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EDITORIAL COMMENTS

Who are the "peoples of Europe"?

The EU Treaties refer to at least two different concepts of "peoples". In the preambles to both the TEU[1] and the TFEU,[2] there are references to "their peoples", which, when read back to the opening lines of the Treaties, clearly mean the peoples of the Member States. However, the promise "to continue the process of creating an ever closer union" is directed, differently, to "the peoples of Europe".[3] How does that concept relate to those who are not Member State nationals, yet who are long-term residents within the EU? "Who" are they in EU law?

At a general level, the shape of the EU migration debate shifts according to relevant events and priorities: as seen recently, for example, in response to the creation of a new cohort of third-country nationals following Brexit; intensified reflection on arrangements for temporary protection and also accession to the Union with reference to Ukraine;[4] and the ongoing task of calibrating effective and humane policies that address borders, international protection, and shared Union and Member State responsibility for inward migration. However, a central concern remains the same: the degree to which

1. I.e. "Desiring to deepen the solidarity between their peoples while respecting their history, their culture and their traditions"; "Determined to promote economic and social progress for their peoples."

2. I.e. "Affirming as the essential objective of their efforts the constant improvements of the living and working conditions of their peoples"; "Determined to promote the development of the highest possible level of knowledge for their peoples through a wide access to education and through its continuous updating."

3. See the preamble to and Art. 1 TEU. See similarly, the preamble to the TFEU ("Determined to lay the foundations of an ever closer union among the peoples of Europe"). Note also in the TFEU preamble that the Member States are "[r]esolved by thus pooling their resources to preserve and strengthen peace and liberty, and calling upon *the other peoples of Europe* who share their ideal to join in their efforts". Exploring who the "peoples of Europe" are in a wider historical perspective and posing questions that still have sharp resonance, see Hansen and Jonsson, *Eurafrica: The Untold History of European Integration and Colonialism* (Bloomsbury Academic, 2014).

4. See esp. Council Implementing Decision 2022/382/EU of 4 March 2022 establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Art. 5 of Directive 2001/55/EC, and having the effect of introducing temporary protection, ST/6846/2022/INIT, O.J. 2022, L 71/1.

the exclusion and othering of third-country nationals is permitted within the framework of EU law.[5]

For third-country nationals who are long-term residents in an EU Member State more specifically, and under the heading "Promoting our European way of life", the Commission signalled in 2020 that it would initiate important and necessary reforms.[6] Any of several problems with the existing legal framework – i.e. Directive 2003/109 concerning the status of third-country nationals who are long-term residents[7] – could be mentioned. For example, the fact that the "EU LTR status" that the Directive creates constitutes an option that individuals must apply for themselves alongside the national statuses that Member States are permitted to retain. It does not, in other words, confer a mandated, EU-based status even though that can offer more transnational prospects than any national status ever could. There is also the extent to which the Directive permits significant national discretion on critical exclusionary issues such as integration requirements and limitations on equal treatment.

Here, in a more general perspective, we highlight the fact that there is a fundamental divergence between the Directive's framing and its stated objectives: that, most basically, those who hold the nationality of a third State yet build and live their lives within an EU Member State are still not admitted to the EU's full territory in a geographical sense or to its collectively constituted society in a deeper sense. They are still not considered as part of "the peoples of Europe". Thus, within the apparently borderless Area of Freedom, Security, and Justice, borders to freedom, in particular – and, therefore, to opportunity – still stand. That gap is exemplified by the language, as expressed most recently through debates on Brexit, but instated since the earliest measures taken under the EEC-Turkey Association Agreement, of being legally "locked in" or "landlocked" in the EU Member State of residence.[8]

Is extending an EU right to freedom of movement and residence beyond persons holding Member State nationality legally possible? There is absolutely no Treaty barrier to it. As a starting point, the preamble to the TEU indicates that the Member States are "[r]esolved to facilitate the free

5. E.g. Hamenstädt, "Expulsion and 'legal otherness' in times of growing nationalism", 45 EL Rev. (2020), 452; Wiesbrock, "Free movement of third-country nationals in the European Union: The illusion of inclusion", 35 EL Rev. (2010), 455.

6. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, "Commission Work Programme 2021 A Union of vitality in a world of fragility", COM(2020)690 final, para 2.5.

7. O.J. 2003, L 16/44.

8. See e.g. Spaventa, "The rights of citizens under the Withdrawal Agreement: A critical analysis", 45 EL Rev. (2020), 193.

movement *of persons*, while ensuring the safety and security of *their peoples*, by establishing *an area* of freedom, security and justice". Similarly, while Article 3(2) TEU does require that the Union "shall offer *to its citizens* an area of freedom, security and justice", it underlines that this area is "without internal frontiers" and that, within it, "the free movement *of persons* is ensured". Article 26(2) TFEU, which defines the internal market, is just as open-ended.[9] Article 79(1) TFEU sets out the objectives of the Union's common immigration policy, one of which is the "fair treatment of third-country nationals residing legally in Member States". To realize that objective, Article 79(2) TFEU establishes competence for the European Parliament and the Council to adopt measures on, *inter alia*, "the conditions of entry and residence, and standards on the issue by Member States of long-term visas and residence permits, including those for the purpose of family reunification" (Art. 79(2)(a)) and "the definition of the rights of third-country nationals residing legally in a Member State, including the conditions governing *freedom of movement and of residence in other Member States*" (Art. 79(2)(b)). It is fair to say that the latter provision does envisage "conditions". But so do Articles 20 and 21 TFEU for the rights conferred on Union citizens, and Article 79(2)(b) also refers to "freedom". Additionally, Article 45 of the Charter of Fundamental Rights (CFR or Charter) affirms that "freedom of movement and residence may be granted, in accordance with the Treaty establishing the European Community, to nationals of third countries legally resident in the territory of a Member State". To date, however, the *free* movement of persons has been facilitated for Member State nationals and for the nationals of European Free Trade Association (EFTA) States only.[10]

The fundamental aim of Directive 2003/109 was to offer a Union level framework that enhanced residence security for long-term residents in the Member States.[11] The "EU LTR" status that it conceived is achieved after five years of lawful and continuous residence within a Member State.[12]

9. I.e. "The internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties."

10. Agreement on the European Economic Area, O.J. 1994, L 1/3; Agreement on the free movement of persons between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other, O.J. 2002, L 114/6. All four EFTA States also participate in the Schengen *acquis*. To contrast the rights extended to EEA and Swiss nationals with the more limited, post-entry rights of Turkish nationals, compare Case C-431/11, *U.K.* v. *Council*, EU:C:2013:589 (EEA); Case C-656/11 *U.K.* v. *Council*, EU:C:2014:97 (Switzerland); and Case C-81/13, *U.K.* v. *Council*, EU:C:2014:2449 (Turkey).

11. Reflecting in detail on the different considerations that apply to temporary and longer-term residence respectively, see recently, Case C-624/20, *E.K.*, EU:C:2022:639.

12. Directive 2003/109 should also be read alongside Directive 2003/86/EC on the right to family reunification, O.J. 2003, L 251/12.

Importantly, "[t]he acquisition of that status is not . . . automatic";[13] depending, instead, on fulfilling a range of conditions set out in the Directive. Thus, for the Court, "the principal purpose of that directive is the *integration* of third-country nationals who are settled on a long-term basis in the Member States".[14] Nevertheless, facilitating intra-EU mobility was another of Directive 2003/109's objectives.[15] In that respect, the Commission's proposal drew from the European Council's 1999 Tampere Conclusions, intending that:

> "a person who has resided legally in a Member State for a period of time to be determined and who holds a long-term residence permit, should be granted in that Member State a set of uniform rights which are as near as possible to those enjoyed by EU citizens; e.g. the right to reside, receive education and work as an employee or self-employed person, as well as the principle of non-discrimination vis-à-vis citizens of the State of residence".[16]

Indeed, for the Commission, "[a] genuine area of freedom, security and justice, a fundamental objective of the European Union, is *unthinkable* without a degree of mobility for third-country nationals residing there legally, and particularly for those residing on a long-term basis".[17]

For Member State nationals, freedom of movement and freedom of residence essentially go together. For third-country nationals, even for those who are long-term residents, they do not. Thus, beyond the harmonization of rules and procedures for short stays of up to 90 days, the Schengen *acquis*, which governs the border or entry dimension of movement from one Schengen Member State to another, does not confer rights concerning what happens after a third-country national's entry to that territory.[18] To enable intra-EU mobility in a substantive sense, Article 14(1) of Directive 2003/109 therefore established that "[a] long-term resident shall acquire the right to reside in the

13. Case C-432/20, *ZK*, EU:C:2022:39, para 24. More generally, this case concerns the implications of absence from the territory of the Union under the framework of Directive 2003/109.

