

## **CARIM INDIA – DEVELOPING A KNOWLEDGE BASE FOR POLICYMAKING ON INDIA-EU MIGRATION**

Co-financed by the European Union

### ***Third-country national students seeking to study in the EU - with special emphasis on Indian students: conditions, rights and possibilities***

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**CARIM-India**  
**Developing a knowledge base for policymaking on India-EU migration**

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**Third-country national students seeking to study in the EU -  
with special emphasis on Indian students:  
conditions, rights and possibilities**

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## **CARIM-India – Developing a knowledge base for policymaking on India-EU migration**

This project is co-financed by the European Union and carried out by the EUI in partnership with the Indian Council of Overseas Employment, (ICOE), the Indian Institute of Management Bangalore Association, (IIMB), and Maastricht University (Faculty of Law).

The proposed action is aimed at consolidating a constructive dialogue between the EU and India on migration covering all migration-related aspects. The objectives of the proposed action are aimed at:

- Assembling high-level Indian-EU expertise in major disciplines that deal with migration (demography, economics, law, sociology and politics) with a view to building up migration studies in India. This is an inherently international exercise in which experts will use standardised concepts and instruments that allow for aggregation and comparison. These experts will belong to all major disciplines that deal with migration, ranging from demography to law and from economics to sociology and political science.
- Providing the Government of India as well as the European Union, its Member States, the academia and civil society, with:
  1. Reliable, updated and comparative information on migration
  2. In-depth analyses on India-EU highly-skilled and circular migration, but also on low-skilled and irregular migration.
- Making research serve action by connecting experts with both policy-makers and the wider public through respectively policy-oriented research, training courses, and outreach programmes.

These three objectives will be pursued with a view to developing a knowledge base addressed to policy-makers and migration stakeholders in both the EU and India.

Results of the above activities are made available for public consultation through the website of the project: <http://www.india-eu-migration.eu/>

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## **Abstract**

This paper proposes to examine the conditions, rights and possibilities of third-country national students, and in particular Indian students, seeking to study in one of the EU Member States from the perspective of the EU legal migration regime. It will be argued that current Directive 2004/114 provides such students with an important set of rights (such as, arguably, a right of entry and residence upon fulfilment of the conditions therefore and a right to work during the studies) but also contains a set of regrettable limitations (such as the lack of provision for students to work in the host country after his or her studies and the restrictive conditions attached to their intra-EU student mobility). Some of these limitations can, however, be overcome by special categories of TCN students relying on a culmination of rights from different sources, in particular agreements concluded by their country of origin with the EU (such as eg. the EEC – Turkey agreement). As such, a number of case studies of such special TCN students are conducted in order to illustrate the possibilities that Indian students may have under their own pending EU-India Trade agreement.

## 1. Introduction

The student seeking to cross borders with a view to obtaining the desired education has increasingly attracted the attention of policymakers and judges in the European Union and the importance of such mobility can scarcely be understated.<sup>1</sup> Indeed, the Education and Training 2020 strategic framework underlines mobility of students as one of the important objectives to be pursued with a view to developing the education and training systems of the Member States.<sup>2</sup> This aim, apart from targeting students with an EU nationality, also includes promoting the EU as a 'world centre of excellence for studies'<sup>3</sup> by offering high quality education and research opportunities to third-country national students.<sup>4</sup> Such external migration is capable of bringing the EU and the Member many benefits ranging from the promotion of worldwide exchange of knowledge and skills, to strengthened cultural dialogue between the sending and hosting countries<sup>5</sup> as well as increased competition between universities on a worldwide level generating strong incentives among the higher education institutes to develop internationally oriented, high quality courses with a greater emphasis on language learning.<sup>6</sup> However, the main advantage is the relatively well-established link between international student mobility, attracted by high quality study facilities, and (subsequent) highly skilled labour migration.<sup>7</sup> In that context, the TCN student has very advantageous migration profile. The burden of hosting TCN students is relatively light: these students usually fully contribute to financing of the higher education system as they are subjected to higher tuition fees than domestic students, as well as bring with them financial resources to support their maintenance which are injected into the local economy.<sup>8</sup> Moreover, as a potential highly skilled worker the (former) TCN student offers a distinct set of benefits: the TCN student is often young and can help reinvigorate an aging (EU) population and counter demographic decline. In addition, having obtained training in the higher education system of the host State ensures that, on the supply side, the student has skills and experience relevant/corresponding to domestic human capital requirements, while on the demand side, employers more easily recognise and are better able to assess the educational attainment of the TCN student (as opposed to a highly skilled migrant trained abroad). Finally, the TCN-student-turned-worker already is already integrated, to a degree, in the host State and so is to an extent familiar with its culture and possibly language.<sup>9</sup>

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<sup>1</sup> See Report of the High Level Expert Forum on Mobility, June 2008, available at: [http://ec.europa.eu/education/doc/2008/mobilityreport\\_en.pdf](http://ec.europa.eu/education/doc/2008/mobilityreport_en.pdf)

<sup>2</sup> Council conclusions of 12 May 2009 on a strategic framework for European cooperation in education and training ('ET 2020'), O.J. [2009] C 119/02, p. 2.

<sup>3</sup> A concept used by the Commission in COM(2002) 548 Final, Proposal for a Council Directive on the conditions of entry and residence of third-country nationals for the purposes of studies, vocational training or voluntary service, of 7.10.2002, p. 3.

<sup>4</sup> For the purposes of this paper 'third-country national' means any individual who does not have a EU or EEA Member State nationality.

<sup>5</sup> See Council Resolution of 30 November 1994 on the admission of third-country nationals to the territory of the Member States for study purposes, O.J. [1996] C 274/10, 19.09.1996, para. 2-5.

<sup>6</sup> See COM(2002) 548 Final, Proposal for a Council Directive on the conditions of entry and residence of third-country nationals for the purposes of studies, vocational training or voluntary service, of 7.10.2002, p. 3. See further: P. Altbach and J. Knight, 'The Internationalization of Higher Education: Motivations and Realities', 11 *Journal of Studies in International Education* (2007) 290, 291ff.

<sup>7</sup> K. Hailbronner, *Immigration and Asylum Law and the Policy of the European Union*, (Kluwer Law International, 2000), p. 16-17 and K. Tremblay, 'Student Mobility between and towards OECD Countries: A comparative Analysis', in *International Mobility of the Highly Skilled*, (OECD Paris 2002), p. 39-67.

<sup>8</sup> M. Lall, *Indian students in Europe: Trends, constraints and prospects, living in the 'age of migration'*, ENCARI Briefing Paper No. 5 (2006), p. 4ff.

<sup>9</sup> See L. Hawthorne, *The Growing Global Demand for Students as Skilled Migrants*, (Migration Policy Institute 2008), p. 2-8.

Overall, therefore, student mobility and exchange is a multifaceted phenomenon which has implications for areas as diverse as the development of cultural and political links between the EU and third countries, internationalisation of the higher education sector and the global competition for highly skilled migrants.

Looking more specifically at the relationship between India and the EU as regards this topic, we see that figures provided by Eurostat estimate that some 61599 Indian students chose to study in one of the EU Member States in 2010. It should further be noted that this student population is growing fast: in 2000 the Indian student population numbered 6568, which in essence comes down to a tenfold increase in the last decade.<sup>10</sup> This phenomenal increase in Indian students seeking a place to study in the EU is something that should be encouraged: further mobility of Indian students and other forms of academic cooperation between the EU and India could be mutually advantageous. For the European Union, attracting Indian students could help address the projected skills shortage<sup>11</sup> in such areas such as engineering, IT and medicine, all subjects in which Indian students traditionally perform very well.<sup>12</sup> Moreover, increased mobility could help strengthen and foster deeper relations and cultural exchange between the EU and India, which is crucial in the light of the ongoing process of strengthening EU-India economic and political cooperation, in particular in the context of the currently ongoing negotiations as regards the Free Trade Agreement which could generate huge economic gains if it were to be implemented fully.<sup>13</sup>

As such, the promotion of student mobility can be considered of considerable importance, an issue increasingly also recognised in the context of the EU - India relations.<sup>14</sup> This paper will therefore examine one of the major factors in determining the attractiveness of the EU as a place of study: the applicable migration regime.<sup>15</sup> This concerns the conditions under which students can obtain a right of residency to study in the host State and the rights and duties attached to such status. Moreover, (the existence of) flanking provisions providing, for example, for a possibility to remain in the host State in order to work there for a period after studies are also relevant. In the EU, the student migration regime is set out in Directive 2004/114 on the conditions of admission of third-country nationals for the purposes of studies, pupil exchange, unremunerated training or voluntary service.<sup>16</sup> This instrument harmonises the conditions under which third-country nationals shall be admitted to a Member State of

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<sup>10</sup> Data obtained from Eurostat, Foreign students in tertiary education (ISCED 5-6) by country of citizenship [educ\_enr18] database on 27 March 2013.

<sup>11</sup> See for an overview of skills situation in the EU: Europe's skill challenge, CEDEFOP Briefing Note 9068 (2012), available at [http://www.cedefop.europa.eu/EN/Files/9068\\_en.pdf](http://www.cedefop.europa.eu/EN/Files/9068_en.pdf) last visited 27 March 2013.

