The comfort of strangers: the European directive on long-term migrants and its transposition into Portuguese law

Manuel Abrantes
PhD Researcher in Sociology
SOCIUS: Research Centre in Economic and Organizational Sociology
School of Economics and Management
Technical University of Lisbon
Contact: mabrantes@socius.iseg.utl.pt

Abstract
While European Union citizenship gradually moved from a matter of employment rights towards a matter of fundamental rights (Jeffery, 2001), the status of third-country nationals remained locked in the realms of national security and economic cooperation. In 1996, the European Council issued a resolution on the need to establish a common legal framework for third-country nationals who are long-term residents in the European Union. The aim of the directive eventually approved in 2003 was twofold: to create a single status of long-term resident for third country nationals across member states, attached to a common set of requirements and rights; and to define to what extent such status is “transferable” in case a long-term resident migrates from a member state to another. In the following years, this directive would be transposed into national law. According to the Treaty of the European Community (art. 249), directives are binding “as to the result to be achieved”, forms and methods being left for national authorities to define. Lawmaking regarding migration at both the European Union and national levels has been widely discussed, but less attention has been paid to the process of transposition (Schibel, 2005).
The goal of this paper is to assess the rationale of the Directive 2003/109/EC on the status of third-country nationals who are long-term residents and its transposition into national law in Portugal. It starts by providing a selective overview of this directive, with an emphasis on the balance between protective advancements for migrants and cautious provisions. The second part discusses the singularities of migration issues in Portugal and the transposition of this particular directive. It is argued that this directive is not merely an effort of approximation of rights; it is also the result of a bargaining process between such approximation and the relative advantage of EU citizens. The final section of the paper highlights some considerations for future research and the unclear capability of the open method of coordination regarding migration policy (Urth, 2005; Velluti, 2007).
Preamble

After several decades of struggle, the European Union is very close to become an area of free movement for all citizens of its member states.¹ What was initially conceived as a matter of economic cooperation — freedom of labour next to freedom of goods, capital and services — moved gradually towards a matter of citizenship and fundamental rights, despite various issues being left unsolved along the way.² There is now a perception that full freedom of movement can be achieved regardless of the differences between origin and destination in terms of rights, culture or economic dynamics; priority has been given to the pursuit of equal treatment between natives and immigrants who live in the same place, at the same time. If this is a difficult task when it refers to EU citizens only, it becomes even more complex when migrants from third countries are brought into the picture. The number of potential immigrants is suddenly large enough to raise nationalist claims favouring a restrictive policy. Most important of all, the poverty of the origin regions also increases dramatically. These reasons, among others, have kept the rights of third-country nationals (TCNs) locked in the realms of economic cooperation and security. It is important to note that this was pretty much how the privilege of free movement started for EU citizens back in the 1960’s and, therefore, it may serve as a lever for TCNs to obtain more favourable legislation in the near future. Still, the fact that European nations provide a very different bulk of rights to foreign inhabitants depending on whether they come from inside or outside the EU is likely to distort social and economic cohesion in significant ways, perhaps not entirely reparable.

The rights of TCNs remained a responsibility of domestic law up until the mid-1990’s. Any security of residence that a TCN would obtain in a particular member state was not valid for the other member states. The same can be said of whether, and under which circumstances, a citizen born abroad could apply for the nationality of the member state where he lived, thereafter enjoying the standard rights of EU citizenship. This change of nationality, when

¹ I am very grateful to the comments of Nuria Ramos Martin and several fellow researchers with whom I had the opportunity to discuss this paper. I also thank the members of the nongovernmental organizations Respect (in Amsterdam) and ComuniDària (in Lisbon) for their unwitting suggestions and inspiration. This work is supported by the FCT – Portuguese Foundation for Science and Technology (research grant SFRH/BD/61181/2009).

allowed, had therefore become an enticing route for TCNs to obtain a secure status, and a reason for apprehension among those fearing the growth of immigration. From a cross-national comparison in 2001, Groenendijk and Guild\textsuperscript{3} nevertheless concluded that the legislation of the fifteen member states on the security of residence for TCNs was remarkably similar in many respects. This suggests that the convergence of legislation was already under way at the national level when governments decided to take a stand at the EU level. At the same time, it is not a coincidence that the urge for Community legislation in this field arised as the ground for a far-reaching enlargement process was being sown. The extension of the EU citizenship to twelve new member states reinforced the need to define the \textit{outer citizenship}, and it played a key role in the manner in which this was done.

In 1996, the European Council issued a resolution on the need to establish a common legal framework for TCNs who are long-term residents in the European Union.\textsuperscript{4} There were two core reasons to open this chapter in Community lawmaking. On the one hand, it was important to facilitate the movement of long-term resident TCNs from a member state to another for the very same economic reasons underpinning the freedom of movement for EU citizens. On the other hand, immigrants who have lived in the host country for a considerable number of years should be given all the tools to be fully integrated, in economic as much as in social terms. This called for a legal status that would assure such immigrants security of residence, access to all services and equal treatment among the population; it was also consensual that the same rights ought to cover the direct family members of the working TCN. The public declaration of the EU’s intention to legislate in this area was followed by a large flow of policy advice from nongovernmental organisations and independent experts. Some of the recommendations would make their way into the upcoming directives. Many others would be left aside. A few ones, such as the protection against deportation, had to be considerably watered down before the member states agreed on including them.

