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Migration and mobility of third-country researchers and students in the European Union and Switzerland

Der Beitrag analysiert die Bestimmungen der Richtlinie über die Bedingungen für die Einreise und den Aufenthalt von Drittstaatsangehörigen zu Forschungs- und Studienzwecken in der EU. Im Weiteren beleuchtet er die gesetzlichen Bestimmungen der Schweiz, welche den rechtlichen Status von Forschern und Studenten aus den Drittländern festlegen. Um die Attraktivität der EU und der Schweiz für Wissen und Innovation zu fördern, sollte der rechtliche Status von Drittstaatsangehörigen weiter verbessert werden. Ebenfalls sollte die Kooperation zwischen der EU und der Schweiz in diesem Bereich verbessert werden.

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1. Legal situation in the European Union and Switzerland

[Rz 1] Researchers and students from third countries make up a special category of mobile highly-qualified migrants in the European Union (hereinafter referred to as the *EU*) and Switzerland¹. Even though third-country researchers and students have slightly different intentions – to either undertake research after they complete their studies or to follow study programmes – they both aim at pursuing intellectual activities in the academic sector at a university of the EU or Switzerland.

[Rz 2] The need of attracting third-country nationals for research or study purposes for the economy and the boost of innovation in Europe was emphasized in the Lisbon European Council of 23 and 24 March 2000 and consequently the creation of a European Research Area (hereinafter referred to as the *ERA*)² as one of top priorities³. A new impetus was given in 2007 with the Euro-

¹ Switzerland has been chosen for its close partnership with the EU based on bilateral agreements, which guarantee free movement rights. Switzerland, therefore, is not considered as a third country for the purpose of this article. See in particular the Agreement on free movement of persons: 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 – Final Act – Joint Declarations (with amendments), OJ L 114, 30 April 2002. See also Art. 2, para. 2(e) of the Directive (EU) 2016/801 of the European Parliament and of the Council of 11 May 2016 on the conditions of entry and residence of third-country nationals for the purposes of research, studies, training, voluntary service, pupil exchange schemes or educational projects and au pairing (recast), OJ L 132, 21 May 2016.

² KAY HAILBRONNER, SIGRID GIED (eds.). *European migration law. A Commentary* (2016), p. 622–623.

³ JOS BERGMANN, DANNY PIETERS, PAUL SCHOEKENS, KIRSTEN VANDEN BEMPTS. General conclusions and recommendations: steps towards a true and dynamic European Research Area. In Jos Berghman and Paul Schoukens' (eds.). *The Social Security of Moving Researchers* (2011), p. 123.

pean Commission's Green Paper on ERA⁴, which particularly intended to promote an increased researcher' mobility⁵. This goes hand in hand with the aim of Europe to become more competitive globally and attract persons who have skills that are lacking on the European market⁶.

[Rz 3] Even though the EU had already enacted special legislation on migration⁷ of third-country researchers and students moving to the EU, namely the Council Directive 2004/114 on the conditions of admission of third-country nationals for the purposes of studies, pupil exchange, unremunerated training or voluntary service (hereinafter referred to as the *Students Directive*)⁸ and Directive 2005/71 on a specific procedure for admitting third-country nationals for the purposes of scientific research (hereinafter referred to as the *Researchers Directive*)⁹, these highly-educated individuals are still treated differently from EU/Swiss researchers and students¹⁰ who can freely move in Europe¹¹, and thus face obstacles specifically related to the conditions of their admission to a university in the EU, their legal status while doing research or studying, and residence rights after completing their research or study programmes.

[Rz 4] In its Communication of 6 April 2016 on the reform of the Common European Asylum System and enhancing legal avenues to Europe, the European Commission (hereinafter referred to as the *Commission*) emphasized the need of a smarter and better-managed migration policy, including facilitated admission and intra-EU mobility of third-country nationals coming to the EU for research or study purposes¹². As a response to that, a new Directive 2016/801 of the European Parliament and of the Council on the conditions of entry and residence of third-country nationals for the purposes of research, studies, training, voluntary service, pupil exchange schemes or educational projects and au pairing (hereinafter referred to as the *Recast Directive*)¹³ was adopted on 11 May 2016. The Recast Directive merges the Researchers Directive and the Students Directive into one legal instrument, which must be implemented by the Member States of the EU before 24 May 2018.

[Rz 5] Switzerland, one of the most important partners of the EU in the area of academic research, remains one of the most popular destinations of highly educated researchers and students in Eu-

⁴ Green Paper of the European Commission. The European Research Area: New Perspectives. COM(2007) 161 final.

⁵ GREGA STRBAN. Variety of researchers and social security. In Jos Berghman and Paul Schoukens' (eds.). *The Social Security of Moving Researchers* (2011), p. 23.

⁶ Communication from the Commission to the European Parliament and the Council. Towards a reform of the Common European Asylum System and enhancing legal avenues to Europe. COM(2016) 197 final, p. 16–18.

⁷ The word *migration* will be used within the context of entering the external borders of the EU, while *mobility* means movement of the researchers and students within the EU – between different Member States of the EU.

⁸ Council Directive 2004/114/EC of 13 December 2004 on the conditions of admission of third-country nationals for the purposes of studies, pupil exchange, unremunerated training or voluntary service (*Students Directive*). OJ L 375, 23 December 2004.

⁹ Council Directive 2005/71/EC of 12 October 2005 on a specific procedure for admitting third-country nationals for the purposes of scientific research (*Researchers Directive*). OJ L 289, 3 November 2005.

¹⁰ Third-country researchers and students wishing to come to the EU or Switzerland enjoy no free movement.

¹¹ ANJA WIESBROCK. Free movement of third-country nationals in the European Union: the illusion of inclusion. *European Law Review*. 2010, 35(4), p. 463.

¹² Communication from the Commission to the European Parliament and the Council. Towards a reform of the Common European Asylum System and enhancing legal avenues to Europe. COM(2016) 197 final.

¹³ Directive (EU) 2016/801 of the European Parliament and of the Council of 11 May 2016 on the conditions of entry and residence of third-country nationals for the purposes of research, studies, training, voluntary service, pupil exchange schemes or educational projects and au pairing (recast) (*Recast Directive*). OJ L 132, 21 May 2016. It must be mentioned that this Article is dealing only with the legal status of third-country students and researchers, thus excluding pupils, volunteers, trainees and au pairs from the scope of the research.

rope¹⁴, including those from third countries. Switzerland has signed bilateral agreements with some countries outside the EU aiming at the facilitation of research cooperation¹⁵. However, whereas researchers and students from the EU enjoy free movement to Switzerland on the basis of a bilateral agreement¹⁶, the legal status of third-country nationals including researchers and students is governed by the rather restrictive provisions of the Federal Act on Foreign Nationals (hereinafter referred to as the *Foreign Nationals Act*)¹⁷ and the Regulation on Admission, Residence and Employment (hereinafter referred to as the *Regulation*)¹⁸.

[Rz 6] Following wide discussions on the need to improve the legal status of third-country nationals who graduated from Swiss universities, certain amendments of the Foreign Nationals Act and of the Regulation were approved by the Swiss Parliament in 2010¹⁹. These amendments aim at facilitating the admission and integration of third-country nationals who graduated in Switzerland (including those at an early stage of research, such as doctoral students), so that they can make better use of their residence rights and can be successfully integrated into the Swiss labour market after the completion of their studies.