<sup>12</sup> See the Migration Policy Centre, 'India-EU Student mobility - A Win-Win Opportunity for the EU?', available at: <http://www.migrationpolicycentre.eu/india-eu-student-mobility-a-win-win-opportunity-for-the-eu/> last visited 27 March 2013.

<sup>13</sup> See Economic impact of a potential Free Trade Agreement (FTA) between the European Union and India CEPII -CIREM, available at: [http://trade.ec.europa.eu/doclib/docs/2007/may/tradoc\\_134682.pdf](http://trade.ec.europa.eu/doclib/docs/2007/may/tradoc_134682.pdf) last visited 27 March 2013.

<sup>14</sup> See Article 18 of the Cooperation Agreement between the European Community and the Republic of India on partnership and development OJ [1994] L 223/24 which emphasises cooperation between EU and Indian higher education institutes, as well as the India-EU Strategic Partnership: Joint Action Plan of 7 September 2005 (updated 2008) which underlines promotion of academic exchange and mutual access facilitation to education institutes.

<sup>15</sup> P. Fargues et al, *EU-India Mobility Cooperation: A Strategic Assset and Field of Opportunities*, SWG Policy Brief no. 1 (2009) p. 3-4. See further Erasmus Mundus Project 2004/3924, Perceptions of European Higher Education in third countries - Country Report India, p. 20ff, available at: <http://ec.europa.eu/education/erasmus-mundus/doc/studies/india.pdf> last visited 27 March 2013.

<sup>16</sup> Directive 2004/114 on the conditions of admission of third-country nationals for the purposes of studies, pupil exchange, unremunerated training or voluntary service O.J. [2004] L 375/12. Note that neither the United Kingdom, Ireland or Denmark are bound by this Directive. For the position of the UK, see L. Williams, *Indian Student Mobility in the UK: Opportunities and Challenges*, CARIM-India RR 2012/17.

the EU for the purposes of studies.<sup>17</sup> The purpose of this paper is thus to elaborate and analyse the EU legal regime as regards the conditions of admission of TCN national for the purposes of studies with a view to determine the conditions, rights and possibilities that TCN (including Indian students) could derive from this Directive, as well critically assessing its functioning as a tool to attract foreign students to study in the EU. A second point that this paper will address is the position of certain specific TCN nationalities, Swiss and Turkish nationals, who can claim additional rights on the basis of their respective cooperation agreements as regards issues relating to studying (eg. equal treatment as regards study allowances<sup>18</sup> in the host State). These are meant as illustrative case studies, the findings of which may be relevant as the relations of the EU and India are developed in the future and more extensive cooperation agreements are concluded.

## **2. Directive 2004/114 on the conditions of admission of third-country nationals for the purposes of studies (...).**

### *Admission - substantive*

The Directive sets out a combination of general and specific requirements fulfilment of which is necessary for the admission of the TCN seeking education in a Member State of the EU. The general requirements<sup>19</sup> are set out in Article 6 of the Directive and require the TCN student to possess a valid travel document, comprehensive medical insurance<sup>20</sup> and, in case the student is a minor, parental authorisation for the desired period of residence.<sup>21</sup> This Article also specifies that a Member State can, *a limine*, refuse admission of a student deemed to constitute a threat to public policy, security or public health. The specific requirements applying to students are found in Article 7 and specify enrolment in a course of study at a higher education establishment and sufficient resources to cover stay, study and return.<sup>22</sup> A Member State may furthermore require the applicant to show that he has sufficient knowledge of the language of instruction and/or require proof of payment of the relevant fees of the higher education establishment.<sup>23</sup>

An applicant satisfying the conditions set out in Article 6 and 7 shall be issued a residency permit valid for at least one year<sup>24</sup>, which is moreover renewable insofar these conditions continue to be satisfied.<sup>25</sup> However, a Member State may withdraw or refuse the renewal of the residency permit in

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<sup>17</sup> Article 3 (1) Directive 2004/114. The Directive also provides provisions for the admission for TCN for purposes other than studies, however, the application of the relevant provisions to these categories of TCN is left to the discretion of the Member State(s).

<sup>18</sup> For the purpose of this paper the term 'study grants' generally refers to grants/loans in place designed to support the maintenance/subsistence of the student during his or her studies.

<sup>19</sup> Which apply to all applications under Directive 2004/114

<sup>20</sup> See however Article 7 (2) of Directive 2004/114 which provides that if host Member State nationals under the national system automatically qualify for comprehensive sickness insurance by reason of being enrolled in a higher education establishment then such insurance shall be extended to TCN students and be considered to the requirements of Article 6 (1) (c).

<sup>21</sup> See Article 6 (1) (a-d). A Member State may also require proof of payment of the relevant fees for an application under Directive 2004/114: Article 6 (1) (e) Directive 2004/114.

<sup>22</sup> Article 7 (1) (a)(b) Directive 2004/114. Member States shall specify and make public the minimum monthly amount required to satisfy the 'sufficient resources' criterion, but are required to take into account the relevant circumstances of individual cases.

<sup>23</sup> Article 7 (1) (c) Directive 2004/114.

<sup>24</sup> Article 12 (1) Directive 2004/114. Where the duration of the course is shorter than one year, the residency permit shall be valid for the duration of the course

<sup>25</sup> Conversely, non-satisfaction of these conditions is grounds for withdrawal or non-renewal of the residency permit: see Article 16 (1) Directive 2004/114.



case the student does not make acceptable progress in his studies or where he does not respect the limits<sup>26</sup> imposed on the pursuit of economic activities ancillary to the studies (see further below).<sup>27</sup> In addition, Article 16 allows withdrawal or non-renewal in case of fraudulent acquisition of the residency permit issued or where the student constitutes a threat to public policy, public security or public health.

Following this short analysis of the conditions of admission, the question could be raised whether Directive 2004/114 provides a right of admission for the TCN student satisfying the conditions of Article 6 and 7 or whether the Member State retains discretion to refuse a student as part of its migration policy.<sup>28</sup> Directive 2004/114 does not provide a clear-cut answer to this issue. It is, however, submitted here that the Directive does confer upon the TCN student fulfilling the conditions of Article 6 and 7 (sufficient resources, admission to an institution of higher education) a right of admission (including both entry and residence). Several arguments can be put forward in support of this view. The first relates to the object and purpose of the Directive: it seeks to harmonise the conditions for entry and residency of TCN seeking to study in a Member State of the EU.<sup>29</sup> This objective would surely be undermined if Member States were free to impose additional requirements for admission (eg. by adopting an admission quota) as this would in essence result in (reintroducing) 24 different migration policies and admission criteria for TCN students.

This argument can be buttressed by referring to the internal coherence of the Directive 2004/114. The Directive primarily uses the term 'admission' of students, which is defined as including both entry and residence.<sup>30</sup> The term 'entry' is, moreover, only used in combination with residence throughout the operative part of the Directive; it does not appear on its own. Recital 17 suggests, furthermore, that the separation of admission into an instance of 'entry' and 'residence' is to be seen as a (procedural) exception which applies where the Member State in question only issues residency permits on its territory (requiring the individual to first be issued with a visa in order to be present on the territory). As such, the Directive therefore pursues a unitary concept of admission, whereby the residency permit issued on the basis thereof should cover both (initial) entry to, and residence in, the Member State. Since Article 12 of the Directive specifies in mandatory wording that the Member States *shall* issue a residency permit to those students satisfying the conditions for admission, it follows that the Directive indeed provides for the mandatory admission of individuals to the territory of the Member State once the conditions listed exhaustively in Article 6 and 7 have been fulfilled.

This interpretation is also supported by reading Article 18 which provides the TCN with a set of procedural guarantees in the application process. The article only refers to rights of appeal of the applicant against a decision to refuse to issue or renew a residency permit; no mention is made of a separate 'entry decision' in the process. In addition, the internal coherence of the Directive would be undermined if one group of Member States which allow the issuing residency permits to individuals abroad are obliged to do so following Article 12 (following satisfaction of Articles 6 and 7), whereas another group of Member States who divide the admission process in a separate entry and residence procedure are not. This would permit Member States to unilaterally modify their obligations under the Directive simply by changing their domestic administrative procedures.

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<sup>26</sup> See Article 17 Directive 2004/114.

<sup>27</sup> See Article 12(2) Directive 2004/114.

<sup>28</sup> Eg. By setting TCN student quotas. The latter interpretation of Directive 2004/114 as providing the Member States with discretion as to the admission was alluded to by Germany and the Netherlands in their submissions in the case of *Payir*, see the Opinion of A-G Kokott in Case C294/06, *The Queen on the application of Ezgi Payir, Burhan Akyuz and Birol Ozturk v Secretary of State for the Home Department*, [2008] ECR I-203, para. 60: 'The Member States point out that the only regulatory instrument of labour market policy remaining to them (...) would be **to regulate more closely, and possibly to reduce distinctly**, the number of Turkish nationals allowed to enter for the purpose of studying.' (Bold by author)

<sup>29</sup> See Recital 3 and 6 of Directive 2004/114.