As soon as the Amsterdam Treaty consolidated the power of the EU to legislate in the field of migration, the European Council — gathering in Tampere in October 1999 — laid down a

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far-reaching set of goals towards the extension and standardization of the rights of TCNs. The scope of these principles was so ambitious, in fact, that all the Community legislation that followed somehow falls behind the original purpose. One of the most daring statements of Tampere is to be found in paragraph 21:

The legal status of third country nationals should be approximated to that of Member States’ nationals. A person, who has resided legally in a Member State for a period of time to be determined and who holds a long-term residence permit, should be granted in that Member State a set of uniform rights which are as near as possible to those enjoyed by EU citizens; e.g. the right to reside, receive education, and work as an employee or self-employed person, as well as the principle of non-discrimination vis-à-vis the citizens of the State of residence. The European Council endorses the objective that long-term legally resident third country nationals be offered the opportunity to obtain the nationality of the Member State in which they are resident.

By 2001, the European Commission presented a proposal for a directive on long-term resident TCNs. The aim was twofold: to create a single status of long-term resident for TCNs throughout the different member states, attached to a common set of requirements and rights; and to define to what extent such status is “transferable” in case a long-term resident TCN migrates from a member state to another. Surrounded by a wide range of disagreements, this proposal eventually materialized into the Directive 2003/109/EC. Controversial adaptations of the original text made by the Council have been discussed by various academic researchers. Some of their insights will be mentioned in the following pages, whenever appropriate. A full discussion of the drafting process clearly exceeds the scope of this paper.

Instead, this paper is focused on the final version of the Directive 2003/109/EC. It will start by providing a selective overview of the directive, with an emphasis on the balance between protective advancements for TCNs and cautious provisions. While lawmaking regarding migration at both the European Union and national levels has been widely discussed, less attention has been paid to the process of transposition (Schibel, 2005). The second part of the paper therefore presents a case study of the transposition of this directive into the law of Portugal. This assessment will be based on the notion provided by the Treaty of the European Community that directives are binding “as to the result to be achieved”, while forms and

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methods are for national authorities to define. Naturally, forms and methods can not restrict in any way the purpose and standards laid down by the directive. If this guideline to assess the transposition of a directive may seem a reasonable basis for systematic examination, a consensual guideline to assess the directive itself is much more difficult to find. After all, this directive does not follow one model only. Some articles were based on the average level of protection granted by national laws to TCNs. Others drew from consensual best practices. In certain parts, the directive seems to answer above all the concerns of the largest host countries; in others, it proposes a new common strategy for the place of immigrants in European societies. Naturally, previous caselaw of the European Court of Justice and international standards were taken into account as well. One can always try to measure to which degree the Articles, as a whole, fulfill the initial purpose of the directive. In this case, the aforequoted paragraph 21 of the Presidency Conclusions in Tampere is included in the preamble of the directive and qualifies as the overarching goal one is looking for: that the rights of TCNs must be as near as possible to the ones enjoyed by EU citizens. This model cannot provide more than a partial solution though. The approximation of rights proposed in Tampere goes without saying that security of residence for TCNs shall not interfere with — nor exceed — the privileges conceded to member state nationals. Hence, this directive is not a simple effort of approximation; it is also the result of a bargaining process between such approximation and the relative advantage of EU citizens. My paper will therefore consider the directive along these two axis.

One: The directive

This directive is a consequence of Art. 63(3) and (4) of the Treaty of the European Community in its 2002 consolidated version. There, a timeframe was set for a common policy on the conditions of long-term residence for TCNs, as well as their mobility between different

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8 The most relevant caselaw of the European Court of Justice for this directive involved the various interpretations of the Decision 1/80 of the EEC-Turkey Association Council. International standards refer mainly to the conventions of the International Labour Organisation and the International Organisation for Migration.
member states. The directive also incorporates contributions of related legislation, especially on the right of migrants to family reunification. It is structured in four chapters: general provisions (definitions and scope); the long-term resident status in a member state (requirements, application procedure, rights, loss of status); conditions of residence in a second member state once the long-term resident status has been obtained; and final provisions. I will point out a set of significant issues, inevitably not exhaustive, most of which combine features of the approximation and the bargaining processes outlined above. The first thing one may note when reading the directive is that many cautious provisions were introduced, due to fears of excessive protection of TCNs. For practical reasons my focus will be on those that are more relevant in the context of Portuguese law, described in the next section of the paper.

