Implications of the EU Lisbon Treaty
on EU Immigration Law

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I. EU competences in EU immigration and asylum law and the perspectives of European harmonization of Member States’ legislation

Legislative competences of the European Union in immigration and asylum law have not been fundamentally extended or modified by the Lisbon Treaty. Article 79 obliges the Union to develop a common immigration policy

“aimed at ensuring, at all stages, the efficient management of migration flows, fair treatment of third-country nationals residing legally in Member States, and the prevention of, and enhanced measures to combat illegal immigration and trafficking in human beings.”

There is no similar commitment to a common immigration policy in the previous version. However, if one looks at Art. 79 para. 2 where the areas are more precisely determined in which the European legislator shall adopt measures with no fundamental difference can be identified with regard to the content and limits of the legislative power of the European Union. Article 79 para. 2 lists exhaustively the areas in which legislative acts may be taken. Thus, from the structure of Art. 79 follows that recourse to the general concept of a common immigration policy does not allow legislative action in order to harmonize national immigration law. Listed are

a. 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. The wording has been changed from the previous formulation “standards on procedures for the issue by Member States of long-term visas “ to “standards on the issue...”. The change signifies extension of competence to the standards on issuing long-term visas and residence permits.

b. Rights of third-country nationals residing legally in a Member State including the conditions governing freedom of movement and residence in other Member States. The provision has been changed from measures defining the rights and conditions “under which nationals of third countries who are legally resident in a Member State may reside in another Member State”. It has always been questionable to what extent the EU competence extends to a regulation of the access of third-country nationals to the labour market. The new formulation, unlike the other formulation, could be interpreted as embracing a larger competence since it does not refer anymore exclusively to the conditions of residence. However, Article 79 para. 5 sets limits to the EU competence. The right of Member States to determine “volumes of admission of third-country nationals coming from third countries to their territory in order to seek word, whether employed or self-employed” is not affected by Art. 79. The debate on the Blue Card to which has been referred to in order to clarify that the competence of the EU does not extend to a right to oblige Member States to admit third-country nationals for the purpose of labour. What exactly the right to determine volumes of admission means, however, is not quite clear. It could
be interpreted in a restrictive sense as setting quota of admission similar to the American model; on the other hand, it may be interpreted in a broader sense as determining volumes as well with respects setting limits to the admission of third-country nationals to the labour market in certain areas and branches generally.

c. Illegal immigration and unauthorized residence, including removal and repatriation of persons residing without authorization. The provision has for the first time included explicitly removal where previously only repatriation was mentioned. However, in the practice of the EU the previous clause was interpreted as embracing removal as well as the Directive on return, adopted in December 2008.¹

d. Combating trafficking in persons, in particular women and children. Although the provision has previously not included in art. 63, there has never been any doubt as to the competence of the European Community in this area under the heading “Fight against illegal immigration”. Thus, the provision means only a clarification.

A highly controversial issue has been whether the competence of the European Union covers integration measures. The predominant view has been that in the absence of any provision authorizing the EC to regulate integration policies, integration measures remain in principle within the competence of the Member States. Article 79 para. 4 now states that the EU may establish measures “to provide incentives and support for the action of Member States with a view to promoting the integration of third-country nationals residing legally in their territories, excluding any harmonization of the laws and regulations of the Member States. Thus, it has been clarifies that there is no legislative competence for harmonization if integration legislation. The EU may only establish measures in order to promote integration, for instance by financial support or policy programmes. Once again, it is not quite clear to what extent the European Union may establish large financial programmes which in turn require Member States to adjust to certain EU prescribed policy guidelines in order to participate at financial support by the EU. Increasingly, the European Union becomes a substantial source of money. As experiences in every federal state have shown, the dependence upon participation in financial programmes may easily be the same result as a harmonized legislation.