<sup>30</sup> Recital 8 of Directive 2004/114

The final argument relates to the characteristics of the Directive: there is no legislative logic in having an instrument that distinguishes between a mandatory part (admission of students) and an optional part (admission of pupils etc.) if the mandatory part in the end nevertheless is subject to discretion of the Member States.<sup>31</sup> In that respect it is also worth mentioning that while the Directive provides for certain derogation possibilities for the Member State, these do not affect this mandatory character. The fact that a Member State may refuse admission<sup>32</sup> and/or withdraw or refuse to renew the residency permit on grounds of public policy, public security or public health<sup>33</sup> must, in the light of the case law on these concepts<sup>34</sup>, be seen as a narrowly interpreted exception to the main principle and certainly not as a foundation for the introduction of generally applicable additional conditions applying to admission.

From this it can be concluded that fulfilment of the conditions for admission laid down exhaustively in the Directive entitles the TCN student to admission without further discretion on the part of the Member State.

#### *Admission - procedural*

After an application for admission has been made, a decision on whether to grant a residency permit in accordance with the provisions of the Directive shall be adopted within a reasonable period of time taking into account the interests of the student as well as the time needed by the competent authorities to process the application.<sup>35</sup> The applicant shall be notified of the outcome of the procedure.<sup>36</sup> In case the application is rejected, the applicant must be able to challenge the decision in a legal procedure.<sup>37</sup> Member States can optionally set fees to cover the processing costs of the applications.<sup>38</sup> Finally, the Directive allows for a fast-track procedure for the issuing of residency permits (and where applicable: visas) on the basis of an agreement between an establishment of higher education and the competent authorities dealing with admission of third-country nationals of the Member State.<sup>39</sup>

#### *Rights derived from 2004/114*

Apart from the (continued) rights of residency for the purposes of study, the Directive in Article 8 also provides the third-country national with a limited right of mobility. This allows the TCN to pursue part of the studies already commenced or a course of study related to studies already completed in a second

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<sup>31</sup> See S. Peers and N. Rogers, *EU Immigration and Asylum Law: Text and Commentary*, (Martijn Nijhoff Publishers, 2006), p. 735.

<sup>32</sup> Article 6 (1) (d) of Directive 2004/114.

<sup>33</sup> Article 16(2) of Directive 2004/114.

<sup>34</sup> See generally N. Nic Shuibhne, 'Derogating from the free movement of persons: When can EU citizens be deported?', 8 *Cambridge Yearbook of European Legal Studies* (2006) 187.

<sup>35</sup> Article 18 (1) Directive 2004/114

<sup>36</sup> Article 18 (1) jo. (3) Directive 2004/114.

<sup>37</sup> Article 18 (4) Directive 2004/114.

<sup>38</sup> Article 20 of Directive 2004/114. Following Case C-508/10, *Commission v the Netherlands*, [2012] nyr., para. 65-78 (concerning excessive fees for visas and permits levied on long-term resident TCN in the context of Directive 2003/109) it is arguable that Member States are not completely free in determining the amount of the processing fee levied for an application under Directive 2004/114. The Court held in that case that such discretion must be exercised with due regard to EU law, and in particular may not undermine the object and purpose of Directive 2003/109 (which concerns the integration of long term resident TCN). In the context of Directive 2004/114, this would lead one to the conclusion that Member States cannot set processing fees at such a high level as to constitute a negation of the (arguable) right of admission of the TCN student.

<sup>39</sup> Article 19 of Directive 2004/114.

Member State.<sup>40</sup> In order to qualify for this right the student must satisfy the conditions in Article 6 and 7 in the second Member State, provide documentary evidence of his/her academic record as well as evidence that the course of study in the second Member State complements the previous studies undertaken, and, finally, either have been resident for two years in the first Member State, or participate in an EU or bilateral exchange programme.<sup>41</sup> Overall, exercise of this right seems somewhat cumbersome, notwithstanding the fact that such intra EU mobility could nevertheless be beneficial to both the student and the Member States involved in the light of the objectives of the Directive (mutual enrichment and cultural exchange between the country of origin and the Member States of the EU etc.). As such, it is somewhat regrettable that such mobility is not facilitated to a greater extent.

The second right conferred upon the TCN student is laid down in Article 17 of the Directive: the student has right to pursue an economic activity as a worker for at least ten hours a week in the Member State in which he has been admitted for the purposes of study.<sup>42</sup> Additionally, a Member State can allow the student to engage in self-employed activity. It is clear that this right constitutes an important flanking right, providing the TCN student with additional means to support him or herself.

However, this right is not without its limitations. The Member State may restrict the right to (self-)employment for the first year of residency.<sup>43</sup> In addition, the economic activity may be made subject to a reporting obligation.<sup>44</sup> Finally, Article 17 further allows the host Member State to take into account 'the situation in the labour market' which suggests a certain freedom on the part of the Member State to condition labour market access (in certain sectors) by TCN students in times of unemployment. However, the extent of this discretion to impose limitation is somewhat unclear. The issue has meanwhile been put to the Court in *Sommer*.<sup>45</sup> At issue in this case was, *inter alia*, the lawfulness of a provision of Austrian legislation which made access to the labour market by TCN students admitted under Directive 2004/114 conditional on a systematic examination of the state of the labour market as well as a quota.<sup>46</sup> If the quota for foreign employment was exceeded further conditions need to be satisfied in order for the TCN student to gain access to the labour market.<sup>47</sup> In his Opinion, A-G Jääskinen held that these strict requirements were precluded by the Directive: Relying on Recital 18<sup>48</sup> of the Directive, he submitted that the Member State could only exceptionally invoke the labour market situation to limit access, which must moreover be justified and subjected to the principle of proportionality.<sup>49</sup> In that respect, general concerns regarding the labour market (high unemployment) are not sufficient; Jääskinen considers that only where such high unemployment is indeed an exceptional situation, or where there is a regional or sectoral imbalance, can the exception be invoked.<sup>50</sup> The Court

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<sup>40</sup> See Article 8 (1) of Directive 2004/114

<sup>41</sup> See Article 8 (1) (a -c). The residency requirement/exchange programme requirement is not applicable in case the course of study pursued in the first Member State obliges the student to do part of his studies abroad. See Article 8 (2) Directive 2004/114.

<sup>42</sup> Art. 17 (2) jo. Art. 17 (1) of Directive 2004/114. Insofar a work permit is necessary for third-country nationals to be allowed access to the labour market, the Directive provides that these shall be granted: see Article 17 (1) second paragraph of Directive 2004/114.

<sup>43</sup> See Article 17 (3) of Directive 2004/114.

<sup>44</sup> Article Article 17 (4) of Directive 2004.114.

<sup>45</sup> Case C-15/11, *Leopold Sommer v Landesgeschäftsstelle edes Arbeitsmarktservice Wien*, [2012] nyr.

<sup>46</sup> In addition, Austria makes use of the limitation provided by Article 17 (3): access to the labour market is limited for the first year of residency.

<sup>47</sup> See Opinion of A-G Jääskinen in Case C-15/11, *Sommer*, para. 16-19

<sup>48</sup> '(...) The principle of access for students to the labour market under the conditions set out in this Directive should be a general rule; however, in exceptional circumstances Member States should be able to take into account the situation of their national labour markets.

<sup>49</sup> Opinion of A-G Jääskinen in Case C-15/11, *Sommer*, para. 52-70.

<sup>50</sup> *Ibid*, para. 59 and fn. 19.

confirmed this approach: whereas Member States can indeed legitimately restrict access to the labour market for the first year, any additional restriction on the basis of situation of the labour market can only take place in exceptional circumstances and is subject to the principle of proportionality.<sup>51</sup> As such, national legislation providing for a systematic examination of the labour market and the operation of a quota are incompatible with Directive 2004/114.<sup>52</sup> The right of access to the labour market is thus a relatively strong one and apart from the derogations that are expressly specified in terms of scope (eg. paragraphs 2-4 of Article 17) restrictions thereof must be interpreted limitedly.

### *Assessment*

This concludes a short overview of Directive 2004/114 as a general instrument for the admission of third-country national students. This is the regime that applies to 'regular' (those lacking more favourable provisions under EU law) third-country nationals seeking to study in one of the Member States of the EU (eg. Indian nationals). As a tool to attract TCN students the Directive undoubtedly has some merit: a harmonised and relatively simple admission procedure does much to clear away the major obstacle of having 24 different migration regimes that would undoubtedly cloud the waters for foreign students seeking to study in the EU and so reduce the overall attractiveness of EU-based higher education institutes. Moreover, the fact that (as argued in this paper) fulfilling the conditions of the Directive gives the student a right of admission promotes legal certainty and circumscribes the freedom of Member States to respond to populist demands to cut migration numbers (see eg. the situation in the UK where tightened visa rules caused a 62% drop in student visa's<sup>53</sup>). Finally, the (limited) right of intra-EU study mobility as well as the right of the student to participate in the labour market can both be considered important rights: the first promotes further exchange of knowledge and culture across EU borders, the latter ensures that the student can supplement his or financial resources by working.