[Rz 7] In the light of the above mentioned aspects, the objective of this article is to give a critical overview of the most relevant amendments of the Recast Directive on the one hand and present the Swiss Foreign Nationals Act and the Regulation on the other hand, allowing a comprehensive assessment of the legal status of third-country nationals coming to the EU or Switzerland for research and study purposes. It will then be evaluated whether certain barriers influencing the migration of highly-educated individuals have been (successfully) eliminated by the latest legal amendments. Finally, it will be illustrated what could or should be done to attract more brains and to enhance innovation in Europe.

¹⁴ International Student Migration Fact Sheet. World Education Services, Symposium on International Students: The New Skilled Migrants, November 2010: <https://www.wes.org/CA/events/FactSheet.pdf>, Accessed on October July 2016.

¹⁵ State Secretariat for Education and Research (SER): Higher education and research in Switzerland: <https://www.sbf.admin.ch/sbfi/en/home/topics/swiss-international-cooperation-in-research-and-innovation/international-affairs/federal-administrations-bilateral-programme-to-promote-research-.html>, Accessed on 5 December 2016.

¹⁶ 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 – Final Act – Joint Declarations (with amendments), OJ L 114, 30 April 2002.

¹⁷ Federal Act on Foreign Nationals (Bundesgesetz über die Ausländerinnen und Ausländer) of 16 December 2005, BBI 2005 7365.

¹⁸ Regulation on Admission, Residence and Employment (Verordnung über Zulassung, Aufenthalt und Erwerbstätigkeit) of 24 October 2007, AS 2007 5497.

¹⁹ Initiative parlementaire – Rapport du 5 Novembre 2009 de la Commission des institutions politiques du Conseil National – Faciliter l'admission et l'intégration des étrangers diplômés d'une haute école Suisse (08.407) et la Modification du Loi fédérale sur les étrangers de L'Assemblée fédérale de la Confédération Suisse (RS 142.20) : <https://www.admin.ch/opc/fr/federal-gazette/2010/373.pdf>, Accessed on 16 September 2016.

2. Recast Directive – new rules for a facilitated admission of third-country researchers and students to universities of the EU

[Rz 8] The weaknesses of the previous regime for admitting third-country nationals for research or study purposes to universities established in Member States of the EU were identified by the Commission²⁰ and criticized by legal scholars²¹.

[Rz 9] The main shortcomings of the Students Directive and the Researchers Directive as highlighted in implementation reports of the Member States of the EU were lengthy and complicated administrative procedures for admission including the obtainment of visas and residence permits, limited rights to teach for researchers, restricted economic activities of students outside their study time, difficulties in exercising intra-EU mobility (making it virtually impossible to participate in certain EU programmes including mobility measures such as Erasmus Mundus or Marie Curie), the lack of opportunities to be integrated in the labour market of the EU, no family reunification rights for researchers and no guarantee for effective judicial protection²². In addition, improvements were considered necessary because of the low number of third-country researchers and students admitted for research or studies in the EU under the Students Directive and the Researchers Directive²³. Eventually, in a broader context, amendments were needed in order to enhance the attractiveness and competitiveness of the EU as a destination for highly-qualified third-country nationals and the need of exchanging ideas and establishing human relations, which can promote mutual understanding and intercultural competences and help assisting personal development²⁴.

[Rz 10] It is already evident from the Preamble of the Recast Directive that its objective – to alleviate the migration of third-country nationals coming to the EU for research or study purposes by facilitating their intra-EU mobility and consequently withdrawing certain legal barriers related to their residence rights and employment possibilities²⁵ – is to remove the aforementioned legal barriers.

[Rz 11] This article will analyse a number of amendments with which the Directive has made it easier for third-country students and researchers to come and stay in a Member State of the EU. The focus will be in particular on harmonized rules on admission conditions²⁶, extra economic rights for students²⁷, increased possibilities for intra-EU mobility²⁸, the integration of

²⁰ Commission Staff Working Document on the Proposal for a Directive of the European Parliament and of the Council on the conditions of entry and residence of third-country nationals for the purposes of research, studies, pupil exchange, remunerated and unremunerated training, voluntary service and au pairing, recasting and amending Directives 2004/114/EC and 2005/71/EC. COM(2013) 151 final and SWD(2013) 78 final, p. 10–22.

²¹ KOCHAROV, p. 913–926; WIESBROCK, p. 455–475.

²² COM(2013) 151 final and SWD(2013) 77 final.

²³ Report from the Commission to the Council and the European Parliament on the application of Directive 2005/71/EC on a specific procedure for admitting third-country nationals for the purposes of scientific research. COM(2011) 901 final, p. 9; 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. COM(2011) 587 final, p. 9–10.

²⁴ COM(2013) 151 final and SWD(2013) 78 final, p. 13–15.

²⁵ Paras. 14, 44 and 53 of the Preamble of the Recast Directive.

²⁶ Arts. 5–11 of the Recast Directive.

²⁷ Arts. 24 of the Recast Directive.

²⁸ Arts. 27–29 and 31 of the Recast Directive.

students and researchers into the labour market of the EU²⁹, more rights for family members of researchers³⁰ and effective judicial protection and other procedural guarantees³¹.

[Rz 12] Before delving into the details of the provisions of the Recast Directive, it is important to mention that this Directive is not applicable to Switzerland, as Swiss researchers and students coming to the EU for research or study purposes can make use of more favourable provisions of bilateral agreements between Switzerland and the EU and thus enjoy free movement rights³². Moreover, some other Member States of the EU – the United Kingdom, Ireland and Denmark – did not take part in the adoption of the Recast Directive and are therefore not bound by its provisions³³.

2.1. Conditions for admission for research or study purposes

[Rz 13] The Recast Directive has merged requirements for admission to universities of the EU for both researchers and students from third countries³⁴. The structure of the Recast Directive is now much clearer and leads to a better understanding of the conditions to be met before becoming a third-country student or researcher in the EU.

[Rz 14] Pursuant to the legal provisions of the Recast Directive, students and researchers must first satisfy general admission requirements³⁵, which are similar for both categories of third-country nationals and which should be verified after submitting certain documents. The general conditions of admission have been merged in one article and are the following: valid travel document, evidence of sickness insurance, payment of application fees and evidence of sufficient resources during research or studies (the assessment of what must be based on an individual examination)³⁶. The list of these requirements is exhaustive, no other general conditions may be set by the Member States.

[Rz 15] If the general conditions are met, specific requirements must be satisfied. These have also been simplified and harmonized compared to the complicated previous legislation, and vary for researchers and students.

[Rz 16] The main specific admission condition for researchers is the submission of the hosting agreement or the contract with the hosting research organisation, which must be approved in accordance with national laws³⁷. Compared to the previous Researchers Directive, it is evident that the hosting agreement is not the only document proving that a third-country national will be working at the research organisation of the EU. A contract meeting the requirements of article

²⁹ Art. 25 of the Recast Directive.

³⁰ Arts. 26 and 30 of the Recast Directive.

³¹ Art. 34 of the Recast Directive.

³² Art. 2, Para. 2(e) and Article 4, Para. 1(a) of the Recast Directive. The Recast Directive also allows more favourable provisions of bilateral and multilateral agreements between one or more Member States of the EU and third countries: Art. 4, Para. 1(b) of the Recast Directive.

³³ Paras. 65 and 66 of the Preamble of the Recast Directive.

³⁴ Chapter II (Admission) of the Recast Directive.

³⁵ These requirements are valid travel document, sickness insurance and sufficient resources. See Article 7 of the Recast Directive.

³⁶ Art. 7 of the Recast Directive.

³⁷ Arts. 8 and 10 of the Recast Directive.

