9 Hard and Soft Law in EU's Integration Policy

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9.1 The Fundamentals of EU Integration Policy

With the entry into force of the Amsterdam Treaty the EU gained legal competence to adopt rules in the field of immigration and asylum policy. While competence issues in this field were regulated in detail in the Treaty itself, there was no such regulation with reference to integration policy.

Accordingly, throughout the first decade of integration policy (1999-2009) the question to what extent the EU could interfere with integration policy in the Member States essentially remained unanswered, considering that Member States continued to be competent in several fields related to integration (labour market, housing, health care, education, culture, etc.) themselves.

Meanwhile several EU-level rules on integration were adopted and institutions were established in the form of classic secondary legislation or by the means of soft law instruments. An example for the former is the directive on the right to family reunification of third country nationals lawfully staying in the Member States (hereinafter family reunification directive)[1] and the directive concerning the status of third country nationals who are long-term l residents (hereinafter long term resident directive),[2] which regulations have been adopted through severe council debates, however.[3] As regards soft law legislation on integration itself, despite the crossfire of resistance by Member States, the fundamental document of the integration policy of the European Union, the *Common Basic Principles*,[4] was adopted in 2004, which already laid down both the definition of the integration process and the objectives to be attained by the integration policy. Furthermore, from 2002 on, the *National Contact Points on Integration* started to be set up (the further developed version of which is the current European Integration Network). In 2007, the *European Integration Fund* was established, serving to support the integration

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1 Council Directive 2003/86/EC of 22 September 2003 on the right of family reunification, OJ L 251, 3.10.2003, pp. 12-18.

2 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, pp. 44-53.

3 Because of which they were rather watered down compared to the original Commission proposal.

4 Council of the EU, Justice and Home Affairs Council Meeting 2618th, Common Basic principles on immigrants integration, 14615/04, 19. November 2004, Brussels.

of migrants (and was replaced in 2014 by the Asylum, Migration and Integration Fund). 2009 saw the setting up of the European Integration Forum (in 2015 replaced by the European Migration Forum), within the framework of which EU institutions, stakeholders and NGO's can exchange views on integration-related issues, and finally the interactive *European Website on Integration* was created as an online tool for those involved with migrants.

Thus, as a result of Member States' resistance to lay down common rules in the field of EU level integration policy, a *double set of EU norms* came into being: on the one hand, the *EU immigration legislation* itself, with references to integration, and on the other hand the EU Framework on Integration based on *soft law* (hereinafter European Framework). While the former is a typical example of secondary EU law, the latter can be understood as a kind of quasi-Open Method Coordination exploiting opportunities in soft-law legislation by setting up various supranational networks of experts, facilitating the exchange of information mechanisms on best practices and operating EU evaluation on integration mechanisms – benchmarking and indicators.

Thus, the end products of the European Framework do not qualify as classic EU legislation; they do not have binding force and cannot be imposed on Member States.

Furthermore, it needs to be clarified at the outset that integration policy can be defined both in a broad and in a narrow sense. In the narrow sense, such policy covers integration measures that fall within the *Member States' competence* as provided expressly under Article 79(2) TFEU,[5] the provision constituting the basis for the EU's integration policy as described below. Consequently, the EU may adopt only the relevant incentive measures in this field. The requirement that the adoption of those integration measures shall be kept within the Member States' competence flows from the completely different organisation of the society, culture, historical and linguistic heritage of the Member States, therefore, the harmonisation of national rules is excluded in this respect. Conversely, integration in the broad sense covers the specific provisions resulting from the harmonisation of rules on legal migration and migration affairs, so in particular the *integration requirement* that may be set as a condition for acquiring the refugee status or to exercise certain rights, as well as the so-called *equal treatment clauses* which were set to ensure the exercise of the rights to be provided to persons who have already acquired such status. Therefore, harmonisation in this respect has been very advance in the last decade and a half.

5 It is worth mentioning that the legal basis for integration was provided in the Treaties under Art. 79 TFEU which covers the common immigration policy, including in particular legal and illegal migration. However, according to the EU's policy structure, migration affairs are separate as the relevant legal basis is provided under Art. 78 TFEU. So therefore, the legal basis for integration in the narrow sense was included under the TFEU only in a manner that it does not strictly cover the beneficiaries of international protection which is relatively unfortunate.

9.2 Competence Issues

Through the adoption of the *Lisbon Treaty* in 2009 the picture seemed to clear: it was explicitly laid down in Article 79(4) of the TFEU that the EU could contribute to the coordination of national integration policies.

Article 79(4) of TFEU says: "The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may establish measures to provide incentives and support for the action of Member States with a view to promoting the integration of third-country nationals residing legally in their territories, excluding any harmonisation of the laws and regulations of the Member States."[6]

The above provision clearly stipulates at the same time that this *coordinative competence* could *by no means target legal harmonisation*. In other words, in this field the EU may not adopt binding directives that would result in the harmonisation of the rights and policies of Member States. Thus Article 79(4) of the TFEU continues to strongly restrict the EU's discretion in the field of social integration by making it clear that integration policy essentially stays *in the competence of Member States*.[7] The Lisbon Treaty thus strongly restricts issues of competence in principle, where the dominance of Member States continues to prevail.

In the field of integration policy the Treaty in fact acknowledges the overweight of Member States competence compared to EU competence; however, this is an oversimplification. The explicit exclusion of legal harmonisation is not at all straightforward in practice, especially considering the dynamics of the convergence of policies on third country citizen integration over the past 15 years.[8] Integration policy namely encompasses several fields – for example the right of access to labour market, education or accommodation – that are covered in the scope of regulation of several directives on third country citizens today. In the field of integration policy, the boundaries of classic EU law, soft law and policy are, accordingly, rather blurred. This is especially true with reference to the above mentioned directives on legal migration, which explicitly set the facilitation of the social integration of third country citizens as an objective and, as the conditions of granting a residence permit and certain rights involved in the status granted by the directive, may themselves impose integration tests or other integration requirements with reference to third country citizens. At the same time, as we will see, the EU law also restricts

6 Art. 79(4) of TFEU.

7 In accordance with the principle of conferral laid down in Art. 5(2) of TEU, EU competence in this field may be of a supportive nature only.

8 An outlook on all policies would be beyond the framework of this study so in what follows we will focus on immigration policy. At the same time, integration for example has played an increasingly marked role in youth policy, cf. https://ec.europa.eu/youth/policy/implementation/migration_en.

Member States' discretion in the above field. Similarly, it needs to be mentioned here that the qualification directive,[9] which was adopted as part of the Common European System in the areas of migration and asylum, also contains equal treatment clauses[10] in order to facilitate the integration of migrants and it is currently being reformed.

In what follows we will examine in the first place how the Europeanization of immigration policy has shaped – in the light of the earlier requirement of unanimity in the Council decision-making – the concept of social integration and how certain Member State concepts have affected, via the EU immigration directives, EU policy in general and the specific integration policies of Member States in particular. It deserves similar attention how the setting up of integration-targeted networks of experts and the Commission itself have enhanced this trend through the instruments of soft law. In relation to this we will examine if the wide margin of discretion allowed to Member States by the soft law regulatory tools on and the directives implementing only minimum harmonization has any limits set by EU law and if it does, where these boundaries run. For this purpose, we will study among others the relevant case law of the Court of Justice of the European Union (hereinafter CJEU). Finally we will try to find an answer to the question if the Lisbon Treaty, which transforms the decision-making system in general and the field of integration policy in particular by giving explicit legal competence to the EU to adopt measures in the above field within the framework of ordinary legislative procedure, will involve any changes in future.

9.3 The Concept of Integration

It must first of all be made clear what the concept of integration actually means. Integration means the process of accepting immigrants into the institutional system and relations network of the host society. The implementation of the former, *i.e.* the actual objectives and instruments of integration policy emerge as much more disputed issues at both the European and the national political scenes. There are basically two approaches to integration or the policy facilitating it. One approach, which can mainly be character-

9 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, pp. 9-26.