However, at the same time the Directive in its current form also suffers from significant limitations. A first important limitation is the undue emphasis that the Directive puts on the temporary nature of the entry and residency: the student having completed his studies must in principle return to his country of origin. The Directive does not provide any options in terms of (facilitated) labour market access for the ex-student either in the host Member State or in the EU more generally. This approach is highly unsatisfactory: it seems wasteful to commit resources for the education of migrant students and training them in the education system of the host Member State if no follow-up scheme is in place to capitalise on the skills so imparted. Rather the EU runs the risk that this potentially valuable asset will leave the EU altogether. Looking, additionally, at the specific case of India, this lack of follow-up work-residency can be said to throw its shadow forwards: the Erasmus Mundus Country Report on India indicated that the lack of work (permit) opportunities constituted an important factor reducing the attractiveness of studying in the EU, putting off Indian students from studying in the EU at all.<sup>54</sup> Finally, this strict return policy disregards the contribution education makes to the integration of the migrant into the host State.<sup>55</sup> The result is that the system created by the Directive seems to pursue promotion of the EU as a place to study for third-country nationals almost in isolation from the aforementioned aims of attracting highly skilled migrants to address EU labour market shortages.

The lack of interaction of Directive 2004/114 with other EU migration instruments is telling in this regard. The student, after having pursued a four or five years of education does not necessarily qualify

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<sup>51</sup> Case C-15/11, *Leopold Sommer v Landesgeschäftsstelle edes Arbeitsmarktservice Wien*, [2012] nyr., para. 42.

<sup>52</sup> *Ibid*, para. 43-44.

<sup>53</sup> See generally BBC News, *Tighter rules for UK student visas*, of 18 March 2011 and *The Economic Times*, *62% drop in student visas in first quarter of 2012*, of 24 May 2012.

<sup>54</sup> Erasmus Mundus Project 2004/3924, *Perceptions of European Higher Education in third countries - Country Report India*, p. 20-22, available at: <http://ec.europa.eu/education/erasmus-mundus/doc/studies/india.pdf> last visited 27 March 2013.

<sup>55</sup> R. Münz et al, 'The Costs and Benefits of European Immigration', *HWWI Report No. 3* (2006), p. 41.

for long-term residency under the LTR directive<sup>56</sup>: Article 24 of Directive 2004/114 allows Member States to exclude periods of residency on the basis of this Directive for the purposes of applying Directive 2003/109. Nor is there an apparent link between the Student Directive and the Researcher's Directive 2005/71 even though the areas are undoubtedly connected, especially where it concerns PhD students.<sup>57</sup> Even the recently adopted Directive 2009/50 laying down the conditions for admission for highly skilled migrants does not explicitly relate to or allow spill over from Directive 2004/114.<sup>58</sup> This fragmentary and inconsistent approach of the EU to its migration policy is regrettable.

Secondly, it may be questioned whether the current limitations on TCN student work (Member States can limit this to 10 hours a week as well as exclude the possibility to work the first year) are not unduly undermining the capacity of the student to supplement his or her financial resources. Looking in particular at the situation of Indian nationals, the Erasmus Mundus report found that close to 50% Indian students responded 'no' to the questions 'cost of living is affordable for me' and the 'cost of study programmes / tuition fees are low'.<sup>59</sup> As such, financial concerns remain major obstacles for Indian students seeking to study in EU and could perhaps be ameliorated with more lenient rules as to work and/or better access to scholarships.

As a final point the current possibility of students residing on the basis of Directive 2004/114 to move to a second EU Member State, as mentioned above, seems unduly cumbersome and unnecessarily circumscribed. Greater scope for mobility in this regard could help promote the EU as an attractive place to study as students could study and allow TCN students to obtain skills at different institutions as well as experience life in more than one Member State.

### 3. Special categories of third-country nationals.

This section will take a closer look at a few case studies in which certain categories of TCN students can rely on EU law and/or cooperation agreements concluded by the EU to claim stronger and/or additional rights. The focus will be on residency rights, rights of equal treatment as regards access to education (precluding the Member State from eg. charging a higher tuition fee to TCN students) and rights of equal treatment as regards study grants (subsistence allowances, providing students with additional resources). Three categories of third-country nationals will be considered: the third-country national family member of an EU citizen within the meaning of Directive 2004/38<sup>60</sup>, the Swiss national and the Turkish national.

#### 3.1 The third-country national family member joining an EU citizen exercising free movement rights under Directive 2004/38.

In order to discuss the position of the TCN family member of an EU citizen, it is necessary to distinguish between the sources for the rights of entry and residence and the sources for rights to equal

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<sup>56</sup> Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents, O.J. 2004 L 16/44.

<sup>57</sup> Council Directive 2005/71/EC of 12 October 2005 on a specific procedure for admitting third-country nationals for the purposes of scientific research O.J. 2005 L 289/15. PhD students in general fall under Directive 2004/114, see Art. 2 (b).

<sup>58</sup> Council Directive 2009/50/EC of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment O.J. 2009 L 155/17. Recital 8 of Directive 2009/50 in fact underlines the separate nature of admission for the purposes of studies under Directive 2004/114 and the fulfillment of the conditions for admission on the basis of Directive 2009/50.

<sup>59</sup> Erasmus Mundus Project 2004/3924, Perceptions of European Higher Education in Third Countries Final Report, p. final report, p. 119-120.

<sup>60</sup> Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, OJ [2004] L 158/77. Here after Directive 2004/38 or CRD.

treatment that the TCN family member can claim in the host Member State. The former involves as a basis a Union citizen exercising his free movement rights under EU law to enter and reside in another Member State. Directive 2004/38 applies to this situation<sup>61</sup> and provides the Union citizen with certain rights, among which a right of entry and residency for certain categories of family members<sup>62</sup> accompanying the Union citizen. The concept of 'family member' includes third country national<sup>63</sup> spouses and children.<sup>64</sup> It follows that these TCN family members derive a dependent<sup>65</sup> right of entry and residency from the position of the Union citizen.

As is well known, the CRD sets out three tiers of residency: initially all Union citizens and their family members have the right to reside for a period of three months whereby the Union citizen will only need a passport or identity card and his/her TCN family member a passport and possibly a visa.<sup>66</sup> For a period beyond that, the Union citizen must fulfil the conditions set out in Article 7(1) of the CRD: he or she must either exercise an economic activity as a worker or self-employed person<sup>67</sup>; or have sufficient resources for himself/herself and his or her family members not to become an unreasonable burden on the social assistance system of the host Member State in addition to having comprehensive medical insurance.<sup>68</sup> After five years of lawful residence in the host Member State the Union citizen<sup>69</sup>, as well as the TCN family member<sup>70</sup>, gain a right to permanent residency, after which he or she has an unconditional<sup>71</sup> right of residency.

If the Union citizen fulfils the relevant conditions as set out above, his TCN family member shall have the right to join him/her.<sup>72</sup> Moreover, if the TCN family member were to reside with the Union citizen in the host Member State for five years, that family member will also receive a right of permanent residency.

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<sup>61</sup> Article 3 (1) Directive 2004/38. See for the limitations the Court in Case C-434/09, *Shirley McCarthy v Secretary of State for the Home Department*, [2011] ECR I-3375, para. 30ff.

<sup>62</sup> See Article 2 (2) of Directive 2004/38. See further Article 3 (2) which creates a category of family members whose entry shall merely be 'facilitated.'

<sup>63</sup> Recital 5. It is further apparent in the system of the Directive which consistently speaks of Union citizens and family members who are not nationals of a Member State.

<sup>64</sup> For the purpose of this paper it will be assumed that spouses/children are most likely to seek to study in the host Member State, as opposed to ascendant family members of the Union citizen.

<sup>65</sup> See Article 5 (1) and Article 7 (2) of Directive 2004/38. However, it should be noted that Articles 12 and 13 of Directive 2004/38, provide for certain residency rights for the family members of the Union citizen in case the family relationship should be interrupted as result of death, departure or divorce.

<sup>66</sup> Article 6 Directive 2004/38.

<sup>67</sup> Article 7 (1) (a) Directive 2004/38. A Union worker is someone who for a certain period of time, performs services for and under the direction of another person, in return for which he receives remuneration, see Case 66/85, *Deborah Lawrie-Blum v Land Baden-Württemberg*, [1986] ECR 2121 para. 17. Moreover, the person must pursue a genuine and effective economic activities which are not on such a small scale as to be regarded as purely marginal and ancillary, see Case C-3/90, *M. J. E. Bernini v Minister van Onderwijs en Wetenschappen*, [1992] ECR I-1071, para. 14. Case law suggests that an individual working in a remunerated employment relationship for about 8-12 hours a week qualifies as a worker: Case 139/85, *R. H. Kempf v Staatssecretaris van Justitie*, [1986] ECR 1741 (12 hours) and more recently Case C-14/09, *Hava Genc v Land Berlin*, [2010] ECR I-931, para. 9, 25-27 (5,5 hours work a week may be sufficient to constitute a genuine and effective economic activity). A self-employed person is defined as someone who pursues an activity outside a relationship of subordination, under his or her own responsibility, in return for remuneration paid to that person directly and in full: Case C-268/99, *Aldona Malgorzata Jany and Others v Staatssecretaris van Justitie*, [2001] ECR I-8615, para. 71.

