implicit element of convergence between naturalisation policies of Member States, for example, within that las on citizenship which provide a fast-track for naturalisation for EU citizens, as the Italian law on citizenship. A further implicit pressure towards convergence can also come from cases where the lack of coordination among laws on acquisition and loss of Member States' citizenships could pose an obstacle to the exercise of the rights of Union citizens. Eventually also the recent affair concerning the Maltese citizenship reform, which has seen a strong reaction of EU institutions, could potentially push forwards the debate on the future necessity to coordinate, at least at a minimum level, member states laws on nationality, as long as they are the only means to have access to the Union citizenship. Cfr. art. 9, (c), legge 5 febbraio 1992, no. 91, Nuove norme sulla cittadinanza, G.U. no. 38, 15.2.1992; Janko Rottmann v. Freistaat Bayern, C-135/08, judgment 2 March 2010, p. I-01449; S. CARRERA, *How much does EU citizenship cost? The Maltese citizenship-for-sale affair: A breakthrough for sincere cooperation in citizenship of the union?*, CEPS paper No. 64/April 2014, at http://www.ceps.eu.

of the EU legal system.

According to the alternative view, the multiple status attributed to third-country nationals who are economic migrants can be seen not as a consequence but as alternative one to the other. This means that a status attributed to a third-country national is privileged as much as it allows both their holders and the EU to fully take advantage from the exercise of that specific activity within the EU, and not, on the contrary, for its degree of proximity with the citizen status[11]. So, status should be structured with the objective to maximise the benefits for that specific category of third-country national workers within the EU. This implicates to focus and give priority to the elements that constitute the added value of having these status regulated and available at the EU level instead of twenty-eight different legal status for the same category of labour migrants. Furthermore, this approach seems to better incarnate the model of the "perfect"[12] citizen that EU laws and policies regarding labour migration and free movement implicitly assume – i.e. of an economically active and mobile person – and could also be an explanation of the current proliferation of sectorial laws that provide a list of *prêt-à-porter* status for third-country nationals as well as the inner fragmentation of the Union citizen status.

Secondly, if status are alternative, and are framed in a way that effectively allow their holders to make the most of the rights attached to them and of the exercise of a particular activity in the EU, the decision to settle permanently in a certain Member State territory and start to accumulate a certain time of residence will reflect the will to «put down roots in the country» instead of being the only mode available to have access to more extended equal treatment rights and to a higher security of residence.

Finally, the claim here is that EU status should be focused on the added value of their being EU status instead of national status. This added value is the right to move and have access to an economic activity within the EU as a whole. Consequently, the adopt an/the alternative approach in framing the status and their relation could be one of the steps to be taken in order to ameliorate the efficiency of the EU labour migration policy, and the usefulness for third-country nationals of the status therein provided. These status are currently based on the assumption that better status have necessarily to come along with the increase of the time of legal residence in one Member State, and are unbalanced

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[11] The acquisition of the citizenship status becomes a matter of choice, as there are certain circumstances under which, especially for the lack of a (formal) coordination between nationality laws of EU Member States, to acquire the citizen status does not necessarily means to acquire a more privileged status, K. GROENENDIJK, E. GUILD, *Converging criteria: Creating an Area of Security and Residence fro Europe's Third Country Nationals*, in *European Law Journal of Migration and Law*, 3, 2001, p. 48.

[12] This expression recalls the one used by S. Carrera when defining the perfect citizen. See S. CARRERA, *In Search of the Perfect Citizen? The Intersection between Integration, Immigration and Nationality in the EU*, The Hague, 2009. The same idea is also expressed by B. ANDERSON, *Us and Them? The dangerous politics of immigration control*, Oxford, 2013, p. 15.

in favour of the national-state citizen model. Consequently, the exercise of mobility rights and the access to an economic activity is both undermined and made more difficult. On the contrary, we state that if the status are conceived to be one alternative to the other, they should be framed on the needs and exigencies that third-country nationals who carry on that particular activity has, and not on the implicit assumption that they are on the way to settle permanently in one of the EU Member States.

For this purpose, it would need to, firstly, reframe the status in order to privilege the right to move and to access to employment and the rights connected to the labour activity. Furthermore, the status should be all transportable, i.e. be attached to the individual and to the activity pursued within the EU. Secondly, it would also need to reduce the fragmentation of the EU labour migration policy, originated by the wide margins of discretion left to Member States, and to reconsider the reasons that justify the maintenance of national regimes and status that compete with the EU status. In this way the sectorial approach could turn effective and a valuable characteristic of the EU labour immigration policy, and not one of its numerous fragilities as it currently is.

5. *Citizenship matters.*

Citizenship matters and it is still, unquestionably, the most significant status for an individual at the end of the day, despite the increasing mobility of persons and the equally unquestionable approach of the status of (long-term) foreigners to that of citizens. However, none of the other status so far considered grant an equal protection against expulsion, equal access to the same set of rights at the national level, equal security of residence and an equally extended possibility of entry and exit the national territory freely. Thus, the exclusionary character of citizenship is not under question. Although criteria other than nationality are gaining momentum, residence *in primis*, is function as a defining criteria that seems not to be renounceable.

Citizenship matters at all levels of government, whether supra-national, national or sub-national, and it has maintained its instrumentality in relation to the nation-building or, in the case of the EU, supra-national building processes over time. Nevertheless, it appears that the above-mentioned nation-building process has undergone a partial change in its end in comparison to the past, i.e. in the era of nation states formation. Under the challenged of migration and of the consequently multi-national character of host (here considered, European Western) countries, nation states found themselves in the necessity to reaffirm and better define the content of national citizenships. As the outcome of an exigency so framed we interpret the relevance acquired in the recently reformed citizenship laws of integration and language as legal

requirements in order to naturalise. Even though the nation states studied here as case studies share some characteristics but, simultaneously, also present important differences, in all three recently amended citizenship laws and, more precisely, in the process and criteria to acquire the national citizenship by naturalisation, an effort of defining more precisely the content of the citizen status for would-be citizens is noticeable. Therefore, this may serve as a confirmation that, despite contrary voices, the era of citizenship is not coming to an end.

Citizenship still matters so much that even within a supra-national state as the European Union it has assumed more and more relevance and a leading role in EU policies on mobile individuals whether they are EU citizens or third-country nationals. For the former the citizen status is the basic prerequisite to the exercise of the rights as mobile citizens of an EU member state, for the latter it is the status in the background and the parameter on which the status provided them at the EU level are shaped and measured.

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