10 So including, for example, the social welfare provision in Art. 28 of the Directive which provides expressly that beneficiaries of international protection and subsidiary protection status receive, in the Member State that has granted such protection, the necessary social assistance as provided to nationals of that Member State. Similarly, according to the provisions on access to education in Art. 27 of the Directive, Member States shall grant full access to the education system to all minors granted international protection or subsidiary protection status, under the same conditions as nationals.

ized as *rights-based*, focuses expressly on the rights to be achieved by migrants as ultimate objectives.[11] In this approach the residence status and the granting of rights related to it are prior to integration in every case. The simple explanation for this is that the rights granted to migrants help integration, *i.e.* the rights in question serve as tools for social bonding and the feeling of belonging to the host society (equal treatment as an integration tool).

The other approach, on the other hand, focusing on social reality itself demands a *certain degree of integration* or at least the ability of integration as a *prerequisite of the rights* to be granted to migrants (rights granted according to the degree of social integration). Integration in this sense means social or cultural connection to the receiving state, which can primarily be demonstrated by integration tests, proficiency in the language and familiarity with the social setup of the host state as well as active participation at the labour market.

The debates on social integration at the EU level can essentially be described as the struggle of these two approaches, *i.e.* the right-based attitude and the approach considering social and cultural aspects in the broader sense.

Of course, these two different approaches raise further questions including, first of all: when integration shall begin (already prior to admission or after that), who shall be covered by the integration obligation and, in this connection, whether the Member States shall eventually facilitate the integration including, for example, through the provision of language courses and specialised trainings in favour of applicants for asylum whose status is still unclear. There is a consensus among Commentators of legal literature on integration that initially it was the rights-based approach to integration that dominated in the European Union (the European Community at the time) as any other extra requirements in the forms of a language test or participation in a compulsory integration programme would have been an obstacle to the free movement of EC citizens. It is true that the question of social integration at that time arose with reference to Member State citizens primarily. At the same time, the Tampere European Presidency Conclusions of October 1999 laying down the fundamentals of the common policy on immigration and asylum[12] also followed the same attitude, explicitly with reference to third country migrants.[13] At that time, being granted secure residence status and exercising the related rights free of

11 Daniel Thym, 'Legal framework for EU immigration policy', *in*: Kai Hailbronner & Daniel Thym, *EU immigration and asylum law*, Commentary 2nd edition, Hart, 2016. p. 291.

12 After the Amsterdam Treaty, the fundamentals of the EU immigration and asylum policy were developed via five-year strategic programmes, which fill the framework of AFSJ in the founding treaty with policy guidelines.

13 This is not surprising as the Tampere programme set the approximation of the rights of third country nationals to those of EU citizens. At the same time, it is important to underline that as regards safeguarding the rights of third country nationals, the objective of the Tampere program at that time was only fair treatment instead of equal treatment, so the protection of such rights was ensured at a lower level at the outset. By contrast, strategic programs adopted after the Tampere program already provide for a higher level of protection setting equal treatment as a general rule.

discrimination were in the focus of integration, the former primarily depending on the length of residence in the host country.

This approach became much more nuanced after the first immigration policy directives were adopted in the field of common immigration policy and the soft law legislation forming the basis of the EU Framework on Integration came into being. The integration conditions and tools appearing in the long term residents' directive and the family reunification directive created the opportunity for Member States to use integration as a restriction or a kind of a derogation clause.

9.4 Hard Law: The Directives Adopted in the Field of Immigration Policy

The first important stage in the connection of integration and EU immigration policy was the debate on legal migration directives based on the legal basis enacted in Articles 63(3) and 63(4) of the TEC. The legislative fundamentals serving as the basis of the EU immigration policy went in hand with the political mandates laid down in the Tampere European Council Conclusions. The latter tried to introduce some coherence into the previously fragmented approaches to integration policy. As a consequence of Member States' resistance, this extremely ambitious programme deteriorated into a mere political statement of intent, however. The first migration directives adopted based on the Tampere programme,[14] thus the family reunification and long-term residents' directives could come into being only after long and complicated Council debates. What is more, in the course of the Council discussions, a new approach requiring integration as a prerequisite for rights emerged in addition to the former rights-based view of integration.[15]

14 It would go beyond the framework of this study to discuss all legal migration directives. Considering the integration of third country migrants it is important to mention, however, that the various directives grant different legal statuses and in relation to those different rights to migrants. Even though the family reunification directive does have a provision on equal treatment, it only sets out granting a status similar to that of the person requesting the family reunification and not to that of EU citizens, what is more, only in the fields of employment, education and vocational training. Other directives ensure equal treatment with EU citizens in a much wider scope of areas. It is the long-term residence directive that has the most generous provisions, whose Article 11 setting out equal treatment essentially covers all areas sensitive from the point of view of third country citizens that are of key importance considering their residence, employment and living conditions in the host country. It thus covers employment, education, vocational training, study grants, the recognition of professional diplomas, certificates and other qualifications, social security, social assistance and social protection, tax benefits and access to goods and services. The provisions of migration directives targeting employment and single permit Directive 2011/98 are somewhat more modest. At the same time, all regulations have several provisions suitable for restricting equal treatment as well.

15 The treaty provisions granting authority in migration issues themselves do not give any guidance as to which of the above approaches should be guiding, *i.e.* the legislator himself failed to clearly support one or the other of them. Thym 2016, p. 292.

The concept of integration appears at several points of the above directives.[16] It is expressed in their preambles already that the right to family reunification and the treatment equal to the status of long-term residence status are meant to facilitate the integration of third country nationals in the host state (rights-based approach).[17] This *integration objective* has since then been confirmed in the case law of the Court as well, as a kind of guidance for the future interpretation of the directives. In the *Kamberaj* judgment[18] the Court ruled that in the implementation of the directive the *integration* of long-term resident third country nationals was the *general rule*, which required that the derogations from equal treatment arising from legal status be interpreted strictly.[19]

Beyond the above, both directives have a kind of a *derogation clause* which stipulates that the long-term status and the entry of family members should be dependent on compliance with integration conditions, which somewhat contradicts the objectives clearly formulated in Tampere. Article 5(2) of the long-term residence directive stipulates that "Member States may require third-country nationals to comply with integration conditions, in accordance with national law."[20] Thus, in accordance with the directive the application of an integration condition is not an expectation imposed on Member States; it is only an opportunity they can use. In other words, integration may serve as a condition for being granted the legal status and related rights in certain Member States. Furthermore, Article 15(3) stipulates, where a third country national wishes to exercise

16 The migration directives essentially mix the elements of these two approaches. De Vries Karin, 'The integration exception', in: Daniel Thym, *Questioning EU citizenship*, Oxford, 2017, p. 277.

17 Recitals (4) and (12) of the long-term residence directive stipulate that "The integration of third-country nationals who are long-term residents in the Member States is a key element in promoting economic and social cohesion", and "in order to constitute a genuine instrument for the integration of long-term residents into society in which they live, long-term residents should enjoy equality of treatment with citizens of the Member State in a wide range of economic and social matters, under the relevant conditions defined by this Directive." Recital (4) of the family reunification directive stipulates that "family reunification is a necessary way of making family life possible. It helps to create sociocultural stability facilitating the integration of third country nationals in the Member State, which also serves to promote economic and social cohesion, a fundamental Community objective stated in the Treaty."

18 Judgment of 24 April 2012 in Case C-571/10, *Servet Kamberaj v. Istituto per l'Edilizia Sociale della Provincia autonoma di Bolzano (Kamberaj v. IPES),* [ECLI:EU:C:2012:233].

19 Para. 86 of *Kamberaj* Judgement. In the *Kamberaj* case the Court was expected to give an answer to the question if the long-term residence directive was compatible with the distribution mechanism of funds for housing benefit which treated third country residents of such legal status less favourably than EU citizens. At the same time, the directive itself authorized Member States to derogate from equal treatment in that they could restrict equal treatment to core benefits with respect to social assistance and social protection. The Court ruled that it was up to national courts to decide if housing benefits fell under core benefits mentioned in the directive. The Court warned national courts at the same time that the meaning and scope of the concept of 'core benefits' must in every case be sought taking into account the objective pursued by the directive, namely the integration of third country nationals who resided lawfully and continuously in the Member States.