<sup>68</sup> In case the Union citizen is resident for study purposes, he or she needs, in addition to sufficient resources and comprehensive medical insurance, to be enrolled in an educational establishment: see Article 7 (1) (c) of Directive 2004/38.

<sup>69</sup> Article 16 (1) Directive 2004/38.

<sup>70</sup> Article 16 (2) Directive 2004/38.

<sup>71</sup> Although long absences from the territory of the relevant Member State can cause the right to lapse: See Article 16 (3) Directive 2004/38.

<sup>72</sup> Article 7 (2) CRD. Note that the TCN family member must also fulfil certain administrative requirements: see Article 9-11 of Directive 2004/38. These are however not in any way constitutive of the right of residency.

Until a right to permanent residency has been obtained, it remains important to distinguish on what basis the Union citizen is resident in the host Member State as this will have consequences for the extent of the right to equal treatment that can be claimed by the TCN family member. For the following discussion it will be assumed that the Union citizen and his family members reside in the host Member State.

Article 24 of Directive 2004/38 extends the right to equal treatment enjoyed by the Union citizen to TCN family members, which provides the latter in any event with a claim for equal treatment as regards matters relating to access to education: it is settled case law of the European Court of Justice that such matters fall within the scope of the principle of non-discrimination.<sup>73</sup> It follows that the TCN family member may not be discriminated against as regards tuition fees, quotas and/or grants/loans that are contributions towards the payment of the tuition fees.<sup>74</sup> The question whether the Union citizen (and by extension, the TCN family member) can claim equal treatment regarding study grants is more difficult to answer.<sup>75</sup> A first distinction to be made here is between those Union citizens that are economically active (as a worker or self-employed person) and those that are not. In case of the former, the Union worker can claim equal treatment rights as regards study grants on the basis of Article 7 (2) of Regulation 492/2011<sup>76</sup> as well as Article 24 of Directive 2004/38.<sup>77</sup> The TCN spouse or child of the Union citizen may also rely on either Article with same effect.<sup>78</sup> In addition, the TCN child-student can rely on Article 10 of Regulation 492/2011: if the child becomes installed in the host Member State during the time that the Union citizen-parent<sup>79</sup> is exercising his free movement rights as a worker<sup>80</sup>, the child-student gains a right to receive education under the same conditions as the host Member State nationals<sup>81</sup> and even a right of independent residency<sup>82</sup> for the purpose continuing his or her education.<sup>83</sup>

<sup>73</sup> First determined in the cases of Case 152/82, *Sandro Forcheri and his wife Marisa Forcheri, née Marino, v Belgian State and asbl Institut Supérieur de Sciences Humaines Appliquées*, [1983] ECR 2323, para. 13-18 and Case 293/83, *Françoise Gravier v City of Liège*, [1985] ECR 593, para. 14-25. Admittedly, these cases deal with scope of the principle of non-discrimination of Article 18 TFEU. The Court has not yet ruled on the application of Article 24 of Directive 2004/38 to these matters, but its scope should be construed in harmony with the Treaty Article. Similar reasoning is apparent in the Court's judgement in Joined Cases C-22/08 and C-23/08, *Vatsouras and Koupatantze*, [2009] ECR I-4585, para. 44.

<sup>74</sup> See Case 293/83, *Gravier*, [1985] ECR 593, Case C-73/08, *Nicolas Bressol and Others and Céline Chaverot and Others v Gouvernement de la Communauté française*, [2010] ECR I-2735 and Case C-357/89, *V. J. M. Raulin v Minister van Onderwijs en Wetenschappen*, [1992] ECR I-1027 respectively.

<sup>75</sup> See for a recent overview regarding the state of affairs in this area: S. Jørgensen, 'The right to cross-border education in the European Union', 46 CML.Rev. 1567 (2009).

<sup>76</sup> Regulation (EU) 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union OJ [2011] L 141/1. While the regulation applies to workers only, the principles apply, *mutatis mutandis*, to the position of the self-employed Union citizen: Case C-337/97, *C.P.M. Meeusen v Hoofddirectie van de Informatie Beheer Groep*, [1999] ECR I-3289, para. 27-29.

<sup>77</sup> See Case 39/86, *Sylvie Lair v Universität Hannover*, [1988] ECR 3161, para. 22-24, recently confirmed in Case C-46/12, *L.N., v Styrelsen for Videregående Uddannelser og Uddannelsesstøtte*, [2013] nyr., para. 47-50 and Article 24 (2) CRD.

<sup>78</sup> See Case 152/82, *Forcheri*, [1983] ECR 2323, para. 10-18 and more generally Case 32/75, *Anita Cristini v Société nationale des chemins de fer français*, [1975] ECR 1085.

<sup>79</sup> Not necessarily the biological parent, see also: Case C-413/99, *Baumbast and R v Secretary of State for the Home Department*, [2002] ECR I-7091, para 56-57, 63.

<sup>80</sup> Case C-480/08, *Maria Teixeira v London Borough of Lambeth, Secretary of State for the Home Department*, [2010] ECR I-1107, para. 44-54, 70-75 and Case C-310/08, *London Borough of Harrow v Nimco Hassan Ibrahim, Secretary of State for the Home Department*, [2010] ECR I-1065, para. 33-43.

<sup>81</sup> Including full equal treatment as regards access to education as well as maintenance grants for study purposes: Case 9/74, *Casagrande v Landeshauptstadt München*, [1974] ECR 773, para. 5-8 and Joined Cases 389-390/87, *G. B. C. Echternach and A. Moritz v Minister van Onderwijs en Wetenschappen*, [1989] ECR 723, para. 33-35.

<sup>82</sup> Case C-480/08, *Teixeira*, [2010] ECR I-1107, para. 49-50, 53 and Case C-310/08, *Ibrahim*, [2010] ECR I-1065, para. 38-39, 42.

<sup>83</sup> See for more extensive treatment of the rights of Union workers and their family members in this regard: A. Hoogenboom, 'Mobility of our best and brightest from a free movement of workers perspective: Migrant EU workers, their children and

Where the Union citizen is not economically active but instead relies on his financial resources, the situation is different. Following the most recent case in this regard, *Förster*<sup>84</sup>, a Member State can lawfully restrict the right to equal treatment regarding study grants to individuals having demonstrated a certain degree of integration in the host Member State by way of residence therein for a certain period of time. The required period of residency may be set by the Member State up to a maximum of five years.<sup>85</sup> After that period, which corresponds to the period of time required to attain a right of permanent residency under Article 16 of Directive 2004/38, a Union citizen can successfully claim a right of equal treatment as regards study grants. For the TCN family member-student this means in principle that he or she will only be able to rely on Article 24 of Directive 2004/38 to claim study grants where he or she has obtained a right of permanent residency.

#### *The TCN family member versus the TCN admitted under Directive 2004/114*

From the above analysis it should be clear that the TCN family member under Directive 2004/38 is in a very favourable position when compared to the situation under Directive 2004/114. He or she will not personally need sufficient resources to maintain him or herself; the right of residency is instead derived from the Union citizen. While a visa requirement can still be imposed and some other formalities remain necessary, other limitations imposed by Directive 2004/114 (as regards acceptable study progress, the duration of the residence permit and the like) will not apply. Neither will the right of residency end upon dropping out of or completing the studies. In addition, the TCN family member-student enjoys an unlimited right to work, a right to equal treatment regarding access to education and, depending on the status of the Union citizen, he or she may in addition be able to supplement his or her income with study grants.

### **3.2 Swiss nationals seeking to study in the EU.**

Switzerland is a member of the European Free Trade Association, an international organisation operating in parallel to the EU and which in addition counts Norway, Lichtenstein and Iceland as its members. The latter have since become a member of the European Economic Area, an agreement which extends the internal market of the EU to these countries. Switzerland, however, did not become party to the EEA Agreement due to a negative vote cast in a referendum. Instead, the relations between Switzerland and the EU are developed and governed by a series of bilateral agreements to which both the EU and the Member States are party. The relevant agreement that will be examined here with a view to examining the position of Swiss nationals wishing to study in the EU is the Agreement on the free movement of persons (AFMP).<sup>86</sup> Before moving to the specific provisions of the agreement, it will be helpful to recall the nature and status of such international agreement in the EU legal order. It is a settled case law of the Court of Justice that international agreements concluded by the EU form an integral part of the Union legal order.<sup>87</sup> As such, they are capable of direct effect<sup>88</sup>

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other family members and equal treatment as regards study grants', 4 Online Journal on free movement of workers (2012) 6, available at: <http://ec.europa.eu/social/main.jsp?catId=475&langId=en&pubId=6884&type=1&furtherPubs=yes>.

<sup>84</sup> Case C-158/07, *Jacqueline Förster v Hoofddirectie van de Informatie Beheer Groep*, [2008] ECR I-8507.

<sup>85</sup> Case C-158/07, *Förster*, [2008] ECR I-8507, para. 49-59.

<sup>86</sup> Agreement between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other, on the free movement of persons, O.J. [2002] L114/06. See for a general overview: S. Peers, 'The EC-Switzerland Agreement on Free Movement of Persons: Overview and Analysis', 2 Eur. J. Migration and L. (2000) 127.