10 of the Recast Directive is now considered as a document equivalent to a hosting agreement³⁸. The Recast Directive presents the requirements for both the hosting agreement and the contract with the hosting organisation in a clearer and more consistent way, thus making it easier to check whether a particular hosting agreement or a contract satisfies the particular conditions mentioned by the Recast Directive.

[Rz 17] Students as economically non-active third-country nationals must meet more specific requirements such as being accepted for a course or studies, having sufficient resources to cover study costs, having sufficient knowledge of the study language and providing a proof of payment of study fees³⁹. Pursuant to the Recast Directive, the list of these specific requirements is considered as being exhaustive. It is thus evident that the practice of certain Member States requiring that third-country nationals wishing to study at a higher education institution in their territory should satisfy additional condition for admission should be considered as breaching EU law.⁴⁰

[Rz 18] It must be emphasized in this context that the threat for reasons of public policy, public security or public health is no longer a reason for refusing the admission of third-country nationals for research or study purposes in the EU. This topic, in particular relevant in the case of international terrorism, is now included in articles 20 and 21 of the Recast Directive and can be a reason for rejecting, withdrawing or refusing to renew an authorisation, be it in the form of a residence permit or of a long-stay visa⁴¹.

[Rz 19] The Recast Directive for the very first time includes a provision stating that when all general and specific conditions are met, a third-country national *should* be admitted for research or study purposes to the university of the Member State of the EU, meaning that there is no margin of discretion once the criteria are met. This provision mirrors the practice of the Court of Justice of the European Union (hereinafter referred to as the *Court*)⁴² and will preclude the Member States from establishing additional conditions for admission than those required by the Recast Directive and in such a way hindering the access of researchers and students from third countries in the EU⁴³.

2.2. Extra economic rights for students and facilitated employment during their studies

[Rz 20] The Recast Directive improves the financial situation of students from third countries by increasing the number of hours they will be allowed to work per week from 10 to 15 (in accordance with national laws of the Member States of the EU)⁴⁴. Furthermore, Member States will lose the possibility to restrict the employment of students during their first study year and students will not have a duty to report that they are engaging in economic activities or to obtain authorisations for work. Finally, employers will no longer be required to get authorisations for

³⁸ Art. 10 of the Recast Directive.

³⁹ These requirements are the following: acceptance of the student to follow a course or studies, payment of fees, sufficient knowledge of the study language, sufficient resources to cover the study costs.

⁴⁰ Decision CJEU of 10 September 2014 C-491/13 *Ben Alaya*, Para. 30.

⁴¹ Arts. 17 and 21 of the Recast Directive.

⁴² Decision CJEU of 10 September 2014 C-491/13 *Ben Alaya*, Para. 35.

⁴³ COM(2011) 901 final, p. 5.

⁴⁴ Art. 24 of the Recast Directive.

hiring third-country nationals studying in the EU⁴⁵ and in that way will be relieved from certain administrative burdens. As a result, students from third countries now have a chance to cover part of their tuition fees and other costs by working. All that will facilitate the continuation of their studies abroad, in particular for students who do not benefit from scholarships⁴⁶.

[Rz 21] It is therefore significant that Member States will still be able to consider the situation of their labour market and in that way restrict the employment of third-country students⁴⁷. The Court has previously emphasized that Member States can limit the access of third-country nationals studying in the EU to the employment on their territory in exceptional cases only⁴⁸. Member States should therefore rather take into account recommendations of the Commission not to treat third-country students as ordinary workers and to invoke the situation of their labour markets based on objective criteria⁴⁹.

2.3. Integration of students and researchers into the labour market of the EU

[Rz 22] Article 25 of the Recast Directive can be considered as one of the main improvements of the current legal status of researchers and students coming from third countries to the EU⁵⁰. This article for the very first time imposes an obligation on every Member State bound by the Directive to allow third-country researchers and students to stay on its territory for at least nine months for seeking an employment or setting up a business⁵¹. The aforementioned provision can be seen as a key element for attracting highly-educated students and researchers from third countries to Member States of the EU⁵². This is similarly an incentive for them to stay on the territory of the EU longer, which will allow them to not only identify their employment possibilities but to also to contribute to the competitiveness of the EU in case their search for a job is successful.

[Rz 23] Member States of the EU, however, will be allowed to apply particular restrictions. Foremost, a certain minimum level of degree obtained can be set for students wishing to benefit from this provision. Furthermore, after three months, Member States can require to prove that a real chance of getting a job exists. Thirdly, Member States are allowed to require that the employment eventually found corresponds to the level of research or studies. Eventually, for getting residence permits for a job search, third-country researchers and students will have to undergo specific administrative procedures and submit relevant documents⁵³. As a result, the stay of students and researchers from third countries for a job-search remains subject to the fulfilment of certain conditions and requirements. On the one hand, these requirements can be regarded as aiming to preclude fraud and/or illegal activities. However, on the other hand, it is doubtful whether such measures do not contradict the objective of successfully integrating third-country nationals who

⁴⁵ Compare with Art. 17 of the Students Directive.

⁴⁶ COM(2013) 151 final and SWD(2013) 78 final, p. 20.

⁴⁷ Art. 24, Para. 3 of the Recast Directive.

⁴⁸ Decosopn CJEU of 21 June 2012 C-15/11 *Sommer*, Para. 42.

⁴⁹ COM(2011) 587 final, p. 8.

⁵⁰ HAILBRONNER, GIES, p. 571.

⁵¹ Art. 25, Para. 1 of the Recast Directive.

⁵² COM(2013) 151 final and SWD(2013) 78 final, p. 20.

⁵³ Art. 25, Paras. 2–7 of the Recast Directive.

completed their research or studies in the EU and who have skills that are lacking in Europe into the European labour market. It is also questionable whether all these conditions (in particular the one requiring to submit a prove of a real chance of getting a job) are proportionate. Finally, it is uncertain whether the period of nine months is long enough to find a position corresponding to research activities or studies performed in the EU.

2.4. Increased possibilities for intra-EU mobility

[Rz 24] Intra-EU mobility of students and researchers is an important element of attracting highly-educated third-country nationals to Member States of the EU⁵⁴. The limitations of provisions of the Students Directive and the Researchers Directive regarding intra-EU mobility for researchers and students from third countries were considered as main hurdles of the previous legal regime, in particular regarding mobility for more than three months⁵⁵. The Recast Directive aims at strengthening intra-EU mobility of researchers and students by introducing simplified requirements related to certain EU programmes comprising mobility measures and distinguishing between general intra-EU mobility rules for both researchers and students and specific rules applicable to researchers or students only⁵⁶.

[Rz 25] Pursuant to the Recast Directive, the main general rule is that third-country students following their studies in one Member State can enter the territory of the second Member State(s) for study purposes on the basis of EU or multilateral programmes including mobility measures or relying on an agreement between two or more higher education institutions. Third-country researchers working on a research project in a Member State of the EU will be allowed to move to another Member State(s) for the purpose of their research activities in the first Member State. In addition to that, researchers will be allowed to teach and students will be entitled to work in the first and the second Member State(s)⁵⁷.

[Rz 26] It is obvious from pertinent provisions of the Recast Directive that different requirements will be applicable to short-term and long-term mobility of researchers. Short-term mobility, which will now be understood as a period comprising no more than 180 days in any 360-day period, will be simplified, so that third-country nationals doing their research in the EU will be entitled to move to the second Member State(s) of the EU on the same valid authorisation issued by the first Member State⁵⁸. If this is the case, Member States will still have a discretion to require that a researcher or a research organisation notifies competent authorities of the first and second Member State(s) of the intention of the third-country researcher to perform a part of his/her research activities in the second Member State(s). Such a notification will be dependent on the submission of a long list of documents in accordance with the Recast Directive⁵⁹.