20 This opportunity has been exploited by certain Member States; all of the following Member States demand certain degree of integration before granting the permit: Austria, Croatia, the Czech Republic, Estonia, France, Germany, Greece, Italy, Latvia, Lithuania, Luxembourg, The Netherlands, Portugal, Romania and Slovakia.

the right of movement between Member States, "Member States may require third-country nationals to comply with integration measures, in accordance with national law." This condition may not be applied at the same time if it was required for being granted the legal status before. In this case, persons who already have the long-term residence status may only be required to attend language courses. This provision essentially means the de jure mutual recognition of Member State decisions certifying social integration.[21] It is an extremely forward-looking provision as it helps, in case a migrant has already integrated into the society of a Member State, the fact of integration to be automatically recognized by the authority of another Member State, too.[22]

The integration requirement in Article 7(2) of the family reunification directive, which was included in the regulation also as a result of Council discussions, says the following: "Member States may require third country nationals to comply with integration measures, in accordance with national law."[23] With regard to refugees and their family members the same article expressly stipulates that integration measures may only be applied after entry. From this it follows *a contrario* that against persons who do not fall under the above category, the requirement of *integration abroad* is also acceptable. This provision thus essentially acknowledges a category that previously existed in the legislation of a Member State only, *i.e.* in Dutch integration legislation specifically: the concept of pre-departure integration measures, according to which the borders of integration extend beyond the borders of the host country, up to the country of origin. Thus, in this case, integration is a requirement that serves being granted the family reunification visa, the lawfulness of which, as we will see, has since then been confirmed in the case law of the Luxembourg Court.

Article 4 of the directive on family reunification also includes a special provision with reference to a further integration condition. By way of derogation, where a child is aged over 12 years and arrives independently from the rest of his/her family, the Member State may, before authorising entry and residence under this directive, verify whether he or she meets a condition for integration provided for by its existing legislation on the date of implementation of this directive. It was the compliance of this provision with the fundamental rights that the Court examined in the judgement in the case *European Parliament v. Council of the European Union*.[24] At the same time, none of the Member States introduced it into their legislation, not even those that insisted on this stipulation in the course of the discussion, *i.e.* Austria or the Netherlands.

In relation to the integration requirements in the migration directives the question of their implementation restrictions arises automatically. The question arises first of all

21 Sergio Carrera & Anja Wiesbrock, *Civic integration of Third Country Nationals: Nationalism versus Europeanisation in the Common EU Immigration Policy*, CEPS Report, 2009, p. 8.

22 Sergio Carrera, 'Integration of immigrants in EU law and Policy', in: Loic Azoulai & Karin De Vries, *EU Migration Law*, Oxford, 2014, p. 157.

23 Four Member States have used this opportunity: Austria, France, Germany and the Netherlands.

24 Judgment of 27 June 2006 in Case C-540/03, *European Parliament v. Council of the European Union*, [2006] ECR I-05769.

whether the terms *integration condition* and *integration measure* in the above directives have the same meaning. According to the widely accepted Groenendijk's view,[25] the integration condition even authorizes Member States to require migrants to successfully pass the integration test as well as to pay the fee/costs thereof. In the scope of application of the integration measure, in contrast, Member States may only require some efforts of migrants, *e.g.* the attendance of courses aiming at the acquisition of language or social skills.[26] In the light of this it is questionable if the stipulation on integration measure in Article 7(2) of the family reunification directive and Article 15(2) of the long term residents' directive can restrict Member States in setting obligatory integration conditions or in using sanctions in the case of non-performance.

Beyond the mere semantic question it is important to examine the *restrictions imposed by the EU rule of law* on these integration requirements. It was in the reasoning of the judgement in the above case of the *EP v. the Council* that the Court first established the following: "The fact that the concept of integration is not defined cannot be interpreted as authorising the Member States to employ that concept in a manner contrary to general principles of Community law, in particular to fundamental rights."[27] This is in compliance with the interpretation of the directives by the CJEU *according to objective.* Accordingly, in relation to the *Chakroun* case the Court ruled that the major objective of the directive was to allow family reunification and Member States were only allowed to use the discretion granted to them without endangering the objective of the directive targeting the facilitation of family reunification or its efficient implementation.[28]

The Court made a similar statement in relation to the interpretation of the long-term residence directive in the case *Commission v. Netherlands*:

> "Having regard to the objective pursued by the directive and the system which it puts in place it should be noted that, where the third-country nationals satisfy the conditions and comply with the procedures laid down in that directive, they have the right to obtain long-term resident status."[29]

It was also confirmed in the *Singh* case that the main objective of the directive was the integration of the third-country nationals with long-term residence in Member States. It was established furthermore that it is the duration of the legal and continuous residence

25 Diego Acosta Arcazaro, EU Integration Policy: Between Soft Law and Hard Law, Research Paper, 27 July 2014.

26 Kees Groenendijk, *The Family Reunification Directive in EU Member States: The First Year of Implementation*, Nijmegen 2007, p. 27.

27 Case C-540/03 of the *European Parliament v. Council*, 70.

28 Judgment of 4 March 2010 in Case C-578/08, *Rhimou Chakroun v. Minister van Buitenlandse Zaken, (Chakroun)*, [2010] ECR I-01839, para. 43.

29 Judgment of 26 April 2012 in Case C-508/10, *European Commission v. Kingdom of the Netherlands*, [ECLI: EU:C:2012:243], para. 68.

of 5 years which shows that the person concerned has put down roots in the country and therefore has long-term residence.[30]

In *Kamberaj*, the Court expressly held that as a general rule, third-country nationals who are long-term residents in the Member States shall be integrated and their equal treatment shall be provided in the areas listed under the directive, therefore, the *derogation* provided for (e.g. in the family reunification directive) must always be interpreted *strictly*.[31] What follows from all these is that Member States – at least in principle – must not use the integration requirement as a means to restrict the rights following from the directive. Although they may introduce various integration measures, these must always comply with the general legal principles like the principles of effectiveness,[32] proportionality,[33] legal certainty[34] and non-discrimination.[35] The same is supported by the contents of the Commission report on the implementation of the family reunification directive and the long-term resident directive.[36]

9.5 Soft Law: The European Integration Framework

Despite the very restricted EU competence in the field of integration and the considerable opposition by Member States several documents with political content have been worked out, which have developed into a European Integration Framework.

30 Judgment of 18 October 2012 in Case C-502/10, *Staatssecretaris van Justitie v. Mangat Singh*, [ECLI:EU:C:2012:636] paras. 45-46. The length of residence continues to be a relevant factor in examining social integration. This is confirmed by what the Court formulated in the *Tahir* case (C-469/13, para. 33): "It Is the five-year duration of the legal and continuous residence that shows that the person concerned has put down roots in the country and therefore that that person is a long-term resident." In spite of this, as we well see in the reasoning in the judgement of the Court in the *P&S* case, residence in itself may not be the decisive factor. In that case the Court established in the case of two persons residing in the Netherlands for over ten years that they could not compare to own nationals for the lack of language proficiency.

31 *Kamberaj* judgment, para. 86. Strict interpretation is supported also by the Court's judgment adopted recently in *Ben Alaya* in which it was confirmed that the list of conditions for residence as set out under the Directives concerning legal migration shall be exhaustive and may not be complemented by additional conditions under the national law. Judgment of 10 September 2014 in Case C-491/13, *Mohamed Ali Ben Alaya v. Bundesrepublik Deutschland (Ben Alaya)*, [ECLI:EU:C:2014:2187].

32 Case C-508/10, *Commission v. the Netherlands*, para. 65.

33 Id. para. 75.

34 Opinion of the advocate general in the *Singh* case, paras. 29, 30, 45, 58, 64.

35 Case C-508/10, *Commission v. the Netherlands*, para. 69.

36 COM (2008) 610, and COM (2011) 585: When using the integration conditions "Member States must be in line with the purpose of the Directive and take due account of the general principles of EU law such as the principle of preserving its effectiveness mint ("*effet utile*") and the proportionality principle."