<sup>87</sup> Case 181/73, *R. & V. Haegeman v Belgian State*, [1974] ECR 449, para. 5.

<sup>88</sup> The criteria for international agreements to have direct effect are as follows:

- (1) The nature and structure of the agreement must not be such as to prevent direct effect.
- (2) The specific provisions examined must be sufficiently clear, precise and unconditional, and not need further implementing measures, see further P. Eeckhout, *External Relations of the European Union*, (Oxford University Press,



allowing Swiss nationals rely on provisions of the AFMP and claim the rights set out therein. This will be of relevance in determining the possibilities of the Swiss student under this agreement.

### *General provisions*

Article 1 lays down the objectives of the Agreement, which envisage the free movement of both economically active<sup>89</sup> and non-economically active persons<sup>90</sup> between the Contracting Parties, subject to the prohibition of discrimination on grounds of nationality.<sup>91</sup> The rights of entry and residency are further elaborated in articles 3-7 AFMP. Of interest are further Article 13 of the AFMP which contains a so-called 'standstill obligation', prohibiting the Contracting Parties from adopting further restrictive measures within the scope of the agreement and Article 16 which makes reference to the applicability of the case law of the ECJ for the interpretation of certain concepts of the agreement borrowed from EU law.<sup>92</sup>

### *Specific provisions found in Annex I of the Agreement on the free movement of persons (Annex I AFMP).*

Under Article of Annex I AFMP all Swiss nationals shall be admitted to the territory of a Member State on the production a valid identity card or passport. No visa requirements may be imposed. As regards the rights of residency for the purposes of study and the possibility to rely on the principle of non-discrimination on grounds of nationality with a view to claiming certain benefits, the examination will take place based on three different categories of students: the student coming to an EU Member State solely for the purposes of study (the pure student), the student that studies and works in the EU (the worker-student) and, finally, the student joining his parents that have moved to the EU (the student, child of a Swiss national).

*The pure student.* The position of the Swiss national student seeking only to study in the EU is governed by Chapter V of Annex I to the AFMP. Under Article 24 (4) the Swiss student is entitled to a residency permit valid for the duration of his or her studies, with a maximum validity of one year. This permit is, however, renewable annually up till the remaining period of study/training.<sup>93</sup> In order to qualify for this right the Swiss national must be enrolled in an vocational training course<sup>94</sup>, have sufficient resources to ensure that he does not need to claim social security in the host Member State, as well as have a comprehensive medical insurance. This Swiss student, resident on the basis of Article 24, can, however, not rely on the principle of non-discrimination to claim equal treatment as regards access to education, nor in order to claim study grants on equal terms to host Member State nationals: Article 24 (4) specifically excludes these issues from the scope of the agreement.

*The student-worker.* The position of the student-worker as regards residency is regulated by Article 6 Annex I to the AFMP. The 'employed person' shall receive a residency permit valid five years if he

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2004). p. 281 and F. Hoffmeister, 'The Contribution of EU Practice to International Law', in M. Cremona (ed.), *Developments in EU External Relations Law*, (Oxford University Press, 2008), p. 57-61.

<sup>89</sup> Art. 1 (a) jo (b) AFMP.

<sup>90</sup> Art. 1 (c) AFMP.

<sup>91</sup> See Article 2 AFMP.

<sup>92</sup> Article 16 moreover obliges the Contracting Parties to "take all measures necessary ensure that rights and obligations equivalent to those contained in the legal acts of the European Community to which reference is made are applied in relations between them."

<sup>93</sup> See Article 24 (5) Annex I to the AFMP.

<sup>94</sup> In accordance with Article 16 (2) AFMP this concept must be interpreted in the light of the classic case law of the ECJ, in which it has taken a broad approach of the concept of 'vocational training', see Case 293/83, *Gravier*, [1985] ECR 593 para. 30. The ECJ has confirmed that the concept includes (most) university studies, see Case 24/86, *Vincent Blaizot v University of Liège and others*, [1988] ECR 379, para. 16-20.

is employed by an employer for a period for more than one year. If he is employed for a shorter duration a residency permit will be issued covering that shorter period. Currently, there is no case law on the definition of 'employed person' within the meaning of Article 6 Annex I to the AFMP. Nevertheless, since the agreement aims to bring about the free movement of persons 'on the basis of the rules applying in the European Community'<sup>95</sup> one can assume that the concept should at least be similar to the concept of 'worker'<sup>96</sup> under EU law. In a variety of cases before the ECJ it has become clear that it is possible for a (full-time) student to be considered a worker within the meaning of Article 45 TFEU if he or she engages in a 'genuine and effective economic activity'<sup>97</sup>, which includes part-time<sup>98</sup> jobs. It follows that a Swiss student exercising such a 'genuine and effective economic activity', will probably be considered an employed person within the meaning of Article 6 Annex I to the AFMP.

Apart from the stronger residency rights connected to 'employed person' status, Article 9 (3) Annex I to the AFMP entitles an employed person to vocational training 'on the same basis and under the same terms' as host Member State national employed persons.<sup>99</sup> While the wording is somewhat ambiguous, it is submitted here that this article gives Swiss student-workers the right to claim equal treatment as regards access to education as well as study grants.<sup>100</sup> In particular 'under the same terms' would seem to imply that the situation of a Swiss student-worker seeking to study should be the same situation as a host Member State national seeking to study.<sup>101</sup>

*The student, child of a Swiss national.*<sup>102</sup> Finally, one must consider the position of the student, child of a Swiss national. In this case the right to reside and the duration of the residency permit will be derived from the right of residency of the Swiss national parent.<sup>103</sup>

As regards the right of equal treatment, Art. 3 (6) Annex I provides that children of Swiss nationals shall, *irrespective of whether the Swiss national-parent who they are joining is economically active*, have a right to admission to general education on the same conditions as host member State nationals. This is certainly an interesting provision. It is similar in wording to Article 10 of Regulation 492/2011<sup>104</sup>, which provides the children of EU national-workers with a directly effective right to

<sup>95</sup> See the preamble to Agreement between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other, on the free movement of persons, O.J. [2002] L114/06.

<sup>96</sup> See Case 66/85, *Lawrie-Blum*, [1986] ECR 2121 para. 17.

<sup>97</sup> See in particular: Case C-3/90, *Bernini*, [1992] ECR I-1071, para. 15, Case C-357/89, *Raulin*, [1992] ECR I-1027, para. 13-14 and Opinion of A-G Geelhoed in Case C-413/03, *Ninni-Orasche*, delivered on 23<sup>rd</sup> of February 2003, para. 30-33.

<sup>98</sup> Case law suggests that 8-12 hours a week is sufficient to be considered a worker: Case C-14/09, *Hava Genc v Land Berlin*, [2010] ECR I-931, in particular para. 22-25.

<sup>99</sup> Vocational training is a concept that has been interpreted broadly by the ECJ, it includes, *inter alia*, university education, see above.

<sup>100</sup> Note that the ECJ has not yet ruled whether this provision has direct effect. However, the direct effect of article 9 of Annex I to the AFMP has been convincingly argued by A-G Colomer in his Opinion in Case C-339/05, *Zentralbetriebsrat der Landeskrankenhäuser Tirols v Land Tirol*, para. 32-45.

<sup>101</sup> Alternatively, the Swiss employed person may be able to rely on Article 9 (2) Annex I to the AFMP; this article provides that 'an employed person and the members of his family referred to in Article 3 of this Annex shall enjoy the same tax concessions and welfare benefits as national employed persons and members of their family.' It may be that this article is similar in scope to Article 7 (2) of Regulation 492/2011, which provides equal treatment as regards educational matters for the EU worker and his family members (as seen above). Compare also Article 9 (3) Annex I to the AFMP and Article 7 (3) Regulation 492/2011 (the latter of which has been supplanted by Article 7 (2) Regulation 492/2011).

<sup>102</sup> The following section applies to children of Swiss nationals with either Swiss nationality or some other TCN nationality. In the latter case the entry of the non-Swiss child may be required to be in possession of an entry visa under Article 1 (2) Annex I to the AFMP.

<sup>103</sup> Article 3 (1) jo. 3 (4). Annex I to the AFMP.

<sup>104</sup> Previously: Article 12 of Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community OJ [1968] Sp. Ed. L 257/2

equal treatment as regards access to education as well as study grants.<sup>105</sup> However, as is apparent from the wording, the article in Annex I to the AFMP goes further: also children of non-economically active parents must be granted equal treatment.<sup>106</sup> As such, children of Swiss nationals can in some circumstances be better off than children of EU nationals.

It is further submitted here that this provision is sufficiently clear to be capable of direct effect. In addition, the formulation of the article 3 (6) Annex I to the AFMP is, apart from what was noted above, exactly the same as that of Article 10 of Regulation 492/2011. Invoking Article 16 (2) of the AFMP leads to the conclusion that Article 3 (6) of Annex I to the AFMP must be accorded direct effect, providing the children of Swiss nationals, residing in the territory of the host Member State where the Swiss-national parent resides with an extensive right of equal treatment as regards education matters.