Another controversial issue has been the question to what extent Member States are still entitled to conclude agreements with third states in matters on immigration policy. The European Court in its case law has established a theory whereby the EC is competent to conclude international agreements in matters in which it has regulatory competence within the EU. The aspects of the EU immigration policy become

increasingly important in the policy concept of the EU. Thus, for instance, agreements on circular migration have recently been put up very high on the EU agenda in connection with the term “partnership with third countries.” The idea is that migration issues must be integrated into the Union’s development cooperation and other external policies. The EU is to work in tandem with partner countries on opportunities for legal mobility, capacities for migration management, identification of migratory push factors, protecting fundamental rights, fighting illegal flows and enhancing possibilities to let migration work in service of development.²

Article 79 does not mention a general competence to conclude agreements but deals specifically with the power of the Union to conclude agreements for “the re-admission to their countries of origin or provenance which do not or no longer fulfill the conditions for entry, presence or residence in the territory of the Member States”. Therefore, it is quite clear that re-admission agreements are to be concluded by the European Union which, however, does not exclude such agreements as long as the European Union has not made use of its legislative competence.

II. Conclusions from EU harmonization of immigration legislation

Based upon Art. 63 para. 3 of the EC Treaty, the Community has enacted quite a substantial number of directives and regulations in the area of asylum as well as immigration law. Immigration law has turned out to be even more difficult than asylum law, particularly with regard to the issues of access of third-country nationals to Member States and their rights within the European Community. European immigration legislation does not imply a replacement of Member States’ sovereignty to grant entry and residence on their territories. There is no such thing as a residence permit for the EU as such. The Schengen visa which is valid for all Schengen states is only applicable to short-term visas of up to three months with a possibility of a prolongation of another three months. There is, however, no competence or legislative rule which enables the EU to provide for a residence permit for all EU Member States. Thus, speaking about EU immigration policy has to keep in mind the inherence restrictions of concept of the EU to a common legal area rather than a federal state.

In terms of quantity EU immigration legislation up to 2010 based upon Art. 63 ECT shows quite an impressive picture. Directives have been adopted on the issue of family reunification, on the legal status of third-country nationals, on students, researchers, victim of trafficking and recently also on admission of highly qualified third-country nationals to the labour market (the so-called Blue Card Directive). The record in quality

will be somewhat less impressive. However, at the outset it should be kept in mind that harmonized legislation required until the entry into force of the Lisbon Treaty unanimous voting. This explains a predominance of techniques to solve controversial issues by vague formulations, unclear compromises which refer to public international law or human rights and leave open, however, what exactly the content of such references means. There are frequent options by which Member States, which at the time of adoption had certain national rules, are allowed to maintain their national practices and rules. At the same time, unanimity has frequently to an abundance of superfluous or excessively detailed regulations. This phenomenon is probably explicable by the combination of two factors: first, the tendency of the delegations of Member States to report a “success” by inserting on an optional basis their national legislation which, as long as it was optional, was acceptable for Member States. A second factor may be the method, by which national rules and practices came into the directive as a compensation for giving in on possibly unrelated points.

To provide an example in the Family Reunion Directive. ³ The Directive provides for a right of entry and residence of the sponsor’s spouse and minor children of a spouse. However, by way of derogation children over 12 years arriving independently from the rest of the family may be required to fulfill a condition of integration. In addition, to way of derogation Member States may also request that applications have to be submitted before the age of 15 if that is provided by the existing legislation at the time of adoption of the directive. Family reunification of minor children of a further spouse and the sponsor may also be prohibited by way of derogation as an option of Member States. Optional are additional requirements for the sponsor who must have stayed lawfully in their territory for a period of up to 2 years before family reunification is allowed or if a Member State wants to take into account its reception capacity by a waiting period of no more than 3 years between submission of the application for family reunification and the issue of a residence permit to the family members may be imposed.

This is just an example of the technique of the Directive to accommodate different national perceptions of allowing family reunification of minor children. The situation may be further complicated by taking into account the jurisprudence of the European Court of Human Rights on Art. 8 ECHR which under certain circumstances does provide for a right to family reunification.