14. Case C-508/10, *Commission* v. *Netherlands*, EU:C:2012:243, para 66 (emphasis added).

15. Ibid., "The right of residence of long-term residents and members of their family in another Member State, provided for by Chapter III of [Directive 2003/109], *also aims* to contribute to the effective attainment of an internal market as an area in which the free movement of persons is ensured, as is apparent from recital 18 to that directive" (emphasis added).

16. COM(2001)127 final, para 1.2.

17. Ibid., para 5.6 (emphasis added).

18. Regulation 2016/399/EU on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code) (codification), O.J. 2016, L 77/1.

territory of Member States other than the one which granted him/her the long-term residence status, for a period exceeding three months, provided that the conditions set out in this chapter are met". Article 14(2) then specified that a long-term resident "*may reside* in *a second* Member State" – meaning that it did not extend an open free movement opportunity vis-à-vis the Member States generally – in three situations: to exercise economic activity in an employed or self-employed capacity; to pursue studies or vocational training; or for undetermined "other purposes". Over time, and in accordance with the conditions set out in the Directive, long-term resident status could be acquired in the second Member State (Art. 23).

Recital 18 of the Directive framed the provisions summarized above around the objective of "contribut[ing] to the effective attainment of an internal market as an area in which the free movement of persons is ensured". However, the distinction between facilitating residence in another Member State and a *right* to move there in the first place is underlined in several other provisions. For example, in direct contrast to Article 27(1) of Directive 2004/38,[19] which rules out restrictions of free movement based on economic grounds, Directive 2003/109 established that "[f]or reasons of labour market policy, Member States may give preference to Union citizens, to third-country nationals, when provided for by [Union] legislation, as well as to third-country nationals who reside legally and receive unemployment benefits in the Member State concerned" (Art. 14(3)). Under Article 15(2), Member States could require third-country nationals holding EU long-term resident status who move there for any purpose – *including economic activity* – to provide evidence that they had stable and regular resources as well as comprehensive sickness insurance. Only family members in situations where the family was "already constituted in the first Member State" could accompany or join the long-term resident in a second Member State (Art. 16).[20] A long-term resident "who has resided in another Member State in accordance with Chapter III shall no longer be entitled to maintain his/her long-term resident status acquired in the first Member State when such a status is granted in another Member State pursuant to Article 23" (Art. 9(4)).[21] Beneficiaries of long-term resident status under Directive 2003/109 were expressly excluded from sectoral mobility rights for the purposes of education

19. Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, O.J. 2004, L 158/77.

20. Cf. for Member State nationals, Case C-127/08, *Metock and Others*, EU:C:2008:449.

21. Art. 9(5) does ask that "Member States who have granted the status shall provide for a facilitated procedure for the re-acquisition of long-term resident status" with particular reference to "the cases of persons that have resided in a second Member State on grounds of pursuit of studies". However, it also confirms that "[t]he conditions and the procedure for the re-acquisition of long-term resident status shall be determined by national law".

and research.[22] And, more generally, while space precludes a more comprehensive discussion here, it can be underlined that several provisions of the Directive – on restrictions of equal treatment, or the setting of integration conditions, or procedural requirements – constitute obstacles to mobility.[23]

The legal infrastructure that Directive 2003/109 put in place was, therefore, already very limited, and it is not very surprising that its mobility framework has had little impact in practice. The design problem is compounded by problematic transposition. In the first Report on the implementation of Directive 2003/109, published in 2011, the Commission observed that "[t]he 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", but it also acknowledged that "[t]ransposition falls short of this ambition".[24] Going further, in strikingly blunt language, the Commission stated that "the weak impact of the LTR Directive in many Member States is to be deplored", highlighting, *inter alia*, "illegal obstacles to intra-EU mobility".[25] Possible amendments to the Directive, to "advance the integration of third-country nationals and improve the functioning of internal market", were already flagged.[26] In its second Report on the implementation of the Directive, published in 2019, the Commission again pointed to the continuing restrictive effects of the conditions placed on intra-EU mobility by the Member States, observing, for example, that "[a] number of Member States have opted under Article 14(3) to apply labour market tests to long-term residents from other