### *The Swiss nationals versus the TCN under Directive 2004/114.*

The conditions imposed on the Swiss pure student are somewhat similar to those imposed on general TCN students in the context of 2004/114. Both categories have to be enrolled in an educational establishment, possess sufficient resources and be covered by comprehensive medical insurance in order to be admitted. Advantages of the Swiss national over the TCN national include the prohibition of a visa requirement and the fact that language requirements cannot be imposed as a matter of immigration. Furthermore, it would seem that the requirement of sufficient resources in the context of the AFMP is less strict than the one applied in the context of Directive 2004/114: the Swiss national must only have enough resources to avoid having to rely on the social security system of the host Member State whereas the standard applied to the general TCN seems higher and less flexible. Finally, the Swiss national will not be subject to any limitations as regards (self-) employment, and will have more extensive mobility rights within the EU: he/she can rely on a general right of free movement without having to satisfy prior/past residency requirements or prove a connection between previous studies and the planned studies.

The advantages of the Swiss national increase if he or she qualifies as an 'employed person' within the meaning of Article 6 Annex I to the AFMP: The residency right will no longer be dependent on the possession of sufficient resources and the employed person status allows the student-worker to claim equal treatment rights regarding access to education as well as maintenance grants for study purposes.

Finally, the child-student of a Swiss national also receives a variety of extra benefits: a relatively strong, dependent, residency right as well as a right to full equal treatment as regards access to education and study grants on the basis of Article 3 (6) Annex I to the AFMP. The latter right exists regardless of whether the parents exercise an economic activity or not.

### **3.3 The Turkish national seeking to study in the EU.**

The Turkish national is another category of TCNs that has a special, well-developed position in the EU on the basis of an association agreement concluded between the EU and its Member States on the one hand and Turkey on the other.<sup>107</sup> This association agreement, concluded in 1963, has as its

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<sup>105</sup> Case 9/74, *Casagrande*, [1974] ECR 773, para. 5-8 and Joined Cases 389-390/87, *Echternach and Moritz*, [1989] ECR 723, para. 33-35.

<sup>106</sup> See further: S. Peers, 'The EC-Switzerland Agreement on Free Movement of Persons: Overview and Analysis', 2 *Eur. J. Migration and L.* 127 (2000), p. 139.

<sup>107</sup> Agreement establishing an Association between the European Economic Community and Turkey, signed at Ankara, 12 September 1963, O.J. 1973 L361/1. Hereinafter: Ankara Agreement. Other relevant instruments include: Additional Protocol to the EEC-Turkey Agreement [1973] O.J. L293/1 and Decision 1/80 of the Association Council of September 19, 1980 on the development of the association (not published in the Official Journal). See for a recent account: N.

purpose the development of the economic relations between the EU and Turkey, as well as to prepare the latter for eventual membership.<sup>108</sup> Unlike the Swiss agreement, however, it does not provide for (directly effective) free movement rights: in particular, Member States of the EU retain the (limited<sup>109</sup>) competence to determine the conditions of first admission of the Turkish national to their territory.<sup>110</sup> This section will focus on the rights that a Turkish national can derive from those instruments with a view to pursue studies in the EU. What was said above as regards the status of international agreements in the Union legal order applies *mutatis mutandis* to this section. The examination of the position of the Turkish student shall take place, as before, under the familiar headings.

*The pure student.* The Turkish national seeking to exclusively study in the EU will have to rely on Directive 2004/114 like a 'regular' TCN. The requirements and rights as set out above will apply. As matters now stand the pure student cannot derive any rights from either the Ankara Agreement, its Additional Protocol or Decision 1/80 as these instruments apply exclusively to economically active Turkish nationals and their family members.

*The student-worker.* The Turkish national combining his studies with work creates interesting possibilities. Article 4 (1) (a) of Directive 2004/114 confirms that the Directive shall be without prejudice to more favourable provisions that can be derived from international agreements (such as the Ankara Agreement and related instruments) concluded with third countries. This allows a Turkish national to rely on a combination of Directive 2004/114 and the relevant provisions relating to the free movement of Turkish workers in Decision 1/80<sup>111</sup> with a view to obtaining the best of both worlds. This creates the following possibilities: First of all the Turkish national can rely on Directive 2004/114 to gain admission to a Member State of the EU for the purposes of study. This is a valuable right, as we have seen that a right of initial entry cannot be derived from provisions of the Ankara Agreement, the Additional Protocol or Decision 1/80.

Secondly, as seen above, the admission under Directive 2004/114 includes a right to work for the third-country national. By taking up employment a Turkish student may come within the scope of application of Decision 1/80, in particular Article 6 thereof. The latter article provides a Turkish worker, after one year of legal employment, with a right to renewal of his work permit, which has been held to include a right of residency.<sup>112</sup> This means that that the Turkish worker-student would no longer have to fulfil the conditions set out in Article 6 and 7 of Directive 2004/114. In addition, insofar the Turkish national continues to satisfy the requirements under Article 6 of Decision 1/80 and resides in the host Member State, he or she can only be ousted on grounds of public policy or public security, rather than on such grounds as 'unacceptable lack of progress in the studies'.

In order for a Turkish national to derive rights from Article 6 of Decision 1/80, he or she must satisfy several conditions.<sup>113</sup> First, the Turkish national must be a 'worker'<sup>114</sup> within the meaning of

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Tezcan/Idriz, 'Free movement of persons between Turkey and the EU: To move or not to move? The response of the judiciary', 46 CMLRev. 1621 (2009).

<sup>108</sup> See the preamble and Article 2 of the Ankara Agreement.

<sup>109</sup> See Case C-16/05, *Tum and Dari*, [2007] ECR I-7415, Case C-228/06, *Soysal and Savatli*, [2009] ECR I-1031. See in the context of Decision 1/80: Case C-242/06, *Sahin*, [2009] ECR I-8465, Case C-92/07, *Commission v the Netherlands*, [2010] ECR I-3683 and Joined Cases C-300/09 and C-301/09, *Toprak and Oguz*, [2010] nyr. See for an interpretation of the standstill obligation: A. Hoogenboom, 'Moving forward by standing still? First admission of Turkish workers: comment on Commission v Netherlands (Administrative Fees)', 35(5) European Law Review (2010) 707.

<sup>110</sup> See Case C-237/91, *Kus*, [1992] ECR I-6781, para. 25.

<sup>111</sup> As noted above. Decision 1/80 is a decision by the Association Council established by the Ankara Agreement with a view to further developing the Association. It provides, among other things, several articles relating to the free movement of Turkish workers.

<sup>112</sup> See Case C-237/91, *Kus*, [1992] ECR I-6781, para. 29-30.

<sup>113</sup> For a more general account regarding the conditions see P. Boeles et al., *European Migration Law*, (Intersentia, 2009), p. 95-105.

Decision 1/80. From the case law on this issue one can conclude that 10 hours' work per week, the minimum Member States must allow under Article 17 of Directive 2004/114, is capable of satisfying this requirement.<sup>115</sup> Secondly, the Turkish national must be 'legally employed'<sup>116</sup>, which should not present any difficulties as he/she can derive a right to work from Directive 2004/114. Finally, the Turkish national must be 'duly registered as belonging to the labour force of the Member State'. This criterium has been held to mean that the Turkish national must have complied with the requirements laid down by national law regulating entry and the conditions of first employment.<sup>117</sup> The satisfaction of this criterium should not present any problems following the Court's ruling in *Payir*: In this case the Court held that the fact that a Turkish national was admitted to the territory of the Member State for the purposes to pursue a study did not bar him from relying on Article 6 of Decision 1/80.<sup>118</sup> It follows that Article 6 of Decision 1/80 could apply to the situation of a student-worker having been admitted on the basis of Directive 2004/114.

Finally, a Turkish student-worker will also be able to claim equal treatment as regards access to education and study grants. This follows from the principle of non-discrimination laid down in Article 10 of Decision 1/80 which in the case of *Wählergruppe Gemeinsam* the ECJ interpreted with reference to the right to equal treatment for EU workers found in Article 45 TFEU.<sup>119</sup> It further held that Regulation 1612/68 (now Regulation 492/2011) was but a specific expression of the principle of non-discrimination in Article 45 TFEU.<sup>120</sup> Since the Court held in the case of *Lair*<sup>121</sup> that EU national-workers could claim equal treatment and receive maintenance grants for study purposes under the same conditions as host Member State on the basis of Article 7 (2) of Regulation 1612/68 (now 7(2) 492/2011), it follows that Turkish student-workers must be able to claim the same right on the basis of Article 10 (1) of Decision 1/80.

As to access to education, the Court had held in *Gravier* (as seen above) that EU nationals could claim equal treatment as regards access to education on the basis of what is now Article 18 TFEU.<sup>122</sup> While there has not been a case explicitly confirming the application of the non-discrimination principle in Article 45 TFEU as regards access to education, it can be safely assumed to fall within the scope of that Article<sup>123</sup>, and thus in the scope of Article 10 (1) of Decision 1/80. This is an important right as tuition fees are often (significantly) higher for TCN nationals than for host Member State or migrant EU nationals.