As an example for the vagueness Art. 7 para. 2 of the Family Reunion Directive may be quoted stating that Member States may require third-country nationals to comply with integration measures, in accordance with national law. Many EU Member States have

introduces the requirement of certain basic language knowledge as a prerequisite for a residence permit for the purpose of family reunification. This seems to in accordance with the Directive. However, in the Directive on the legal status of third-country nationals with a long-term residence permit it is spoken of integration conditions. Therefore, an argument is made that measures do not imply a right to make entry and residence conditional upon prior language knowledge since the wording has been chosen “integration measures” rather than “integration conditions”. Against this argument one may object that Art. 7 para. 2 2. sentence allows with regard to refugees and their family members explicitly that integration measures may only be applied once the persons concerned have been granted family reunification.

Where does this all amount to? One clear consequence is that the directives of the EU on immigration frequently refer to immigration concepts and national practices. The solution of conflicts which frequently also raise very highly sensitive national issues by options and compromises is deferred to the European Court of Justice which may be prepared to make the political decisions for the development of European immigration legislation. Whether from a democratic point of view this is the idea of solution may well an issue of debate.

The Commission has indicated that it does consider the existing directives and regulations on immigration and asylum law as just a first stage on the way of a common immigration and asylum policy. Therefore, although some of the provisions have hardly been implemented in the Member States, a series of new directives and regulations has been announced in order to achieve “full” harmonization which in principle is covered by the legislative competence of the European Union, provided that the subsidiarity principle has been complied with. The subsidiarity principle requires that the Union in areas which are not falling within their exclusive competence will take measures only in so far as the aims of measures cannot be achieved by Member States on the central, regional or local level. Subsidiarity principle is the principle which is most frequently violated by the European Union and particularly in the area of asylum law. Recast proposals have already been submitted by the Commission in the area of asylum law but not yet in the area of immigration law. It will be interesting to see whether under the majority principle some of the directive will undergo substantial changes and whether the compromise character is replaced by a larger degree of harmonization.
III. The Blue Card Directive and the Researchers Directive – a significant step on the way to an open labour market for highly qualified third-country nationals?

The Blue Cad Directive adopted on 25.5.20091 has set high objectives in order to achieve the objectives of the “Lisbon strategy”. The Directive is to contribute to achieve to goal of attracting and retaining highly qualified third-country workers as part of the aim of the European Union of “becoming the most competitive and dynamic economy in the world”. Therefore, the goal is to facility the admission of highly qualified workers and their families by establishing a fast-track admission procedure and by granting them equal social and economic rights as nationals of the host Member State in a number of areas. However, already the Preamble makes clear where the limits are. The Recital no. 2 mentions that it is necessary to take into account the priorities, labour market needs and reception capacities of the Member States. In addition, the Directive is without prejudice to the competence of the Member States to maintain or introduce new national residence permits for any purpose of employment. The Directive is also without prejudice to the right of the Member States to determine the volumes of admission of third-country nationals entering their territory for the purposes of highly qualified employment. It applies also to highly qualified third-country nationals who seek to remain on the territory of the Member State and who are legally resident in a Member State on other schemes, such as students having completed their studies. Member States, therefore, retain the possibility not to grant residence permit for employment in certain professions, economic sectors or regions.

What are the major elements of the Blue Card? The Blue Card cannot be compared to a Green Card granting in principle a right to permanent residence and immigration. The Blue Card differs from an ordinary residence permit of Member States in two respects: first of all, a residence permit issued as a Blue Card must have a standard period of validity between one and four years. Secondly, there is a set of guaranteed rights connected with the issue of a Blue Card concerning for instance temporary unemployment, equal treatment with nationals of the Member States in a number of areas like working conditions, recognition of diplomas, certificates and social security as well as access to goods and services. The labour market, however, is not unlimited for the first two years of legal employment. Blue Card holders are restricted to the exercise of paid employment activities which the Blue Card has been granted and which meet the conditions for admission set out in the Directive. After two years Member States may but are not obliged to grant the persons concerned equal treatment with nationals as regards access to highly qualified employment without restrictions, which means

without a priority examination of available domestic labour force or equally entitled Union citizens.