[Rz 27] Long-term mobility – a period of more than 180 days – is left to the discretion of Member States: they will be able to choose whether to allow third-country nationals doing their research

⁵⁴ HAILBRONNER, GIES, p. 651.

⁵⁵ WIESBROCK, p. 462–465.

⁵⁶ Arts. 27–31 of the Recast Directive.

⁵⁷ Art. 27 of the Recast Directive.

⁵⁸ Art. 28, Para. 1 of the Recast Directive.

⁵⁹ Art. 28, Paras. 2–10 of the Recast Directive.

in one Member State to move to the second Member State(s) on the basis of the same valid authorisation issued by the first Member State or to apply a specific procedure. The Recast Directive specifies the requirements for this specific procedure⁶⁰ thus making it evident that in such a case a third-country researcher or a research organisation will be dependent on the duty to transmit a lot of obligatory documents to competent authorities of the second Member State(s).

[Rz 28] Compared to the Researchers Directive, the Recast Directive has strengthened intra-EU mobility of third-country researchers by granting them an additional right to teach in the second Member State(s) and increasing the period of short-term mobility from three months to 180 days (6 months)⁶¹. Nevertheless, many discrepancies remain. Foremost, the link between EU research programmes such as Marie Curie or other similar programmes comprising intra-EU mobility measures⁶² has not been taken into account and this is an essential shortcoming of the Recast Directive. Furthermore, intra-EU mobility of third-country nationals doing their research in the EU will continue to be dependent on their research activities in the first Member State. Moreover, even more complicated conditions for intra-EU mobility will be applied if the second Member State(s) decides so. Even in the case of short-term mobility third-country researchers can be required to submit a notification including a lot of documents to the second Member State(s) and thus will once again have to meet the requirements for admission for research activities. Regarding long-term mobility of third-country researchers, an additional right to teach and the increased period of long-term mobility of more than 180 days (6 months) can be subject to presenting the same documents as for the first admission (if a Member State so decides).

[Rz 29] Hence it is doubtful whether this wide discretion of Member States as well as unnecessary and even more complex administrative procedures allowed by the Recast Directive do not contradict the aim of the EU to encourage intra-EU mobility of researchers and to attract more brains and innovation to Europe. In fact, concerns have been raised as to whether the Recast Directive has not worsened previous intra-EU mobility rules⁶³.

[Rz 30] Intra-EU mobility of third-country nationals studying in the EU will be more dependent on the applicability of certain EU or multilateral programmes (for instance, Erasmus Mundus), comprising mobility measures or agreements between higher education institutions⁶⁴. If this is the case, students from third countries will be allowed to move to the second Member State(s) to continue their studies for a period of up to 360 days on the basis of the valid authorisation issued by the first Member State. Nevertheless, even in this situation Member States will enjoy discretion to make intra-EU mobility of students dependent on the notification and the submission of certain documents to competent authorities in order to carry out studies in the second Member State(s)⁶⁵. The situation of third-country nationals who study in the EU and who are not covered by programmes including mobility measures or in the absence of the agreement between higher education institutions will be different. Such students will have to meet the conditions for admission to the second Member State(s) once again and their intra-EU mobility will be more limited.

⁶⁰ Art. 29, Paras. 1–7 of the Recast Directive.

⁶¹ HAILBRONNER, GIES, p. 650–651.

⁶² COM(2013) 151 final and SWD(2013) 78 final, p. 17.

⁶³ KOCHAROV, p. 916.

⁶⁴ COM(2013) 151 final and SWD(2013) 78 final, p. 17.

⁶⁵ Art. 31, Para. 1 of the Recast Directive.

[Rz 31] The question arises whether such provisions of the Recast Directive tend to reach its objective to increase the mobility of third-country students in the EU. The answer is probably negative,⁶⁶ since intra-EU mobility of students from third countries will continue to be dependent on a wide margin of discretion of Member States of the EU and on and the outcome of complex administrative procedures – an important shortcoming already identified in the Students Directive⁶⁷.

2.5. More rights for family members of researchers

[Rz 32] Compared to the Researchers Directive, the Recast Directive strengthens the right of family reunification for third-country researchers as an essential condition for doing their research in the EU⁶⁸ and emphasizes that Member States are under an obligation to apply the Family Reunification Directive⁶⁹ in such a situation.

[Rz 33] The structure of the Recast Directive makes it evident that rights of researchers' family members are twofold. The first and the most important basic right is the right to family reunification if the conditions set by the Family Reunification Directive are fulfilled. In this case Member States are under an obligation to allow researchers' family members to accompany a third-country researcher and issue them a residence permit⁷⁰. Next to that, the Recast Directive explicitly mentions the right of a researcher's family members to accompany a third-country researcher to the second Member State(s) in case of intra-EU mobility of the researcher, i.e. the right to intra-EU mobility stemming from the basic family reunification right⁷¹. In other words, the mobility of a researcher's family members is linked to the exercise of intra-EU mobility by the respective third-country nationals performing their research activities in the EU. Considering the fact that short-term and long-term mobility of researchers differ and that this mobility will depend on Member States' discretion, mobility of a researcher's family members will similarly remain subject to certain restrictions.

[Rz 34] Whereas the Recast Directive has granted the right of family reunification to third-country researchers working in the EU⁷², no such right exists for family members of third-country nationals coming for study purposes to Member States of the EU. This is particularly regrettable for those third-country students who are at an early stage of their research career, i.e. doctoral candidates. A family reunification right would facilitate the situation of such students from third countries wishing to stay on the territory of the EU after the completion of their studies in order to look for a job.

⁶⁶ HAILBRONNER, GIES, p. 598.

⁶⁷ KOCHAROV, p. 916.

⁶⁸ HAILBRONNER, GIES, p. 643.

⁶⁹ Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification, OJ L 251, 3 October 2003; See Art. 26, Para. 1 of the Recast Directive.

⁷⁰ Art. 26, Para. 4 of the Recast Directive.

⁷¹ Art. 30 of the Recast Directive.

⁷² HAILBRONNER, GIES, p. 644.

2.6. Effective judicial protection and other procedural guarantees

[Rz 35] Legal provisions regulating procedural guarantees for dealing with applications for admission of third-country researchers and students form an important separate part of the Recast Directive and are threefold.

[Rz 36] First, the Recast Directive contains an essential amendment entitling third-country nationals studying or doing research activities in the EU to judicial redress – a legal challenge to courts of Member States⁷³. That is an important step forward compared to the previous regime permitting researchers and students from third countries to a legal challenge to Member State's competent authorities only⁷⁴ and depriving them of an important legal remedy stemming from the Charter of Fundamental Rights of the European Union⁷⁵.

[Rz 37] Second, a time limit for dealing with applications for authorisations – residence permits and long-stay visas depending on the form chosen by the Member State⁷⁶ – has been introduced: that must be done as soon as possible but not later than 90 days from the submission of the application. An accelerated procedure is applicable if the research organisation has been already approved. In the latter case, the decision must be taken within 60 days⁷⁷. This amendment creates more legal certainty for both students and researchers from third countries and research organisations and will enable them to better plan/arrange studies or research activities⁷⁸. It is doubtful, however, whether these time limits are appropriate (not too long) and whether the procedure for dealing with applications will not cause practical problems related to delays.