*The student, child of a Turkish worker.* As before the Member State retains discretion to authorise the first admission of the child.<sup>124</sup> If this route is chosen, the right of residency of the child will initially depend on national legislation, with Article 7 of Decision 1/80 providing labour market access after the

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<sup>114</sup> The ECJ has held that this concept is to be interpreted in reference to the concept of Union worker, see: Case C-1/97, *Birden*, [1998] ECR I-7747, para. 23-25.

<sup>115</sup> See Case C-14/09, *Genc*, [2010] ECR I-931, in particular para. 22-25.

<sup>116</sup> Defined as a 'stable and secure situation as a member of the labour force of the host Member State', Case C-188/00, *Kurz*, [2002] ECR I-10691, para. 48. This criterium has been used to exclude Turkish workers from the scope of protection of Decision 1/80 who were only allowed work during the time an appeal procedure ran against the refusal to confer a residency permit, see Case C-192/89, *Sevince*, [1990] ECR I-3461, para. 31-32.

<sup>117</sup> Case C-1/97, *Birden*, [1998] ECR I-7747, para. 37

<sup>118</sup> Case C-294/06, *Payir*, [2008] ECR I-203, para. 44

<sup>119</sup> Case C-171/01, *Wählergruppe Gemeinsam*, [2003] ECR I-4301, para. 73.

<sup>120</sup> Case C-171/01, *Wählergruppe Gemeinsam*, [2003] ECR I-4301, para. 80-88.

<sup>121</sup> Case 39/86, *Lair*, [1988] ECR 3161, para. 21-24

<sup>122</sup> Case 293/83, *Gravier*, [1985] ECR 593, para 15-26

<sup>123</sup> Can be read in Case 152/82, *Forcheri*, [1983] ECR 2323, para. 10-17.

<sup>124</sup> Of course, this is different if the child is actually born in the host Member State.

family member has resided for a few years in the host Member State.<sup>125</sup> However, the child may also rely on Directive 2004/114 with a view to gaining entry and combine this with the rights he may derive under Article 7 of Decision 1/80.

In both cases the student-child is in a very strong position as regards its rights to its education: Article 9 of Decision 1/80 was interpreted in *Gürol*<sup>126</sup> to provide the Turkish child-student with a directly effective right of equal treatment for both as regards access to education as well as study grants.

#### *The Turkish national versus the TCN under Directive 2004/114.*

The Turkish national-student seeking only to study will not be in a more favourable position than a 'general' TCN: they will both have to rely on Directive 2004/114 with a view to gaining admission and the Turkish pure student will only have the rights conferred by that Directive.

However, a combination of the right to admission under Directive 2004/114 and the relevant provisions in Decision 1/80 creates interesting possibilities: by using Directive 2004/114 as a means of admission and subsequently taking up employment next to the studies, the Turkish national will most likely fulfil the requirements to be considered a worker and thus be able to claim several rights on the basis of the aforementioned Decision 1/80. In particular, it has been argued that after one year of legal employment the Turkish student-worker will qualify for the rights under Article 6 of Decision 1/80 and thus be entitled to a renewal of his or her work permit and concomitant right of residency. This means that the Turkish worker will no longer need sufficient resources, and will no longer be limited as regards the hours of work imposed by the Directive, as the right of residency is now derived directly from the more favourable Article 6 of Decision 1/80. Since Article 4 Directive 2004/114 allows for cherry-picking the most favourable rights however, one might still argue that the Turkish national retains his or her limited right of study-related mobility, under the conditions as mentioned in Article 8 of Directive 2004/114. Worker status also means that the Turkish national will be able to rely on Article 10 (1) of Decision 1/80 to claim equal treatment as regards access to education and study grants.

Finally, the student, child of a Turkish worker may use Directive 2004/114 to gain admission to the Member State of his worker-parent and subsequently enjoy full equal treatment as regards access to education and study grants following the case of *Gürol*.

#### *Implications for Indian students.*

The above case studies have shown that certain TCN nationals can derive additional rights from EU law either on the basis of their status as family member of an EU citizen or on the basis of cooperation agreements concluded by the EU with their country. This allows some of the limitations of Directive 2004/114 to be overcome (eg. no follow-up residency for work purposes can be circumvented by Turkish students relying on Article 6 of Decision 1/80, additional financial resources that can be obtained through non-discrimination on grounds of nationality). Indian nationals (unless qualifying as a family member of an EU citizen), however, are not so fortunate. The current 1994 EU-India Cooperation Agreement contains no equal treatment or residency rights for Indian students, student-workers or children of Indian workers. It is unclear whether the pending Free Trade Agreement will change this status quo; the scope of the negotiations seems to be limited to liberalisation of goods and services as well as tackling non-tariff barriers. As such, in its final form the EU-India FTA may be

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<sup>125</sup> A child of a Turkish worker having completed a course of vocational training gains immediate access to the labour market in case the worker-parent has been legally employed in the host Member state for a period of three years: see Article 7 of Decision 1/80, last paragraph.

<sup>126</sup> Case C-374/03, *Gaye Gürol v Bezirksregierung Köln*, [2005] ECR I-6199, para. 20-21, 26, 36-38.

alike to the recently concluded EU-Korea FTA<sup>127</sup> which has similar objectives. This agreement does not contain any relevant provisions that may affect the position of students on issues of residency and/or equal treatment.<sup>128</sup> Overall, therefore, the position of Indian students when it comes to rights of residency etc. is that of the 'generic' TCN, which is primarily determined by Directive 2004/114.

#### 4. Conclusion.

This paper aimed to look at the different conditions under which a third-country national student could claim admission to the EU for the purposes of study and which rights of relevance to the study could be claimed. The basic instrument for admission, Directive 2004/114, provides a right of residency upon fulfilling the relevant conditions, among which the most salient the requirements of identification papers, enrolment in an establishment for higher education and sufficient resources in combination with comprehensive medical insurance. In addition to a right of residency, the Directive also provides the TCN student with some limited rights relating to work and mobility within the EU for study purposes. However, while the merits of a harmonised admission procedure should not be discounted, the Directive also suffers from some serious flaws, in particular due to the lack of provision of post-study work-and-residency permits, the limitations applying to the amount of work a TCN student may undertake and the cumbersome right of intra EU study mobility. Looking in particular at the concerns raised by Indian students as to funding for their studies abroad as well as their desire to work post-study in the host State, these limitations can be considered serious and undermine the attractiveness of the EU as a place to study. The Commission in its review of the Directive has acknowledged the issues therewith (including those mentioned here) and is seeking to amend the Directive addressing in particular the post-study work possibility.<sup>129</sup> At the moment of writing, the Commission is still engaged in drafting this proposal.

As regards the case studies engaged in, we saw that certain categories of third-country nationals can claim additional rights on the basis of international agreements and other EU legislation. The position of third-country national family member, joining a Union citizen, is primarily regulated by Directive 2004/38 and is in substantive terms approximated to that of the Union citizen itself. This allows a TCN family member-student to claim a strong, albeit dependent, right of residency as well as additional rights of equal treatment as regards such matters as access to education and, in some circumstances, study grants. In addition the TCN family member-student has a more extensive right to engage in an economic activity than under Directive 2004/114. Swiss nationals, as a result of elaborate international agreements concluded between the EU and Switzerland, also enjoy a wide range of rights. The Swiss student, coming to the EU solely for study purposes, is not subject to visa or language requirements, has more extensive mobility rights as well as a more extensive right to work. Taking up such works qualifies the Swiss student-worker as an employed person, which in turn leads to increased rights, in the form of a stronger right of residency irrespective of having sufficient resources and a right of equal treatment as regards access to education and study grants. Finally, the position of student-children is also strong, with a right of residency dependent on that of the Swiss parent, and with equal treatment benefits similar to those enjoyed by the student-worker. The position of Turkish nationals is more patchwork than that of the Swiss national. The Turkish study-only national will have apply on the basis of (national legislation implementing) Directive 2004/114 to gain admission for study purposes. After being admitted however, the Turkish student can combine Directive 2004/114 with the rights under Decision 1/80 if he or she finds employment. This leads to a

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<sup>127</sup> Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part, OJ [2011] L127/6

<sup>128</sup> See also in particular Art. 7.1 (6) EU-Korea FTA.

<sup>129</sup> COM(2011) 587 Final, Report from the Commission to the European Parliament and the Council on the application of Directive 2004/114/EC on the conditions of admission of third-country nationals for the purposes of studies, pupil exchange, unremunerated training or voluntary service of 28.9.2011, p. 10-11.

stronger right of residency and equal treatment benefits across the board. The student-child of a Turkish worker is in a similarly favourable position: it may rely on Directive 2004/114 for its residency rights and Decision 1/80 for a right to equal treatment including access to education as well as study grants.

As such Directive 2004/114 offers interesting possibilities to those TCN nationals being able to claim certain rights on the basis of international agreements concluded by the EU with third countries. While Swiss nationals may have no real use for Directive 2004/114, Turkish nationals, and possibly other types of TCN from countries with which the EU has concluded agreements, do benefit from the best of both worlds-approach. Should the currently still negotiated agreement between India and the EU contain certain provisions setting out equal treatment rights, it may be that Indian students will also be able to claim a privileged position in the future.