After the failure of the open coordination mechanism to be introduced in the area of immigration policy[37] it came as a surprise that from 2002 onwards, as a result of the Justice and Home Affairs Council meeting in Luxembourg in 2002[38] the EU started working out a common European cooperation framework.[39] This framework was based on a *'quasi' open coordination mechanism* that was outside the Community decision-making procedure in the traditional sense, exploiting at the same time opportunities in soft law/ policy through setting up various expert networks, facilitating the exchange of information mechanism on best practices at the EU level and operating EU evaluation mechanisms.

The major elements of the framework can be summarised as follows:

Its most important element is *setting up the network of national contact points on integration* (whose further developed version is the current *European Integration Network*). The decision on this was still made at the 2002 Council session and it was the Commission that set up the network of national contact points at the Council's request. The Network functions as an international forum of experts from ministries in the Member States responsible for integration. Within the framework of this forum there is primarily experience exchange and the exchange of the best Member State practices among Member States, while the forum also participates in working out several important practical instruments like the annual reports on migration and integration[40] and handbooks on integration.[41]

37 Communication from the Commission to the Council and the European Parliament on an open method of coordination for the community immigration policy. COM (2001) 387. One of the most prominent examples of Member State resistance after Tampere that the Commission had to face was the failure of the open coordination mechanism in to be introduced in the area of immigration in 2001. The mechanism was to complement ordinary legislation and put the integration of third country nationals in the focus of coordination. The proposal was, however, completely ignored by the Council.

38 It was within the framework of the Justice and Home Affairs Council meeting on October 14-15 2002 that the demand for coordinated EU action with respect to Member State integration policies first arose.

39 Worth mentioning here is the Commission's communiqué based on the Tampere milestones and issued in 2003 '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, which drew attention to the holistic approach to be applied in the integration policy.

40 Annual reports on migration and integration (2004), (2006), (2007). Surprisingly, the Commission issued the second report not as a Communication but only in the form of a simple commission staff working document which, as regards its ranking, has a much weaker status among soft law instruments. The report highlights the practice used by Member States with growing emphasis according to which newcomers must meet certain integration requirements primarily in the form of participation in obligatory courses. Special mention should be made of the Netherlands which requires in the case of family members of certain citizenships for the event of immigration with the purpose of family reunification that they take what is referred to as the overseas integration test, which may be concerning from a human rights point of view. Therefore the Commission specifically underlines in their working document that the integration measures and conditions must be applied in compliance with EU regulations, free of discrimination, and these may not prevent the implementation of the above instruments.

41 Three Handbooks on Integration issued by the Commission for policymakers and practitioners (2004), (2007), (2010).

The second pillar of the Framework was adopting what are referred to as the *Common Basic Principles*, the necessity of which was first formulated at the Thessaloniki European Council[42] in 2003. The Council laid down in their Conclusions that integration policies should be understood as a continuous, two-way process based on mutual rights and corresponding obligations of legally residing third-country nationals and the host societies.[43] They furthermore confirmed that, even though it was Member States that had primary responsibility, working out and developing integration policy also required a coherent European Union framework, certainly considering the legal, political, economic, social and cultural diversity of Member States.[44] Thus they held it especially important to formulate the above-mentioned Common Basic Principles in the field of integration, which was ultimately implemented by the Council in November 2004.[45] The Common Basic Principles are a core document of the integration policy of the European Union that lays down the definition of the integration process as well as the objectives to be attained by the integration policy. This thus meant the first decisive step towards reinforcing a uniform European integration framework, defining more closely what an EU-level integration policy should include.

Having a closer look at the Council Conclusions of November 2004 one can see that the document, much before it elaborates on the Common Basic Principles, expressly emphasises *the importance of member state competence* and its overweight in the integration of third country nationals. It stresses furthermore the primary responsibility of respective Member States for the Union as a whole and considers it important to point out that there are considerable differences in the policies from Member State to Member State in view of the fact that these depend on the needs of the host societies as well as on the histories and legal systems of the Member States.[46] Within the framework of this attitude the basic principles were defined so widely that they cannot be considered a common European model even with the greatest benevolence.[47]

In light of the above it is not surprising, either, that the Common Basic Principles already include the institution of integration condition, which originally rooted in the legislations of only a few, traditional host countries and was transposed to the EU level from there. The second basic principle lays down the requirement of respecting EU values, while the fourth sets the requirements of familiarity with the culture and history, and proficiency in the language of the host society.

42 Presidency Conclusions from the Thessaloniki European Council, 19-20 June 2003, 28.

43 The necessity to adopt the Common Basic Principles serving as the basis for a common European framework for integration was confirmed also by the similarly five-year Hague Programme adopted at the Brussels session of the European Council on 4-5 November 2004.

44 *Cf.* Id. Presidency Conclusions from the Thessaloniki European Council, 31.

45 Council of the EU, Justice and Home Affairs, 2618th Council Meeting, Common Basic principles on immigrants integration, 14615/04, 19 November 2004, Brussels.

46 Sergio Carrera, *In Search of the Perfect Citizen*, Brill, Nijhoff, 2009, p. 76.

47 Carrera 2014, p. 163.

The third element of the Framework is the *European Integration Fund*, which was set up in 2007 with the aim to support Member States' efforts in the integration of third country nationals with various backgrounds in the European societies.[48] In 2014, the Integration Fund was replaced by the *Asylum, Migration and Integration Fund*.[49]

Finally, in 2007 the Commission started preparing the operation of the so-called *European Integration Forum*, primarily with the aim to involve NGO's in EU processes. The platform started operation in 2009, creating the opportunity for non-governmental organizations assisting migrants to express their views on the integration of migrants. The major tasks of the forum included consultation, professional experience exchange and the formulation of proposals and reports, publicity for which was ensured via the integration website. In 2015, the operation of the Integration Forum was replaced by that of the *European Migration Forum*.[50]

An important stage in integration policy was furthermore the European Pact on Asylum and Migration, which came into being at the initiative of the French EU presidency, which was adopted by Member States in the form of Council Conclusions in October 2008.[51] The Pact states that Member State policies must be based on an equilibrium between migrants' rights and obligations and must require the acquisition of the language of the host state and include actual measures facilitating employment. They must furthermore emphasise the necessity to respect the identity of the European Union and the Member States as well as the fundamental values. The Pact is a document strongly guided by intergovernmental logic. Some representatives of the legal literature go as far as maintaining that the contents of the Pact were primarily inspired by French regulations already in force; what is more, it was the explicit objective of the French strategy to have national priorities and rules acknowledged under the disguise of supranationality and form them into a "European trend."[52] This is well reflected by the proposition of the Pact to make the rules on family reunification stricter, according to which Member States

48 The Fund primarily focuses on measures related to the integration of newcomer third country nationals.

49 According to Regulation 516/2014/ EU establishing the Fund its aims are to contribute to the efficient treatment of migration flows and improve the implementation and development of the EU's common policy on immigration and asylum. It is worth mentioning here that one of the major changes brought about by the Commission's proposal concerning the new multilingual financial framework (Multiannual Financial Framework 2021-2027) is that the integration-related part of the former Asylum, Migration and Integration Fund (AMIF) will be removed and the remaining Asylum and Migration Fund (AMF) will be strengthened by the Commission. The amendment was adopted with the purpose to finance short-term migration-related challenges from the AMF and long-term integration needs from the Cohesion Fund.

50 The European Migration Forum is similarly the platform of dialogue between civil society and European institutions in issues related to migration, asylum and the integration of third-country nationals. At least once a year it organizes a meeting attended by civil society organizations, local and regional authorities as well as representatives of Member States and EU institutions.

51 *Cf*. Presidency Conclusions, 15-16 October 2008, paras. 19-20.

52 S. Carrera & E. Guild, *The French Presidency's European Pact on Immigration and Asylum 4,* http://www.ceps.eu/book/french-presidency%E2%80%99s-european-pact-immigration-and-asylum-intergovernmentalism-vs-europeanisatio.

would, on the one hand, consider their own receiving capacity and on the other hand, families' ability to integrate, assessing the requirement of the availability of accommodation and financial resources in the host country and, for instance, language proficiency.[53]

The end of 2009, thus the entry into force of the Lisbon Treaty meant the beginning of a new era in the history of the European Union and of integration policy within that. The treaty already provided an explicit legal basis for the facilitation of EU-level integration policy and gave authorization for ordinary legislative procedures.[54] What is more, after long preparations, the European Commission presented in summer 2009 their proposal for a new, multiannual home affairs and justice development programme for 2010-2014, to replace the Hague Programme under the name Stockholm Programme. The Programme listed integration under policy priorities and called upon the Commission to support Member State efforts by working out a coordination mechanism that could further develop structures serving the European exchange of information by establishing a common reference framework. Beyond that, it called upon the Commission to define the European modules supporting the integration process and to work out the basic indicators for the monitoring of the outcomes of integration policies.