[Rz 38] Third, a transparency procedure has been introduced obliging Member States to make information regarding applications, conditions for entry and residence for research or study purposes of third-country nationals and their family members easily accessible⁷⁹. This new provision especially improves the search for conditions for admission⁸⁰ and makes it easier for third-country nationals to make a decision of moving to the EU for research or study purposes.

3. The Recast Directive – a right way forward to attract brains and innovation to Europe?

[Rz 39] The analysed amendments of the Recast Directive disclosed certain shortcomings, some of which were already problematic under the old regime.

[Rz 40] Foremost, the Recast Directive remains a document of minimum harmonization containing a wide discretion of Member States on many issues, such as considering the situation of their labour markets for the employment of students⁸¹, controlling how third-country nationals studying or doing research in the EU make use of their chance to be integrated in the labour market of

⁷³ Art. 34, Para. 5 of the Recast Directive.

⁷⁴ HAILBRONNER, GIES, p. 655.

⁷⁵ COM(2013) 151 final and SWD(2013) 78 final, p. 19.

⁷⁶ Art. 17, Paras. 1–2 of the Recast Directive.

⁷⁷ Art. 34, Paras. 1–2 of the Recast Directive.

⁷⁸ COM(2013) 151 final and SWD(2013) 78 final, p. 19.

⁷⁹ Art. 35 of the Recast Directive.

⁸⁰ COM(2013) 151 final and SWD(2013) 78 final, p. 17.

⁸¹ Art 24, Para. 3 of the Recast Directive.

the EU⁸², applying procedures, which must be complied with for intra-EU mobility for students, researchers and their family members (these procedures became even more complicated than before)⁸³, or dealing with applications for authorisations⁸⁴. Accordingly, the Recast Directive failed to achieve an increased harmonisation level – a problem already identified under the previous regime⁸⁵. The wide margin of discretion of Member States also becomes evident when looking at other provisions of the Recast Directive, i.e. the possibility to renew⁸⁶, reject⁸⁷ or withdraw applications for research or studies⁸⁸, the decision on the possibility of researchers to teach in accordance with national law⁸⁹ or on granting equal treatment rights for researchers⁹⁰. For this reason, third-country nationals are likely to be discouraged rather than encouraged to come for studies or research activities to the EU. In the future, it would be preferable to limit the Member States' margin of discretion.

[Rz 41] Furthermore, some other provisions of the Recast Directive create ambiguities. Even though it is not mentioned among the specific admission conditions for research activities in the EU, the structure of the Recast Directive suggests that only researchers can be admitted to a university of the Member State. A researcher is characterized as a third-country national holding a doctoral degree or a higher education qualification giving access to doctoral programmes⁹¹. This definition raises issues in particular regarding doctoral candidates. Even though the preamble of the Recast Directive encourages Member States to treat doctoral students as researchers⁹², it is more than evident that the interpretation of this important definition is left for the discretion of Member States, which can in practice regard doctoral candidates as students⁹³.

[Rz 42] It would be desirable to treat all doctoral candidates coming to the EU from third countries as researchers at the early stage of their career for the purpose of the Recast Directive. This would create not only more legal certainty, but also enhance their chances of integration into the EU labour market.

[Rz 43] The duration of authorisations (residence permits or long-stay visas) limited to at least one year⁹⁴ produces additional administrative burden for renewing such authorisations after the first year for both students and researchers and creates legal uncertainty. The most logical way would be to issue authorisations for the whole period of studies or research activities in the EU. Member States should consequently be encouraged to take into consideration the duration of a research project or study programme when granting authorisations for third-country students and researchers.

⁸² Art. 25, Paras. 2–7 of the Recast Directive.

⁸³ Arts. 28–31 of the Recast Directive.

⁸⁴ Art. 34, Paras. 1–2 of the Recast Directive.

⁸⁵ COM(2011) 587 final, p. 10.

⁸⁶ Art. 18 of the Recast Directive.

⁸⁷ Art. 20 of the Recast Directive.

⁸⁸ Art. 21 of the Recast Directive.

⁸⁹ Art. 23 of the Recast Directive.

⁹⁰ Art. 22 of the Recast Directive.

⁹¹ Art. 3, Para. 2 of the Recast Directive.

⁹² Para. 12 of the Preamble of the Recast Directive.

⁹³ Art. 3, Para. 3 of the Recast Directive.

⁹⁴ Art. 18, Paras. 1–2 of the Recast Directive.

[Rz 44] The Recast Directive is not applicable to third-country nationals who enjoy long-term resident status⁹⁵ and the link to the Long-Term Residence Directive is missing⁹⁶, despite the directly expressed aim to integrate third-country researchers and students into the labour market of Member States and their possibility to stay on the territory of the EU for a certain period of time to identify their employment possibilities. Also, relevant provisions of the Long-Term Residence Directive make it evident that third-country nationals studying in the EU and third-country nationals who reside solely on temporal grounds or whose residence permit have been formally limited are excluded from the scope of application of this instrument⁹⁷. These legal norms create inconsistencies in the status of researchers and students from third countries who are in fact excluded from a chance to obtain long-term residence status in the Member State of the EU. Moreover, an important barrier to attract brains and innovation to Europe is created. The aforementioned duty of Member States to integrate third-country researchers and students in the labour market of the EU should be related to their possibility of getting long-term residence status in Member States. Similarly, the Long-Term Residence Directive should be applied to these third-country nationals and a direct reference to the Long-Term Residence Directive should be created in the Recast Directive. That would be the most logical solution, which will add more legal certainty and correspond to the jurisprudence of the Court⁹⁸.

[Rz 45] Eventually, the Recast Directive could be interrelated to the Blue Card Directive⁹⁹, at least in the case of third-country researchers (including doctoral candidates) in the EU. These highly-qualified third-country nationals are allowed to search for a job in the EU corresponding their research activities. Therefore, they should be granted a right of getting a blue card and a direct reference to the Blue Card Directive should be included in the Recast Directive¹⁰⁰. A blue card certifying that a third-country researcher is on the territory of a Member State for the purpose of highly qualified employment would increase his/her chances of getting a job after their research activities in the EU.

4. Migration of third-country nationals for research and study purposes to Switzerland – main legal issues

[Rz 46] Switzerland, contrarily to the EU, has no specific legal acts exclusively dealing with the migration of third-country nationals coming to its territory for research or study purposes. Hence from the perspective of Swiss law, the Foreign Nationals Act and the Regulation on Admission, Residence and Employment are the main legal documents of general application, which also determine the legal status of researchers and students from third countries.

⁹⁵ Art. 2, Para. 2(d) of the Recast Directive.

⁹⁶ Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long term residents. OJ L 16, 23 January 2004.

⁹⁷ Art. 3, Paras. 2(a) and (e) of the Long-Term Residence Directive.

⁹⁸ Decision CJEU of 18 October 2012 C-502/10 *Singh*, Para. 54.

⁹⁹ 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. OJ L 155, 18 June 2009. This directive is already under review because of high salary thresholds, which are difficult to be met.

¹⁰⁰ Pursuant to Art. 2, Para. 2(g) of the Recast Directive, blue card holders are excluded from its application. Also the Blue Card Directive sets expressly that third-country researchers are excluded from the scope of its application: see Art. 3, Para. 2(d).

[Rz 47] Since migration from countries not belonging to the EU-EFTA area has been regulated in a restrictive way and no free movement rules are applicable, the rigorous provisions of the Foreign Nationals Act and of the Regulation regarding admission conditions, work and residence permits for all third-country nationals (including those coming to Switzerland for research and study purposes) must first be met before being able to enter the Swiss territory¹⁰¹.