22. See Art. 2(2)(d) of Directive 2016/801/EU on the conditions of entry and residence of third-country nationals for the purposes of research, studies, training, voluntary service, pupil exchange schemes or educational projects and au pairing (recast), O.J. 2016, L 132/21. Limited intra-EU mobility rights also apply in other sectors; see e.g. Art. 18 of the EU Blue Card Directive (Directive 2009/50/EC on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment, O.J. 2009, L 155/17, to be replaced from Nov. 2023 by Directive 2021/1883/EU, O.J. 2021, L 382/1; see esp. Arts. 20–23); and Arts. 21 and 22 of Directive 2014/66/ EU on the conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer, O.J. 2014, L 157/1.

23. See generally, Acosta Arcarazo, *The Long-Term Residence Status as a Subsidiary Form of EU Citizenship – An Analysis of Directive 2003/109* (Martinus Nijhoff Publishers, 2011); Boelaert-Suominen, "Non-EU nationals and Council Directive 2003/109/EC concerning the status of third-country nationals who are long-term residents: Five paces forward and possibly three paces back", 42 CML Rev. (2005), 1011; and Peers, "Implementing equality? The Directive on long term resident third country nationals", 29 EL Rev. (2004), 437.

24. COM(2011)585 final, para 3.7.

25. Ibid., p. 10.

26. Ibid., p. 11, i.e. "taking better account of temporary stays in the calculation of the 5-year period; further encouraging circular migration through more flexible arrangements as regards periods of absence of the EU territory, in line with the EU Blue Card scheme; facilitating access to the labour market of the second Member State; and further simplifying the acquisition of LTR status in the second Member State".

Member States who apply to reside for exercising an economic activity" and "[a]ll Member States have chosen to apply the option provided by Article 15(2)(a) of the Directive concerning the condition for applicants to prove having stable and regular resources".[27] Other conditions applicable in some Member States included the setting of *exhaustive* lists of "other purposes" with reference to Article 14(2); onerous integration requirements; and additional obstacles to being accompanied or joined by family members. The othering of third-country nationals through integration requirements, in particular, is enabled by how Article 15(3) of the Directive is constructed: while a Member State "*may* require third-country nationals to comply with integration measures, in accordance with national law", the provision continues that "[t]his condition shall not apply where the third-country nationals concerned have been required to comply with integration conditions in order to be granted long-term resident status, in accordance with the provisions of Article 5(2)". Thus, while the concern behind integration requirements seems to be integration into the Member State of residence, conditions set by fellow Member States automatically satisfy that concern for subsequent Member States.[28]

The Commission concluded that:

> "the way that most Member States have implemented the intra-EU mobility provisions of the Directive has not really contributed to the attainment of the EU internal market. Only few long-term residents have exercised the right to move to other Member States. This is also because in some cases exercising this right is subject to as many conditions as the ones for a new application for a residence permit, or the competent national administrations do not have enough knowledge of the procedures, or they find difficult to cooperate with their counterparts in other Member States".[29]

In April 2022, it published its proposal to recast Directive 2003/109, and that proposal is now working its way through the legislative process. If facilitating residence security and integration in an EU Member State were the primary motivations behind the genesis of Directive 2003/109, facilitating greater intra-EU mobility for long-term residents is the central aim of the recast measure. In that light, the proposal seeks "to create a *true* EU long-term

27. COM(2019)161 final, pp. 7–8.

28. The Court of Justice has acknowledged, in general, the discretion permitted to the Member States in setting integration requirements in the first place: see Case C-579/13, *P and S*, EU:C:2015:369, and the annotation by Jesse, "Integration measures, integration exams, and immigration control: *P and S* and *K and A*", 53 CML Rev. (2016), 1065.