One of the main challenges of the drafting process right from the start was to lay down definitions. By then, the keywords of the directive had become part of the common vocabulary among policymakers, social partners and opinion makers, without any sort of agreement as to what they exactly meant. Third-country national came to be defined by the European Council as a person who does not hold the nationality of any EU member state. This seemingly basic assumption has an important implication. It confirms that, for purposes of moving within the EU, the conditions under which a TCN is able to acquire the nationality of the member state where he or she resides remain beyond discussion. For instance, a Brazilian-born migrant who acquires Portuguese nationality enjoys all the rights of EU citizenship irrespective of the fact that the requirements to acquire Portuguese nationality may be more flexible than what is permitted by other member states. For the time being, the European Council has chosen to stay out of this debate. On the other hand, long-term residence came to be defined as a minimum of five years of legal and continuous stay in the same member state — continuous meaning that the person is not absent from this country for

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9 The United Kingdom, Ireland and Denmark opted out of this directive. This means they are not committed to grant a long-term resident status to any TCN, neither to recognize the long-term resident status granted to TCNs by other member states.


11 Art. 2(a) of the directive, mentioning Art. 17(1) of the Treaty of the European Community, reference in footnote 6.

12 At the same time, the common perception is that the legislation of the European states regarding acquisition of nationality are converging. If this is the case, it may be paving the path for EU legislation on the issue; or, on the contrary, eliminating the need for it entirely.
longer than six consecutive months or a total of ten months during the five years.\textsuperscript{13} In times of increasingly flexible labour and capital markets, these limits for absence are too strict for the life trajectory of many working TCNs and therefore seem to restrict considerably the approximation of their rights to the ones enjoyed by EU nationals.

A second remark on the directive is that, once these essential concepts have been defined, it offers member states a large amount of freedom in the act of transposition. This is especially the case for what counts as “legal” residence, the requirement to prove “stable and regular” resources in the course of the application for long-term resident status, and the access to social security benefits after obtaining the status. To be sure, every European directive seeks to establish only basic standards, upon which national legislators shall decide clearly the “forms and methods” adequate in their particular state. The specific problem in this directive is that, by being loose in the definition of the requirements for long-term resident status, it then has to compensate by imposing too many limitations on the rights of long-term resident TCNs to move between member states. If all member states would agree on a full set of liquid criteria to grant the long-term resident status (and trust each other as to the correct application of these criteria), the need for controlling the movement of these citizens across the borders would be significantly reduced – certainly not eliminated, as the directive still allows national authorities to “examine the situation of their labour market” when processing the application of a TCN with long-term resident status conceded in a different member state.\textsuperscript{14} But there are reasons to believe that the lack of specification in many articles of Chapter II is behind the strictness of Chapter III.

Furthermore, the directive is vague — almost silent — about the rights of TCNs in the period of five years before applying for long-term resident status. Member states are therefore entirely free to oppose the directive \textit{through the backdoor} by applying policies of immigration that make a legal and continuous stay of five years extremely difficult. The European Commission has later moved forward in this regard by issuing two proposals for directives on general conditions of entry and residence for TCNs.\textsuperscript{15} Implicitly, the long-term resident status

\textsuperscript{13} Art. 4 of the directive.

\textsuperscript{14} Art. 14(3) of the directive.

\textsuperscript{15} Commission of the European Communities, “Proposal for a Council Directive on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment” and “Proposal for a Council Directive on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State, and on a common set of rights for third-country workers legally residing
was established *under the condition* that every member state maintains entire freedom to decide on the rights of TCNs until their stay reaches the agreed length of time. But it may be impossible to guarantee rights of long-term residence without guaranteeing rights of short-term residence, for the simple reason that all long-term residents once had to be short-term ones. In this sense, the most severe limitation of the directive to its initial purpose is that the long-term resident status is not granted or safeguarded by the European Union itself — in the way that the rights of EU citizens are — but rather by the particular member state where the TCN resides.

The practical implication is that the freedom of movement for TCNs who obtained long-term resident status is restricted in several respects.\(^{16}\) They may be required to repeat a part of the application process — such as proving stable resources and sickness insurance, as well as complying with possible “integration measures” — as soon as they enter the second member state. The same is to say that the status of long-term resident conceded by a member state is not transferable into a second one. Once the second member state has recognized that status, however, the TCN enjoys immediately all the rights that were granted to him in the first member state. It can therefore be said that the approximation of rights between TCNs and EU citizens has been enacted at the *principle* level, but not at the *procedural* level. The consequences of this inconsistence will depend on how member states decide to process applications from TCNs who obtained the long-term resident status in a different member state: it can range from a simple check-and-go to a complex bureaucratic operation.

However, the directive does include some standard rules for application procedures, both in the “first” and “second” member states.\(^{17}\) Procedures must be transparent and non-binding, and the authorities have the duty to notify the applicant of the final decision within a maximum of six months, save for exceptional situations. Whenever an application is refused, the applicant must be given a written justification for the refusal and the right to dispute it by legal means. On the other hand, the directive allows for a long list of administrative requirements regarding the length of the stay, sources of income, family members, health insurance and criminal record; and it does not mention who shall bear the expenses

\(^{16}\) Arts. 14 and 15 of the directive.

