Chapter 10

Conclusions and Policy Recommendations

The Tampere European Council set a policy agenda for the establishment of a common European immigration policy, based on the fair treatment of third-country nationals residing legally in the European Union. More than ten years after Tampere, the question still on the table is how to develop a comprehensive migration policy that responds to Europe’s needs in terms of labour market and skills shortages, but that also sufficiently guarantees the rights and interests of third-country nationals. The Tampere programme was certainly ambitious, embodying a strong commitment to fundamental rights and freedoms, democratic institutions and the rule of law, and emphasising the importance of improving the situation of third-country nationals in the European Union. Yet, in 2010, the EU is nowhere near to having a uniform immigration policy based on the fair treatment of third-country nationals. Even though the Community acquis in the area of freedom, security and justice is substantial, most measures are oriented towards cooperation between administrations, in particular in security matters, rather than guaranteeing and promoting the rights and interests of migrants from third countries.¹

Be that as it may, the preceding chapters have shown how the application of EU law to third-country nationals residing in a Member State of the Union, has gradually transformed power structures in the area of migration law, which has traditionally been a sovereign prerogative of the nation states. The first area of legislation where the Member States lost control, were entry and residence rights of third-country national family members of EU citizens. On the basis of the concept of Union citizenship introduced with the Maastricht Treaty, the Court has proactively interpreted the rights of Union citizens and their family members.² Many principles established by the Court were incorporated into Directive 2004/38/EC, which has, together with the case law of

¹ See Parliamentary question, 19 November 2008, by Gerard Deprez on behalf of the Committee on Civil Liberties, Justice and Home Affairs to the Council (O-0128/08).
the ECJ, imposed considerable limitations on the discretion of Member States.\(^3\) As a result, third-country national family members of Union citizens enjoy much more extensive rights than do other categories of third-country nationals, even though (at least for the first five years) their rights are of a derivative nature.\(^4\)

Next, after the insertion of Title IV into the Treaty by the Treaty of Amsterdam, the Community adopted a number of Directives, laying down access and residence rights of certain categories of third-country nationals, and limiting state discretion in these areas. With the adoption of the four Directives on legal migration and the implications of the free movement provisions on the immigration of third-country national family members, one can certainly speak of a shift of competence from the national to the European level. Yet one might question the conclusion that this process will eventually lead to the regulation of almost all aspects of immigration law at the EU level, turning national law largely into implementing measures of Community rules.\(^5\) It is true that the competences of the Community in this area have been gradually extended, national veto powers reduced and the EP’s competences extended. Yet, it is precisely in the area of legal migration and, above all, in respect of labour migration, that Member States have insisted on retaining national competences. In particular, after an initial period of intensive activity on the part of the European institutions in the field of legal migration after the Tampere European Council, the terrorist attacks on 11 September 2001 led to a heightened emphasis on state control and illegal migration, turning the Council negotiations on the draft Directives on legal migration into a difficult exercise.

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\(^3\) Carrera, S./Merlino, M., *The European Court of Justice and Enacting Citizenship* (2008), ENACT.

\(^4\) Yet, the positive effects of Directive 2004/38/EC for third-country nationals are, at least to a certain extent, hampered by the inadequate transposition of the Directive into national law. This is in particular the case due to the fact that insufficient and partial implementation mainly concerns the exercise of free movement rights by Union citizens who are accompanied by family members from third countries. See European Commission, Report on the application of Directive 2004/38/EC on the rights of citizens of the Union and their family members to move and reside freely within the territory of the Member States, COM(2008) 840 final, 10 December 2008. See also European Parliament, Draft Opinion of the Committee of Legal Affairs for the Committee on Civil Liberties, Justice and Home Affairs on the application of Directive 2004/38/EC on the rights of citizens of the Union and their family members to move and reside freely within the territory of the Member States, 2008/2184(INI), 16 January 2009; Carrera, S./Faure Atger, A., *Dilemmas in the implementation of Directive 2004/38/EC on the right of citizens and their family members to move and reside freely in the EU* (2009), EP Briefing Note, p. 7.