29. COM(2019)161 final, p. 9.

resident status, *in particular* by strengthening the right of long-term residents to move and work in other Member States".[30] However, it is important to recognize that the Commission's proposal is also, more instrumentally, "responding to the overall objective of attracting the skills and talent the EU needs" and therefore sits within a wider "Skills and talent" package.[31] The EU's market needs, in other words, the economic boost that legal migration brings, especially considering the demographics of the ageing EU population.

To achieve greater intra-EU mobility compared to the system instituted by Directive 2003/109, significant proposed changes in the recast Directive include enabling long-term resident status to be achieved by accumulating residence periods from different Member States; "clarifying that all periods of legal residence should be fully counted, including residence periods as students, beneficiaries of temporary protection, or residence periods initially based on temporary grounds"; introducing a *right* to move to and work in other Member States, "closely aligned to the right that EU citizens enjoy"; and "by making it easier for long-term residents to return to their country of origin without losing their rights, benefiting both the countries of origin and the countries of residence".[32]

The European Parliament's suggestion that the required residence period should be reduced from five to three years was not adopted, though the Commission suggests that its proposal would still "provide European added value by greatly facilitating the acquisition of the EU LTR status in situations of mobility between Member States", and in two main ways: first, because cumulative residence periods in different Member States would be recognized for the five-year lawful residence threshold; and second, because "persons who had already acquired EU LTR status in one Member State should only need three years to acquire the status in a second Member State".[33] However, the recast Directive would retain Directive 2003/109's purposes of movement – i.e. "exercise of an economic activity in an employed or self-employed capacity", "pursuit of studies or vocational training" or "other purposes" – and it does not preclude a Member State from adopting an exhaustive list of "other purposes", even though that practice was identified in the 2019

30. COM(2022)650 final, p. 1 (emphasis added).

31. Ibid. See again, Commission Work Programme 2021, op. cit. *supra* note 6, para 2.5: "[w]e will continue the work on the new pact on migration and asylum. In this context, the Commission will propose a number of measures on legal migration, which will include a 'talent and skills' package and, as part of it, a revision of the long-term residents Directive and a review of the single permit Directive, as well as options developing an EU talent pool. Other elements of the pact include an EU action plan against migrant smuggling and a voluntary return and reintegration strategy".

32. COM(2022)650 final, p. 2 (emphasis added). The Commission also refers to European Parliament resolutions supporting these ideas.

33. Ibid., p. 8.

implementation report as a significant barrier to mobility. More positively, a critical change is that the second Member State would "no longer be entitled to carry out a check of the labour market situation when examining applications submitted by EU long-term residents for the exercise of an economic activity in an employed or self-employed capacity, and any pre-existing quotas for EU long-term residents residing to other Member States should be abolished".[34] The proposal also offers some improvements as regards the ancillary conditions and processes that produce obstacles to mobility, noted above and including the rights of family members, protection from expulsion, integration requirements, and equal treatment.

Nevertheless, there are still significant differences, in both substantive and procedural respects, when the recast Directive is compared to the rights provided for in Directive 2004/38 as regards Member State nationals.[35] To take a specific example, the requirements of stable and regular resources and sickness insurance are retained in the recast Directive,[36] including for long-term residents who are economically active in the second Member State. This contrasts directly with freedom of movement for Member State nationals, which attaches no financial conditions to residence in another Member State when economic activity – more specifically, work and self-employment within the meaning of EU law – is undertaken;[37] and also includes a right to move to and reside in another State to *seek* opportunities for economic activity.[38] The continuing permissiveness with respect to *national* integration requirements also seems at odds with the emphasis in EU law more generally on promoting the *shared* values of the Union and all of its Member States, especially those expressed in Article 2 TEU. It is equally vital to underline that expanding the personal scope of freedom of movement and residence would not undermine the status of or the rights associated with Union citizenship. On the contrary, it would dilute the constricting (over)emphasis on freedom of movement and residence in the development of that status, the wider

34. Ibid., p. 14. Also, "where EU long-term residents apply for residence in a second Member State in order to exercise a regulated profession, their professional qualifications should be recognized in the same way as those of Union citizens exercising the right to free movement, in accordance with Directive 2005/36/EC and other applicable Union and national law", which marks another significant advance from Directive 2003/109.