\(^{17}\) Arts. 7 and 10 for the first member state, Arts. 19 and 20 for second member states.
throughout the application process, nor in case of initiating a legal dispute of the official decision. This is a matter of high concern according to authors such as Brouwer\textsuperscript{18} and Cholewinski\textsuperscript{19}, especially because the draft directive first produced by the European Commission was much clearer in protecting the applicants from expenses they may not be able to cover. If some member states wish to retain the freedom to regulate domestically on this matter, the main chance is that they will not do so in favour of the applicants.

The directive does not interfere with more favourable bilateral or multilateral agreements between the EU and third countries, or a member state and a third country.\textsuperscript{20} In the light of such an agreement, a member state may always grant permanent residence permits under more favourable conditions. The other member states are nonetheless free to reject the recognition of these permits in case the TCN moves there.

Requiring the applicants for long-term resident status to prove “stable and regular resources” and “sickness insurance”\textsuperscript{21} may be extremely difficult for those who do not hold a permanent employment contract. The rational argument is that five years is long enough for migrants to obtain a secure employment situation, but the labour market is often less generous than this, particularly for workers with low educational qualifications. Whether the requirements make it too difficult for TCNs to obtain the long-term resident status is not the issue here; the \textit{objective} risk to the purpose of the directive is that it may create inequality between different groups of immigrants, depending on qualifications or gender, among other variables. It is true that the Paragraph 9 of the preamble states that economic considerations, for instance rising unemployment, are not valid reasons to reject any application for long-term resident status. In the end, this only covers the macro-dimension of economic processes, not their implications at the micro-level.

The same Art. 5 mentions that applicants may be required to comply with national “integration conditions”.\textsuperscript{22} The integration condition that is most frequently applied across


\textsuperscript{20} Art. 3(3) of the directive.

\textsuperscript{21} Art. 5 of the directive.

\textsuperscript{22} The same applies for the second member state in case a TCN with long-term resident status moves there (Art. 15).
Europe is language proficiency, mostly for its tight link with social integration and political rights. Interestingly though, as noted by Gross\textsuperscript{23}, this is not a requirement for EU citizens who move from their country to a second member state. In fact, imposing a language requirement inside the EU could easily be discarded as an obstacle to freedom of movement.

The Art. 11 was one of the most widely discussed parts in the directive, as much before as after the Council agreed on the final text. It describes the particular areas in which TCNs with long-term resident status deserve the same treatment as nationals of the member state where they reside. There are two main ways of looking at this article. On the one hand, it is as specific as can be. It includes access to employment, education, training, social security\textsuperscript{24}, tax benefits, goods and services; it also guarantees the recognition of diplomas and the freedom of association and affiliation. For non-discrimination purposes, it is a large step towards Tampere. On the other hand, the enumeration of these rights — instead of presenting equal treatment as an overarching universal notion — can also be seen as the rejection of equal treatment \textit{in itself}. Halleskov\textsuperscript{25} goes right to the point when stating that the Art. 11

reflects that the Community does not believe that even people who have resided for more than five years in a Member State and fulfilled the numerous conditions laid down in Chapter II of the Directive are worthy of genuine equality of treatment in all areas of life.

A last remark about the content of the directive is that it incorporates security concerns associated with the various terrorist attacks of the years before. The possibility to refuse and withdraw long-term resident status to TCNs who are deemed a threat to public security is mentioned twice in the preamble (Paragraphs 8 and 21) and in three different articles (6, 9, 17). Plus, Art. 12 concerning the protection against expulsion for long-term residents excludes citizens who are considered to represent a public threat. The main handicap of the directive in this regard is that it translates security concerns solely into protecting public authorities, and


\textsuperscript{24} The access to social security had already been consolidated as an issue of non-discrimination by the Council of the European Union, “Council Regulation 859/2003 of 14 May 2003 extending the provisions of Regulation (EEC) No 1408/71 and Regulation (EEC) 574/72 to nationals of third countries who are not already covered by those provisions solely on the ground of their nationality” in \textit{Official Journal of the European Communities}, 20.05.2003, L124/1.

never the rights of the TCNs. As observed by Brouwer, the drafting process was simultaneous to a significant progress on data surveillance networks, such as the Schengen Information System, the Eurodac fingerprint database and the Visa Information System. The directive allows member states to refuse or withdraw long-term resident status based on information collected in these networks; and although the citizens who are being refused or withdrawn the status must be given a justification, it is not clear how much they are allowed to know about it. It is unlikely that it will include confidential files from international security systems. Naturally, this may limit significantly the ability to dispute the official decision through legal means. By assuming security as an exclusive concern of the national authorities, while TCNs are simply on the wrong side of the battlefield, the directive reflects the common perception that legislating on migration issues is essentially finding the best possible compromise between security and human rights; unfortunately, it does not handle well enough the fact that they are one and the same thing.

Two: The transposition into Portuguese Law

For most of the 20th century, the concern of Portuguese policymakers regarding migration issues was either very weak or focused on the rights of Portuguese nationals living abroad. Especially during the 1950’s and 1960’s, migrant outflow was considerably larger than migrant inflow, and the domestic legislation covering the latter consisted of broad regulations spread through different codes. This came to change drastically with the transition from the dictatorial regime into parliamentary democracy in 1974-76. First of all, the colonies of Guinea-Bissau, Cape Verde, São Tomé and Príncipe, Mozambique and Angola were granted political independence. In legal terms, this meant that any citizen who would move from one of these countries to Portugal, in what used to be considered a change of residence within the “national territory”, was suddenly a foreigner. Second, the overall flow of immigrants — mainly, though not exclusively, from the former colonies — grew at an amazing pace since then. Between 1974 and 1999, the number of foreigners living in Portugal increased sixfold.