4.1. Reasons for amending the Foreign Nationals Act and the Regulation on Admission, Residence and Employment

[Rz 48] Before 2010, there were wide discussions in Switzerland regarding the improvement of the legal status of those third-country nationals who graduate from a higher education institution in Switzerland. More specifically, it was considered that the restrictive norms of the Foreign Nationals Act and of the Regulation produce constraints for scientific, technical and economic development of Switzerland and impaired its competition at the global level¹⁰². Another argument was the waste of public funds dedicated for studies of third-country nationals who were encouraged to leave the Swiss territory after the completion of their studies and were subsequently employed in another country in direct competition with Switzerland (for example, the United States). As a result, a contradictory effect was created – third-country nationals were educated at a Swiss higher education institution on the condition that they will leave the Swiss territory after they finish their study programmes. Switzerland, consequently, restricted itself from making use of such well-educated people from third countries and instead ensured their departure as soon as possible, despite a real need for highly-qualified specialists¹⁰³.

[Rz 49] Different interest groups expressed their opinions regarding the necessity to change the existing legislation. The community FUTURE, representing interests of institutions of higher education, researchers and politicians engaging in favour of research development in Switzerland, stressed that conditions for coming to Switzerland and obtaining a permission for studies were so strict that many educated third-country nationals opted for other destinations to pursue their studies. In addition, they faced enormous difficulties when looking for a job after completion of their study programmes. All that created negative consequences for Switzerland as a place for high-quality education and economic prosperity¹⁰⁴.

[Rz 50] UNES, the Swiss Students' Union, emphasized the need to integrate third-country nationals who graduate from a Swiss higher institution into the Swiss labour market and in that way ensure intercultural communication. From this perspective, Swiss employers should be relieved from a duty to prove that no other suitable candidate can be found among Swiss nationals and nationals of the Member States of the EU or EFTA states¹⁰⁵.

[Rz 51] The Labour and Economic Office of the Canton of Zürich, however, expressed the opinion that there was no need to change the existing situation since improving the status of third-country nationals who graduate in Switzerland created discrimination between them and other

¹⁰¹ Judgment of the Federal Administrative Court C-2638/2010 of 21 March 2011 (BVGE 2011/1), p. 4–6.

¹⁰² Rapport – Faciliter l'admission et l'intégration des étrangers diplômés d'une haute école Suisse, p. 376.

¹⁰³ Rapport – Faciliter l'admission et l'intégration des étrangers diplômés d'une haute école Suisse, p. 375, 380.

¹⁰⁴ Rapport – Faciliter l'admission et l'intégration des étrangers diplômés d'une haute école Suisse, p. 377–378.

¹⁰⁵ Rapport – Faciliter l'admission et l'intégration des étrangers diplômés d'une haute école Suisse, p. 378.

third-country nationals possessing no higher education diplomas. Moreover, those who come from third-countries, graduate from a Swiss university and who afterwards apply for a job in Switzerland are all well-educated and thereby easily accepted to the Swiss labour market.

[Rz 52] Another authority representing the Canton of Vaud supported the view that amendments of the existing legislation were not needed. The authority supported the position that third-country nationals admitted to Switzerland for study purposes are entitled to stay on the Swiss territory only temporarily and that in fact there is no intention to integrate them in the Swiss labour market¹⁰⁶.

[Rz 53] Following the abovementioned discussions, certain amendments of the Foreign Nationals Act and of the Regulation were approved by the Swiss Parliament in 2010. These amendments codified a practice that had started in 2008¹⁰⁷ and had as its principal aim to improve the legal status of third-country nationals graduating from a Swiss higher education institution (including those at an early stage of research such as doctoral candidates) by facilitating their admission and integration, so that they can make better use of their residence rights and can be successfully integrated into the Swiss labour market after the completion of their study programmes. In addition, other objectives such as meeting the demands of Swiss higher education institutions, attracting more brains and innovation to Switzerland by compensating the shortage of highly-educated specialists and enhancing Switzerland's competition at the international level have been emphasized¹⁰⁸.

4.2. Main legal improvements of the Foreign Nationals Act and of the Regulation on Admission, Residence and Employment

[Rz 54] The principal amendments of the Foreign Nationals Act and of the Regulation, which will be researched in unison with other relevant legal norms of these statutes, can be summarized as follows: Facilitated admission conditions for studies in Switzerland, the possibility to be integrated into the Swiss labour market after graduation and facilitated requirements for obtaining long-term residence status.

4.2.1. Facilitated admission conditions for studies

[Rz 55] In accordance with article 27 of the Foreign Nationals Act, third-country nationals can now be admitted for studies in a Swiss higher education institution – university or professional high school¹⁰⁹ – if they possess appropriate accommodation and necessary financial resources, have a required educational level and personal characteristics needed for studies, and a higher education institution confirms their previously acquired qualifications so that they can start their study programmes¹¹⁰. Pursuant to a relevant provision of the Regulation which has been left un-

¹⁰⁶ Rapport – Faciliter l'admission et l'intégration des étrangers diplômés d'une haute école Suisse, p. 379.

¹⁰⁷ Judgment of the Federal Administrative Court C-3859/2014 of 6 January 2016, p. 9.

¹⁰⁸ Judgment of the Federal Administrative Court C-3859/2014 of 6 January, p. 10.

¹⁰⁹ Judgment of the Federal Administrative Court C-857/2013 of 19 May 2014, p. 11.

¹¹⁰ Art. 27 of the Foreign Nationals Act.

changed, it is the duty of the higher education institution to confirm that a required educational level and personal characteristics needed for studies have been met¹¹¹.

[Rz 56] It is essential to emphasize that a provision of the Foreign Nationals Act obliging third-country nationals to also submit a declaration confirming the intent of departure after the completion of their study programmes has been taken out of the text of the Act, as it contradicted the objective to attract more brains and innovation to Switzerland. This is an important improvement intending to facilitate the admission procedure by only relating it to objective conditions necessary for the commencement of studies and not to an ambiguous requirement, aiming at the protection of the Swiss labour market.

[Rz 57] Particular problems related to the aforementioned admission conditions can however still be identified. Primarily, if qualifications acquired in a third country are not recognized as equal by a Swiss higher education institution, third-country nationals will be precluded from commencing their studies. Furthermore, a third-country national can find it difficult to satisfy the requirement to possess necessary financial resources since the Regulation imposes a burden to prove that either a bank in Switzerland confirms that such a third-country national has enough financial means, or that there is a grant available for studies, or that a person residing in Switzerland issues a financial guarantee in favour of such third-country national¹¹². Moreover, personal characteristics required for studies are met only on the condition that there is no proof that a third-country national aims to pursue his/her studies in Switzerland with the sole aim to evade requirements for entering and staying on the Swiss territory¹¹³. Finally, even the duration of studies (including all study levels such as bachelor, master and doctoral degrees) is regulated and limited to a maximum period of eight years with a possibility to extend this time limit in exceptional situations only¹¹⁴.

[Rz 58] Hence it is still a long and complicated procedure imposing a huge burden on a third-country national, which must be complied with before being admitted for study programmes in Switzerland. Doubts can be raised as to whether the aforementioned amendments are therefore sufficient to improve the legal status of third-country nationals from third countries aiming to pursue their studies on the Swiss territory.