35. Or as regards their third-country national family members; though for the latter, "freedom" to move is similarly out of reach, being tied to accompanying or joining the Union citizen from whom the rights derive. See esp. Arts. 3(1), 6(2) and 7(2) of Directive 2004/38.

36. Considering the similarities and distinctions between "stable and regular" (Directive 2003/109) and "sufficient" resources, see Case C-930/19, *X* v. *Belgian State*, EU:C:2021:657.

37. Compare Arts. 7(1)(a) and 7(1)(b) of Directive 2004/38.

38. See further, Art. 14(4)(b) of Directive 2004/38; and Case C-710/19, *GMA (Demandeur d'emploi),* EU:C:2020:1037.

possibilities of which are starting, finally, to thrive.[39] The EU has already, as noted above, extended the "fullest possible" freedom of movement and residence to EEA State nationals and more limited, but still comparably greater, *free* movement opportunities to Swiss nationals. These third-country nationals also start (and many continue) their EU-connected lives outside the territory of the Union. In contrast, third-country nationals who are long-term residents within that territory exemplify "present social membership, that is, actual social ties with EU Member States".[40]

Relatedly, the extent to which freedom of movement might be delimited in the absence of underpinning primary rights, as compared to Member State nationals, can be worked out, both in the legislation itself and in the case law that will later interpret it. Once again, that is nothing new when the EEA Agreement is recalled: after all, even Directive 2004/38's permanent residence rights, often perceived as epitomizing the security of residence enjoyed by Union citizens in a host Member State, are also possible for EEA nationals.[41] The Court of Justice has sought to delimit the Directive's unshareable, citizenship-specific elements and not apply them by analogy to rights provided for in other external agreements.[42] More generally, the Court has also engaged with the underpinning objectives and purposes of Directives 2003/109 and 2004/38 respectively to establish intended differences between them;[43] but also to identify points of overlap "which are based on the same logic": in the latter respect, because "the provisions of those directives may lend themselves to a comparative analysis and, where appropriate, be interpreted in a similar way".[44] Moreover, the financial burden on host States has already been a matter of controversy and compromise with respect to Union citizens.[45] Whether we agree or not with where those lines have been

39. See further, Jancic (Ed.), *The Changing Role of Citizens in EU Democratic Governance* (Hart Publishing, 2023); Iliopoulou-Penot, "The construction of a European digital citizenship in the case law of the Court of Justice of the EU", 59 CML Rev. (2022), 969; and Hyltén-Cavallius, *EU Citizenship at the Edges of Freedom of Movement* (Hart Publishing, 2020).

40. Van den Brink, "The relationship between national and EU citizenship: What is it and what should it be?" in Kostakopoulou and Thym (Eds.), *Research Handbook on European Union Citizenship Law and Policy* (Edward Elgar, 2022), p. 100, at p. 109.

41. On permanent residence rights, see Arts. 16–18 of Directive 2004/38. See also the judgment of the ETFA Court in Case E-4/11, *Clauder*, [2011] EFTA Ct. Rep. 216.

42. Distinguishing the scope of protection against expulsion provided for under the EEC-Turkey Association Agreement and Directive 2004/38 respectively, see Case C-371/08, *Ziebell*, EU:C:2011:809, esp. para 60 et seq.

43. E.g. Case C-930/19, *X* v. *Belgian State*.

44. Case C-624/20, *E.K.*, para 43.

45. See esp. Arts. 7, 8, 14, 15 and 24 of Directive 2004/38; and Case C-67/14, *Alimanovic*, EU:C:2015:597.

drawn, the exclusion of long-term residents who are not Member State nationals on financial risk grounds can hardly stand as an argument against realizing a more genuinely *internal* market when financial constraints are already imposed on Member State nationals under Directive 2004/38 in order to protect national public finances.