26 Reference above in note 13.
28 The statistical data mentioned in this section have been collected by Baganha, Maria Ioannis, and Marques, José Carlos (2001), Imigração e Política. O Caso Português. Fundação Luso-Americana, Lisbon.
In the meantime Portugal joined the EU, and various chapters of national legislation required adjustment in order to comply with the Community standards. It seems therefore adequate to say that the current Portuguese legislation on matters of immigration developed under two main sorts of pressure: the fast increase in immigration and the European integration. On the one hand, legislation was required to respond to what was happening at the time within national borders, concerning not only the number of immigrants but also the specific difficulties experienced on the ground by immigrants and employers, as much as society and economy at large. Naturally, this has never been a pacific subject among political actors or social partners. On the other hand, the EU acquis had to be transposed into domestic law. The record of legislation clearly reflects the two parallel lanes. The first law entirely devoted to immigration was adopted in 1981, as a response to the initial tide of immigrants, and subsequently reformed in 1993, 1998 and 2007. On this issue, like in many others, there is often a mismatch between the concerns at the national level and the concerns at the EU level. Being a member state compels domestic law to constantly find a way through this mismatch.

Since 1981, the immigration law establishes the conditions and procedures of entry, residence, leaving and being removed from Portuguese territory for foreigners. “Foreigners” gradually came to exclude citizens from other EU member states, and for clarity purposes I will hereby use the term “third-country nationals” (TCNs) like in the previous section. According to the Constitution of the Portuguese Republic, lawmaking on immigration issues is the responsibility of the national parliament, drawing from advice by the Ministry of Internal Administration. Such a procedure means that the legislative act is in practice conducted by the ruling party or coalition, first through the Ministry of Internal Administration and possibly at the other end through the parliament depending on the distribution of seats. The Aliens and Borders Service, integrated in the Ministry of Internal Administration, is responsible for

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29 The two processes are not entirely independent from each other, as the accession to the EU certainly contributed to the economic growth that created demand for immigrant labour force. It is noteworthy, though, that an impressive increase of immigration was already under way before that. In terms of annual growth, the highest rates were in the period of 1975-80.
30 These acts refer to the Laws 264-B/81, 58/93, 244/98 and 23/07.
31 Art. 161 in the latest Revision of the Constitution of the Portuguese Republic in 2005, posted on the website of the national parliament: http://www.parlamento.pt
32 In 2007, when the most recent immigration law was adopted, the Socialist Party alone held both the government and the majority of seats in the Parliament.
controlling the borders, informing and processing administrative applications by immigrants, issuing permits and maintaining statistical records.

Assessing the transposition of the European directive on long-term resident status for TCNs calls for a quick look into the regulation operating in Portugal before the directive was adopted, as set by the immigration law of 1998. This will be done in the light of the main issues raised so far. Afterwards, the transposition of the directive within the new law of 2007 will be examined.

The previous law

The closest that the Portuguese immigration law of 1998 came to a long-term resident status for TCNs was through the “permanent residence permit”. This permit allowed TCNs to remain in the Portuguese territory for indefinite time without having to prove the viability or the conditions of their stay. As long as all statutory rules were fulfilled, it operated as a plain right — meaning that the acceptance or refusal of an application was not at the discretion of authorities — and this represented an important triumph in the struggle for the rights of immigrants. Not that the statutory rules were exactly easy to meet. They consisted of ten years of lawful residence so far, proof of current accommodation in Portugal, a criminal record free of serious offences and holding a valid residence visa. This last requirement was often the hardest. The residence visa was (and still is) a temporary permit with a renewable validity of two years, requiring TCNs to prove at the time of every renewal the purpose of their stay, their means of support and housing. The degree according to which these criteria are assessed is stricter if the applicant is living with dependent family members.

The TCNs who obtained the permanent residence permit were granted the same working rights and scholarship opportunities as Portuguese citizens. Hence, they did not need to apply for a work permit thereafter. The nationals of former colonies were not provided with special

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33 The requirement of ten years of stay before obtaining security of residence meant that, by the time the Directive 2003/109/EC was adopted, Portugal was — together with Greece — the strictest member state in this regard. At the national level, the definition of a timespan of ten years had actually been a difficult victory for the immigrant organisations. The law of 1993 required twenty years of stay to apply for the permanent residence permit.

34 Introduced in 1993 under the pressure of rising unemployment, the work permit is one of the chapters of Immigration Law most contested by immigrant representatives. Unless hired by a Portuguese employer while
treatment among TCNs in regards to the permanent residence permit. However, due to extensive bilateral agreements, they did enjoy an easier access to the labour market and educational system in the absence of a secure status (besides the practical advantage of usually speaking the official language). This meant that they had better chances than other TCNs to satisfy the requirements for the permanent residence permit. At the same time, the access to dual citizenship or full Portuguese nationality was rather flexible in comparison with most of the EU member states, constituting a true alternative to the application for secure residence.