The Commission complied with the above call and, among others, issued their communication on the European Agenda for the integration of third country nationals[55] in 2011, the major objective of which was to enhance the advantages of economic, social and cultural benefits involved in migration. The communication emphasises the importance of immigrants having their full share of all areas of community life and underlines the importance of local authorities in this respect.

In 2015, as a kind of reaction to the migration crisis, the Commission put forward the European Agenda on Migration[56] to serve as a kind of guidance for the future immigration policy of the EU and, as its implementation, in June 2016 adopted its integration action plan aiming at the integration of third country nationals, which, similar to earlier soft tools, targeted the possibly smoothest integration of migrants and, in order to facilitate this, the most efficient political cooperation possible among Member States. The action plan is based on the common basic principles laid down in 2004 and the integra-

53 The original draft of the Pact even included a direct reference to the integration treaty, which has clearly been drawn from French legislation in force, and which ultimately failed due to resistance by certain Member States, especially the government of Spain.

54 *Cf.* Art. 79(4) of TFEU.

55 Communication from the Commission on the European Agenda for the Integration of Third-Country Nationals, COM (2011) 455.

56 European Agenda on Migration, COM (2015) 240 final, Brussels, 13.05.2015. The above mentioned AFSJ programs were adopted by the European Council that is by the heads of states and governments, and the Commission released its action plan in respect of such programs only on that basis. Conversely, having regard to the fact that Ypres Guidelines, denominated as guidelines due to their weaker programming character and which were adopted as post-Stockholm guidelines in June 2014, could not provide an appropriate answer to the migration flow in 2015, the Commission exercised the right of programming and so issued the European Migration Strategy on 13 May 2015.

tion agenda of 2005 (which was renewed in 2011) and fits well in the earlier structure of the EU integration framework and thus the common European support and platform system. The plan itself rules on a common policy framework and support measure package that could provide assistance to Member States in further developing and consolidating their national integration policies with reference to third country citizens. Thus the Action Plan is essentially of a complementary nature compared to the previous measures like the Asylum, Migration and Integration Fund replacing the European Integration Fund and the renewed European Integration Network (which was launched in the Action Plan as the further developed version of the earlier set up network of national contact points). The Action Plan once again emphasises that at the national, regional and local levels Member States play a primary role in the area of integration.

Finally, as part of the soft law tools mention must be made of the European Partnership for Integration[57] signed by the European Commission and the EU Social and Economic partners in December 2017, laying down key principles and commitments to support and strengthen opportunities for refugees and migrants legally residing in the EU to integrate into the European labour market.

As we can see, in principle the tools of the current coordination policy provide opportunity for discussing Member State integration strategies and exchanging good practices, and with various support give impetus to Member States for developing their integration strategies along the EU lines. At the same time, these soft law tools are often criticised for making it possible for Member States to introduce measures in line with their own national integration policies, while pushing into the background European initiatives that do not meet their political preferences.[58]

The exploitation of the potential in the European networks strongly depends furthermore on the positions Member State representatives have in their respective governments. While some Member States delegate high-rank officials who, having actual decision-making competence, have genuine influence in the political arena, other representatives lack the suitable mandate and thus have very little chance to influence the political agenda.

As we can see, several EU soft law tools have come into being in the field of integration in the past one and a half decades. At the same time, much less attention has been devoted to evaluating these acts with respect to the question to what extent these soft law tools have contributed and continue contributing to the policy learning process, the exchange of good practices and in general to the dissemination of policy responses in order to facilitate the integration of third country nationals.[59]

57 https://ec.europa.eu/homeaffairs/sites/homeaffairs/files/elibrary/documents/policies/legalmigration/integration/docs/20171220_european_partnership_for_integration_en.pdf.

58 Augusto Veloso Leao, Laura Westerveen & Ilke Adam, 'The First Year of Implementation of the EU Action Plan on Integration', *Policy Brief*, 2017/2.

59 *Cf.* Ibid. 2.

9.6 The Driving Factors of the Change of Attitudes in Integration

As outlined above, the concept of integration has undergone a significant change both in EU immigration law and the integration framework itself. In this new interpretation, integration is defined as a condition, a kind of *sine qua non* for social inclusion. Some authors in the legal literature believe it may be problematic that it is no longer the duration of residence that plays the major role with reference to the rights and guarantees granted to migrants but these have become dependent on an uncertain legal concept and thereby essentially on the discretion of respective Member States. Some Commentators go as far as maintaining that the above interpretation of integration serves as the tool of a restrictive immigration policy.[60] What is certain nevertheless is that we can witness a shift of emphasis from rights to obligations. It is worth examining what has led to this paradigmatic change and who or what have played key roles in this process.

As regards the migration policy directives discussed, it was mentioned above already that the Council watered down both draft directives, essentially transposing certain national provisions into them. It was at the initiative of Germany, Austria and the Netherlands that the reference to integration tools and conditions were included in the directives, what is more, in a direct form. These three Member States have thus succeeded in transposing their own integration policy tools into the EU immigration legislation.[61] The EU policy thereby served as a kind of transfer tool for the legitimization of the national integration policies of the above three states at the scene. Moreover, facilitating thereby the emergence of these national integration policies in other national arenas. The watering down of EU standards, thus the intergovernmental logic prevalent in the chambers appeared, by time, outside the chambers as well, and it did so in relation to the Commission initiatives which, in many cases, reflected the policy priorities of Member States with a great political weight. As an example, in the Commission's Communication on a Common Agenda for Integration: Framework for the Integration of Third Country Nationals in the European Union[62] the Commission proposed specific tools for the practical implementation of the contents of the Common Basic Principles both at the national and the EU levels. Thus, with reference to the second basic principle it underlined the importance of public participation in introductory programmes organized for newcomer third country citizens with the purpose of making immigrants understand, respect and appreciate the usefulness of common European and national values.

60 Elspeth Guild & Sergio Carrera, 'Are integration tests liberal? The Universalistic Liberal Democratic Principles as Illiberal Exceptionalism', in: Rainer Bauböck & Christian Joppke, *How Liberal Are Citizenship Tests?*, EUI Working Paper No. 41, 2010, p. 32.

61 The only explanation for including the integration clauses in the legislation was that the latter would thus be in compliance with their national legislations.

62 COM (2005) 389.

Not only the EU institutions but the expert networks themselves as well as the national experts playing a key role in the latter contributed to the paradigmatic change. Several national experts of countries that seemingly had more experience in the area of immigration channelled their national integration policies into the EU areas (more) successfully. Unsurprisingly, these countries (and their representatives) were the same as the countries (and their representatives) who urged the introduction of the conditions in the immigration policy directives. The Framework thus not only legitimized the new concept but explicitly contributed to its dissemination among Member States in the form of a so-called good practice. The Framework ultimately developed into a supranational platform where Member States with less experience in the field of integration simply started following the good practice produced by the Framework, which had in many cases been imported from traditional host countries.[63]

Of course, it should be noted that emphasizing the role of certain national interests in relation to the paradigm shift, however, does not mean that no pan-European interest attached to make the acceptance of the host country's social values as the basic requirement for social inclusion in order to avoid ghettoisation,[64] or in order to combat radicalisation.

9.7 The Limits of the New Concept

Although, as we have seen, the Europeanization of the integration policy transformed the classic concept of integration policy, it also limited it at the same time. The gradual intrusion of EU law in the areas of immigration and integration policies took place to the detriment of Member State competence in the field of integration policy. This is well illustrated by the control of the Member State implementation of EU immigration directives by the Commission (in the form of infringement procedures) and the Court (preliminary ruling procedure).[65] In the case of immigration directives, Member State acts do not merely have to comply with the legislative objectives and the specific provisions themselves, but also with the legal principles developed by the Court as well as with the

63 Carrera 2014, p. 176. However, it is important to underline that such trend cannot be justified in all matters; for example, typically, the pre-entry integration conditions are still applied only by countries hosting large numbers of migrants.