4.2.2. Possibility to be integrated into the Swiss labour market

[Rz 59] Pursuant to the Foreign Nationals Act, third-country nationals who graduate from a Swiss higher education institution acquire a right to stay in Switzerland for further six months to look for employment under the condition that their professional activity is of high scientific or economic importance¹¹⁵. Within this period of time, Swiss employers do not have to show any longer that a suitable employee cannot be found among Swiss or EU nationals, i.e. a priority for Swiss/EU and EFTA nationals is not applicable¹¹⁶.

¹¹¹ Art. 24 of the Regulation on Admission, Residence and Employment.

¹¹² Art. 23, Para. 1 of the Regulation on Admission, Residence and Employment.

¹¹³ Art. 23, Para. 2 of the Regulation on Admission, Residence and Employment.

¹¹⁴ Art. 23, Para. 3 of the Regulation on Admission, Residence and Employment.

¹¹⁵ These criteria are considered as alternative, not cumulative. See Judgment of the Federal Administrative Court C-857/2013 of 19 May 2014, p. 15.

¹¹⁶ Art. 21 of the Foreign Nationals Act.

[Rz 60] It is obvious that, on the one hand, third-country nationals and Swiss employers can now both benefit from this legal norm, which facilitates the procedure of employment of Swiss higher education graduates from third countries and is essential from the perspective of their integration in the Swiss labour market. However, on the other hand, it is doubtful whether the period of six months is enough for finding a position corresponding to the level of studies.

[Rz 61] In addition, a requirement to only hire such third-country nationals with a degree from a Swiss higher education institution whose future professional activity is of high scientific or economic importance is ambiguous. The Foreign Nationals Act is silent on how the scientific or economic importance must be interpreted in this context. The Swiss Federal Administrative Court ruled that high scientific or economic importance can be attributed to such activity, which is performed by a qualified academic at a superior scientific level, i.e. scientific teaching, research¹¹⁷, scientific development or when a specific (unique) specialist knowledge is used in such fields of activities, which are of high economic significance such as, for instance, application of new technologies. In the latter case there must be a proven demand for highly-qualified specialists in that particular field (of studies) or the employment of the highly-educated specialist should be capable of indirectly creating more positions or generating new jobs for the Swiss labour market and thus helping the Swiss economy. Good study grades are not sufficient for considering a particular activity of scientific or economic importance, there must also be a link between any kind of education (social and natural sciences, arts, etc.)¹¹⁸ acquired and the job profile¹¹⁹, which cannot be subordinate or of minor significance (such as, for example, an auxiliary work)¹²⁰. In other words, only «the best heads» from third countries can be attracted and retained in Switzerland¹²¹.

[Rz 62] The latter requirement can be regarded as further restricting chances of third-country nationals graduating from a Swiss higher education institution to find a position in the Swiss labour market and hence contradicts the general objective to improve the legal situation of well-educated individuals. It can be questioned whether the abovementioned interpretation of the Swiss Federal Administrative Court is too restrictive, and thus impossible to be met. To put it differently, it is very doubtful whether a specialist can create new jobs for the Swiss economy directly after his/her graduation. This can also lead to the situation that Swiss employers will give preference to a national of an EU/EFTA Member State (as this is less complicated), even though a better or similarly qualified third-country national with a diploma from a Swiss higher education institution applied for a particular position.

4.2.3. Facilitated requirements for getting long-term residence status in Switzerland

[Rz 63] The last amendment of the Foreign Nationals Act concerns a facilitated requirement for settling permanently in Switzerland. According to the Foreign Nationals Act, a general rule for getting long-term residence status (the so-called C permit) is that a third-country national has

¹¹⁷ A position of a research assistant working part-time can be regarded as having high scientific importance on the condition that such an assistant has good future perspectives to pursue a career of a researcher in a Swiss higher education institution. Also employment in different Swiss higher education institutions are taken into consideration. See Judgment of the Federal Administrative Court C-857/2013 of 19 May 2014, p. 15–19.

¹¹⁸ Judgment of the Federal Administrative Court C-857/2013 of 19 May 2014, p. 13.

¹¹⁹ Judgment of the Federal Administrative Court C-674/2011 of 2 May 2012, p. 10–11.

¹²⁰ Judgment of the Federal Administrative Court C-857/2013 of 19 May 2014, p. 14.

¹²¹ Judgment of the Federal Administrative Court C-3859/2014 of 6 January 2016, p. 10.

legally resided in Switzerland for a period of minimum ten years and has been in a possession of a residence permit without interruption for the last five years. Temporary stays for educational or training purposes are, as a rule, excluded from the aforementioned period of five years. However, an exception has been made for nationals from third countries who graduate from a Swiss higher education institution: the period of their studies in Switzerland are taken into account on the condition that they have possessed a residence permit for an uninterrupted period of two years¹²². This amendment improves the legal status of third-country nationals with a Swiss higher education institution diploma and encourages them to complete their study programmes in Switzerland. This aims at a better integration into the Swiss labour market and increased chances of third country nationals to settle permanently.

4.3. Remaining legal shortcomings

[Rz 64] Despite the aforementioned improvements of the Foreign Nationals Act and the Regulation, essential shortcomings continue to exist.

[Rz 65] First and most essentially, the Foreign Nationals Act and the Regulation were amended with the objective to improve the legal status of only those third-country nationals who graduate from a Swiss higher education institution. The legal status of third-country nationals who hold a degree from a university of a third country or a university of the Member State of the EU or EFTA and who subsequently aim at being employed as researchers in Switzerland has not been improved. To put it differently, this category of highly-educated individuals has acquired no additional rights for applying for research positions in Switzerland and hence their chances to undertake research in Switzerland remain very limited and are subject to restrictive conditions. More precisely, their employment is subject to quotas, and priority is given to Swiss citizens or nationals of the EU and EFTA Member States. In addition, other cumulative requirements of the Foreign Nationals Act must be met before a residence permits for such third-country nationals can be issued: their employment must match Swiss general economic interests; their professional qualification, professional and social adaptability, language proficiency and age for a sustainable integration into the Swiss labour market and social environment are taken into consideration, there must be an application made by a Swiss employer to hire them and salaries of that particular branch, profession and area should be complied with¹²³. As a result, barriers for legal migration of well-educated third-country nationals with higher education diplomas from other countries remain in Switzerland.

[Rz 66] Second and more specifically, the previous analysis of certain amendments of the Foreign Nationals Act and of the Regulation has shown that even the legal status of those third-country nationals who graduate from a Swiss higher education institution remains subject to different previously mentioned constraints. In addition, professional qualification, professional and social adaptability, language proficiency and age for sustainable integration in the Swiss labour market and social environment are of significance when obtaining work permits¹²⁴. Integration thus

¹²² Art. 34 of the Foreign Nationals Act.

¹²³ See in particular Arts. 18–25 of the Foreign Nationals Act; Arts. 18a–22 of the Regulation on Admission, Residence and Employment. See also Judgment of the Federal Administrative Court C-857/2013 of 19 May 2014, p. 9, 16.

¹²⁴ Arts. 21–23 of the Foreign Nationals Act. See also Judgment of the Federal Administrative Court C-857/2013, p. 9–10.

plays an important role, is dependent on efforts and good will of a third-country national and is a condition for obtaining long-term residence permits¹²⁵. In other words, integration in Switzerland and Swiss economic interests are primarily taken into account and the Swiss labour market test is applied when hiring third-country nationals who graduate from a Swiss higher education institution. As a result, well-educated people from third countries still face restraints for being employed and integrated in Switzerland and their Swiss diploma is no guarantee for a successful professional future in this country.