The legislation was much more inclusive when it came to family rights, both before and after TCNs obtained the permanent permit. The right to family reunification was granted after two years of lawful residence in Portugal, and this included spouse, children (of the working TCN or the spouse) up to 21 years old, dependent ascendants, and adult siblings depending on specific approval. Furthermore, children who were born in Portugal or under 21 at the time of arrival could apply directly for a permanent status. Very often they enjoyed a security that their working parents lacked. In fact, immigrants who did not have a stable employment situation could apply for the renewal of their residence visa on the grounds of having dependent children in Portuguese territory.

After acquiring a permanent residence permit, TCNs were allowed to be absent from Portugal for a maximum of two continuous years, or a total of twenty months in a three-year period, without losing the status. Other than that, the only ground for withdrawal of the permanent permit was criminal behaviour. In this case (just like for TCNs without such permit) the decision whether deportation would take place was based on a graded system that combined the length of the stay so far and the possible existence of dependent children. Once again, family was a key factor.

Illegal residence, though sanctioned by the law, has never been a major subject of direct monitoring. It is commonly accepted that, as long as there are authorities responsible for still abroad, TCNs who wish to work lawfully in Portugal must go through a winding chain of administrative steps. They should start by applying for a temporary visa at the Portuguese office in their home country; once in Portugal, they need to find an employer who is willing to offer them a promise-contract; this promise-contract will allow them to request a work permit (with a renewable validity of one year at a time) from the Aliens and Borders Service; the work permit, in turn, allows the actual contract to be signed between employer and employee. Showing an employment contract, in turn, is most of the times a requirement for the renewal of the residence visa every two years.
locating practices of undocumented work (the General Labour Inspectorate and the Labour Court), these will in the end uncover most of the cases of illegal residence. According to the legislation, undocumented work is dealt with multiple sorts of fines, imprisonment or suspension of activity for the employer, and possible deportation for the employee. But the actual record of sanctioning illegal employment is rather low for a country where it is denounced by so many nongovernmental organisations.

The new law

In line with standard practice, the Directive 2003/109/EC specified a deadline of two years for member states to transpose it into domestic law. By the end of January 2006 Portugal had not yet done so, which motivated a letter of formal notice from the European Commission. The same happened to other nations, namely Spain, France, Luxembourg, Hungary and Italy; only the two states of the Iberian Peninsula were eventually condemned by the European Court of Justice to pay the costs for the delay. Portugal certainly belongs to the group of member states with a considerable record of non-compliance in the field of labour law. Letters of formal notice have been common, and for three of the most controversial directives reasoned opinions were issued. What is important here is not to evaluate Portugal’s degree of non-compliance in absolute or relative terms, but rather the motives for non-compliance. There are strong indications that the main reason for the late legislative behaviour of Portugal during the 1990’s was the difficulty in dealing with “issue linkages”, as argued by Falkner et al. Transposing a Council directive into a specific national law has often implications for other national laws. Even if domestic consensus has been reached regarding the direct consequences of the directive, spillovers to other matters may cause fervent disagreement. The ability of states to deal with this difficulty often determines whether they succeed in transposing the directive on time.

35 Art. 26 of the directive.
36 This was the case for the Directive 93/104/EC concerning certain aspects of the organization of working time, the Directive 94/33/EC on the protection of young people at work, and the Directive 96/34/EC on the framework agreement on parental leave concluded by the UNICE, the CEEP and the ETUC.
37 Falkner, Gerda et al. (2004), “Non-compliance with EU Directives in the Member States: Opposition Through the Backdoor?” in West European Politics 27(3), pp. 452-473. The authors provide the following definition for ‘issue linkage’ in p. 461: “It is a broad category which refers to all those cases where Member States transposed – or tried to transpose – a Directive in connection with other issues. They can either be thematically related to the subject of the Directive or extraneous. Note that the direction of influence can be either positive or negative, leading to improvement or decline of implementation performance.”
This seems to have been the case here. Rather than an act of silent opposition to European policy, the delay was a result of the very low level of agreement that existed between domestic actors — government, political parties, immigrant representatives, trade unions — by the time the directive came out. On the other hand, the choice was to integrate the regulations of this directive into a whole new immigration law, which besides responding to particular domestic concerns also transposed six other Council directives. A further obstacle was that the governing party and the distribution of seats at the parliament changed in March 2005, during the transposing period. It is therefore not surprising that the defense of Portugal against the Commission’s accusation of delay was that a process of public consultation was still under way.

Given the large scope of the immigration law of 2003, my analysis will naturally focus on the articles that regulate the long-term resident status for TCNs.