For the first two years, Blue Card holders may therefore only change their employer subject to an authorization of the competent authorities in accordance with national procedures. After two years, a Member States has either the possibility to grant full equal treatment with regard to access to the labour market or a Blue Card holder is allowed to change employment conditions subject to an obligation to communicate such changes to the competent authorities. The Directive also explicitly allows Member States to retain restrictions on access to employment activities in cases where, in accordance with existing national or community law, the activities are reserved to nationals, Union citizens or EEA citizens. Behind this articles the basic principle of EU immigration law, whereby access of third-country nationals to the labour market requires in principle an examination whether for a specific occupation a national or an equally entitled EU citizen is available. Priority is explicitly laid down in accession treaties with the new Member States. Thus, Rumanians and Bulgarians as well as nationals of the ten Eastern Member States that have acceded in 2005, by Union law are entitled to preferential treatment. Member States are not allowed to deviate from such principles. It is not clear what exceptions are allowed and to what extent the principle can be considered as a general principle binding with respect to all third-country nationals wanting to have access to the EU labour market. One may well argue that it would hardly make sense to give only the nationals of newly acceding states a guarantee to legal preference. However, the principle is a major obstacle for a more flexible and open access to the labour market of third-country nationals. It may also be doubtful whether a tight restriction of highly qualified third-country nationals to the specific employment for which the Blue Card has been granted is in accordance with international obligations of EU Member States under international treaty law.

A third major element of the Blue Card is the possibility to move into another EU Member State for the purpose of exercising highly qualified activities after 8 months, which, however, is dependent on a positive decision of the second Member State. This means that a second Member State must take a positive decision to admit the Blue Card holder. The second Member State is in principle entitled to apply the same conditions valid for the first issuing of the Blue Card. This means that control of immigration remains the right of the second Member State which may require a prior examination of whether nationals or equally entitled EU citizens are available for the specific occupation.

A permanent residence permit will only be acquired – and that applies also for Blue Card holders – under the Directive for long-term residence permit holders. The Directive
requires in principle a five-year legal residence in order to acquire a right to permanent residence which simultaneously gives a right to move to a second Member State provided that certain basic conditions are fulfilled such as sufficient means of living, sickness insurance or an employment contract. The Blue Card Directive facilitates, however, these requirements by allowing that different times in different EU Member States may be accumulated in order to acquire the five years of lawful residence time necessary to receive the long-term EU residence permit. Finally, the Blue Card allows immediate reunification of family members (spouses and minor children) irrespective of the perspective of a long-term residence or a minimum period of residence or integration requirements. This is a major facilitation in comparison to the general requirements applicable to third-country nationals under the Family Reunion Directive.\(^5\)

What are the conditions requiring a Blue Card? The Directive requires in general the fulfillment of such conditions as are generally posed upon third-country nationals in order to get a residence permit (valid travel documents, sickness insurance, not to pose a threat to public policy etc.). Obtaining a Blue Card, the applicant must present a valid work contract or binding job-offer for highly qualified employment. Highly qualified employment means the employment of a person who has the required competence as proven by higher professional qualification which means as a rule evidence of higher education qualifications or by way or derogation attested by at least five years of professional experience of a level comparable to higher education qualifications and which is relevant in the profession. In addition, to get a permit under the Directive, the salary must not be inferior to a relevant salary threshold defined in the national law which shall be at least 1.5 times the average gross annual salary in the Member State concerned. Only for specified categories the salary threshold must be lowered to at least 1.2 time the average gross annual salary in the Member State concerned. The threshold is considerable since it may prevent particularly junior academics who do not reach the level of 1.5 time the average salary.

Whether the Blue Card will eventually be operative remains to be seen. It is a beginning but probably not much more and will require scrutiny as to the conditions and sometimes bureaucratic requirements.

\(^5\) It should, however, be mentioned that in the national law of many Member States there are frequently exceptions made for nationals of third states who do not raise in general problems of illegal immigration.