[Rz 67] Thirdly, conditions for arriving to Switzerland continue to be restrictive. It is evident from legal provisions of the Foreign Nationals Act and of the Regulation that third-country nationals wishing to study in Switzerland must have recognized identity documents and a visa (if needed), possess necessary financial resources, must not pose a threat to public order, public security and to Switzerland's international relations and must not be convicted of crimes resulting in their expulsion from the Swiss territory¹²⁶. If compared to the Recast Directive, these requirements are even more restrictive and aim at precluding third-country nationals who are «dangerous» for Switzerland from coming to this country¹²⁷. It is questionable whether a very general requirement to not be a threat to public order, public security and Switzerland's international relations is proportional (excluding the case of terrorism). Every situation must be assessed individually and only serious threats based on well-grounded proof can create an obstacle for entering the Swiss territory. Similarly, the possession of necessary financial means can be a significant factual barrier for coming to Switzerland because of the very elevated standard of living of this country. That concerns in particular the situation of those third-country nationals who are not in the possession of scholarships.

[Rz 68] Fourthly, critical barriers exist for third-country nationals who want to work during their studies. Pursuant to the Regulation, third-country nationals pursuing studies in Switzerland are allowed to have a side job only after six first months of their studies. Moreover, an employment is possible under strict conditions: there is a limit of 15 weekly hours, a higher education institution should confirm that a side job will not have an influence on continuation of studies, an employer must apply for a permission to work and salaries of that particular branch, profession and area should be complied with¹²⁸. If a third-country national pursuing his/her studies in Switzerland wants to start working in his/her particular scientific field, the same conditions have to be met, excluding the weekly hours' time limit¹²⁹. It is thus obvious that starting a side job while studying in Switzerland at the same time imposing duties on both the Swiss higher education institution and the employer can pose a big hurdle. These restrictions are capable of not only depriving third-country nationals from their chance to obtain additional financial resources necessary for the completion of study programmes, but can likewise discourage them in general from coming to Switzerland for educational purposes, in particular for such third-country nationals for whom study grants are not available.

¹²⁵ Arts. 4 and 34 and Chapter 8 of the Foreign Nationals Act.

¹²⁶ Art. 5 of the Foreign Nationals Act; See also Art. 8 of the Regulation on Admission, Residence and Employment.

¹²⁷ In accordance with the Recast Directive, Member States can only withdraw or refuse to renew an authorisation for reasons of public policy, public security or public health. See Art. 21, Para. 4.

¹²⁸ Art. 38 of the Regulation on Admission, Residence and Employment.

¹²⁹ Art. 40 of the Regulation on Admission, Residence and Employment.

[Rz 69] Fifthly, a family reunification right for third-country nationals studying at a Swiss higher education institution is very limited. Primarily, only family members (spouses and unmarried children under 18 years) of those third-country nationals who possess long-term residence permits (C permits) are guaranteed a right to family reunification and a residence permit, on the condition that they live together in Switzerland. Family members of third-country nationals possessing other sort of residence permits (L permits and B permits) may be admitted to reside in Switzerland on the condition that they live together with a third-country national, have an appropriate apartment and are not subject to social assistance. Moreover, only family members of those third-country nationals who are in possession of a long-term residence permit (C permit) and of a residence permit of more than one year (B permit) are allowed to work¹³⁰. Hence a right to family reunification is essentially dependent on the legal status of a third-country national studying in Switzerland, i.e. on the type of a residence permit he/she possesses. It is obvious that it is impossible for a third-country national studying in Switzerland to obtain a long-term residence permit upon his/her arrival to Switzerland as a requirement of 10 years' residence is applicable. In other words, they have no automatic right to a family reunification once they are on the Swiss territory. Another issue is related to a condition that family members cannot be dependent on Swiss social assistance. Third-country nationals enrolled at a higher education institution in Switzerland can find it very difficult or even impossible to prove that they are in a possession of financial resources needed for their family members who do not work. Knowing that such restrictive provisions apply, third-country nationals can be discouraged from coming to Switzerland for studies together with their families.

5. EU-Swiss mobility of third country researchers and students – a possibility for the future?

[Rz 70] Neither EU nor Swiss legislation addresses the question whether researchers and students from third countries who have already arrived to the EU have a possibility to move to Switzerland or those who arrived to Switzerland have a chance to move to the EU for research or study purposes. In other words, no EU-Swiss mobility is guaranteed for these third-country nationals.

[Rz 71] With the objective of strengthening the cooperation between the EU and Switzerland, measures enabling EU-Swiss mobility of third-country students and researchers such as an extension of the bilateral agreement to cover also legally resident third country national students and researchers can be helpful. That will not only facilitate a complicated legal status of third-country researchers and students by giving them a legal chance to continue their research or study programmes in higher education institutions of the EU or Switzerland. Eventually, the collaboration in the academic sector between the EU and Swiss universities will be strengthened. However, considering the current situation in Switzerland and more specifically the results of the Referendum against Mass Immigration and their implementation¹³¹, it is doubtful whether the aforementioned cooperation between the EU and Switzerland can be the object of negotiations for the near future.

¹³⁰ Art. 46 of the Foreign Nationals Act.

¹³¹ Implementation of the Popular Initiative «Stop Mass Immigration»: <https://www.admin.ch/gov/en/start/documentation/dossiers/umsetzung-der-initiative-gegen-masseneinwanderung.html>, Accessed on 15 December 2016.

6. Conclusions

[Rz 72] From the perspective of EU law, the Recast Directive improves the legal status of third-country nationals coming to the EU for research or study purposes and their family members and is a step forward confirming that EU migration policy is going to a right direction within this field. Nevertheless, researchers and students from third countries will continue to face difficulties after the Recast Directive will have been transposed into the laws of the Member States, in particular because of the wide discretion left to Member States, complicated intra-EU mobility rules and the absence of a link to the Long Term Residence Directive. All that creates ambiguities in the legal status of highly-educated third-country students and researchers and their chance to settle permanently in the EU is low. As a result, more feasible provisions improving the legal situation of these third-country nationals further are needed in order to make sure that they do not only enjoy a right to come to the university of a Member State of the EU, but those that have skills that are lacking on the European market also have a possibility to be successfully admitted to the labour market of the EU Member States and settle permanently in the EU together with their families at the end of their studies or research activities.

[Rz 73] From the perspective of Swiss law, even though certain amendments of the Foreign Nationals Act and of the Regulation on Admission, Residence and Employment had a legitimate and well-grounded aim to primarily improve the legal status of third-country nationals graduating from Swiss higher education institutions so that these highly-educated individuals acquire extra chances to start their profession career in Switzerland, essential obstacles continue to exist. More specifically, a requirement that only such third-country nationals can be admitted to the Swiss labour market whose professional activities are of high scientific and economic importance is not only a new provision of the Foreign Nationals Act but is at the same time a significant obstacle capable of depriving such third-country nationals to come to Swiss higher education institutions. In addition, the legal situation of third-country nationals with a higher education diploma from third countries or EU/EFTA Member States must likewise be urgently facilitated. Otherwise, objectives to attract innovation and talents from all over the world needed by Switzerland and increasing Switzerland's competition at the global level will not be reached. Therefore, another reform of the Foreign Nationals Act and of the Regulation would be desirable in the future.

[Rz 74] Cooperation between the EU and Switzerland should also be strengthened within this field. The creation of an attractive legal status of third-country nationals coming to the EU or Switzerland for research or study purposes, including EU-Swiss mobility, will not only be beneficial for the concerned individuals, but is also essential for the exchange of knowledge and the boost of innovation in Europe. Finally, it will strengthen the collaboration in the academic sector between EU and Swiss higher education institutions.

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