The first thing to say is that the long-term resident status did not replace the permanent residence permit defined in the previous law. It was decided that these two forms of secure status should coexist, even if the length of stay required to apply for a permanent residence permit had to be lowered from ten to five years — otherwise it would be more convenient for TCNs to apply for the long-term resident status and simply give up on the permit. But if the same exact set of basic rights is provided by both status, why were they not merged? The reasons for this are not clear. Administrative inertia seems to have played a role: it is easier to add a category of secure residence than to reform the original one. In fact, some differences remain at the procedural level. The most significant one is that the long-term resident status is the result of a stricter application process, while the permanent residence permit is still a plain right as long as statutory rules are fulfilled.

The implementation of the long-term resident status is the sole subject of Chapter III of the law. In most respects, it is just as unspecific as the directive itself, and many articles are a

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38 Council Directives 2003/86 on the right to family reunification; 2003/110 on assistance in cases of transit for the purposes of removal by air; 2004/81 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities; 2004/82 on the obligation of carriers to communicate passenger data; 2004/114 on the conditions of admission of third-country nationals for the purposes of studies, pupil exchange, unremunerated training or voluntary service; and 2005/71 on a specific procedure for admitting third-country nationals for the purposes of scientific research.
liquid translation of the text by the European Council. The requirement of “stable and regular” resources — i.e. the transposition of the Art. 5 of the directive — is clarified in the Implementing Order 1563/2007 attached to the law. It requires TCNs to prove, for an upcoming period of at least twelve months, an income equal to or above the national minimum wage. If there are dependent family members, it is necessary that the worker earns an additional amount for the spouse (at least 50% of the national minimum wage) and for every child (at least 30% of the national minimum wage). The same conditions apply for an application to family reunification under a permanent residence permit or a long-term residence status obtained by the TCN in a different member state.

For the TCNs who already reside in Portugal, the period of stay before the adoption of the law is valid as well. If their lawful stay has already reached five years and they meet all other conditions, the application for long-term resident status can be submitted immediately.

In relation to the specification of rights to equal treatment described in Art. 11 of the directive, they are transposed to the Article 133 of the Portuguese law exactly as they have been phrased by the European Council. As for the approximation of rights between TCNs of different origins, the outcome of the law is not so clear. Art. 5 confirms that the law does not rule over bilateral or multilateral agreements signed in the past or in the future with particular countries, especially the ones with Portuguese as an official language. This may raise justified complaints of unfair treatment towards TCNs coming from other countries, especially since the law protects potential future agreements. The EU has been under similar tension due to the preferential treatment enjoyed by TCNs from the European Economic area (non-members of the EU), Switzerland and other countries under association agreements such as Turkey. On the other hand, the fact that the Portuguese law has not eliminated the privileges granted to citizens of former colonies may come to operate as a lever for the rights of the other TCNs, similarly to what happened with the multiple interpretations of the decision 1/80 of the EEC-Turkey Association Agreement by the European Court of Justice.

The right to family reunification is also a polemic part of the law. As it derives from a different directive, it will not be discussed extensively in this paper. It is enough to say that the broad notion of family adopted in the previous law was somewhat watered down, within a process of legislative convergence among member states. Although the right to reunification is extended to adult children (even if economically independent), it is only applicable to
parents of the worker in case they do not work, while brothers and sisters have been excluded altogether. The law is also a bit stricter than earlier regarding minor children. They are still given the right to stay in Portugal as long as one of their parents holds a residence permit, but the retention of this privilege after reaching 18 years old now depends on being studying or working, and not having been absent for a considerable amount of time during the years before. In comparison with the standards set by the EU, one can not conclude that these conditions are too strict; they do however represent a stricter approach than the previous law.

One of the main gaps in the law is an utter silence regarding fees. Neither amounts, nor responsibilities are mentioned for any of the administrative steps towards the acquisition of a secure status. This is the subject of a separate Implementation Order, to be updated every year; and it can be argued that it is enough. But a more explicit law in this regard would be important, especially because it is expected that many of the applicant TCNs belong to the lower income segment of the population. On the other hand, penalties for “administrative offences” are the subject of a full chapter with 18 Articles (from192 to 208).

The law is equally silent as to the procedure to dispute a refusal of the long-term resident status. It does mention that TCNs have such right. What entity to appeal to or who shall bear the costs of it — important for the same reason mentioned in the paragraph above — are nowhere to be found. This very much reflects the approach of the European Council itself, who settled for a broad reference to the “right to mount a legal challenge” instead of the stronger “right to apply to the courts” proposed in the Commission’s draft. If one accepts that the European Council preferred a more moderate version on the grounds that every member state should decide what sort of legal dispute is more adequate, then the transposition into Portuguese law is simply unacceptable.

In regard to the TCNs who acquired long-term resident status in a different member state and wish to move to Portugal, the law allows them to apply for an initial residence visa of three months. This application requires the TCN to specify the reason for moving, but such reason does not have to be accompanied by any document and it is enough that the migrant intends to find a job or to pursue studies in Portugal. However, the application for a permanent resident status that must take place after three months does require proof of resources and accommodation. This is very much consistent with the reluctance of the European Council when it comes to “freedom of movement” for long-term resident TCNs.
The usual standards for the withdrawal of status — including non-fulfillment of the requirement of stable and adequate resources — also apply for those who have finally obtained long-term resident status. They may also lose the status if they are absent from the EU for more than twelve months, or from Portugal for more than six years (Art. 131). The first time-span is evidently much stricter than the second one.