64 See Commission Communication on immigration, integration and employment: "Ethnic residential concentration or so-called ghettos tends to isolate communities and prevent their participation in the wider society." COM (2003) 336, 21.

65 The situation is somewhat different with reference to the Framework, whose sui generis nature initially prevented its revision from the point of view of compliance with general legal principles. Immigration directives do not have a special legal nature; their contents are obligatory for Member States to the same extent and they set the minimum standard the Member States are required to guarantee as regards both the rights and the guarantees offered to third country nationals. Thereby the various disproportionately high fees, discriminative procedural rules, the exclusion of the opportunity of judicial review previously used in this field are not to be allowed in future.

fundamental rights. The first case where the Court examined the lawfulness of integration conditions was the above mentioned case of the *European Parliament v. Council*.[66] In this case, even though it was established that the disputed provisions did not violate the fundamental right of respect to family life laid down in Article 8 of the European Convention on Human Rights (hereinafter ECHR), the judgement was groundbreaking in that it set a limit to restrictive acts by Member States to the detriment of rights laid down in the Directive.[67]

Unlike immigration directives, the integration framework is not based on the traditional institutional and decision-making methods but on soft law acts, whose legal effects are very difficult to grasp. The end products of the framework do not come into being under the guise of secondary legislation, but in the form of annual reports, handbooks, Commission communications, work documents and Council conclusions, most often as results of discussions behind closed doors, the legal binding force of which is strongly disputed.[68] Accordingly it is difficult to determine their relation to the principles arising from the constitutionality that constitutes the basis of the EU rule of law, *i.e.* legal certainty, transparency, accountability and judicial review.

At the same time, by providing an explicit legal basis for the EU level implementation of integration policy, the Lisbon Treaty creates the opportunity for involving the tools accepted within the Framework under the scope of the Treaty. Of course, it cannot be emphasized enough that this excludes the transfer of responsibilities from the Member States and may serve only for encouraging and coordinating the Member State measures.

By the reference to the ordinary legislative procedure, Article 79(4) of the TFEU extends the scope of the Community decision-making method, thereby contributing to higher efficiency, democratic control and legal certainty in the field of integration policy. Finally, emphasis should be put on the role of the Court, which is now empowered to act with full competence in this field in future, thereby ensuring the judicial revision of a wider range of the acts issued.[69]

66 *Cf.* Judgment of 27 June 2006 in Case C-540/03, *European Parliament v. Council of the European Union*, [2006] ECR I-05769.

67 Id., p. 60. The CJEU pays special attention to the contents of the preamble of the Directive in guaranteeing the rights of family reunification.

68 Even though the framework tools do not have a legally binding force, this does not mean that they lack an indirect legal impact or do not shape either directly or indirectly the legal position of third country nationals. As an example, they may serve as sources of legal interpretation for national forums as regards the provisions of immigration directives on integration. Carrera 2014, p. 181.

69 This competence was strongly restricted before in that preliminary ruling procedures could only be initiated in cases ongoing at Member State courts against the judgement of which courts the national legislation did not provide the opportunity of legal remedy.

9.8 Recent Integration Case Law of the Court of Justice of the European Union

As we have seen, Member States must not – at least in theory – use the integration conditions as tools to restrict the rights following from the migration directive. In the light of all these it is worth examining the recent relevant practice of the Court and what is referred to as the *integration exception* in its focus. The latter serves as the *legal confirmation* of the rights granted in the directives thus accepted by the Court as well, hereby significantly increasing Member States' discretion in the application of integration conditions *i.e.* as the prerequisite of the rights granted in the directives concerned. Thereby this new approach of the concept of integration according to which compliance with the requirements set by the Member States is a key to the rights laid down in the directives and to equal treatment has essentially been confirmed by the Court as well.

Integration exception as a lawful restriction first appeared in the case of the Court in relation to the *P&S* case.[70] According to the base case the third country nationals P and S held long-term residence permit in the Netherlands issued on the basis of the long-term residents' directive. Even though the Member State did not require meeting the integration condition for acquiring the long-term residence status itself, according to Dutch law the applicants of the base case were obliged to pass, within a set deadline, a social integration examination or else pay a fine; the examination was to prove that they had oral and written proficiency in the Dutch language and basic knowledge of the Dutch society. Although failure to pass the examination by the deadline did not involve the withdrawal of the legal status, it did involve a new examination date as well as a fine to gradually increase. This obligation was essentially imposed on all third country nationals granted long-term residence status who had failed to pass the examination earlier or were unable to prove qualifications equal to that.

P and S lodged an appeal against the decisions obliging them to pass the social integration examination. The Centrale Raad van Beroep (Higher Social Security Court of the Netherlands) administering the appeals asked the Court of Justice of the EU for a preliminary ruling regarding the question if citizens' integration obligation was compatible with the long-term residents' directive and especially Articles 11(1) (a) and (b) of the latter requiring equal treatment in employment, education and vocational training. They asked the Court the specific question if, after granting the legal status of "holder of long-term residence permit" Member States could impose on the holder an integration condition in the form of an obligatory social integration examination where failure attracted a fine.

70 Judgment of 4 June 2015 in Case C-579/13, *P and S v. Commissie Sociale Zekerheid Breda and College van Burgemeester en Wethouders van de gemeente Amstelveen* [ECLI:EU:C:2015:369].

In this respect the Court established that the directive did not oblige Member States to demand and did not prevent them from demanding third country nationals to meet certain integration obligations after attaining the long term residence status.

As regards the requirement of equal treatment with own citizens, the Court examined if third country nationals were at all *in a comparable situation* with own citizens. In relation to this the Court pointed out that while own citizens could be assumed to have language proficiency, the same could not be assumed of third country citizens. Accordingly, as regards the usefulness of measures related to integration they were not in a similar situation as own citizens and as a consequence such a measure *did not violate* the right *to equal treatment* of third country nationals with long-term residence status.[71] In short, the implementation of the requirement of equal treatment granted in the long-term residents' directive is subject to a *comparability test*.

Essentially the same was confirmed in the judgement of the Court made in the *Alo* and *Osso* case[72] nine months later. Ibrahim Alo and Amira Osso are Syrian citizens, they arrived in Germany in 1998 and 2001 respectively and received complementary protection there. According to German law, the residence of persons granted *subsidiary protection and social benefits* depended on an obligation to establish residence at a specified place. On the one hand this obligation is meant to facilitate the *proportional share of the burden of these benefits* among the various institutions with such an authority. On the other hand, its objective could be to facilitate *the integration of* non-EU citizens *into German society*. In both base cases *Alo and Osso* disputed their obligation with respect to the place of residence.[73] In relation to this the Federal Administrative Court of Germany administering the legal dispute asked the Court if the residence obligation was compatible with the contents of Articles 29(1) and 33 of the qualification directive 2011/95/EU.[74] In compliance with the above provisions persons granted subsidiary protection are entitled to receive *social benefits* under the same conditions as *own citizens* and similar to other *third country nationals* lawfully staying in the Member States have the right of *free movement*.

71 Case C-579/13, *P&S*, paras. 42-43.

72 Judgment of 1 March 2016 in Joined Cases C-443/14 and C-444/14, *Kreis Warendorf v. Ibrahim Alo and Amira Osso v. and Region Hannover*, [ECLI:EU:C:2016:127].

73 Their residence permits involved the obligation to establish residence in a specific place – the town of Ahlen (Germany) and the region of Hannover with the exception of the capital of Lower Saxony.

74 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, pp. 9-26.