In its proposal for the recast Directive, the Commission expresses something that is, in one sense, very obvious yet, at the same time, utterly important to highlight and restate, that:

> "the Member States' prerogative to determine volumes of admission of third-country nationals coming from third countries to their territory in order to seek work relates only to third-country nationals coming from outside the EU, and does not apply to their intra-EU mobility. Therefore, EU rules have an important influence on the efficient mobility of third-country nationals across the Member States".[46]

Consider even the title of Directive 2003/109 – a measure "concerning the status of third-country nationals who are long-term residents". The proposal for the recast Directive retains that wording. But through it, the person, the human being, seems somehow a bit distanced, recalling the necessary but insufficient aim of "fair treatment" of third-country nationals in Article 79(1) TFEU. The Commission has probably gone as far as it feasibly could, and there may be no point in proposing legislation that has absolutely no chance of being adopted. But perhaps it should be proposed anyway, requiring the institutions that might later decline to adopt it at least to confront the possibilities that the Treaties offer, and bringing ambitious ideas and aspirations into public debate.

The distancing of lawfully resident third-country nationals is not confined to the Member States or, more collectively and institutionally, to the EU legislator. In particular, notwithstanding the enlarged personal and material scope of EU law through the Union's AFSJ competences, the Court of Justice still prevents third-country nationals from invoking Article 18 TFEU with respect to nationality discrimination,[47] even though Article 18 TFEU makes no reference to Member State nationals at all.[48] Moreover, the Court has

46. COM(2022)650 final, p. 4.

47. See e.g. Opinion 1/17 (*EU-Canada CET Agreement*), EU:C:2019:341, para 169; Joined Cases C-22 & 23/08, *Vatsouras and Koupatantze*, EU:C:2009:344, para 52.

48. I.e. "Within the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited". Non-discrimination guarantees for third-country nationals can, however, be found in bilateral agreements; see e.g. the Communities-Russia Partnership Agreement considered in Case C-265/03, *Simutenkov*, EU:C:2005:213.

extended that case law also to exclude third-country nationals from relying on the prohibition on nationality discrimination in Article 21(2) CFR, even though that provision is addressed to no-one in particular either.[49] The restrictive approach of the case law was not how the Commission seemed to see things in its proposal for Directive 2003/109, noting its remark that:

> "[r]especting the principle of universalism, most of the rights enumerated in the Charter are conferred on all persons *regardless of their nationality* or place of residence; the Charter thus enshrines a number of rights conferred on the nationals of the Member States and on third-country nationals residing there. To that extent it reflects the European Union's traditions and positive attitude to equal treatment of citizens of the Union and third-country nationals".[50]

Fundamentally, the EU has never yet found a way to manage the paradox of the deeply existential quality attributed to the idea of freedom of movement and residence, on the one hand, and the implications in reality of a border-free "area" premised *inter alia* on "freedom", on the other. Even the narrower concept of a border-free internal market provides, on its own terms, enough of a justification for rethinking the mobility and inclusion of third-country nationals who are long-term residents in the territory of the Union. The ethical, human, moral, and social arguments are stronger still. After all, let us remember that we are only speaking here of people who have already been lawfully resident in an EU Member State for *five years*.

Those who make their lives – their homes – within the territory of the Union belong to the "peoples of Europe". For the Union directly, then, they are "its peoples" too, to highlight a third conception of the term in the Treaties since Article 3(1) TEU commits the Union to promoting "the well-being of its peoples". EU law can – and should – better reflect and make real that promise.

49. Case C-930/19, *X* v. *Belgian State*, paras. 50–53, with reference to the Explanations relating to the Charter of Fundamental Rights (O.J. 2007, C 303/17). Importantly, however, Art. 20 CFR's guarantee that "[e]veryone is equal before the law" can be relied on by third-country nationals (ibid., paras. 54–55). See also, addressing the prohibition on discrimination on grounds of ethnic origin in Art. 21(1) CFR, Case C-94/20, *Land Oberösterreich* v. *KV*, EU:C:2021:477, paras. 58–64. See generally, Weingerl and Tratnik, "Climbing the wall around EU citizenship: Has the time come to align third-country nationals with intra-EU migrants?", 33 EJIL (2022), 15.

50. COM(2001)127 final, para 1.6 (emphasis added). When the Charter is applied in connection with Directive 2003/109, greater protection than we have seen to date in EU citizenship law can, ironically, follow: compare esp. the application of Art. 34 CFR in Case C-571/10, *Kamberaj*, EU:C:2012:233 with the more limited application of Art. 1 CFR in Case C-709/20, *C.G.*, EU:C:2021:602.