Another significant novelty of the law is that several articles include the duty of the Aliens and Borders Service to inform the Office of the High Commissioner for Immigration and Intercultural Dialogue and the Advisory Council for Matters of Immigration. These two institutions, created as recently as 1996 and 1998 respectively, are defined as governmental organisations with administrative autonomy. Their main function is to keep track of events, producing regular reports and providing policy advise, among other things. The public consultation process behind the drafting of the new immigration law called for more accountancy and transparence from official authorities, and this is why the need to collect and share information is present in many articles. Still, nongovernmental organisations may doubt that informing two institutions directly linked to the authorities is an efficient tool to pursue public accountancy and transparence. Furthermore, their concerns for the information rights of the immigrant do not find any appease in the final law. Art. 212 grants authorities the right to act according to information collected about TCNs — both at the national and international level — irrespective of their current status. Provisions on this issue are much more descriptive than they were in the previous law, reflecting the “securitization” that was already visible in the European directive. There is not any clear description of what TCNs under investigation are allowed to know about their personal files, and their only protection in this respect may derive from the duty of official authorities to keep the two aforesaid organizations informed.

A final, overarching criticism to the law is that it regulates the conditions of permanence of immigrants without addressing integration matters in a clear tone. Gross proposes two ways of looking at the link between integration and migration law. On the one hand, integration can be seen as a precondition to obtain a secure status of residence; security is then granted as a sort of prize for integration. On the other hand, a secure status may be granted as a means to the end of integration. The directive under examination, and its transposition into Portuguese

39 Reference above in footnote 22.
law, fall somewhere between the two approaches. If the first view is endorsed, then it should be related to the current working and living conditions of the TCNs and not depend on a combination of years with a sinuous line of bureaucratic arrangements. If the second view is assumed instead, then five years of lawful residence (which often correspond to some more years of actual stay) seem certainly too long a period to be without the proper legal means to integrate. In the end, the law is focused on answering “When should strangers be trusted?”, while it does not answer “When should TCNs stop being considered strangers?”. The risk is that, in the eyes of both EU citizens and TCNs, the only attainable cooperation goal may be expanding the comfort of strangers.

Final provisions

Since the adoption of the Directive 2003/109/EC, the rights of TCNs have remained under permanent discussion at the EU level. The long-term resident status has not been among the topics on the top of the agenda, though. Due to the length of their stay, the long-term residents are commonly accepted as the migrants than can be trusted. But to the extent that the status of secure residence is detached from matters of integration, the legislation is indifferent to the likely possibility that for a long time they will remain strangers in the host nation. It is unclear if member states are interested in facing this challenge through the EU legislative framework. Those who care about the security of long-term migrants and their consistent contribution for European societies and economies have reasons to worry about the fact that, even after the tense project for an European Constitution coming to a conclusion with the Lisbon Treaty and a new Charter of Fundamental Rights, concrete advancements in protecting this group of TCNs are nowhere to be seen.

Back in November 2004, the European Council gathered to reflect upon the practical results of the Tampere resolutions five years before. This meeting provided the basis for the European Commission’s Hague Programme — a strategic plan “for freedom, justice and security” in the Community area. There is some concern that this new programme took over the Tampere’s principle of “access to justice for all” and pretty much limited it to civil and criminal regulations.40 A careful look into the text of the programme, structured in ten

40 This is for instance the contention of Brouwer (2005), reference in footnote 17.
priorities, may give evidence on the contrary; but the mere fact that one needs to look closer is significant. Certainly the text does not show the same degree of confidence and ambition as the Council’s declaration in Tampere, and the concept of “approximation of rights” has been abandoned. It is a child of the open method of coordination, which according to some authors has not yet proved to be fruitful regarding migration issues.\footnote{Discussions of this topic have been provided by Urth, Helene (2005), “Building a Momentum for the Integration of Third-Country Nationals in the European Union” in European Journal of Migration and Law 7, pp. 163-180; and more recently by Velluti, Samantha (2007), “What European Union Strategy for Integrating Migrants? The Role of OMC Soft Mechanisms in the Development of an EU Immigration Policy” in European Journal of Migration and Law 9, pp. 53-82.} For the security of long-term residents, this seems to mean that there will not be any significant protective advancements in the short run. The main suggestion from this case study of the Directive 2003/109/EC and its transposition into Portuguese law is that Tampere has to a large extent remained a set of ideals without practical application. One can still hope to go further with smaller steps.

Biographical note
Manuel Abrantes is a researcher at SOCIUS: Research Centre in Economic and Organizational Sociology, Technical University of Lisbon, and a Guest Lecturer in Sociology of Labour and Leisure at the Open University Portugal. His key research interests comprise work, migration, gender, and political participation. Since 2010, he has been conducting his PhD research about working conditions and relations in domestic service occupations. He is the author of Borders: opportunities and risks for immigrant workers in cities of the Netherlands, as well as a contributor to recent edited volumes on migration, employment and governance.