As regards the issue of social benefits, the Court rules that even though *unequal treatment* can be established in relation to imposing the obligation of residence,[75] it immediately added in the reasoning of the judgement that equal treatment could not be demanded if the persons in question were not in an objectively comparable situation with reference to the objective to be implemented by the regulation.[76] However, one of the objectives of the German rule setting the above residence obligation is to prevent that foreigners granted social benefits should be concentrated in certain areas and thereby *social tension* could develop, negatively affecting the *foreigners' integration.* The second objective was that foreigners with special integration needs should be bound to a certain place of residence so that they could *use integration opportunities* there. In the light of the above the Court concluded that Article 29 of the directive in question was not relevant considering that persons to be granted subsidiary protection and German citizens were *not in a comparable situation* as regards *the objective of facilitating integration*.[77] CJEU thereby confirmed that *the right of* third country nationals *to equal treatment* could be subordinated to a Member State restriction targeting integration: if different treatment *targets facilitating integration,* there is no comparable situation and equal treatment cannot be demanded. At the same time, the referrability to the integration exception could significantly weaken the equal treatment granted by the EU legislator to third country nationals and the implementation of the social rights related to it. For this very reason certain authors strongly criticise the comparability test applied in the case of restriction with an integration purpose.[78] They opine that the legislator already decided in the issue of comparability when laying down the rights included in the migration directives and adding derogation provisions thereto.[79] In their opinion, integration restrictions could also endanger the level of legal harmonization attained in migration law by deteriorating its scope by offering the opportunity of non-compliance with the earlier laid down common standards.

From the above criticism it does not follow certainly that Member States must not introduce obligatory migration measures.[80] The question rather is where the *limits* of their application should be drawn.

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75 Joined Cases C-443/14 and C-444/14, *Kreis Warendorf v. Ibrahim Alo and Amira Osso v. and Region Hannover*, paras. 52-53. Unlike German nationals, for whom there are no such residence conditions, a beneficiary of subsidiary protection status will therefore be eligible for welfare benefits only if he is prepared to accept a residence condition.

76 Id. para. 54.

77 Id. para. 59.

78 De Vries 2017, p. 283.

79 As an example the qualification directive points out in its Art. 29 that Member States shall ensure that beneficiaries of international protection receive, in the Member State that has granted such protection, the necessary social assistance as provided to nationals of that Member State. By way of derogation from the general rule, Member States may limit social assistance to core benefits.

80 According to De Vries, in the Case C-579/13, *P&S*, for example, the Court could have solved the question simply by pointing out that the integration examination does not affect the right to equal treatment in employment or education of the person concerned. De Vries 2017, p. 283.

The scope of the integration restriction and thus its impact on third country nationals is determined by the *nature* of the integration measure itself. In the reasoning of the P&S judgement the Court held it important to point out that proficiency in the language and knowledge of the society facilitate communication and social interaction for migrants as well as their access to work and vocational training.[81] Thus, on the whole, the examination required by Dutch law may *have a positive effect* on migrants' integration. As it is pointed out in the judgement: "such an obligation does not, by itself, jeopardise the achievement of the objectives pursued by Directive 2003/109, but may on the contrary contribute to their achievement."[82] It emphasised furthermore that the rules on implementing the integration obligation must not *infringe the principle of equal treatment* and must not jeopardise the implementation of the objectives of the directive, depriving it of its *effectiveness.*[83] The Court found in fact that in this specific case the high amount of the penalty would lead exactly to the above.

The Court findings in the *P&S* judgement were soon confirmed in the *K&A* judgement[84] which focused on family reunification and the obligation of a prior civic integration examination.[85] In the base case, an Azerbaijani and a Nigerian citizen ask for dispensation from the requirement to pass the civic examination with reference to their health conditions, which request is rejected. The request for preliminary ruling essentially concerned the question if the *pre departure integration measure* was in compliance with EU law, *i.e.* specifically if Member States were allowed to require third country nationals to pass an integration examination that would assess their knowledge of the language and society of the Member State concerned before giving them permission for entry/residence to/in that Member State, which examination also incurred the payment of various fees. With reference to the special rules referring to the above refugees, the Court ruled with an *argumentum a contrario* that as a main rule Member States may require compliance with certain integration measures before issuing permission of entry to their territory to family members. At the same time, the CJEU pointed out that this was not allowed to undermine *the objective of family reunification* itself as a main rule.[86] That would, in particular,

81 Case C-579/13, *P&S*, point 47: "it cannot be disputed that the acquisition of knowledge of the language and society of the host Member State greatly facilitates communication between third-country nationals and nationals of the Member State concerned, and moreover encourages interaction and the development of social relations between them." It also "makes it less difficult for third-country nationals to access the labour market and vocational training."

82 Id., para. 49. The Court rules that "in particular the level of knowledge required to pass the examination, the accessibility of the courses and material necessary to prepare for that examination, the amount of examination fees and specific individual circumstances like age, illiteracy or level of education must be considered."

83 Id., paras. 44-45.

84 Judgment of 9 July 2015 in Case C-153/14, *Minister van Buitenlandse Zaken v. K & A* [ECLI:EU:C:2015:453].

85 Case C-153/14, *K&A*, para. 53.

86 In this respect the Court found that since the examination fee was to be paid per each family member and on every single examination occasion, the fee of EUR 350 including further related costs was capable of making family reunification impossible or extremely difficult.

be the case if the application of that requirement were automatically to prevent family reunification "where, despite having failed the integration examination, they have demonstrated their willingness to pass the examination and they have made every effort to achieve that objective."[87] The Court emphasised furthermore that specific individual circumstances must be taken into consideration in the decision-making,[88] which Dutch law makes impossible. Ultimately it found that the regulation would make exercising the right of family reunification impossible or extremely difficult because it did not allow taking into consideration special individual circumstances which were objective obstacles to passing this examination by those concerned, and the fee of such examination was set too high.

As we have seen in the *P&S* case, the scope of integration exception was still strongly *limited*. The judgement can be interpreted to create the opportunity for restricting equal treatment, but only in order to help the acquisition of language proficiency and do so in a way making sure that it would not involve *disproportionate* burden for the migrant. Similarly in the *K&A* case, in which the Court ruled that passing an integration examination abroad could be set as a requirement but it must not be used for keeping outside family members wishing to enter the country.

In connection with *P&S* and *K&A*, however, it is important to emphasize that the situations involved in such cases are different, so the integration requirements defined as conditions for acquiring the relevant status (for example, definition of the pre-entry integration condition) shall be separated from integration-related provisions which may be set as preconditions for exercising the rights attached to the already acquired status. Whilst judgment in *K&A* judgement is an example for the first one, the judgment in *P&S* is an example for the latter one. The difference between the two cases is that as regards the pre-entry conditions, entry is permitted as a general rule, since it is expressly allowed under the family reunification directive.[89] On the contrary, as regards the exercise of the rights attached to the relevant status upon acquisition of such status, equal treatment shall prevail as a general rule and making the exercise of the relevant rights subject to certain integration measures may only have a limited scope.

In the judgement in the case *Alo* and *Osso*, however, the *scope* of integration exception considerably *widened*, The geographical restriction is no longer aimed to compensate for the lack of migrants' language proficiency or social knowledge; it much rather aims to mitigate social tension.[90] What is more, contrary to its previous decisions, here the Court merely accepted the fact that such a restriction facilitated integration without providing

87 Case C-153/14, *K&A*, para. 56.

88 Such as the age, level of education, economic situation or health of a family member, which must be taken into consideration in order to dispense those family members from the requirement to pass an examination such as the one at issue.

89 However, individual circumstances shall be considered in each case.

90 Which concept the Commission fails to enlarge upon, unfortunately.

an explanation why free movement would increase social tension among refugees compared to Member State citizens.[91]

In any case, it is sure that whilst such measures previously aimed at making the migrants capable of integration into the society, a new criterion has now come to the fore according to which the *society may also have limits as to the reception*, meaning that the limited reception capacity of the society may also justify the application of a condition for integration. Such a new approach, so the question relating to the reception capacity of the society is likely to have come to the fore due to circumstances relating to the increasing migratory pressure, including the protection of citizens, the stability and security of the society.

The subdued stance of the Court made in relation to the *Alo* and *Osso* case and the fact that the earlier stipulation made in the above cases according to which Member State integration measures must not deprive the directive of its effective implementation is not mentioned; furthermore, that only a general reference is made to the Charter of Fundamental Rights[92] without examining compliance with one of its concrete provisions[93] indicate greater discretion enjoyed by Member States. Moreover, since this is the first case where the CJEU is involved with the rights of persons eligible for international protection, the judgement in the *Alo* and *Osso* case is expected to be a frequent basis of reference in future.

As we can see from the above the integration exception creates the opportunity for Member States to deprive all those who fail to comply with social cohesion requirements of the equal treatment enjoyed in social rights. After the decision of the Court in the *P&S* and especially in the *Alo* and *Osso* cases, Member States can now refer to the integration exception for the introduction of national provisions that make social rights/equal treatment dependant on compliance with integration conditions. This approach seems to move away from the former rights-based approach at the same time reflecting that, in the field of migration law, the question of *solidarity* is strongly related to the questions of social integration/participation. Thus the approach emphasising "integration as a condition", which used to be present in relation to residence rights related to family reunification and with reference to being granted the long-term residence status only, seems to be emerging in the field of *social rights* as well.

In order to understand this – at least partial – change in attitudes, it suffices to consider the wide-scale social changes that have taken place in recent years, *e.g.* today's deepening migration crisis and the crisis of the European Union itself, in relation to

91 De Vries 2017, p. 281.

92 In this interpretation, following from preamble 16 of Directive 2011/95, the rights recognized by the European Charter of Fundamental Rights must also be respected. Joined Cases C-443/14 and C-444/14, *Kreis Warendorf v. Ibrahim Alo and Amira Osso v. and Region Hannover*, para. 29.

93 For example, the right to respect for family life laid down in Art. 8 of the ECHR. Jean Yves Carlier & Luc Leboeuf, 'Choice of residence for refugees and subsidiary protection beneficiaries, variation on the equality principles, Alo and Osso', *CML Rev*, 2017/2, p. 643.

which latter many maintain it is exactly the social benefits demanded by immigrants[94] that are the triggering reasons.[95] At this point, attention should be drawn to the paradigmatic change in the case law of the Court in relation to EU citizens in recent years.[96] According to the latest jurisprudence of the CJEU, the level of integration or lack of intention to integrate of economically inactive EU citizens in the host state has had growing relevance for the equal treatment of union citizens in the field of social provisions.[97] In the light of the above it is not at all surprising that the Court orders equal treatment in social provisions to be dependent on integration requirements to be met by third country citizens.

9.9 Conclusion

Article 79(4) of the TFEU strongly limits the discretion of the European Union in the area of social integration by making it clear that integration policy is mainly Member State competence. Although competence issues in this field seem to be laid down thus, integration policy in practice is affected by several other fields of policy. As an example, EU immigration policy directives explicitly set it as an objective to facilitate the integration of third country nationals; what is more, they authorize Member States to set various integration requirements.

94 Both migrants arriving from third countries and workers arriving from East-European countries.

95 Challenges related to the growing burden on the social welfare system of Member States have been present in the migration directives themselves since the very beginning. On the one hand they lay down precisely under what conditions the right of residence can be awarded (or potentially lost). In many cases directives set conditions that exclude the possibility of migrants becoming would-be exploiters of the social welfare system. Thus, in the case of migration directives with employment objectives, the right of entry and residence depend on accepting employment (Blue Card, Researchers, Seasonal, Intra Corporate Transfer Directives). The requirements of stable and regular sources of income – primarily in the form of salaries – and comprehensive health insurance so as to guarantee that the migrant should not become a burden on the social welfare system of the Member State concerned emerge in the cases of family reunification and long-term residence status as well. Only those awarded the status of under international protection and the victims of human trafficking are exempted from this strict system of economic conditions.

96 Which restrictive practice is, in fact, nothing else but the close interpretation of legislation instead of the earlier extremely extensive case law interpretation.

97 According to some commentaries in the *Dano* case (Judgment of 11 November 2014 in Case C-333/13, *Elisabeta Dano and Florin Dano v. Jobcenter Leipzig*, ECLI:EU:C:2014:2358) it was the lack of intention for integration of the person applying for social benefit and her marginal position in German society that lead the Court to establish without applying a proportionality test that she is not entitled to equal treatment in social welfare. Herwig Verschueren, 'Preventing benefit tourism in the EU. A narrow or broad interpretation of the possibilities offered by the ECJ in Dano?', *CMLRev*, (2015) 52, p. 373; Ferdinand Wollenschlager, 'Consolidating Union Citizenship', in: Daniel Thym, *Questioning EU citizenship*, 2017, Hart, p. 188. In its case law concerning economically inactive citizens and job-seekers, the Court has applied for almost one and a half decades the benchmarks of "genuine link" and "some degree of social integration" as the objective benchmarks of justifying cases of derogation from equal treatment (D'Hoop, Collins, Bidar cases). Daniel Thym, 'EU Migration policy and its Constitutional Rationale: A cosmopolitan outlook', *CMLRev,* (2013) 50, p. 709.

Due to the Tampere Programme serving as the basis for the common immigration and integration policy and the five-year strategic programmes replacing it, a substantial body of law has emerged in the past almost two decades with the objective, among others, of combating the difficulties involved in the integration of third country nationals. The gradual Europeanization of the above areas has not totally been free of problems, especially in the light of Member State efforts aimed to limit EU-level action even more strictly. This intergovernmental logic – which essentially also led to the failure of the implementation of the Tampere programme – resulted in a bifurcation of the EU level integration policy.

The *immigration directives* targeting the efficient implementation of the Tampere Programme which, as a consequence of unanimous decision-making in the Council, only laid down minimum standards in the end were transformed into the reflection of the integration policies of just a few member states of significant political weight as the integration requirements were incorporated into EU law. A similar process could be observed in the case of the integration framework developing on a soft law basis, where the experience exchange among expert networks has provided excellent fertile ground for the transposition and dissemination of good practices – including various integration programmes – followed by certain traditional host countries into other Member States. In the meantime, under the slogan "More Europe", the concept of integration itself has undergone a significant change and now subordinates the implementation of the rights laid down in the directive to the requirement of social integration. Paradoxically, however, Europeanization has also launched a process contrary to the above, considering that Member State acts adopted in the field of immigration policy are continuously monitored by the Commission and may undergo judicial review any time. The main aspect of this review is the compliance of the above with EU legal principles, *i.e.* efficiency, lack of discrimination, proportionality and legal certainty.

Until today, the above aspects have in fact been given emphasis in the case law of the Court. However, some changes have been experienced concerning the latest integration exceptions. The case law has confirmed that third country nationals' right to equal treatment laid down in the migration directive may be subject to the Member State restriction aiming at integration: where a Member State's act targets the facilitation of integration, there is no comparable situation and equal treatment cannot be demanded. An excellent example of this is the *Alo* and *Osso* judgement, which case focused on a Member State restriction making social welfare provisions dependant on obligatory places of residence with an integration objective, and in which case the CJEU no longer mentioned the stipulation applied in its previous case law according to which Member State integration measures must not deprive the directive of its effective implementation. It seems that the

Court's migration and integration case law with reference to third country nationals has increasingly markedly reflected the growing Member State fears related to the crisis process of the European Union.[98]

Whilst integration measures previously aimed at making the migrants capable of integration into the society, a new criterion has now come to the fore according to which the *society may also have limits as to the reception*, meaning that the limited reception capacity of the society may also justify the application of a condition for integration. Such a new approach, so the question relating to the reception capacity of the society is likely to have come to the fore due to circumstances relating to the increasing migratory pressure, including the protection of citizens, the stability and security of the society. Finally, as regards the Integration Framework, it continues to harbour several shortcomings. At the same time, the entry into force of the Lisbon Treaty, which provides an explicit legal basis in the field of integration and is to introduce an ordinary legislative procedure is expected to bring some change in this respect, at least as far as commission monitoring, judicial review in the above field and the future implementability of the general principles of EU law are concerned.

A the same time, we should keep in mind that the legislative basis introduced through the Lisbon Treaty strengthens Member State competences in the field of integration; accordingly, the EU may adopt only measures aimed at encouraging and supporting Member State measures under the provision in question.

98 This is especially understandable if you examine the area of the social rights of economically inactive citizens in the EU enjoying free movement where, with the *Dano* case, a paradigmatic change has taken place, too.